Reports of Cases

ORDER OF THE GENERAL COURT (Eighth Chamber)

20 May 2020*

(Action for annulment — Energy — Internal market in natural gas — Directive (EU) 2019/692 — Addition of Article 49a to Directive 2009/73/EC concerning the adoption of decisions derogating from certain provisions of that directive — Application of Directive 2009/73 to gas lines to or from third countries — Objection to the deadline of 24 May 2020 for granting derogations from the obligations laid down by Directive 2009/73 — No direct concern — No individual concern — Inadmissibility)

In Case T-530/19,

Nord Stream AG, established in Zug (Switzerland), represented by M. Raible, C. von Köckritz and J. von Andreae, lawyers,

applicant,

v

European Parliament, represented by L. Visaggio, J. Etienne and I. McDowell, acting as Agents,

and

Council of the European Union, represented by A. Lo Monaco and S. Boelaert, acting as Agents,

defendants,

APPLICATION under Article 263 TFEU seeking partial annulment of Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (OJ 2019 L 117, p. 1),

THE GENERAL COURT (Eighth Chamber),

composed of J. Svenningsen (Rapporteur), President, R. Barents and C. Mac Eochaidh, Judges,

Registrar: E. Coulon,

makes the following

* Language of the case: English.

Order

Background to the dispute

1 Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57) was repealed and replaced by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 (OJ 2009 L 211, p. 94).

2 Directive 2009/73 is intended to introduce common rules concerning the transmission, distribution, supply and storage of natural gas in order to facilitate access to the market and encourage fair and non-discriminatory competition. In that regard, that directive lays down, inter alia, an obligation to unbundle transmission systems and transmission system operators and provides for the introduction of a system of non-discriminatory third-party access to gas transmission and distribution systems on the basis of published tariffs.

3 Under Article 36 of Directive 2009/73, major new gas infrastructure, namely interconnectors, liquefied natural gas facilities and storage facilities, may, upon request and under certain conditions, be exempted, for a defined period of time, from some of the obligations laid down by that directive. In order to benefit from that exemption it must inter alia be shown that the investment will enhance competition in gas supply and enhance security of supply and that the level of risk attached to the investment is such that that investment would not take place unless an exemption was granted.

4 The applicant, Nord Stream AG, is a company incorporated under Swiss law in which the Russian company PJSC Gazprom has a 51% shareholding and in which four Swiss companies have respective shareholdings of 15.5% each for two of those companies, each of which is indirectly owned by a German company, and 9% each for the other two companies, one being indirectly owned by a French company and the other being the subsidiary of a Netherlands company. The applicant owns and operates Nord Stream, a system of two lines, construction of which was completed in 2012 and which is to be operated for a period of 50 years. That system ensures the flow of gas between Vyborg (Russia) and Lubmin (Germany), near Greifswald (Germany). Once it reaches the German territory, the gas is transferred into the onshore pipelines NEL and OPAL, which are subject, under the supervision of the German regulatory authority, to the obligations laid down by Directive 2009/73.

5 On 17 April 2019, acting on European Commission Proposal COM(2017) 660 final of 8 November 2017, the European Parliament and the Council of the European Union adopted Directive (EU) 2019/692 amending Directive 2009/73 concerning common rules for the internal market in natural gas (OJ 2019 L 117, p. 1) ('the contested directive'), which entered into force on the 20th day following that of its publication, that is, 23 May 2019.

6 According to recital 3 of the contested directive, that directive seeks to address obstacles to the completion of the internal market in natural gas which result from the non-application, to date, of EU market rules to gas transmission lines to and from third countries.

7 In that regard, Article 2(17) of Directive 2009/73, as amended by the contested directive, provides that the concept of an 'interconnector' covers not only '[any] transmission line which crosses or spans a border between Member States for the purpose of connecting the national transmission system of those Member States', but also, now, '[any] 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'.

