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Leigh Hancher , Kim Talus & Moritz Wüstenberg

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Retrospective application of legal rules in the European Union: recent practice in the energy sector

Leigh Hancher, *is Professor of European Law, Tilburg University, the Netherlands and Part-time Professor of European Energy Union Law, FSR/RSCAS/EUI, Florence, Italy as well as Counsel to Baker Botts LLP, Brussels. Email: i.l.hancher@uvt.nl*; **Kim Talus,** *is the James McCulloch Chair in Energy Law and founding Director of the Tulane Center for Energy Law (Tulane Law School). He is also a professor of European energy law at UEF Law School (University of Eastern Finland) and a professor of energy law at Helsinki University. He is also the Editor-in-Chief for OGEL (www.ogel.org). Email: kim.talus@uef.fi*; **Moritz Wüstenberg,** *is a senior researcher at the University of Eastern Finland. Email: moritz.wustenberg@uef.fi***.**

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The continual availability of energy is economically and socially essential, but is primarily reliant on private operators and investments to be maintained and developed. Investments in the energy sector are typically highly capital intensive and require long payback periods. This in turn calls for legal and regulatory stability for such investments by the legislator. While changes to laws are inevitable, such changes should be implemented prospectively and take into account the legitimate expectations attached to existing investments. In this article we analyse the recent practice of the EU to retrospectively apply legal rules in the energy sector. Our research shows that it has been common practice of the EU to grant transitional periods and grandfathering rights to allow market participants to adapt to the 'new rules of the game'. However, while this represents common practice, our research shows that this practice is applied with discretion and can even be misused in the pursuit of political objectives, violating established legal principles including legitimate expectations and legal certainty.

Keywords: EU law; energy law; Gas; interconnections; third countries; amendments; derogations; exemptions

1. Introduction

This article focuses on the retrospective application of laws in the European Union (EU) legal system, a hotly debated and highly topical issue. Energy investments are long-term, capital-intensive investments. One of the main concerns for investors in this area is regulatory stability. Investors can usually live with a wide range of legislative situations and investments can be made in various regulatory environments. However, unexpected and significant changes in the frameworks that existed at the time of final investment decision can be detrimental for these investments, especially if the capital expended has not been fully recovered. To abate the risk caused by such changes, agreements in the energy area often include different types of stabilisation clauses that aim to ensure that regulations are not changed, or are changed only pursuant to negotiations between the investor and the host state.

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In the case of these energy investments, retrospective application of laws is connected to the tension between sovereign rights of states to change laws and regulations in the light of, *inter alia*, policy developments and investor rights and legitimate expectations. This article seeks to examine the interaction between private and public interests in the energy sector – an area where stable returns on private investments are invariably dependent on the specific provisions of the applicable regulatory framework created by the legislator. The article will draw on examples of recent EU measures that are particularly relevant for the themes of retrospective application of new legislation and investor protection, with a view to illustrate how theory and legislative (and judicial) practice may sometimes diverge.

The concept of retrospectivity raises particular issues in the EU legal order, and it follows that it is necessary to keep in mind the potential sources of retrospectivity and their legal effects. As discussed in this article, the principles of primacy of EU Treaty law, as well as direct effect within the EU legal system, may induce retrospectivity given the obligations of the member states to apply EU law in cases where national rules are deemed to infringe EU law and must be set aside *ex tunc*.

As we explain in the first section, potential solutions to possible conflicts may differ depending on the source of the measure that requires retrospective application. In particular, even if general principles such as the primacy of EU law can have potentially adverse consequences for individuals, the application of this principle does not exclude the application of the principles of legitimate expectations and legal certainty.

This theme is elaborated further in the second section, which focuses on how retrospectivity may result from secondary legislation as well as from individual EU decisions relating to national measures. Legal certainty can be embraced in different ways to guarantee legitimate expectations when an underlying European or national regime is adopted or amended. This may encompass the inclusion of transitional or 'grandfathering' provisions into the relevant EU secondary legislation. As we will explore in greater detail in the third section, EU energy sector secondary legislation usually makes express provision for transitional periods or for arrangements to 'grandfather' certain acquired or vested rights in the light of amendments to the earlier regime from which those rights were derived. This in effect prevents the full, retrospective application of the new or amended legal framework. We will illustrate this with reference to the recently adopted Clean Energy Package[1] and in particular to the provisions of the recast Renewables Energy Directive 2018/2001.[2]

The final section examines a peculiar case of the retroactive application of secondary EU law. Although 'grandfathering' provisions are typical of secondary legislation, as explained in the third section, there may be instances where an express provision is either missing entirely or is inadequate so that amendments to European legislation may produce retrospective, and indeed certain retroactive, effects on implementation at the national level – as has recently occurred in the EU legal system following the amendment to the 2009 Gas Directive. We argue that the amended Gas Directive may produce not only retrospective but potentially fully retroactive effects on one specific project and

1 For details, see www.ec.europa.eu/info/news/clean-energy-all-europeans-package-completed-good-consumers-good-growth-and-jobs-and-good-planet-2019-may-22_en

2 Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ 2018 L328/28) accessed 27 August 2020.

that this appears to be the intention of the European Commission and the legislator, leaving potentially little room for the member states to apply their national legal principles.

2. Concepts and sources of retrospectivity

2.1. *The blurred line between retrospectivity and retroactivity*

Before turning to the sources of retrospectivity in EU and national law, it is useful to consider the differences between retroactive and retrospective changes to laws.[3] While this distinction is elusive, it can generally be said that retrospective application refers to a situation where new laws interfere with rights already acquired. Here, the new rules apply only from the date of their entry into force, but these new rules also have implications for activities that were commenced in the past. A retrospective application of national law may be triggered when the legislation in force is adjusted, for example, because there is new evidence showing that the assumptions on which the legislation was based are no longer correct, or because of changes in the political environment.[4] In such cases, new rule applies to the *future effects* of situations which arose under the earlier rule. They do not apply to legal situations that have arisen and become definitive under the old law.

