

Gas Strategies Interview: Ana Stanic, founder of E&A Law

The investment outlook in Europe's energy sector appears increasingly uncertain, as EU centralisation and fractious geopolitics heighten regulatory risk. Gas Strategies spoke to Ana Stanic, founder of boutique firm E&A Law, to discuss the shifting sands of the EU legislative environment and what it means for energy investors.

In the field of energy, Stanic has experience in strategic areas such as maritime border disputes, oil and gas resources straddling boundaries, concession agreements to construct large energy infrastructure projects, cross-border mergers and acquisitions and host-government agreements to build pipelines. Stanic also advises on EU law, particularly in energy, environment and state aid, and how it relates to international law.



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What is your view on the investment climate in the European energy sector?

The European investment climate is at its most uncertain point in a decade. You could say that's because of the complex geopolitical situation, but it's also a question of rising regulatory risk in the EU.

There are a number of reasons for this trend: the fact that we are yet again faced with proposals by the European Commission to amend EU energy legislation is a key uncertainty; the fact that some of these proposals suggest a departure from the liberalised, market-based approach to EU energy policy is another.

Furthermore, the investment framework, with its arbitration framework that has existed since the 1960s, is under threat in the EU. The energy industry views arbitration as a key mechanism for settling disputes with states, as it ensures that such disputes will be resolved by a neutral and entirely independent body. For example, in the case of the Canada-EU Free-Trade Agreement, the EU has removed the right of an energy company to appoint an arbitrator in an investment dispute it brings against one of the states, and replaced it with a mechanism where all the arbitrators are appointed by Canada and the EU Commission.

The Commission is also trying to terminate bilateral investment treaties between EU Member States and is challenging (albeit unsuccessfully) the jurisdiction of arbitral tribunals to decide on disputes where EU states are respondents. With respect to investments that are already in place, we've seen the Commission take the unprecedented action of preventing Romania from complying with an arbitral award, which is, under the ICSID Convention – a multilateral treaty to which all EU countries are party and have been for the last 30 years – automatically enforceable.

Although there's no legal basis for Romania to refuse the enforcement of the arbitral award, the Commission has argued that Romania's compliance with it would amount to illegal state aid and has threatened the country with infringement proceedings.

There are some who argue that state aid is a matter of international public policy, but I don't agree. The very fact that state aid approved by the Commission is not illegal means that state aid itself is not a matter of international public policy. In any event, under the ICSID Convention an award contrary to international public policy must be enforced: enforcement is automatic.

The actions of the Commission have set off alarm bells everywhere. We'll see what the EU Court of Justice says since the Commission's actions have been challenged. I very much hope the court will come down on the side of investment protection and uphold international treaty obligations.

So, we can see that there's a growing friction between EU and international law. Nord Stream 2 is another example of this friction – in this case, between EU law and the UN Law of the Sea Convention (UNCLOS). And if you put all this in the mix you get a pretty uncertain investment climate.

What does this actually mean for potential investors?

It's unappealing for our own companies, which are already struggling. It's also unappealing to foreign investors, who, the Commission says, we need to attract to Europe to invest in our infrastructure development.

What kind of infrastructure investment is needed?

In my opinion, emphasis should be placed on the construction of interconnectors to ensure the free flow of gas within the EU and thereby the creation of an internal EU market.

At the same time, more emphasis should be given to creating a coherent energy policy in which the role of gas as a transition fuel is clear, and energy security is pursued from the viewpoint of

the energy mix as a totality, rather than by reference to each fuel separately.

There has been much talk about the “Energy Union”. What do you make of it?

The concept of “Energy Union” was coined by Donald Tusk when he was the Polish Prime Minister to promote the idea of a single buyer of gas. Somewhat bizarrely, even though the concept was vehemently attacked as an anti-market idea that breached EU competition law, it was adopted by the Commission and has now become central to its energy strategy.

Although the Commission has sought to distance itself from Tusk’s original concept, the Parliament and certain Member States continue to see joint purchasing of gas as a key, albeit unwritten, objective of the Energy Union.

The Commission’s proposed amendments to the Decision on Intergovernmental Agreements (IGAs), which envisage it taking an active part in the negotiation of bilateral IGAs with non-EU member states, as well as the amendments to the Security of Supply Regulation, which entail detailed information on commercial contracts being provided to the Commission (and which is already being provided to ACER) point in the same direction.

Why this remains an objective given the gas glut in the EU and falling gas prices is unclear to me. The pursuance of this objective, despite it being contrary to fundamental principles of EU law, in my view further undermines legal certainty in the EU.

Moreover, when it comes to security of supply, having access to this kind of information does not provide any assistance or guarantee. Security of supply is about physical availability, not contractual availability.

The Energy Union is not a legal concept; it is a political strategy. Consequently, an IGA cannot be said to be incompatible with EU law simply because it is incompatible with the objectives of the Energy Union. Nor can an infrastructure project be approved or rejected by reference to its compliance with the objectives of the Energy Union.

It is crucially important that decisions issued by national regulatory authorities and the European Commission are based on EU law and soundly reasoned. Depoliticisation of EU energy policy is crucial to reducing uncertainty surrounding energy projects in the EU.

What key legislative risks must investors take into account?

As mentioned earlier, the Commission has proposed an entire reframing of the Security of Supply Regulation. One of the key problems I see with the regulation concerns the nine regions that are to be set up for the purposes of preparing risk assessments and preventative action and emergency plans.

The regional groupings are not the same as those under the regulation concerning Projects of Common Interest. It is also not clear how the countries in the proposed regions would be able to assist one another in an emergency – according to the solidarity proposal [more on which below] – as in many cases they are dependent on the same source for gas, and so if one of them was not getting gas then, arguably, neither would the others.