8 However, under Article 49a(1) of Directive 2009/73, as added by the contested directive, 'in respect of gas transmission lines between a Member State and a third country completed before 23 May 2019, the Member State where the first connection point of such a transmission line with [that] Member State's

network is located may decide to derogate from [certain provisions of Directive 2009/73] for the sections of such gas transmission line located in its territory and territorial sea, for objective reasons such as to enable the recovery of the investment made or for reasons of security of supply, provided that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas, or to security of supply in the Union'. That provision also states, first, that derogations of this kind are to be 'limited in time up to 20 years based on objective justification, renewable if justified and may be subject to conditions which contribute to the achievement of the above conditions', and, second, that 'such derogations shall not apply to transmission lines between a Member State and a third country which has the obligation to transpose [Directive 2009/73, as amended, into] its legal order under an agreement concluded with the Union'.

9 Furthermore, the contested directive amended Article 36 of Directive 2009/73 by providing, in point (e) of paragraph 1 of that article, that the exemption granted under that provision to new infrastructure must not be detrimental to, inter alia, 'security of supply of natural gas in the Union'.

10 Regarding the implementation of the amendments made to Directive 2009/73 by the contested directive, Article 2 of the contested directive provides that, except for those which have no geographical borders with third countries and no transmission lines with third countries and, as a result of their geographical situation, Cyprus and Malta, 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with [that directive] by 24 February 2020, without prejudice to any derogation pursuant to Article 49a of [Directive 2009/73]'.

Procedure and forms of order sought

11 By application received at the Registry of the General Court on 26 July 2019, the applicant brought the present action, in which it claims that the Court should:

– annul the contested directive inasmuch as it introduces into Directive 2009/73 a new Article 49a, the first sentence of paragraph 3 of which states that '[derogation] decisions pursuant to paragraphs 1 and 2 [of that article] shall be adopted by 24 May 2020';

– order the Parliament and/or the Council to pay the costs.

12 By documents lodged at the Court Registry by the Republic of Poland on 2 October 2019, by the Commission on 15 October 2019, by the Republic of Lithuania and by the Republic of Estonia on 30 October 2019, and by the Republic of Latvia on 6 November 2019, those Member States and that institution applied for leave to intervene, pursuant to Article 143 of the Rules of Procedure of the General Court, in support of the Parliament and the Council.

13 By separate document lodged at the Court Registry on 14 October 2019 pursuant to Article 130(1) of the Rules of Procedure, the Council raised a plea of inadmissibility in which it contends that the Court should:

– dismiss the action as inadmissible;

– order the applicant to pay the costs.

14 By separate document lodged at the Court Registry on 15 October 2019 pursuant to Article 130(1) of the Rules of Procedure, the Parliament raised a plea of inadmissibility in which it contends that the Court should:

– primarily:

  – dismiss the action as inadmissible;

  – order the applicant to pay the costs;

– in the alternative, should the Court reject the plea of inadmissibility or decide to reserve its decision on the plea of inadmissibility until it rules on the substance of the case, set new time limits for the Parliament and the Council to submit their respective defences.

15 In its observations, filed at the Court Registry on 6 December 2019, regarding the pleas of inadmissibility raised by the Parliament and the Council, the applicant claims that the Court should reject those pleas as unfounded and, consequently, declare the action admissible.

16 By decision of 4 April 2020 the President of the General Court, pursuant to Article 67(2) of the Rules of Procedure, decided, in view of the particular circumstances of the present case, to give that case priority.

Law

The pleas of inadmissibility

17 In support of its plea of inadmissibility, the Parliament contends that the applicant does not have standing to bring an action seeking partial annulment of the contested directive and, in addition, it has doubts as to the applicant's interest in bringing proceedings to obtain partial annulment of that directive. For its part, in support of its plea of inadmissibility, the Council contends that the action is inadmissible inasmuch as, first, the applicant has no interest in bringing proceedings for the partial annulment of the contested directive, second, it does not have standing to bring an action for partial annulment of that directive, and, third, the partial annulment that is sought would significantly alter the substance of the contested directive.

18 For its part, the applicant maintains that it has both an interest in bringing proceedings for the partial annulment of the contested directive and standing to bring such proceedings.