Retroactive application, on the other hand, refers to a situation where laws apply to transactions that were concluded before the enactment of a new law. Retroactive application is such that laws apply back in time, prior to their publication and to facts that occurred entirely in the past and change the legal consequences of those 'completed' transactions[5] or, as the CJEU phrased it, legal situations that have 'become definitive under the old law'.[6] Given the likelihood that legitimate interests will be adversely affected, a 'true' retroactive application of laws is rather rare in most legal systems, especially if this would involve penal sanctions.

In sum, retrospective application refers to a situation where new laws change the future legal consequences of actions that took place in the past or alter rights acquired before the new rules were enacted. Retroactive application, in turn, refers to a situation

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3 The standard definition from the *Oxford Dictionary of Law* implies an interchangeable use of the terms 'retroactive legislation' and 'retrospective legislation' by defining both as 'Legislation that operates on matters taking place before its enactment, eg by penalizing conduct that was lawful when it occurred. There is a presumption that statutes are not intended to have retroactive effect unless they merely change legal procedure', see 'retrospective legislation'. *A Dictionary of Law*, Jonathan Law (ed), Oxford University Press, 2018. Oxford Reference.

4 D. Fouquet and J Nysten, 'Retroactive and retrospective changes and moratoria to RES support' (Becker Büttner Held Policy Brief, March 2015). The authors give the following as an example of retrospective change:

> Applied to changes in RES support schemes, this would mean that the law would enter into force on a given date and from that date on eg the support also for RES installations existing and operating already prior to the entry into force of the law would be adjusted.

5 N Duxbury, 'Ex Post Facto Law' (2013) 58(2) The American Journal of Jurisprudence 135.

6 C-596/13 P – *Commission v Moravia Gas Storage*, ECLI:EU:C:2015:203, para 32. We argue that investments become 'definite' at the moment of the final investment decision, as at that moment the investment has become irreversible from the investor perspective. This investor perspective can be supported by the fact that the intention of protection of the legitimate expectations, that the CJEU case law relies on, is to protect the individual investor.

where laws apply to transactions that were concluded before the enactment of a new law, attaching new consequences to these in the past.[7]

The European Commission does not seem to distinguish the two terms and generally uses the term 'retroactive' to cover both retroactive and retrospective changes.[8] A circumstance in which new legal consequences would be attached to past actions at the time of their occurrence is uncommon. For the most part, changes in laws impair or negate rights that were acquired under existing laws prior to their change, sometimes referred to as *vested rights*, from their entry into force.[9] Such changes should be considered retrospective, as they attach legal consequence only from their entry into force. However, as we will explore in this contribution, the line between retroactivity and retrospectivity can become blurred in certain circumstances. A relevant example is the situation where national rules have to be amended due to a conflict with EU law, leading to retrospective or retroactive changes in laws. This is explored next.

2.2. *The primacy of EU law over national law as a source of retroactivity*

In the context of EU law, it should be recalled that member states (as well as their national courts) may have a duty to disapply provisions of national legislation as well as intra-EU bilateral investment treaties *ex tunc*.[10] From this perspective, it is important to consider in the context of EU law the role of CJEU rulings and the distinctive features of EU law based on the principles of the primacy or supremacy of EU law and direct effect. This means that any act of national judicial bodies, as well as legislative and administrative bodies, must comply with EU law: provisions of national law that are contrary to EU law must be set aside.

The general rule that has emerged from the case law is that any court ruling interpreting a particular provision of EU law automatically has retroactive or *ex tunc* effect, reaching back to the date at which the disputed national provision entered into force. The CJEU has, however, recognised that the retroactive effect of its rulings may be limited by the principle of legal certainty.[11]

It follows from the CJEU's approach to primary law that *ex tunc* effect is not considered to be a new rule of the game – the court is merely clarifying and defining the meaning and scope of the rule of EU law as it must be or ought to be applied.

Even against the backdrop of the primacy of EU law, the principles of legal certainty and the protection of legitimate expectations remain fundamental principles of the EU law.[12] These closely related legal principles have a number of different applications in the EU legal system. Among other things, these principles require that rules (including

7 *Ibid* and AG Opinion C-596/13 P – Commission v Moravia Gas Storage; see also Fouquet and Nysten (n 4).

8 See eg Communication from the European Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Renewable Energy: A Major Player in the European Energy Market, COM (2012) 271.

9 See eg Duxbury (n5) 139–145.

10 This latter area has been subject to intense discussions following the judgment of the CJEU in Case C-284/16, *Slovak Republic v. Achmea*, EU:C:2018:158.

11 Case C-292/04, *Meilicke and others*, ECLI:EU:C:2007:132, para 35.

12 Case C-17/03, *VEMW* [2005] E.C.R. I-4983; C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, para 52; and Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6945, para 70.

secondary legislation such as directives and regulations) involving negative consequences for individuals (natural and legal persons) should be clear and precise, and their application predictable for those subject to them.[13] One of the most obvious applications of these principles is the prohibition of retroactivity.[14]

Member states and their governments have broad rights in amending the regulatory frameworks for the future consequences of situations that arose under the former rules.[15] However, the right to amend national regulatory frameworks for the future is not absolute or without boundaries under EU or national laws. Among other things, the exercise of such rights may be restricted by the legitimate expectation of affected market players. As the General Court has recently confirmed: 'The principle of the protection of legitimate expectations is a general principle of EU law which, as such, is applicable in any context falling within the scope of EU law'.[16]

In general, the principle of legal certainty normally precludes measures arising from secondary legislation from taking effect before their entry into force, or at the earliest from their publication. It may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.[17] One technique to protect legitimate expectations for existing players is to build in adequate transitional periods.[18]

The case for a transitional period may depend on the standpoint of the authority seeking to make the legislative change and, where applicable, relevant national law principles. Importantly, and in order to protect those affected by sudden legislative changes at EU level, the CJEU has required the implementation of new rules to be combined with a transitional period to allow market players to adapt to the new 'rules of the game'.[19]

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13 C-17/03, *VEMW* [2005] E.C.R. I-4983, para 80; 325/85 *Ireland* v *Commission* [1987] ECR 5041; C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, para 27; and Case C-63/93 *Duff and Others* [1996] ECR I-569, para 20.

