

Amendments to the Danish Continental Shelf Act

Summary

A proposed bill to amend the Danish Continental Shelf Act provides the government with the power to reject applications for laying pipelines, when so warranted by Danish by foreign policy, national security or military interests. If enacted in its current form, the amendments will take effect on 1 January 2018 and will to apply to all applications that have not yet been processed, but were submitted prior to that date, c.f. s 2(2) of the proposal.

Background

The amendment exclusively affects pipelines on the territorial sea and not pipelines on the continental shelf. Pursuant to Art. 79 of UNCLOS 1982, all states are entitled to lay pipelines on the continental shelf in accordance with the provisions of that article. The state may therefore not impede the laying or maintenance of pipelines on grounds other than those including the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, c.f. Art. 79(2).

Art. 79 does however not affect the right of the coastal state to establish the conditions for pipelines entering its territorial sea, c.f. Art. 79(4).

The Danish Act on the Delimitation of the territorial sea prescribes that the Danish territorial sea comprises the outer territorial waters, i.e. 12 nautical miles from the baseline, as well as inner territorial waters, including ports etc.

Under international law therefore, whereas the coastal state does not enjoy sovereign rights over the shelf, it may act more freely with regards to terms for laying pipelines under the territorial sea. Accordingly, the proposed bill introduces additional grounds on which applications for pipelines under the territorial sea may be refused, including foreign policy, security and military interests.

Danish regulations on laying down pipelines under the territorial sea are primarily contained in executive order no. 361 of 26 April 2006 on certain pipeline facilities for transporting hydrocarbons on the territorial sea and continental shelf. Pursuant to sections 1 and 2 of the executive order, pipelines may be established for transporting hydrocarbons extracted outside Danish territories when permission thereto has been granted by the Minister of Transport and Energy. The Minister may under the current regime demand that certain terms are complied with before a permit is issued, c.f. section 2, including inter alia terms concerning the exploration of the continental shelf, exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines and the access to repairing existing pipelines.

Whereas the Minister may consider environmental and safety aspects before issuing a permit, the executive order does not explicitly permit him or her to take into account considerations of foreign policy, national security or military interests.

The purpose of the amendment therefore is to provide the government with the power to consider such aspects when granting permission to an applicant requesting access to the territorial sea. Considering that pipeline facilities on the continental shelf and territorial sea to a wide extent are subject to similar regulations, the government has deemed it apposite to adjust the scope of the Danish Continental Shelf Act to encompass the territorial sea as concerns pipeline facilities.

Should the amendment gain the support required in the Danish parliament, the Continental Shelf Act will be titled the Act on the Continental Shelf and Certain Pipeline Facilities on the Territorial Sea.

The new rules

The Act introduces a new section 3(a), according to which the establishment of pipelines for transporting hydrocarbons and power cables presupposes a permission from the Minister on Energy, Utilities and Climate. The provision further stipulates that the Minister is to issue such permits only if they are deemed to be compatible with foreign policy, national security and military interests of the Kingdom of Denmark.

The bill proposes a two step-application procedure.

First, the Minister of Energy, Utilities and Climate must obtain a recommendation from the Minister for Foreign Affairs on whether the establishment of a power cable or a pipeline on the territorial sea is compatible with the foreign policy, national security and military interests of the Kingdom of Denmark, c.f. s 3(a)(2) of the proposed bill.

The explanatory notes underline that The Minister of Foreign Affairs shall decide on the recommendation at his or hers sole political discretion, including considerations of national security, the defence of the Kingdom of Denmark, political, economic and/or military capacities and foreign policy, including European alliances.

Secondly, s 3(a)(3) stipulates that if the Minister of Foreign Affairs issues a positive recommendation under the new first step, the Minister of Energy, Utilities and climate shall process the application in accordance with s 4(2) and 4(a) of the current regime, including making the customary assessment of safety and environmental aspects.

If the recommendation issued by the Minister of Foreign Affairs is negative, the Minister of Energy, Utilities and Climate must reject the application. The Minister of Energy, Utilities and Climate must follow the recommendation from the Minister of Foreign Affairs.

The explanatory note emphasises that the recommendation issued by the Minister of Foreign Affairs does not constitute a decision under administrative law, meaning that it does not presuppose consultation of the parties involved or a justification in order to be considered legal. Furthermore, the Energy Board of Appeal does not enjoy powers to review the recommendation of the Minister of Foreign Affairs, c.f. ss 3(a)(2) and 6(a)(8). As such bodies are deemed unfit to assess the recommendation from the Minister of Foreign Affairs, which will include foreign policy, national security or military interests, applications that have been rejected on the basis of a negative recommendation cannot be appealed to an administrative body. Such rejections may however be submitted to the ordinary courts for review by instigating legal procedures against the Minister of Energy, Utilities and Climate within 6 months, c.f. s 6(c)(1) and (2).

Given that the Minister of Foreign Affairs is not required to provide the grounds for a negative recommendation, the access to the judicial system may however prove futile.

Although the proposed bill seems to have a general aim, it is widely considered to (at least to some extent) target the expansion of the existing Nord Stream pipeline (the Nord Stream 2) and to constitute a reaction to the political and military unrest in Eastern Europe.

Given that the right to take into account the criteria described above is limited by international law to the territorial sea, applicants under the Nord Stream 2 have publicly communicated that they intend to divert the pipeline in order to circumvent the territorial sea of Denmark – and in turn the competence of the Danish Foreign Minister.

The government proposal has spurred serious concerns about the rule of law as a result of, inter alia, the fact that the amendments contained in the bill are to apply to applications submitted prior to its entry into force, that the Minister of Foreign Affairs is not required to provide grounds for a negative recommendation and that the limitations on the right of appeal may prove unconstitutional.

What final form the proposed bill will take on remains to be seen. WSCO will provide an updated comment on the new Continental Shelf Act if/when the bill has passed parliament, and in what form.

In case of any questions or comments, please contact Rósing Rasmussen on +45 51786874 or Bo Sandroos on +45 40885422.

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