19 In that regard, pursuant to Article 130 of the Rules of Procedure, where, by separate document, one or more defendants apply to the Court for a decision on inadmissibility or lack of competence without going to the substance of the case, the Court must decide on the application as soon as possible, where necessary after opening the oral part of the procedure.

20 In the present case, the Court considers that it has sufficient information from the documents before it and decides to rule on the pleas of inadmissibility raised by the Parliament and the Council by way of the present order without it being necessary to open the oral part of the procedure, it being understood that, for the reasons set out below and irrespective of whether the applicant demonstrates that it has an interest in bringing proceedings, it has not established that it had standing to bring an action for partial annulment of the contested directive.

Preliminary observations

21 Under the fourth paragraph of Article 263 TFEU, 'any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person [(first scenario)] or which is of direct and individual concern to them [(second scenario)], and against a regulatory act which is of direct concern to them and does not entail implementing measures [(third scenario)]'.

22 In that regard, although the fourth paragraph of Article 263 TFEU does not expressly deal with the admissibility of actions for annulment brought by natural or legal persons against a directive, it is nonetheless apparent from case-law that this fact alone is not a sufficient ground for declaring such actions inadmissible. Indeed, the EU institutions cannot, merely by means of their choice of legal instrument, deprive natural or legal persons of the judicial protection which they are afforded by that provision of the Treaty (see, by analogy, order of 10 September 2002, *Japan Tobacco and JT International* v *Parliament and Council*, T-223/01, EU:T:2002:205, paragraph 28 and the case-law cited).

23 That said, under the third paragraph of Article 288 TFEU, a directive is addressed to the Member States. Thus, under the fourth paragraph of Article 263 TFEU, natural or legal persons, such as the applicant, may bring an action for annulment against a directive, such as the contested directive, only if it is of direct and individual concern to them (the second scenario) or if it constitutes a regulatory act which is of direct concern to them and does not entail implementing measures (the third scenario) (see, to that effect, judgments of 25 October 2010, *Microban International and Microban (Europe)* v *Commission*, T-262/10, EU:T:2011:623, paragraph 19; of 6 September 2013, *Sepro Europe* v *Commission*, T-483/11, not published, EU:T:2013:407, paragraph 29; and order of 7 July 2014, *Wepa Lille* v *Commission*, T-231/13, not published, EU:T:2014:640, paragraph 20).

24 Regarding the concept of a 'regulatory act' for the purposes of the third scenario referred to in the fourth paragraph of Article 263 TFEU, it must be understood as referring to any acts of general application other than legislative acts. Regarding legislative acts, the authors of the Treaty of Lisbon sought to maintain a restrictive approach as regards the possibility for individuals to seek annulment thereof, requiring them to demonstrate that they are 'directly and individually concerned' by those legislative acts (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 59 and 60, and Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice, 25 March 2003 (CONV 636/03, point 22), and Cover note from the Praesidium to the Convention, 12 May 2003, CONV 734/03, p. 20).

25 In that regard, the distinction between a legislative act and a regulatory act is based, according to the FEU Treaty, on the criterion of the procedure — legislative or otherwise — which led to its adoption (see order of 7 January 2015, *Freitas* v *Parliament and Council*, T-185/14, not published, EU:T:2015:14, paragraph 26 and the case-law cited). Under Article 289 TFEU, legal acts adopted by legislative procedure constitute legislative acts, as do, in the specific cases provided for by the Treaties, certain acts adopted on the initiative of a group of Member States or of the Parliament, on a recommendation from the European Central Bank (ECB) or at the request of the Court of Justice of the European Union or the European Investment Bank (EIB).

26 In the present case, it is common ground that the contested directive was adopted under Article 194(2) TFEU and in accordance with the ordinary legislative procedure, as described in Article 294 TFEU. Consequently, that directive, including Article 1 thereof, which provides for, inter alia, the insertion of an Article 49a into Directive 2009/73, and in respect of which the applicant seeks partial annulment in the present case, constitutes a legislative act for the purposes of the FEU Treaty.