14 As the court has recently held with respect to penal and administrative sanctions:

> First of all that it is clear from the Court's case-law that the principle that penal provisions may not have retroactive effect constitutes a general principle of EU law (see, to that effect, judgments of 10 July 1984, *Kirk*, 63/83, EU:C:1984:255, paragraph 22, and of 8 February 2007, *Groupe Danone v Commission*, C-3/06 P, EU:C:2007:88, paragraph 87). That general principle of law requires the infringement attributed to a person and the penalty imposed on that basis to correspond to those which were laid down at the time when the action or omission constituting the infringement occurred (see, to that effect, judgments of 10 July 1984, *Kirk*, 63/83, EU:C:1984:255, paragraph 21, and of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 56). More specifically, first, that general principle of law is also applicable to fines of an administrative nature (see, to that effect, judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 202). Case C521/15 *Spain v Council*, C: 2017; 982, at 145–146.

15 C-60/98, *Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl (CEMED)* [1999] ECR I-3939 para 25; 1/73, *Westzucker GmbH v Einfuhr und Vorratsstelle für Zucker* [1973] ECR. 723, para 5.

16 T-217/17 *FVE v Commission*, 20 September 2019, EU:T:633 para 68.

17 Case 98/78, *A. Racke v Hauptzollamt Mainz* [1979] ECR 69, para 20–22.

18 As will be seen later in the article, this transitional period has been of relevance under the EU law. See C-17/03, *VEMW* [2005] ECR I-4983. It has also been a relevant factor under international investment law practice relating to legislative changes in the context of renewable energy support schemes. For this see, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3.

19 C-17/03, *VEMW* [2005] ECR I-4983 and C-347/06, ASM Brescia C-347/06, ASM Brescia [2008] ECR I-5641; see also A. Boute, 'The Quest for Regulatory Stability in the EU Energy Market: An Analysis Through the Prism of Legal Certainty' (2012) 37 *European Law Review* 675.

This transitional period may only be excluded where there is an overriding consideration of public interest.[20]

3. EU practice on existing investments in the energy sector

The liberalisation of the EU energy markets has meant that the EU legislative framework for energy has been in a constant state of flux for the past 30 years. New rules have been introduced through four consecutive legislative packages (1996/1998, 2003, 2009 and 2019). In addition to these larger legislative waves, many other details have been introduced and altered though individual legislative measures. These constant modifications of the EU energy law regime meant that the rules that regulate the economic actors in the EU energy markets have constantly changed. It should be no surprise that the question of retroactivity or retrospectivity of the new rules has been a key concern for companies active in EU energy markets, and the question has been litigated before the CJEU. This section will examine and discuss some of the key judgments from the court.

In *ASM Brescia SpA v. Comune di Rodengo Saiano*,[21] the dispute concerned changes in laws which affected certain long-term natural gas distribution concessions. The concessions in *ASM Brescia* were originally concluded in 1984 and due to expire by the end of 2014. By a variation, the concession was prolonged to 45 years. As part of the implementation of the first Natural Gas Directive 98/30/EC, an Italian legislative decree was passed in 2000, pursuant to which pre-existing long-term concessions were given an expiry date following a transitional period. In addition, the decree contained provisions concerning automatic and general extensions to the transitional period in certain cases. The questions that were posed to the CJEU in a request for a preliminary ruling concerned the compatibility of these extensions with, *inter alia*, general principles of EU law, such as equal treatment, non-discrimination, legal certainty and protection of legitimate expectations.[22]

After noting that the principle of legal certainty is a part of EU law and binds national authorities when implementing EU law, the CJEU found that 'the principle of legal certainty requires, particularly, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals and undertakings',[23] and that in this case,

> the principle of legal certainty not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.[24]

Similar issues were raised in another case relating to changes in law and policy. In *VEMW and others*,[25] the arguments presented before the CJEU in favour of

20 Case 74/74, *Comptoir national technique agricole (CNTA) SA v Commission* [1975] ECR 53.
21 Case C-347/06*ASM Brescia SpA v. Comune di Rodengo Saiano*, Judgment, 17 July 2008, [2008] ECR I-5641.
22 *Ibid*, para 42–45.
23 *Ibid*, para 69.
24 *Ibid*, para 71.
25 Case C-17/03 *VEMW and others v. Directeur van de Dienst uitvoering en toezicht energie*, Judgment, 7 June 2005, [2005] ECR I-4983.

certain pre-liberalisation agreements[26] were, among others, based on the protection of legitimate expectations and legal certainty. The CJEU restated the significance of the principle of legitimate expectations but noted that the European Community had not given any signals that could have led an undertaking to believe that the legislative situation in 1989–1990 would be maintained. On the contrary, the CJEU referred to a European Commission communication from 1989[27] where the commission assessed the possibilities of opening up the transmission networks reserved to national or regional monopolies.[28]

In relation to the principle of legal certainty, the CJEU recalled that the principle did not mean that an individual could expect legislation to remain unamended, but only that the special situations of traders would be taken into account when legislation is amended. This had already been done in the form of a specific possibility to apply for a transitional regime lasting as long as the pre-liberalisation commitment was in force. The rationale of this provision enabling the application for a transitional regime was to comply with the principle of legal certainty.

In the recent Baltic Cable case,[29] the CJEU was asked, on a reference from a Swedish administrative court, to rule on the impact of electricity legislation on the revenues generated by an interconnector between Sweden and Germany. The interconnector had been constructed and entered into operation before the adoption and entry into force of the first Electricity Regulation 1228/2003, which provided for an exemption from certain of its provisions for new infrastructure.[30] Baltic Cable AG, the owner of the interconnector, could not qualify for the exemption. The Regulation 1228/003 was subsequently revised as part of the Third Electricity Package and the revenue control provisions further refined and extended in Art 16(6) of Regulation 714/2009.[31] This regulation provided for an exemption only for new infrastructure (ie

26 Pre-liberalisation agreements are agreements entered into prior to the liberalisation of the EU energy markets. It is still somewhat unclear whether the new EU energy regulation should apply to these agreements, and if so to what extent.

