

**ORLEN S.A. POSITION**  
**on**  
**Energinet's application for an amendment of the Danish Utility Regulator's decision**  
**of 14 February 2022**  
**on the establishment of joint market zone**

On 18 August 2023, Energinet announced that it plans to apply to DUR for an amendment to the Decision and invited market participants and other interested parties to submit comments to the Application. According to the Application, Energinet wants the Decision to be changed in the following way:

- all references to § 2 of Executive Order no. 816 of 27 June 2016 on economic regulation of Energinet.dk (**Executive Order no. 816**)<sup>1</sup> and the principle of inclusion of necessary costs for efficient operations and a necessary return on capital (i.e. break-even regulation) are to be omitted from the Decision;
- it is to be approved that the pricing in the agreement that makes the capacity in the upstream pipeline available to the Energinet Transmission Unit (**Availability Agreement**) is based on the recovery of the Energinet Upstream Unit's costs for efficient operations of the upstream activities and a risk-adjusted return on the invested capital so that this applies to the gas transmission activities pursuant to section 37d of the Danish Gas Supply Act<sup>2</sup>

Energinet argues that such an amendment of the Decision is necessary to enable compliance with the requirement that the non-transmission tariff charged for the EP II Branch Pipeline (**Upstream Pipeline**) is to be subject to pricing corresponding to that applicable to the gas transmission activity, pursuant to NC TAR<sup>3</sup>. Energinet also believes that it has had access to charge a risk-adjusted return on the invested equity in the Upstream Pipeline in the non-transmission tariff since the entry into force of the new revenue cap regulation as of 1 January 2023. Energinet has thus fixed the tariff for 2023 in May 2022 and September 2022 (**Tariff**), respectively, and based it on a risk-adjusted return on the invested equity in the Upstream Pipeline. Consequently, Energinet has used a rate of return for Tariff calculation, which reflected Energinet's expectations for the Danish Utility Regulator's determination of a risk-adjusted rate of return.

However, it should be stressed that a risk-adjusted return on the invested capital in the upstream part of the Baltic Pipe was included in the Tariff by Energinet **without legal basis and in violation of transparency obligations as well as the requirement of regulatory approval**. In our view, an amendment to the Decision proposed by Energinet will not ensure that these requirements are met. Energinet Application is also unjustified due to the fact that there is no valid legal basis for applying principles of new economic regulation of Energinet, including risk-adjusted return on the invested capital, to the pricing in the Availability Agreement between the Energinet Transmission Unit and the Energinet Upstream Unit, so that it would be based on Upstream Unit's costs for efficient operations of the upstream activities and a risk-adjusted return on the invested capital. Finally, the introduction of a risk-adjusted rate of return in relation to the non-transmission tariff, instead of historical break-even regulation, represents a significant change of the tariff-setting framework from the one

<sup>1</sup> Bekendtgørelse nr. 816 af 27. juni 2016 om økonomisk regulering af Energinet.dk.

<sup>2</sup> Lov om gasforsyning, jf. lovbekendtgørelse nr. 1100 af 16. august 2023.

<sup>3</sup> Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas, OJ L 72, 17.3.2017, p. 29–56.

communicated to Open Season 2017 participants and thus is contrary to Orlen's legitimate expectations as party to the Capacity Agreement concluded with Energinet.

**I. Energinet failed to meet transparency obligations and the requirement of regulatory approval in relation to the return on the invested equity in the Upstream Pipeline**

In our view, a risk-adjusted return on the invested capital in the upstream part of the Baltic Pipe was included by Energinet in the Tariff without a legal basis and in violation of transparency obligations and the requirement of regulatory approval. At the same time, an amendment to the Decision proposed in the Application will not ensure these requirements are met.