27 In those circumstances, irrespective of the fact that, as a directive, the contested directive provides for the adoption of transposing measures by certain Member States to which it is addressed, in itself already excluding the possibility that it may in principle be regarded as an act which does not entail 'implementing measures', the condition relating to the applicant's standing to bring proceedings against that directive cannot be based on the third scenario referred to in the fourth paragraph of Article 263 TFEU, because the contested act, namely the contested directive, does not constitute a 'regulatory act' for the purposes of that provision.

28 Regarding the second scenario referred to in the fourth paragraph of Article 263 TFEU, it should be borne in mind that, in certain circumstances, even a legislative act which applies to economic operators generally may be of direct and individual concern to some of them for the purposes of that provision (see, to that effect, judgments of 17 January 1985, *Piraiki-Patraiki and Others* v *Commission*, 11/82, EU:C:1985:18, paragraphs 11 to 32, and of 27 June 2000, *Salamander and Others* v *Parliament and Council*, T-172/98 and T-175/98 to T-177/98, EU:T:2000:168, paragraph 30).

29 Thus, in the present case, it is necessary to examine whether the applicant, in the light of the conditions laid down, as regards the second scenario, by the fourth paragraph of Article 263 TFEU, has shown that it was directly and individually concerned by the contested directive, bearing in mind that the concept of direct and individual concern referred to in that provision corresponds to that referred to in the fourth paragraph of Article 230 EC, a concept which the authors of the Treaty of Lisbon had no intention of altering (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 70 and 71).

Whether the applicant is directly concerned

30 The Parliament considers that the applicant is not directly concerned by the provision of the contested directive in respect of which it seeks partial annulment in the present case, because that provision is specifically addressed to the Member States, for whom it is to grant, where operators so request, a possible derogation, and that that provision thus has no impact and produces no effect on the applicant's legal situation.

31 In particular, the Parliament considers that there is nothing in that provision requiring the applicant to request, within a certain period, a derogation from the obligations laid down by Directive 2009/73, as amended. Accordingly, given that there is no indication in the contested directive regarding the date on which the applicant must request such a derogation, it is for the Member States, in the national measures transposing that directive, to establish the procedural rules regulating the submission of a request for derogation and, in that regard, they have a margin of discretion, provided that they draw up those rules in such a way as to ensure that the potential requests for derogation may be examined and, where appropriate, granted in good time.

32 Thus, according to the Parliament, it is the draft legislation transposing the contested directive in Germany, which provides the option for operators to submit a request for derogation in the 30 days following the entry into force, on 12 December 2019, of that national legislation, that must be taken into consideration and, in that regard, if the applicant were to fail to submit its request within that period laid down by the national authorities, it would be that German legislation which would have an effect on its legal situation and not the contested directive. From the Parliament's point of view, although the contested directive lays down a deadline for granting derogations, the Member States have a margin of discretion as regards the date for submitting any request for derogation, meaning that the total period during which requests could be filed by operators and processed by the national authorities — a period contested by the applicant in the present case as being, allegedly, too short or too rigid — would vary from one Member State to another. In Germany, derogation procedures could thus be filed and dealt with within a five- to six-month period, between 12 December 2019 and 24 May 2020.

33 The Council contends that the applicant is not directly concerned by either the contested directive in general or the single provision of that directive in respect of which it seeks partial annulment specifically. In that regard, the applicant does not explain how one or other of the legal obligations imposed on the Member States by the contested directive, including the period prescribed for them to grant derogations from Directive 2009/73, as amended, would be liable to have direct legal effects on the applicant's situation. In addition, the alleged consequences for the applicant of the implementation of the contested directive, as set out in the application, are purely hypothetical, as they would materialise only if the applicant were not granted a derogation, something which was unknown on the date the present action was brought. In addition, the Member States have a margin of discretion in adopting national measures transposing the contested directive and, in particular, have total freedom as regards the possibility of granting derogations to transmission lines to and/or from third States. In fact, by emphasising, in paragraph 21 of the application, that, 'following the transposition of the Amending Directive in Germany, the German legislation implementing [Directive 2009/73] will fully apply to the German section of Nord Stream', and by indicating, in addition, that it intends to ask the German authorities for a derogation, the applicant itself admits that the conditions for it to be directly concerned by the contested directive are not satisfied in the present case.