27 'Communication on Increased Intra-Community Electricity Exchanges' (COM(89)336 final of 29 September 1989).

28 Case C-17/03 *VEMW and others v. Directeur van de Dienst uitvoering en toezicht energie*, Judgment, 7 June 2005, [2005] ECR I-4983*,* para 73–78.

29 Case C-454/18 *Baltic Cable AB v Energiemarknadsinspektionen*, Judgement, 11 March 2020, ECLI:EU:C:2020:189.

30 Art. 7 of Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity (OJ L 176, 15.7.2003, 1–10).

31 Article 16(6) of Regulation 714/2009 restricts what TSOs can do with congestion revenues generated by an electricity interconnector to:

> (a) guaranteeing the actual availability of the allocated capacity; and/or (b) maintaining or increasing interconnection capacities through network investments, in particular in new interconnectors. If the revenues cannot be efficiently used for the purposes set out in points (a) and/or (b) of the first subparagraph, they may be used, subject to approval by the regulatory authorities of the Member States concerned, up to a maximum amount to be decided by those regulatory authorities, as income to be taken into account by the regulatory authorities when approving the methodology for calculating network tariffs and/or fixing network tariffs. The rest of revenues shall be placed on a separate internal account line until such time as it can be spent on the purposes set out in points (a) and/or (b) of the first subparagraph.

Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on Conditions for Access to the Network for Cross-Border Exchanges in Electricity and Repealing Regulation (EC) No. 1228/2003 (OJ L 211, 14.8.2009, 15).

completed after 4 August 2003), in its article 17. The Swedish regulator applied these revised provisions to Baltic Cable AG, effectively depriving it of a reasonable profit as Article 16(6) of the Regulation required that so called 'congestion income'[32] could only be applied to certain purposes. None of these options appeared to be available to Baltic Cable AB. Baltic Cable AB argued, *inter alia*, that the impact on its business violated the right of ownership, the right to conduct a business and the principle of proportionality. The Swedish energy regulator admitted that the impact on the company was possibly disproportionate but that it was bound by the regulation and could not apply Article 16(6) *contra legem*.[33] In its ruling the court went to considerable lengths to avoid a violation of the principle of non-discrimination – again, a fundamental principle of European law. The CJEU held that the national regulatory authorities must apply Article 16(6) in a manner that puts a company such as Baltic Cable AB 'in a position in which it is able to carry out its activity in financially acceptable conditions, corresponding to the conditions of the electricity transmission market, which includes making an appropriate profit'.[34] The court's justification for its far-reaching approach – which indeed amounts to an interpretation *contra legem* of the contested provision – is the need to avoid discrimination between Transmission System Operator (TSO) operating a more extensive transmission network and an interconnector vis-à-vis TSOs operating only an interconnector.

This case law clearly suggests that economic operators in EU energy markets have a degree of protection against retrospective changes to the legislative frameworks. The principle of legal certainty, as interpreted by the CJEU, requires that special situations of economic operators should be taken into account and transitional periods should be provided in order to protect these operators from sudden changes in the legislative framework that have a significant negative impact on their investments. The principle of non-discrimination may also be invoked if investors are put at a substantial disadvantage vis-à-vis other market players. This same approach is also visible in some of the rules included in the Clean Energy Package. This issue is examined next.

4. The Clean Energy Package and 'new rules of the game'

4.1. *Objectives and implementation*

The ambitious new Clean Energy Package comprises several directives and regulations, numerous provisions of which have as their objective to introduce a new 'market design' for wholesale and retail electricity transactions.[35] In particular, in proposing the recast Electricity Regulation[36] and revised Electricity

32 These rules have been designed and are sensible in relation to TSOs that also run a more extensive transmission network, but are problematic for Baltic Cable AB, whose only business is the high-voltage electricity interconnector between Sweden and Germany. If Article 16(6) is applicable this effectively means that it cannot use the revenue it generates as it pleases and cannot use it to generate a reasonable profit.

33 Case C-454/18 *Baltic Cable AB v Energiemarknadsinspektionen,* Judgement, 11 March 2020, ECLI:EU:C:2020:189, para 29.

34 *Ibid*, para 78.

35 For details, see www.ec.europa.eu/info/news/clean-energy-all-europeans-package-completed-good-consumers-good-growth-and-jobs-and-good-planet-2019-may-22_en accessed 27 August 2020.

36 Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the Internal Market for Electricity (OJ L 158, 14.6.2019, 54–124).

Directive,[37] the EU intends to create a new regulatory structure for the EU electricity market, that is capable of dealing with the steadily increasing amounts of renewable energy that are part of the system. The EU is of the firm view that to make the 'energy transition' to a low-carbon future happen cost-effectively, and on target for 2050, a well-functioning internal market is the key. This in turn has meant that certain privileges hitherto enjoyed by renewable energy soruces (RES) producers and suppliers under previous EU secondary legislation will be gradually withdrawn.[38] These provisions recognise and protect various vested rights, such as derogations from balancing responsibility.[39] It is worth noting that detailed grandfathering provisions can also be found in delegated legislation adopted under the earlier third-package rules in the form of network codes (NCs) and guidelines (GLs).[40]

Article 6 of the recast Renewables Energy Directive 2018/2001[41] explicitly recognises in its Article 6(1) that:

> Without prejudice to adaptations necessary to comply with Articles 107 and 108 Treaty on the Functioning of the European Unioin (TFEU), Member States shall ensure that the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support.

The above examples show how the secondary legislation in the EU makes attempts to avoid retroactive changes by providing for adjustments and grandfathering rights.

37 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on Common Rules for the Internal Market for Electricity and Amending Directive 2012/27/EU (OJ L 158, 14.6.2019, 125–199).

38 See eg the provisions in Art 12(6) of the recast Electricity Regulation 2019/943 on Dispatching of Generation and Demand Response:

> Without prejudice to contracts concluded before 4 July 2019, power-generating facilities that use renewable energy sources or high-efficiency cogeneration and were commissioned before 4 July 2019 and, when commissioned, were subject to priority dispatch under Article 15(5) of Directive 2012/27/EU or Article 16(2) of Directive 2009/28/EC of the European Parliament and of the Council (20) shall continue to benefit from priority dispatch. Priority dispatch shall no longer apply to such power-generating facilities from the date on which the power-generating facility becomes subject to significant modifications, which shall be deemed to be the case at least where a new connection agreement is required or where the generation capacity of the power-generating facility is increased.