As acknowledged in the Application, the Tariff has been based on the assumption that Energinet can charge a risk-adjusted return on the invested equity in the Upstream Pipeline in the non-transmission tariff since the entry into force of the new revenue cap regulation as of 1 January 2023. Thus, Energinet has included in the Tariff for non-transmission services risk-adjusted return, reflecting its expectations for the DUR's determination of a rate of return for 2023 and 2024. However, DUR has **neither fixed nor approved methodology underlying the calculation of return on the invested equity in the Upstream Pipeline nor determined directly rate of return for such investment by any legal act.**

This contradicts the Gas Directive and NC TAR requirements, according to which at least tariff methodology for non-transmission services should be fixed or approved by the national regulatory authority (NRA). In particular, according to Article 41(6)(a) of the Gas Directive, the NRA *"[...] shall be responsible for **fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for [...] access to national networks, including transmission [...] tariffs**"* (emphasis added). Accordingly, the Recital (32) Gas Directive states that *"**national regulatory authorities should be able to fix or approve tariffs, or the methodologies underlying the calculation of the tariffs, on the basis of a proposal by the transmission system operator or distribution system operator(s) or liquefied natural gas (LNG) system operator, or on the basis of a proposal agreed between those operator(s) and the users of the network.**"* (emphasis added). The principle mentioned above is also reflected in the wording of Article 13(1) of the Gas Regulation,<sup>4</sup> which refers to *"**Tariffs, or the methodologies used to calculate them, applied by the transmission system operators and approved by the regulatory authorities pursuant to Article 41(6) of Directive 2009/73/EC**"* (emphasis added).

The above requirements apply to the return on the invested capital included in non-transmission tariffs since obligations under Article 41(6)(a) of the Gas Directive are not limited to transmission tariffs and do not differentiate tariff components or fees charged by TSO. Furthermore, Article 13(1) Gas Regulation states that tariffs for access to networks, or the methodologies used to calculate them, applied by the TSO and approved by the NRA, *"[...] shall [...] **reflect the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including an appropriate return on investments, and, where appropriate, taking account of the benchmarking of tariffs by the regulatory authorities**"* (emphasis added). At the same time, Article 26(1)(c)(ii) NC TAR requires NRA or TSO to carry out, where non-transmission services provided to network users are proposed, periodic consultations regarding i.a. the non-transmission service tariff methodology. Within five months following the end of the final consultation, NRA, acting in accordance with Article 41(6)(a) of the Gas Directive, shall take and publish a motivated decision on non-transmission service tariff methodology (Article 27(4) NC TAR). Thus, in its Analysis of the Consultation Document on the Gas Transmission Tariff

<sup>4</sup> Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211, 14.8.2009, p. 36–54, as amended.

Structure for Denmark of 14 February 2022, the European Union Agency for the Cooperation of Energy Regulators (ACER) underlined that “[...] **the NC TAR sets rules for the allocation of revenue associated with transmission and non-transmission services that the TSO provides. [...] The obligation of NRAs to regulate revenue of the TSO, including transmission and non-transmission, is set under Article 41(6)(a) of Directive 2009/73/EC [...]. Furthermore, Article 41(6)(a) of Directive 2009/73/EC and Article 13 of Regulation (EC) No 715/2009/17 set the terms that should apply to this specific revenue regulation.**”<sup>5</sup>.

However, despite the above requirements, the return on the invested equity in the Upstream Pipeline included by Energinet in the Tariff has not been approved by the DUR, nor is it based on any methodology established by NRA and published before **Tariff’s entry into force**. In particular, the return on the invested equity was not subject to approval in DUR’s decision of 12 May 2022 on partial approval of a tariff methodology for the Danish gas transmission system<sup>6</sup>, as it sets out the rules for Energinet’s allocation of the cost base resulting from the costs incurred by Energinet related to ownership and operation of the gas transmission system, and thus covers only part of the transmission services revenue to be recovered from capacity-based transmission tariffs with the aim of deriving reference prices (Article 3(2) TAR NC). Also, the Decision on the establishment of a joint market zone, which, according to the Application, is to be amended, cannot be qualified as necessary regulatory approval. It requires merely that [...] **the pricing in the Availability Agreement only includes necessary costs for efficient operations and a necessary return on capital** (emphasis added), without specifying how the rate of return should be calculated. Therefore, it must be underlined that the subject of the Decision was not the return on the invested equity in the Upstream Pipeline or the non-transmission service tariff methodology itself.

