

# The Security-Oriented Turn in Energy Law

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It is not without a certain irony of history that 50 years after the „Neue Ostpolitik“ of Willy Brandt, a chancellor of the Social Democratic Party must once again draft new Ostpolitik. The invasion of Ukraine by the Russian Federation, which is contrary to international law and, as the latest shocking news from Ukraine shows, associated with war crimes – has fundamentally shifted the coordinates of security policy. The extent of this shift is not yet fully apparent. Nevertheless, the first outlines of a new order are already becoming discernible.

In addition to the fundamental reorientation of defence policy, which has also been subject to multiple contributions to this debate, the energy policy is moving into focus and taking on central strategic importance: In the [final declaration of the Versailles Summit on 11 March 2022](#), the participating heads of states and governments agreed in addition to a commitment to increase European defence capabilities and also to also end dependence on imports of gas, oil and coal from Russia as soon as possible. The [European Council](#) called on the Commission to present a plan to this effect by the end of May 2022. In addition, the European Union and the United States have concluded an energy partnership to be able to substitute energy supplies from Russia with supplies of liquefied natural gas (LNG) in the short and medium term. The daily press reports and the growing uncertainty as to whether Russia will stop its gas deliveries in the short term have increased the pressure to take such actions.

These important aspects of security policy must be taken into account in defining a new security strategy in the wake of the new era. As illustrated by the current crisis, security policy implications have to play a central role in a new energy policy.

## The long legacy of Germany's *Sonderweg* in energy policy

Germany is particularly affected by this change in energy policy, as it continues to be highly dependent on Russian energy supplies. [Timothy Garton Ash](#)<sup>1)</sup> See Ash, In Europe's Name: Germany and the Divided Continent, New York 1993. and [Helen Thompson](#)<sup>2)</sup> Thompson, Disorder: Hard Times in the 21st Century, Oxford 2022. have recently once again pointed out the historical dimension of Germany's dependence on Russian energy supplies. It ultimately originated in the „Neue Ostpolitik“ of the German social-liberal coalition of the 1970s and has been steadily increased by all federal governments since then, regardless of their party affiliations. This may explain why Germany held on to the realisation of the Nord Stream 2 pipeline until the eve of the Russian attack against Ukraine, even though [security](#)

[strategy](#) analysts had been warning for years, especially since 2014, that this would lead to a further increase in Germany's dependence on Russian gas supplies. However, this has led to contrasting reactions in Germany: Despite the imposition of sanctions against Russia, attempts were made to save the project until the very end. The construction of LNG import terminals in Stade and Brunsbüttel also failed to materialize despite many years of planning.

## **First steps by the Federal Government toward a more security-oriented energy policy**

Now the German government feels compelled to initiate a security policy turnaround in energy policy within a very short time. Due to the current circumstances, the green energy minister is already acting as the chief buyer of fossil energies in the Gulf. Gazprom Germania GmbH's German subsidiary has been placed under the trusteeship of the Federal Network Agency under the Foreign Trade and Payments Act (AWG) in an unprecedented step. Two key consensus points among at least two of the three coalition partners are also open for discussion, the accelerated phase-out of coal energy and the decommissioning of the last nuclear power plants.

Furthermore, the German Bundestag has also taken legislative action: In a fast-track procedure, it passed the Act on the Introduction of Level Requirements for Gas Storage Facilities on 23 March 2022. According to this act, gas storage facilities in Germany must be 80 % filled with gas on 1 October of each year, 90 % on 1 November and 40 % on 1 February. Since the extensive stockpiling obligations for petroleum products were introduced in 1966 (with subsequent amendments), these are the first rules on compulsory stockpiling of energy products introduced in Germany.

At the same time, the character of renewable energies is changing from a pure instrument for combating climate change to a component of security policy. Just a few days after the Russian invasion of Ukraine, the German government published the drafts of the [Renewable Energy Sources Act and Offshore Wind Energy Act](#), which were passed by the German cabinet last week. These draft laws stipulate that the expansion of renewable energies is no longer only in the public interest, but should serve public security. In the end, the security of energy supply is even linked to the existence of the state in the draft laws. As explained in the draft laws, a secure energy supply is not only crucial for the functioning of the economy, but also for the functioning of state institutions and the survival of the population. However, according to the Federal Ministry of Economics and Climate Protection, without the expansion of renewable energies, the supply of electricity cannot be secured in the long term. Therefore, with reference to public safety, planning procedures for renewable energy projects are now to be accelerated. This shall be further accompanied by reduced opportunities for legal action. This is intended to achieve the expansion target of generating a total of 80 % of gross electricity consumption from renewable energies by 2030.

## **Necessity for a change in the concept of security in energy law**

Although these are only first steps, they point to a deeper change in energy policy and, along with it, energy law. Until now, the concept of energy security has been reduced primarily to the aspects of security and affordability of energy supply. In recent years, climate and environmental protection have been added as further aspects. However, the security policy dimension of energy supply has been underestimated. There is no other explanation for Germany's decision over the past two decades to phase out two forms of energy with base load capability, nuclear energy and coal-based power generation, thereby making itself increasingly dependent on Russian gas supplies, without taking sufficient account of the security policy.