39 Article 5 of the recast Electricity Regulation 2019/943 (relating to balance responsibility) provides that

> 1. All market participants shall be responsible for the imbalances they cause in the system ('balance responsibility') […]. 2. Member States may provide derogations from balance responsibility only for: (a–b) […] (c) installations benefitting from support approved by the Commission under Union State aid rules pursuant to Articles 107, 108 and 109 TFEU, and commissioned before 4 July 2019.

40 A pertinent example is Commission Regulation (EU) 2016/1447 establishing a network code on requirements for grid connection of high voltage direct current systems and direct current-connected power park modules, which makes detailed transitional provisions for cables that are either under construction and/or are not completed on the date of its entry into force. See Commission Regulation (EU) 2016/1447 of 26 August 2016 (OJ 2016 L241/1) and Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources (OJ 2018 L328/28).

41 Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources (OJ 2018 L328/28).

These types of adjustments appear necessary in the light of the case law from the CJEU and should be employed constantly throughout the secondary EU energy law.

Although the Clean Energy Package does not impinge on a member state's right to grant state support to RES energy, it does go some way to harmonise the conditions for financial support to be found compatible with the treaty's state aid rules. This may in turn affect the level of support available at the national level. Again, the Clean Energy Package makes provision for grandfathering. A good example is the requirement for eligibility of fossil fuel plants for inclusion in capacity remuneration mechanisms.[42] Therefore, secondary legislation can in turn serve as a source of protection of legitimate expectations of investors in the future application of the treaty's principles – including the state aid provisions.[43]

It should be recalled that according to Article 3(9), 'Aid for generation adequacy', of the European Commission Guidelines on State aid for environmental protection and energy 2014–2020, to avoid distortions to the internal energy market the European Commission is conferred the right to approve capacity mechanisms in the EU member states. In accordance with the recast electricity regulation, the commission is likely not to approve state aid to installations that exceed these limits unless they are grandfathered in accordance with Article 22(4).

4.2. *Pseudo-retroactive adjustments to national support schemes for RES*

An example of the application of nationally derived principles on retroactivity in the context of EU law can be seen in a recent decision on certain exemptions from RES surcharges for so-called 'self-consumption' of electricity by large energy-intensive users.[44] Under the German Erneuerbare-Energien-Gesetz (EEG), as last amended in 2017, producers of renewable electricity were paid by network operators to supply renewable electricity. Network operators were in turn compensated for the additional cost through a general surcharge on electricity consumption (the EEG surcharge). Certain consumers were, however, exempted from paying the EEG surcharge. These included 'self-suppliers' – ie companies that produced electricity for their own use and were not dependent on a network to transmit or distribute that electricity.[45]

Prior to the 2014 amendment to the EEG, the compensation for renewable electricity producers was based on surcharges to electricity suppliers. This logic was changed

42 'Capacity mechanisms shall incorporate the following requirements regarding CO_2 emission limits … ' (Art 22(4) (a): 'from 4 July 2019 at the latest, generation capacity that started commercial production on or after that date and that emits more than 550 g of CO_2 of fossil fuel origin per kWh of electricity shall not be committed or to receive payments or commitments for future payments under a capacity mechanism'; Art 22(4) (b): 'from 1 July 2025 at the latest, generation capacity that started commercial production before 4 July 2019 and that emits more than 550 g of CO_2 of fossil fuel origin per kWh of electricity and more than 350 kg CO_2 of fossil fuel origin on average per year per installed kWe shall not be committed or receive payments or commitments for future payments under a capacity mechanism'.

43 See further L Hancher and K Talus, 'Exploring the Limits of EU's Unbelievable Behaviour on Nord Stream 2' Euractiv, 29 May 2019.

44 European Commission, SA.46526, Reduction on EEG-Surcharges for Self-Consumption, 19.11.2017, C (2017) 8482 final.

45 Gesetz zur Einführung von Ausschreibungen für Strom aus erneuerbaren Energien und zu weiteren Änderung des Rechts der erneuerbaren Energien, Bundesgesetzblatt Jahrgang 2016 Teil I Nr. 49, ausgegeben zu Bonn am 18 Oktober 2016, para 61.

through the 2014 amendment to the EEG, which imposed the EEG surcharge on electricity consumption. This change was deemed necessary, as the surcharges on supplies meant that self-supply had become interesting to avoid paying the surcharges on electricity supply. In order for all actors to contribute to the financing of renewable support, the surcharge was applied on all consumption, but with certain exemptions.[46] These exemptions provided that self-supply facilities that were in operation before August 2014 would be exempted since the additional burden arising from the surcharge would not achieve the desired regulatory effect. These exemptions were approved by the commission until December 2017 pending review by Germany.[47]

In its 2017 submissions, the German government maintained that under German law, the legislator has to consider the impact of legislation on existing investments, referred to as the concept of a 'pseudo-retroactivity' ('unechte Rückwirkung'). In the context of this contribution, it is important to note that the German law concept of 'pseudo-retroactivity' could be more accurately described as retrospective changes to laws which impair vested rights.[48]

Investors in certain existing installations would suffer undue hardship, and bankruptcies in key economic sectors would occur, should this surcharge be imposed upon them.[49] Furthermore, it was stressed that the investment decisions in relation to existing installations were taken on the basis of the legal framework in force at the time and in the expectation that it would continue to apply.[50] The decisive factor in determining whether this 'pseudo-retroactivity' is allowed is whether there is a clear and specific justification for the legislator to alter the legal consequences of past behaviour in a way that imposes a financial burden.[51]

Germany, basing its position on the jurisprudence of its Federal Constitutional Court, maintained that in accordance with these legal principles, and when introducing amendments that would result in pseudo-retroactivity, it had to consider whether the public interest justifying an adverse change outweighed this confidence.[52] Hence, a transitional period should be provided so that existing installations would be exempt from the new legislation until the operator was obliged to make a new investment – and could take account of the altered framework conditions before making a new investment decision. The European Commission agreed with this justification of undue hardship and approved the measure as compatible state aid based on Art 107 (c) TFEU (see chapter 3.2 of its decision).