Finally, in our view, the **amendment to the Decision proposed by Energinet will not ensure that the requirements of transparency and regulatory approval are met**. As Energinet assumes, the pricing in the Availability Agreement as from 1 January 2023 must be based on recovery of the costs of efficient operations of the activities and a risk-adjusted return on the invested capital in the same way as for the gas transmission activities pursuant to section 37d of the Danish Gas Supply Act. According to the Application, this is equivalent to calculating a non-transmission tariff on the basis of a return on equity set by DUR in its decision of 22 December 2022 on the rate of return for the return on equity for 2023 – 2024 for the transmission system owner<sup>7</sup>. However, DUR’s decision of 22 December 2022 sets the rate of return for the equity used only when determining the income limits for 2023 – 2024 for transmission system owners, whilst in relation to Upstream Pipeline, Energinet does not act as the transmission system owner, but as the owner of the upstream pipeline network. In particular, according to the decision, DUR determined the interest rate based on § 18(3) of the Executive Order no. 1609 of 28 December 2022 on revenue framework and regulatory accounts for transmission system owner (**Executive Order no. 1609**)<sup>8</sup>, while § 2(15) of this executive order defines transmission system owner as any natural or legal person who owns a transmission system. At the same time, Executive Order no. 1609 excludes from the definitions of “asset base,” “operating costs,” and “income,” respectively, assets covered by gas upstream pipelines and gas upstream installations, costs in connection with gas upstream pipelines and gas upstream installations and income from gas upstream pipelines and gas

<sup>5</sup> ACER, Agency Report – Analysis of the Consultation Document on the Gas Transmission Tariff Structure for Denmark, 14.02.2022, [https://acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Publication/Agency%20report%20-%20analysis%20of%20the%20consultation%20document%20for%20Denmark\\_2022.pdf](https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/Agency%20report%20-%20analysis%20of%20the%20consultation%20document%20for%20Denmark_2022.pdf), p. 23.

<sup>6</sup> Forsyningstilsynets Delvis Godkendelse Af Tarifmetode I Det Danske Gastransmissionssystem, 12.05.2022, Sagsnr.: 22/00038, <https://afg.forsyningstilsynet.dk/>

<sup>7</sup> Forsyningstilsynets Afgørelse om forrentningssats for forrentningen af egenkapitalen for 2023-2024 for transmissionssystemejer, 22.12.2022, Sagsnr.: 22/02080, <https://afg.forsyningstilsynet.dk/>

<sup>8</sup> Bekendtgørelse nr. 1609 af 28. december 2022 om indtægtsramme og reguleringsregnskab for transmissionssystemejer.



upstream installations (§ 2(2), (3) and (7)). Accordingly, in the decision of 22 December 2022, DUR took into account only assets that constitute the gas transmission system and the associated risks. For instance, DUR divided *GAS-TO's assets [...] into assets relating to the new Baltic Pipe connection to Poland, which has recently been commissioned, and other assets relating to the **rest of the gas transmission network*** (emphasis added)<sup>9</sup>. Given the above, while setting the rate of return for the return on equity for 2023 – 2024 for the transmission system owner, DUR has not considered assets and risks related to Upstream Pipeline (and was not allowed to take them into consideration). It should also be noted that Orlen has appealed the decision of 22 December 2022 and will be subject to review by the Danish Energy Board of Appeal. Therefore, DUR's decision of 22 December 2022 cannot substitute separate regulatory approval for the methodology underlying the calculation of return on the invested equity in the Upstream Pipeline.