34 In the application and in its observations regarding the pleas of inadmissibility raised by the Parliament and the Council, the applicant maintains that it is directly concerned by the contested directive as, in its view, since no derogation decision has been adopted by the German regulatory authority under Article 49a of Directive 2009/73, as added to that directive by the contested directive, the requirements of Directive 2009/73 will be applicable to it. The same is true of the obligations concerning the unbundling of transmission systems and transmission system operators as laid down by Article 9 of Directive 2009/73, the obligation to grant third parties access to its pipeline as laid down in Article 32 of that directive, and tariff obligations as laid down in Article 41(1) and (6) thereof and in the corresponding German transposing legislation.

35 Those new obligations must entail, for the applicant, significant changes to the shareholders' agreement concerning the applicant, to its articles of association, and to the gas transmission agreement which it has concluded with Gazprom export LLC. However, in that regard, the possibility of obtaining a derogation from the German regulatory authority under the new Article 49a laid down by the contested directive, which in its case would be excessively difficult or even impossible to obtain, would not remedy the fact of the applicant's situation being directly and seriously affected by that directive, in particular because that type of derogation is applicable only to some of the obligations laid down in Directive 2009/73, because those derogations are granted only on a temporary basis, and because the excessively short period within which the national regulatory authorities must decide on requests for derogation, in this instance by 24 May 2020 at the latest, would undermine the possibility of the applicant obtaining such a derogation. Lastly, regarding the provision of the contested directive laying down that period, in respect of which the applicant seeks annulment in the present case, it leaves the Member States no discretion, so that its application is purely automatic and results from EU rules alone.

36 In that regard, it should be borne in mind that, according to settled case-law, the condition that a natural or legal person must be directly concerned by the European Union act against which the action is brought, as laid down by the second scenario referred to in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be met, namely, first, that measure must directly affect the legal situation of the applicant, and, second, it must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules (order of 19 June 2008, *US Steel Košice* v *Commission*, C-6/08 P, not published, EU:C:2008:356, paragraph 59, and judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42).

37 The same applies where the possibility for addressees not to give effect to the contested European Union act is purely theoretical and their intention to act in conformity with it is not in doubt (see order of 19 June 2008, *US Steel Košice* v *Commission*, C-6/08 P, not published, EU:C:2008:356, paragraph 60 and the case-law cited, and judgment of 4 December 2019, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission*, C-342/18 P, not published, EU:C:2019:1043, paragraph 39 and the case-law cited).

38 In the present case, it must be pointed out that, generally, from the entry into force of the contested directive, pipeline operators such as the applicant now have, potentially, a part of their gas transmission lines, in this instance the part located between a Member State and a third State up to the territory of the Member States or the territorial sea of that Member State, made subject to the obligations laid down by Directive 2009/73 and the provisions of national legislation transposing that directive as amended by the contested directive.

39 However, regarding the specific obligations to which the part of the gas transmission lines of certain operators, such as the applicant, will now be subject under Directive 2009/73, as amended, and regarding the way in which those obligations will specifically be defined, these are dependent on the national transposing measures which the Member State in whose territorial sea that part of the line is located will adopt or has adopted under Article 2 of the contested directive, read in conjunction with the third paragraph of Article 288 TFEU, by 24 February 2020 at the latest.

40 A directive cannot, of itself, impose obligations on an individual and may therefore not be relied upon as such by the national authorities against operators in the absence of measures transposing that directive previously adopted by those authorities (judgment of 26 February 1986, *Marshall*, 152/84, EU:C:1986:84, paragraph 48, and order of 7 July 2014, *Group'Hygiène* v *Commission*, T-202/13, EU:T:2014:664, paragraph 33; see also, to that effect, judgment of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, paragraphs 20 and 25).