This example shows that both legal certainty and protection of legitimate expectations, as a sub-element of legal certainty, require that a transitional period is granted in situations of legislative changes affecting contracts and other beneficial administrative acts. This is particularly important where significant up-front

46 European Commission, SA.46526, Reduction on EEG-Surcharges for self-consumption, 19.11.2017, C (2017) 8482 final, para 50–54.

47 *Ibid*, para 50–58.

48 See eg Duxbury (n 5).

49 European Commission, SA.46526 (n 44), para 59.

50 At the relevant time the EEG surcharge was imposed on third-party supply of electricity and not, as of 2014, on self-supply.

51 The legislator had to take account of the financial impact that amendments to laws can have on situations which have started in the past but are continuing to produce effects ('unechte Ruckwirkung').

52 European Commission, SA.46526 (n 44), para 75–76.

investments have been made. Those affected by changes in laws or regulations must be adequately protected, even if the demands of certainty and foreseeability do not require that the legal position of a private person must remain unaffected or that no legislative changes could take place. They do, however, require that when enacting new legal rules affecting the rights or obligations of private persons or companies, the legislature must take account of the particular situations of these persons and provide, where appropriate, for adaptations in the application of the new legal rules.

5. Retroactivity in the guise of retrospectivity: the new provisions of the EU Gas Market Directive

5.1. *Developments towards the legislative change*

The Nord Stream 2 pipeline project is designed to transmit up to 55 billion cubic metres of natural gas from Russia to a landing point in Germany. The project is privately financed by international energy companies as well as financial investors and will be operated by a Swiss company. It runs parallel to the earlier Nord Stream 1 pipeline.

Over the last few years, the European Commission has made various attempts to complicate the realisation of the Nord Stream 2 project. First, the commission suggested that EU energy law would apply to an offshore pipeline like the Nord Stream 2 that transports natural gas to the EU internal market. The 2009 Gas Market Directive[53] was not intended to be applicable to external gas pipelines that bring gas into the internal EU natural gas pipeline network.[54] Regulatory practice for offshore pipelines confirmed this. EU energy law had so far not been applied to the offshore pipelines in the Mediterranean region, such as Transmed, Medgaz or the planned Galsi pipeline, nor was it applied to the Nord Stream 1 pipeline. For these and other import pipelines, the applicability of EU energy law started once the gas reached the internal EU pipeline network.

Eventually, following the views of the majority of academics,[55] shared by the Commission Legal Service,[56] the commission and its DG Energy conceded that EU energy law in force at the time was not applicable to the Nord Stream 2 project. The commission then changed its approach and initiated a process to acquire a mandate from the council to negotiate an intergovernmental agreement (IGA) with Russia for the Nord Stream 2 pipeline. The objective of the IGA was, according to the commission, to ensure that the operation of the pipeline reflects some of the fundamental principles of EU energy law.[57]

53 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 2003/*55/EC* (OJ L 211, 14.8.2009, 94–136).

54 See for a detailed assessment K Talus, 'Application of EU Energy and Certain National Laws of Baltic Sea Countries to the Nord Stream 2 Pipeline Project' (2017) 10(1) *The Journal of World Energy Law & Business* 30; see also A. Goldthau, *Assessing Nord Stream 2: Regulation, Geopolitics & Energy Security in the EU, Central Eastern Europe & the UK* (EUCERS Report 2016), S. Pirani and K. Yafimava, *Russian Gas Transit Across Ukraine Post-2019: Pipeline Scenarios, Gas Flow Consequences, and Regulatory Constraints* (OIES paper NG 105, February 2016).

55 eg *ibid.*

56 'Legal Opinion Undermines EU's Ability to Block Nord Stream Pipeline' (*Politico*, 7 February 2016)

57 The leaked draft mandate that the Commission is seeking is available at www.politico.eu/wp-content/uploads/2017/07/NS-Draft-Mandate.pdf accessed 27 August 2020.

The academic rejection of the commission's reasoning was subsequently confirmed by the council's legal service.[58] In an opinion dated 27 September 2017, the EU Council's legal service provided a detailed analysis on the competence and legal issues surrounding the Nord Stream 2 pipeline project. The opinion provides a robust legal analysis of various claims put forward by the European Commission and essentially rejects most of them. For example, it specifically rejected the commission's suggestions relating to the existence of a 'legal void' and a 'conflict of laws', stating that the idea of a 'legal void' was without any foundation as the legal framework for an offshore pipeline like Nord Stream 2 was based on international law, EU law and the national law of the relevant states. It also found that given that the Gas Market Directive did not apply to the Nord Stream 2 pipeline prior to its connection with the EU internal market, there was no 'conflict of laws'.[59]

Interestingly, the council's legal service also noted that the fact that the EU energy law in force then excluded the possibility of a conflict of laws situation did not mean that such a situation could not be created through changes in laws. With a legislative proposal dated 8 November, the commission attempted to move towards creating a conflict of laws where none previously existed.[60] The next sections will focus on the details of this legislative initiative that has now been implemented.

5.2. *The legislative change: background*

The European Commission rushed to table a proposal for the Gas Market Directive amendment. An initial indication of this legislative change came in September 2017 in Commission President Juncker's 2017 State of the Union letter of intent to the parliament and council.[61] Less than two months later, on 1 November 2017, the European Commission presented a proposal for the amendment.[62] The considerable haste in preparing this legislative proposal and the choice not to conclude a separate impact assessment, as required by the commission's own 'Better regulation guidelines', have been noted and criticised by most commentators.[63]

After extended talks amongst the EU member states and several consecutive versions of a possible amendment, on 12 February 2019 the trilogue reached a compromise

58 K. Talus, 'An Intergovernmental Agreement for Nord Stream 2: Rationale, Content and Impact' (2017) *Oil, Gas and Energy Law* www.ogel.org

59 It has been suggested that the Commission's insistence on the conflict of laws leading to the need for an IGA despite its clear legal weakness has to do with (political) opposition to the Nord Stream 2 pipeline by some central European and Baltic Member States. See K. Yafimava, 'The Council Legal Service's Assessment of the European Commission's Negotiating Mandate and What It Means for Nord Stream 2' (*OIES Energy Insight*, 19 (October 2017).