Moreover, Energinet's Application implies that the pricing in the Availability Agreement would have to be based on recovery of the costs of efficient operations of the activities and a risk-adjusted return on the invested capital as from 1 January 2023. According to the Application, amended DUR's Decision may affect the calculation of differences for the non-transmission tariff for 2023 and thus affect the future level of the non-transmission tariff. However, any retroactive modifications of the Tariff based solely on an amendment to the Decision would be contrary to Article 41(6)(a) of the Gas Directive as well as Article 30(1)(b)(iii)(2) of NC TAR, which requires a methodology for tariff calculation to be fixed or approved before the tariff's entry into force. Therefore, potential changes in the pricing in the Availability Agreement shall not affect non-transmission tariff without proper NRA decision fixing or approving methodology underlying the calculation of such tariff before it entered into force. Specifically, they shall not affect the calculation of differences for the non-transmission tariff for 2023.

Apart from the above, proper methodology for risk-adjusted return on the invested capital as regards non-transmission tariff has not been subject to the necessary consultation process, which, according to Article 26(1)(c)(ii) NC TAR should include: (1) the non-transmission service tariff methodology; (2) the share of the allowed or target revenue forecasted to be recovered from such tariffs; (3) the manner in which the associated non-transmission services revenue is reconciled as referred to in Article 17(3) NC TAR; (4) the indicative non-transmission tariffs for non-transmission services provided to network users. Moreover, as ACER stressed in its Analysis of the Consultation Document on the Gas Transmission Tariff Structure for Denmark of 14 February 2022 [...], **the setting of revenue regulation for the upstream assets should precede the consultation on transmission tariffs** (emphasis added)<sup>10</sup>. It should also be noted that Article 13(1) of Gas Regulation requires tariffs for access to networks, or the methodologies used to calculate them, applied by the TSO and approved by the NRA under Article 41(6) Gas Directive, to be transparent. Specifically, according to Article 18(2) of Gas Regulation, **"in order to ensure transparent, objective and non-discriminatory tariffs and facilitate efficient utilization of the gas network, transmission system operators or relevant national authorities shall publish reasonably and sufficiently detailed information on tariff derivation, methodology, and structure."** (emphasis added). What is more, according to Article 30(1)(b) NC TAR, TSO or NRA shall publish before the tariff period, i.a. parameters consisting: (1) types of assets included in the regulated asset base and their aggregated value; (2) cost of capital and its calculation methodology; (3) capital expenditures, (4) operational expenditures; (5) incentive mechanisms and efficiency targets; (6) inflation indices. Given the above, **Energinet's Tariff and tariff methodology do not meet the requirement of**

<sup>9</sup> Forsyningstilsynets Afgørelse om forrentningssats for forrentningen af egenkapitalen for 2023-2024 for transmissionssystemejer, 22.12.2022, Sagsnr.: 22/02080, <https://afg.forsyningstilsynet.dk/>, p. 44.

<sup>10</sup> ACER, Agency Report – Analysis of the Consultation Document on the Gas Transmission Tariff Structure for Denmark, 14.02.2022, [https://acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Publication/Agency%20report%20-%20analysis%20of%20the%20consultation%20document%20for%20Denmark\\_2022.pdf](https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/Agency%20report%20-%20analysis%20of%20the%20consultation%20document%20for%20Denmark_2022.pdf), p. 22.