Third, as the risk assessments and plans are required to be prepared for the designated regions whereas solidarity is required to be arranged between neighbouring Member States who can be in different regions.

The fourth issue is that the proposal seems to ignore the fact that the gas is largely owned by private companies. In order for solidarity to be provided by Member States they would have to expropriate the gas from its owners.

The proposal has some extremely vague words regarding compensation. Such lack of detail is of great concern, as such actions would affect the bottom line of companies.

What is the motivation for the EU's behaviour?

Centralisation of power in the hands of the Commission is, in my view, the most likely motivation. The Lisbon Treaty marked a turning point because for the first time, in Article 194, EU institutions gained the competence to adopt legislation with respect to energy. The EU and Member States now share competence in the field of energy.

In respect of EU foreign energy policy, the Commission has asserted that the EU has exclusive competence on account of it being afforded the same in respect of foreign direct investment, including in the field of energy.

There have been repeated calls for the “Europeanisation” of energy policy. It is said that Member States don't sing from the same hymn sheet when it comes to energy policy – for example that Germany is too pro-Russian, that the UK does whatever it wants and so on. I agree there's a need to Europeanise energy policy, but not with moves that undermine the market liberalisation model and hamper the investment climate. The latter are, in my view, fundamental to successful energy policy in the EU.

When Donald Tusk called for the adoption of the concept of the Energy Union, arguing that what the EU needed was a cartel of buyers to be on the other side to Gazprom – because that was the only way to secure favourable market prices – that, in my view, amounted to a departure from the market liberalisation model. As do some of the proposed amendments to the Security of Supply Regulation.

I don't think there is any legal basis, nor any need, for such a departure. The current glut of gas in the EU market and arrival of US LNG shows the market has and can deliver lower prices.

We must not forget that all EU gas supply contracts contain price-review clauses and that arbitration has been used successfully to lower prices. All of this is evidence that the market is working – so the last thing we need now is legislation that undermines market principles.

I think EU legislation should be concentrated on delivering an internal market for energy rather than energy security – the latter follows the former.

What do you make of the solidarity proposal in the Security of Supply Regulation?

I think both Articles 12 and 15 proposals are relatively controversial – the latter more so than the former. Under the proposed wording of Article 12, Member States in designated regions must help ensure gas supply to households, essential social services and district heating installations in neighbouring Member States as a last resort in the case of a severe crisis.

As long as the emergency continues, no other customers may be supplied by the other Member States in the designated region.

The EU has express competence to propose legislation ensuring security of supply under Article 194. This arguably extends to imposing solidarity obligations regarding gas supply between Member States. However, the key issue is the lack of detail regarding how payment will be made to companies forced to divert gas to another country. It is also unclear how compensation will be made to companies that do not receive gas due to an emergency in other countries.

There is much debate over the proposed wording of Article 15, which extends the solidarity obligations under Article 12 to non-EU Member States. Pursuant to this provision, a declaration of emergency by, for example, the Ukraine would trigger obligations on neighbouring EU member states to supply Ukraine's consumers – even if this meant industrial customers in neighbouring states went unsupplied, and in breach of the applicable gas supply contracts.

In my view, the EU does not have competence to impose solidarity obligations on EU member states in respect of non-EU Member States, whether or not they are members of the Energy Community.

The EU's competence under Article 194 is limited in two key ways: it expressly provides that the EU can only adopt legislation that ensures security of supply in the EU (excluding Ukraine) and importantly, only for the purposes of the "establishment and functioning of the internal market and with regard for the need to preserve and improve the environment".

Extending the solidarity provision to non-EU countries does not come within either of these limitations. I understand that there's much debate with respect to this provision in the Council of Ministers. While I understand it's an EU objective for the Ukraine to somehow be brought within the EU fold, in my view this has to be done properly by way of a treaty and with the express agreement of Member States.

So where does Nord Stream 2 fit into all this?

Under international law, an EU Member State cannot stop a pipeline from being constructed in its exclusive economic zone ("EEZ"), but it does have a say over its route. A distinction is drawn between sovereignty, which a state has over its land and territorial seas, and the sovereign rights it enjoys to exploit natural resources in the EEZ pursuant to Articles 58 and 79 of UNCLOS.

When NS1 was being built, EU institutions accepted that the Third Energy Package (TEP) did not apply.

In recent discussions it has been simply said that the TEP applies to NS2. However, the only way this argument can succeed is if somehow it could be argued that EU law trumps international law. It wouldn't be the first time that EU lawyers have taken this view, and the Commission does like this view – it certainly took that view when it forbade Romania to comply with the ICSID arbitral award, which we discussed earlier.

But I don't think it is legally sound. Nor do I think that ignoring international law is a policy the EU should pursue, especially given the state of the world today. I think the EU should promote compliance with international law by showing that it will itself abide by the rules.

Do you feel Brexit could weaken the influence of the EU on energy development?

I don't think so. However, some believe the UK's departure from the EU will further weaken the EU's commitment to market liberalisation as an objective and principle of EU energy policy. I think there is a strong possibility that this may happen, and steps must therefore be taken to ensure that it does not.

What impact will this have on the investment outlook?

I believe the uncertainties surrounding Brexit, including when it will actually be triggered and what shape it will take, have already undermined – and will continue to undermine – the investment outlook both in the UK and the EU.

I am currently working with political consultants and gas experts to analyse the different Brexit scenarios and how these may affect the investment outlook in the UK and the EU generally, as well as EU and UK energy policy specifically. I suspect we will be working on this for a number of years to come.