60 See also *ibid*.

61 Jean-Claude Juncker, State of the Union 2017 Letter of Intent to President Antonio Tajani and to Prime Minister Jüri Ratas, 13 September 2017.

62 European Commission, 'Proposal for a Directive of the European Parliament and of the Council Amending Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas' COM (2017) 660 final, 2017/0294 (COD).

63 K Yafimava, 'Building New Gas Transportation Infrastructure in the EU – What Are the Rules of the Game?' (Oxford Institute of Energy Studies – OIES Paper NG 134, July 2018); L Hancher and A Marhold, 'A Common EU Framework Regulating Import Pipelines for Gas? Exploring the Commission's Proposal to Amend the 2009 Gas Directive' Journal of Energy and Natural Resources Law; K Talus, 'Discriminatory Nature of the Proposed Changes to the Gas Market Directive – Extension to External Pipelines or Only One of Them?' (2018) 22(2) *Utilities Law Review* 55.

on key issues relating to the amendments to the Gas Directive. The application of the Gas Market Directive was restricted to the territory and territorial sea of the member state where the first interconnection point is located.[64] Once the trilogue proceedings accepted the wording, the legislative process progressed rapidly with only minor changes to the text.

It appears peculiar that despite legal concerns as to the compatibility of the amendment with international and EU law[65] and the apparent haste in the adoption process, which led to several normal procedural steps in the legislative process being omitted, the EU legislative bodies eventually passed the amendment. The underlying reasons for this appear to be connected to a number of issues. First, the European Parliament voted in favour of this amendment due to political opposition to the Nord Stream 2 project.[66] Second, certain member states, including Poland and some of the Baltic states, had similar political reasons to oppose Nord Stream 2 and were pushing for the amendment as well as other means to complicate the project in the council. For those countries that would have been affected by the amendment, meaning coastal states with offshore pipelines to producing countries,[67] the derogation under Article 49a (discussed below) goes a long way in explaining their support. Finally, for many member states the project is not relevant, and the amendment will not have an impact on their situation. Against this political background, the amendment was passed.

5.3. *The devil in the details – substantive and temporal scope*

The most important element of the amendment is arguably the definition of an 'interconnector' under Article 2, point (17). The new wording states:

> (17) 'interconnector' means a transmission line which crosses or spans a border between Member States for the purpose of connecting the national transmission system of those Member States or a transmission line between a Member State and a third country up to the territory of the Member States or the territorial sea of that Member State.

By modifying the definition of an interconnector, the legislator extended the scope of the directive. Through this modification, the applicability of the Gas Market Directive, and all the other instruments of EU energy law that follow, is extended to the territorial sea of the member state where the first interconnection point is located. Prior to the amendment, all gas volumes transported through import pipelines bringing gas to the EU internal market were subject to EU gas market regulation at their

64 This was widely reported in various news; see eg 'France, Germany Compromise on Russia's Nord Stream II Gas Pipeline' (France 24, 8 Februrary 2019) www.france24.com/en/20190208-france-germany-compromise-russias-nord-stream-ii-gas-pipeline accessed 19 May 2020.

65 For this, see Hancher and Marhold, 'A Common EU Framework' (n 63); Talus, 'Discriminatory Nature of the Proposed Changes (n 63); and M Wüstenberg and K Talus, 'WTO Panel Report in the *EU – Third Energy Package* and Commission Proposal to Amend the 2009 Gas Market Directive' (2019) 37(3) *Journal of Energy and Natural Resources Law* 327.

66 European Parliament, 'Russia Can No Longer Be Considered a 'Strategic Partner', say MEP's' (Press Release 12 March 2019) www.europarl.europa.eu/pdfs/news/expert/2019/3/press_release/20190307IPR30737/20190307IPR30737_en.pdf accessed 19 May 2020.

67 These include Italy and Spain.

landing terminal.[68] Now, the point where the same gas volumes fall within the scope of the EU energy law is moved to the border between the exclusive economic zone and the territorial sea, 12 nautical miles from the coast of the first landfall. While the physical structures of the pipeline remain unchanged, the legal, operational and economic impacts on operators are considerable.

A derogation for most of the provisions of the Gas Directive is now possible under its Article 49a, which is available for pipelines that are 'completed before the date of entry into force of this Directive'. Recital 4 of the amendment explains the reason for the derogation under Article 49a:

> to take account of the previous lack of specific Union rules applicable to gas [ ] transmission lines to and from third countries, Member States should be able to grant derogations from certain provisions of Directive 2009/73/EC to such [ ] gas transmission lines which are completed at the date of entry into force of this Directive.

Presumably, this was introduced to ensure legal certainty and protection of legitimate expectations for investors and owners of pipelines for which the investments had already been made under the regulatory framework during which EU energy law was deemed not to apply to such pipelines. This reasoning is problematic when it comes to pipeline projects where the final investment decision had been made and significant capital spent already before the intended legislative change became known. According to the case law of the CJEU, new rules should not apply to legal situations that arose and became definitive under the old law.[69] Where the final investment decision has been taken and significant capital committed and spent, the investment has become irreversible and thus 'definite'. The only pipeline which was formally not 'completed' while having committed considerable capital was the Nord Stream 2 project.

It is also of relevance to this article that all pipelines where the final investment decision has not been taken have the possibility to apply for a regulatory exemption from the main rules of the Gas Market Directive. This exemption is not available for the Nord Stream 2 project, as one of the conditions for the exemption under Article 36 (1) b is that the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted. As such, the Nord Stream 2 pipeline is the only project that cannot benefit from an exemption under Article 36 or a derogation under Article 49a. An alternative certification procedure fulfilling the requirements of the amended Gas Directive might have been used by the German regulator,[70] but this option has not yet been applied to Nord Stream 2.