**transparency** in relation to the return on the invested capital included in non-transmission tariffs.

It should be noted that failure to fix or approve by NRA the methodology for the return on the invested capital included in non-transmission tariffs and to ensure required transparency in relation to those tariffs is not only **contrary to the requirements of the Gas Directive, Gas Regulation, and NC TAR but also constitutes a violation of the principle of loyalty**, which requires Member States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising from the Treaties or resulting from the acts of the institutions of the Union (art. 4(3) Treaty on European Union<sup>11</sup>). It can also be **qualified as the incorrect implementation of the Gas Directive** since – according to Article 288 of the Treaty on the Functioning of the European Union – the directive shall be binding as to the result to be achieved upon each Member State to which it is addressed. In light of the recital (32), fixing or approving by the NRA tariffs or methodologies used by TSO to calculate tariffs for access to networks is clearly one of the essential objectives of the Gas Directive. As a result, applying by Energinet Tariff, including risk-adjusted return on the invested equity in the Upstream Pipeline, which neither has been fixed/approved by DUR nor calculated on the basis of methodology fixed/approved by DUR, may lead to **liability for failure to fulfil obligations under the Treaties** (Articles 258 and 259 of Treaty on the Functioning of the European Union). It should also be stressed that a Member State's failure to fulfil obligations may, in principle, be established whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution<sup>12</sup>. Moreover, according to the CJEU's case law, a failure to fulfil obligations may arise due to the existence of an administrative practice that infringes Community law, even if the applicable national legislation itself complies with that law<sup>13</sup>.

## **II. Lack of legal basis for applying revenue framework regulation in relation to return on the invested equity in the Upstream Pipeline**

In our view, Energinet Application is unjustified as there is no legal basis for DUR to amend the Decision in such a way that the pricing in the Availability Agreement would have to be based on Upstream Unit's costs for efficient operations of the upstream activities and a risk-adjusted return on the invested capital. According to Energinet, as from 1 January 2023, Executive Order no. 816 is not relevant for the pricing in the Availability Agreement between the Energinet Transmission Unit and the Energinet Upstream Unit and, therefore Decision should be updated so that it is based on the current principles for economic regulation of Energinet, in the same way as for the gas transmission activities pursuant to § 37d of the Danish Gas Supply Act.

However, in our view, **current economic regulation, including risk-adjusted return on the invested capital, may be applied only to transmission tariffs**. This follows from the precise wording of § 37d(1) of the Danish Gas Supply Act, pursuant to which only *prices for services from the transmission system owner or system operator are set in accordance with a revenue framework*. Respectively, *the Danish Supply Authority annually sets the revenue framework for the transmission system owner or system operator with a view to covering the costs of efficient operation of the activities and return on the invested capital*. At the same time, definitions of "transmission system owner" and "system operator" do not entail any upstream activities since they refer to notions of "transmission" and "transmission system." According to § 6(33) of the Danish Gas Supply Act, a transmission system owner is any natural

<sup>11</sup> Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.

<sup>12</sup> I.a. Judgment of the Court of 9.12.2003 in Case C-129/00 Commission v Italy, [2003] ECR I-14637, par. 29; Judgment of the Court of 5.5.1970 in Case 77/69 Commission v Belgium, [1970] ECR 237, par. 15

<sup>13</sup> I.a. Judgment of the Court of 27.04.2006 in Case C-441/02 Commission v Germany, [2006] ECR I-3449, par. 47; Judgment of the Court of 12.05.2005 in Case C-278/03 Commission v Italy, [2005] ECR I-3747, par. 13

or legal person who owns a transmission system, while a transmission system is defined as *high-pressure pipelines with associated necessary facilities for transporting gas with appropriate gas quality, excluding upstream facilities* (§ 6(32) of the Danish Gas Supply Act). On the other hand, a system operator is to be understood as any natural or legal person who handles parts of a transmission company's tasks (§ 6(29) of the Danish Gas Supply Act), which is any natural or legal person who handles transmission and is responsible for the operation, maintenance and, if necessary, establishment and modification of the company's infrastructure to ensure that the transmission system can satisfy a reasonable demand for the transmission of gas in the long term (§ 6(31) of the Danish Gas Supply Act). However, the notion of transmission excludes the transport of gas through systems consisting of upstream facilities (§ 6(30) of the Danish Gas Supply Act). It should be therefore concluded that the revenue framework provided for in § 37d(1) of the Danish Gas Supply Act applies only to transmission services of the Energinet acting as transmission system owner.