41 Thus, regardless of whether they are sufficiently clear and precise, the provisions of the contested directive cannot, before the adoption of the national transposing measures and independently of those measures, be a direct or immediate source of obligations for the applicant and liable, on that basis, to affect its legal situation directly for the purposes of the fourth paragraph of Article 263 TFEU (see, to that effect, judgment of 27 June 2000, *Salamander and Others* v *Parliament and Council*, T-172/98 and T-175/98 to T-177/98, EU:T:2000:168, paragraph 54, and order of 7 July 2014, *Group'Hygiène* v *Commission*, T-202/13, EU:T:2014:664, paragraph 33). In particular, the German regulatory authority cannot, if the Federal Republic of Germany has not adopted measures transposing the contested directive, require the applicant to comply with the obligations which are newly applicable in its case, as laid down by that directive.

42 In that regard, the fact that the applicant's activities are now partly governed by EU law, in this instance by Directive 2009/73, as amended, is in any event simply the result of its choice to develop and maintain its activity in the territory of the European Union, in this instance in the territorial sea of one of the Member States of the European Union (see, to that effect, judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraphs 127 and 128). However, the contested directive, as such and since its entry into force, does not produce immediate and concrete effects on the legal situation of operators such as the applicant and, in any event, not before the expiry of the deadline for transposition laid down in Article 2(1) thereof.

43 Moreover, to accept the applicant's point of view that its legal situation has been directly affected by the entry into force of the contested directive, on the ground that the operation of its Nord Stream double pipeline system previously fell outside the material scope of Directive 2009/73, would be tantamount to considering that, each time the European Union enacts new legislation in a given area, making operators subject to obligations to which they were not previously subject, that legislation, even if adopted in the form of a directive and according to the ordinary legislative procedure, would

necessarily directly affect those operators for the purposes of the fourth paragraph of Article 263 TFEU. Such an approach would however be at odds with the very wording of the third paragraph of Article 288 TFEU, according to which '[directives] shall be binding, as to the result to be achieved, upon each Member State to which [they are] addressed, but shall leave to the national authorities the choice of form and methods', and would thus be at odds with the fact that the operators are, in principle, affected, as regards their legal situation, by the national measures transposing any directive.

44 Thus, in the present case, it is only through the intermediary of the national measures transposing the contested directive that the Member States, in this instance the Federal Republic of Germany in the applicant's case, will adopt or have adopted that operators such as the applicant will be or are subject, under the conditions agreed on by those Member States, to obligations under Directive 2009/73 as amended by the contested directive (see, to that effect, orders of 10 September 2002, *Japan Tobacco and JT International* v *Parliament and Council*, T-223/01, EU:T:2002:205, paragraph 47, and of 7 July 2014, *Group'Hygiène* v *Commission*, T-202/13, EU:T:2014:664, paragraphs 33 and 36).

45 In that regard, first, on the date the present action was brought, the Federal Republic of Germany had no such transposing measures. Second and in any event, contrary to the applicant's assertions, it must be pointed out that, regarding the national transposing measures which were intended, by 24 February 2020 at the latest, to be adopted by the Member States and to make the obligations under Directive 2009/73, as amended by the contested directive, binding with regard to operators, those Member States had a margin of discretion in implementing the provisions of that directive.

46 First, regarding the obligations laid down in Article 9 of Directive 2009/73, as amended, the Member States have the possibility, under the new first subparagraph of Article 9(8) and under Article 9(9) of that directive, as added by the contested directive, to decide not to apply the transmission system and transmission system operator unbundling obligation laid down in Article 9(1) thereof. More specifically, they 'may' make such a decision in respect of the part of the gas transmission system connecting a Member State with a third country between the border of that Member State and the first connection point with that Member State's network, where, in the first case, on 23 May 2019 the transmission system belonged to a vertically integrated undertaking and where, in the second case, on 23 May 2019 the transmission system belonged to a vertically integrated undertaking and arrangements are in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter IV of Directive 2009/73. Similarly, under Article 14(1) of that directive, as added by the contested directive, Member States may decide not to apply Article 9(1) thereof and to designate, upon a proposal from the owner of the transmission system concerned and with the Commission's approval, an independent system operator.