Based on our earlier discussion of the principle of legal certainty in EU law, we established that this normally precludes measures from taking effect from a point in time before their publication. It may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned

68 The original wording of Article 2(17) was: '"interconnector" means a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States'.

69 C-596/13 P – *Commission v Moravia Gas Storage*, ECLI:EU:C:2015:203, para 32.

70 See on this K Yafimava, 'Gas Directive Amendment: Implications for Nord Stream 2' (Oxford Institute of Energy Studies Energy Insight 49, March 2019).

are duly respected.[71] Neither of these requirements is met in this particular case. Contrary to legitimate expectations being respected, the fact that the Nord Stream 2 project is the only project to fall into the scope of this retroactive application suggests that this change in the regulatory framework is specifically designed to interfere with the Nord Stream 2 project.[72]

The first indication that the Gas Market Directive would possibly be amended was given on 8 November 2017.[73] Projects that were initiated and to which capital was committed before this date should, according to the case law of the CJEU and the common practice of the EU, be given a transitional period. The CJEU requires that the implementation of new rules is combined with a transitional period to allow market players to adapt to the new 'rules of the game'.[74] This transitional period may be excluded where there is an overriding consideration of public interest.[75] There appear to be no public interest considerations involved in this particular situation that would require the exclusion of a transitional period for pipelines under construction. On the contrary, circumstances (including publicly made statements by the commission) indicate that the objective of the rapid change in law is closely linked to one specific project, the Nord Stream 2 pipeline, and is only based on discriminatory considerations, rather than any legitimate public interest, including the security of supply or the overall functioning of the EU gas markets.[76]

6. Conclusion

From the above discussion it is apparent that the amendment was carefully put together so that its impact on all other, past and future, pipelines would be eluded. The solution that was eventually arrived at is an ingenious invention that introduces substantive rules that allow for derogations for pipelines that were (mechanically[77]) completed at the time of the implementation of the directive. Through the amendment, future import pipelines were granted the right to apply for exemptions under Article 36, previously applicable to pipelines of the internal market, before a final investment decision is made. The Nord Stream 2 pipeline is placed neatly into a temporal gap between these two regimes: the final investment decision had been made before the directive

71 Case 98/78, *A. Racke v Hauptzollamt Mainz* [1979] ECR 69, para 20.

72 Both the intention to apply the new changes primarily to Nord Stream 2 and the problematic aspects of the retroactive application of the new rules to Nord Stream 2 have also been noted by Yafimava, 'Building New Gas Transportation Infrastructure' (n 63).

73 European Commission Press Release, Energy Union: Commission Takes Steps to Extend Common EU Gas Rule to Import Pipelines' (8 November 2017) www.ec.europa.eu/commission/presscorner/detail/en/IP_17_4401 accessed 20 May 2020.

74 Case C-17/03, *VEMW* [2005] ECR I-4983 and C-347/06, C-347/06, ASM Brescia [2008] ECR I-5641; see also Boute (n 19).

75 74/74, *Comptoir national technique agricole (CNTA) SA v Commission* [1975] ECR 53.

76 Nord Stream 2 AG challenged the Gas Market Amendment before the General Court. See T-526/19, *Nord Stream 2 v. Parliament and Council*. Due to a lack of standing to bring a claim for annulment of a legislative act (directive) under EU law, the case was dismissed. The investor has also brought proceedings against the EU under the Energy Charter Treaty (Permanent Court of Arbitration case 2020–07).

77 The German regulator took the understanding that the amended directive requires 'constructional/technical' completion for an article 49a derogation to be available. See on this Bundesnetzagentur Press Release, 'No Derogation from Regulation for Nord Stream 2' (15 May 2020) www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/EN/2020/20200515_NordStream2.html;jsessionid=9AC79692C4F61B6A622F8A491B99B8B6 accessed 20 May 2020.

was amended so there was no possibility (or even any need at that time) to apply for an exemption, but the construction of the pipeline was not completed at that date either.

The retrospective application of new rules to existing situations or in the case at hand – existing investments that have become 'definite' – is always a complicated issue, but it is also highly problematic when new rules are retroactively applied to existing and ongoing investments. This article has illustrated the difficult questions that arise when rules are applied retrospectively, using energy sector investments as the example. The energy sector is a perfect example of the difficulties retrospective application of new rules can create. Investments in energy are as a rule large-scale, up-front investments with long payback periods. This type of investment relies on regulatory stability.[78]

We have sought to identify the source of retrospectivity in order to distinguish its consequences in a multi-layered legal order such as that of the EU. We have argued that even in the limited situations where the CJEU applies the primary treaty articles with retrospective effect, and even if this does not amount to the introduction of new rules of the game, the fundamental principles of legal certainty and legitimate expectations must be respected.

Indeed, secondary legislation must respect these principles, and this is expressly acknowledged in the new Clean Energy Package – the latest package of energy legislation. Investments in the energy sector can be, and are, made under a variety of legal and regulatory schemes. As long as details of the applicable framework are known and understood before the final investment decision is made, the investor can tailor the investment to fit the existing regulatory reality. However, unforeseeable and sudden regulatory changes can create significant difficulties for the investors. Applying such changes retrospectively makes a difficult situation worse. This, in turn, makes it much more difficult for the EU to attract the investments it urgently needs to tackle climate change.

The clear starting point should be that retrospective, and even more so retroactive, application of laws should always be avoided, especially where this results in discrimination between market players. This can be done through exemptions and derogations, and it can also be done through transitional periods – ie grandfathering. In circumstances where it cannot be avoided, appropriate compensation should be granted to those private investors who are negatively affected by the change. This seems to be the approach under the EU legal system, where the courts have emphasised the need to consider those private investors that are negatively affected by changes in laws.

Disclosure statement

All three authors have at some point in time provided legal advice for Nord Stream 2 AG. This article is a product of academic research and all views and opinions expressed are strictly personal to the authors.

78 See for example: P. Cameron, 'In Search of Investment Stability', in K. Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar Publishing Ltd, 2014), 124.