The above conclusions regarding the scope of current economic regulation are confirmed also by the wording of executive orders introducing this regulation in relation to Energinet. Specifically, Executive Order no. 1609, which applies to the determination of the revenue framework for transmission system owners, excludes from the definitions of "asset base" "operating costs" and "income" respectively, assets covered by gas upstream pipelines and gas upstream installations, costs in connection with gas upstream pipelines and gas upstream installations and income from gas upstream pipelines and gas upstream installations (§ 2(2), (3) and (7)).

Similarly, Executive Order no. 1605 of 28 December 2022 on economic regulation of Energinet and its wholly owned subsidiaries (**Executive Order no. 1605**)<sup>14</sup> clearly excludes gas upstream pipeline and gas upstream plant operations from its scope. According to § 1(2) of Executive Order no. 1605, these operations are covered only by §§ 9, 10 and 11, subsection 1, i.e., requirements on presentation of accounts and submitting annual reports and other accounts for the previous financial year to DUR. It should be, therefore, concluded that contrary to Energinet's assumptions, § 2 of Executive Order no. 816 has not been repealed by § 12(4) of Executive Order no. 1605 since the latter provision does not apply to gas upstream pipeline and gas upstream plant operations. In this respect, **Executive Order no. 816 should continue to regulate return on the invested equity in the Upstream Pipeline**, allowing Energinet to include in the prices for activities carried out using the Upstream Pipeline necessary return on capital (i.e., break-even rate of return).

In consequence, the **Energinet Application is unjustified as there is no valid legal basis to apply principles of new economic regulation of Energinet, including risk-adjusted return on the invested capital, to the pricing in the Availability Agreement** between the Energinet Transmission Unit and the Energinet Upstream Unit so that it would be based on Upstream Unit's costs for efficient operations of the upstream activities and a risk-adjusted return on the invested capital.

### **III. Risk-adjusted return on the invested capital in the upstream part of the Baltic Pipe was included by Energinet in the Tariff contrary to Orlen's *bona fide* and legitimate expectations**

Orlen has *bona fide* made its investment in the Baltic Pipeline through its legal predecessor, Polskie Górnictwo Naftowe i Gazownictwo S.A. (PGNiG), taking part in Open Season 2017 and concluding the Capacity Agreement with Energinet. The Information Package 2 presented to PGNiG in 2017 and containing a final set of Energinet's tariff calculations (based on which

<sup>14</sup> Bekendtgørelse nr. 816 af 28. december 2022 om økonomisk regulering af Energinet og dennes helejede datterselskaber.





potentially interested shippers could make their bids) indicated that the average cost of gas transportation would average at 0.75 EUR / MWh over the whole 2022 – 2037 booking period.

In Phase 2 of the Open Season 2017, PGNiG submitted a binding bid of 93 TWh of capacity for the duration of 15 years in entry and exit points of the Danish transmission system, allowing the transporting of gas alongside the Baltic Pipeline route. Notwithstanding the undoubted strategic merits of the Baltic Pipeline infrastructure for Poland, such a high bid was primarily driven by the level of indicative tariffs provided by Energinet. **The expected transportation tariff of 0.75 EUR/MWh in 2023 indicated in its Information Package 2 guaranteed necessary cost competitiveness against alternative benchmarks, primarily the Emden-Mallnow route.** However, since then, the expected economic attractiveness of the Baltic Pipeline route has declined.

Following a successful bid in Phase 2 of the Open Season 2017, **PGNiG signed with Energinet Capacity Agreement stipulating rules of cooperation between sides in the so-called "capacity period" (2022-2037).** This agreement contains an indemnification clause whereby Energinet is compelled to indemnify and hold harmless PGNiG from any loss exceeding € 3 million arising from specific events listed in the agreement. When calculating any potential loss of PGNiG, an assessment needs to be made as to whether the economic balance between Energinet and PGNiG established initially under the Capacity Agreement, the OS 2017 Rules, and the Information Packages have been altered to the disadvantage of PGNiG.