In addition to the strategic security implications of the significantly accelerated expansion of renewable energies, a new security policy orientation is also necessary for the supply of conventional energies, which will continue to be necessary for the foreseeable future. To this end, security policy aspects must be integrated to a much greater extent in energy law than before. In the case of energy law measures, for example in the expansion of energy grids, in the regulation of energy storage facilities or in the regulation of fees, the security policy aspect of these measures must be taken into account more intensively than before, without losing sight of free competition and the market-based freedom of the players.

## **The security-oriented turn of European energy policy**

Unlike Germany, the European Union has already taken implications of security policy of European energy supply into account for almost 20 years. The drivers here were primarily the new Eastern European member states, which were already confronted with significantly higher gas prices from Russia after their accession to the European Union in 2004. The Russian-Ukrainian gas crises of 2006 and 2009 also served as an important incentive for the development of a European internal energy market.

In response to the unlawful annexation of Crimea in 2014, the European Union had [designated](#) the security policy dimension as a core component of European [energy policy](#) with the [introduction of the Energy Union](#). Therefore, numerous measures already exist at the European level that are committed to this goal. In addition to crude oil stockpiling obligations, these include security measures for gas supply pipelines in order to be able to supply the member states internally in the event of an emergency by redirecting gas flows. Furthermore, in order to ensure the secure supply of natural gas, specific rules of conduct were ordered, which in particular oblige the Member States to draw up prevention and emergency plans. The initiation of the first stage i.e. the early warning stage of the gas emergency plan was declared

by the Federal Minister of Economics and Technology on 30 March 2022 and a „gas crisis team“ was established.

However, the shift towards security in European energy policy does not focus solely on the internal market, but also takes external relations into account. The Commission has linked energy policy with its foreign trade policy in order to improve access to energy resources and to foreign markets for technologies and services. In recent years, this has led to closer cooperation between member states regarding gas procurement. Furthermore, this contributed significantly to the rapid conclusion of the energy partnership with the United States in the first place.

## **Investment protection as a key for a comprehensive security policy**

In addition to the conclusion of new energy supply contracts, considerable investments in the transformation of the European energy infrastructure are necessary in the short term, especially to accelerate the expansion of renewable energies. This is also essential for creating a new infrastructure for the import of liquefied natural gas. However, for such investments, a stable investment framework is necessary. The Energy Charter Treaty is an important instrument for securing these investments on the one hand and is the basis for energy policy cooperation on the other hand. It promotes energy cooperation and guarantees comprehensive guarantees for investments in energy infrastructure.

Currently, the revision of the Energy Charter Treaty [is being debated](#). Some signatory states are pushing to restrict investment protection to investments in renewable energies in the future. There are also proposals to limit the access to neutral arbitration tribunals. However, the security policy shift in energy law shows that the Energy Charter Treaty should continue to play a central role as a multilateral instrument not only for the protection of investments in renewable energies, but also for conventional forms of energy. Therefore, it remains necessary for the strategic protection of energy imports.

## **The need for further strengthening transatlantic cooperation**

In addition to this sectoral investment protection in the energy sector, a strengthening of trade relations is also necessary. Against the backdrop of the sanctions that have been imposed on the Russian Federation of an unprecedented scale, strengthening of transatlantic trade is gaining strategic importance. The Federal Constitutional Court recently [rejected](#) constitutional doubts about the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU. Already in 2019, the ECJ had [declared](#) the planned system of investment jurisdiction (investment court with appellate instance) to [be compatible with EU law](#) – which was already the subject of an intensive debate on Verfassungsblog. Therefore, the swift ratification of CETA should send a strong

signal of transatlantic unity. The revival of negotiations to conclude a transatlantic free trade agreement (TTIP) with the USA, for which CETA could now serve as a constitutionally and EU law-compliant blueprint, also does not seem out of the question at present. By doing so, the energy partnership with the USA could be based on a broader framework and strengthened through a comprehensive mutual trade policy.

## **National defence strategy must take the security-oriented turn of energy policy into account**

The full range of such strategic aspects should be taken into account by the Federal Government in developing its „national defence strategy“. [Robert Blackwill and Jennifer Harris](#) have already described the strategic importance of economic policy and especially energy policy measures as „war by other means“. <sup>3)</sup> *Blackwill/Harris, War by Other Means, Cambridge/MA, 2016.* Accordingly, redefining the security policy must not stop solely at the selection of new weapons systems. Rather, the German government faces the task of also realigning its energy policy with the changed strategic situation in accordance with the European energy policy.

*This article reflects the personal opinion of the author.*

*A German version of this article has been published [here](#).*

### References

- See Ash, *In Europe's Name: Germany and the Divided Continent*, New York 1993.
- Thompson, *Disorder: Hard Times in the 21st Century*, Oxford 2022.
- Blackwill/Harris, *War by Other Means*, Cambridge/MA, 2016.