On 29 December 2020, new economic regulation principles of Energinet were **introduced** by the Act amending the Energinet Act, the Electricity Supply Act, and the Natural Gas Supply Act<sup>15</sup>. According to amended § 37d of the Natural Gas Act, transmission service prices are set according to a revenue framework. The revenue framework for transmission operator should be established annually by DUR with a view to covering costs of efficient operation of the transmission activities and return on the invested capital. On this basis, Executive Order No. 1609 allows DUR to determine the rate of return for the equity capital that can be included in the income framework in the form of a risk-adjusted rate of return.

According to the Application, the theoretical difference between applying the non-transmission tariff rate of return in the historical break-even regulation, i.e., a break-even rate of return, and the rate of return in the new economic regulation, i.e., by application of a risk-adjusted rate of return in accordance with DUR's decision of 22 December 2022 can be calculated at DKK 31 million for 2023. **The introduction of a risk-adjusted rate of return in relation to non-transmission tariff represents, therefore, a significant change of the tariff-setting framework from the one communicated to OS 2017 participants on which PGNiG's binding capacity commitment was based.** The Information Packages contained tariff simulations which, in line with the Danish OS Rules, were intended to "support the decision-making and allow for a more thorough analysis of Costs of Transportation, construction costs and risks." Tariffs were simulated based on only CAPEX, OPEX, and ABEX values, assuming the "no loss, no gain" principle. There was no mention of including the risk-adjusted rate of return in tariffs. The tariff forecasts were constructed around a scenario approach, with each scenario being restricted only by a different set of assumptions on Baltic Pipe bookings and flows. Moreover, the OS 2017 Information Packages did not include information about potential changes to the tariff methodology or qualitative or quantitative assessment of the impact of these changes on future tariffs. Energinet neither presented nor discussed any scenario referring to the possible introduction of the risk-adjusted rate of return. Should information on a potential shift away from a break-even regulation, i.e., a break-even rate of return, to the

<sup>15</sup> Lov om ændring af lov om Energinet, lov om elforsyning og lov om naturgasforsyning, jf. lovbekendtgørelse nr. 423 af 19. april 2023.

current economic regulation, i.e., application of a risk-adjusted rate of return, be presented to the OS participants in 2017, PGNiG may have taken a different approach to capacity booking.

**In light of the above, on the basis of legitimate expectations, we could not reasonably expect that the Tariff would include a risk-adjusted rate of return in relation to the non-transmission tariff.**

It must be underlined that the principle of legitimate expectations of investors is protected by EU law. In particular, the principle of legitimate expectations has long been recognized by the CJEU as a general principle of European law and is well-settled in judgments of this Court. The legitimate expectation of an entity may be based, for example, on the promises on the part of public administration or by soft law instruments. Protection of legitimate expectations is not unlimited as the promise made by the public body, first and foremost, must be correct. Following the Court's settled case law, the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of EU law, nor can the conduct of a national authority responsible for applying EU law, which acts in breach of that law, give rise to a legitimate expectation on the part of an economic operator of beneficial treatment contrary to EU law<sup>16</sup>.

#### **IV. Conclusion**

Considering all of the above, in our view, the **amendment to the Decision proposed by Energinet is unjustified, and the pricing in the Availability Agreement should only include necessary costs for efficient operations and a necessary return on capital.**

At the same time, **risk-adjusted return on the invested capital in the upstream part of the Baltic Pipe should not be included by Energinet in the Tariff.** In this regard, **DUR should require Energinet to modify the Tariff, at least insofar as it concerns the risk-adjusted return on the invested capital in the upstream part of the Baltic Pipe**, pending approval of appropriate methodology for the risk-adjusted return in relation to non-transmission tariff and fulfilment of publication requirements.

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<sup>16</sup> Judgment of the Court of 20.06.2013 in Case C 568/11 Agroferm, EU:C:2013:407, para 52 and the case-law cited.