47 Secondly, under the amendments made to Directive 2009/73 by the contested directive, in particular those concerning Article 36 thereof and the addition of Article 49a thereto, the national authorities may decide to grant to 'major new gas infrastructure' and to 'gas transmission lines between [the] Member [States] and … third [countries] completed before 23 May 2019' exemptions or derogations from certain articles of Directive 2009/73, as amended, in this instance, as regards Article 36, exemptions from Articles 9, 32, 33 and 34, as well as from Article 41(6), (8) and (10), and, as regards Article 49a, derogations from Articles 9, 10, 11 and 32, as well as from Article 41(6), (8) and (10).

48 In that regard, as the Parliament rightly contends, it is for the Member States to adopt national measures enabling the operators concerned to ask to benefit from those derogations, determining precisely the conditions for obtaining those derogations in the light of the general criteria laid down by Article 49a of Directive 2009/73, as amended by the contested directive, and regulating the procedure enabling their national regulatory authorities to decide on such requests within the periods laid down by the contested directive. In addition, for the purpose of implementing those conditions, the national regulatory authorities have a wide discretion as regards the grant of such derogations and any specific

conditions to which those derogations may be subject (see, by analogy, judgment of 4 December 2019, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission*, C-342/18 P, not published, EU:C:2019:1043, paragraphs 48 to 53).

49 It follows from the foregoing that, generally, the applicant is not directly concerned by the provisions of the contested directive.

50 The same is true regarding the single provision in respect of which annulment is sought by the applicant, namely the first sentence of paragraph 3 of the new Article 49a, introduced by the contested directive, under which '[derogation] decisions pursuant to paragraphs 1 and 2 [of that article] shall be adopted by 24 May 2020'. This lays down an obligation for the national regulatory authorities, who are responsible for processing requests for derogation under that provision, to decide on those requests until 24 May 2020 at the latest. That obligation to act within a time limit thus falls directly on the national authorities.

51 By contrast, regardless of the fact that the Member States have a margin of discretion in implementing that provision of the contested directive, the obligation thus laid down by the EU legislature does not directly affect the operators who are making such requests for derogation or who, like the applicant, are intending to do so. Indeed, as the Parliament contends, without being contradicted on that point by the applicant, under the German legislation transposing the contested directive, operators were required to submit a request for derogation at least within the 30 days following the entry into force of that national legislation. Thus, it is through that provision of national legislation that the applicant's legal situation is directly affected, as its right to request a derogation from certain obligations laid down by Directive 2009/73, as amended by the contested directive, is regulated, including from a temporal standpoint, by that provision of national legislation, both as regards the period within which the request must be submitted and as regards the period within which that request will be processed. In addition, the contested directive does not state what consequence would have to be drawn, with regard to a request for derogation pending before a national regulatory authority, if that authority were not in a position to comply with the deadline of 24 May 2020, as laid down by that directive, for deciding on that request.

52 Lastly, the applicant cannot rely on the solution adopted by the Court in the judgment of 7 October 2009, *Vischim* v *Commission* (T-380/06, EU:T:2009:392). Admittedly, it is apparent from that judgment, in particular from paragraph 58 thereof, that the Court acknowledged, in the case giving rise to that judgment, that the applicant was directly and individually concerned by the directive contested in that case inasmuch as that directive included a chemical substance in the annex to the basic directive in respect of which it constituted an implementing measure. However, it must be pointed out that that stance in the case-law was attributable to the specific qualities of that applicant, who was the person who had made the notification which had led, first, to the procedure for examining the chemical substance, a procedure which specifically concerned one of its products, and, second, to the inclusion of that substance. In addition, it was a holder of existing authorisations for plant protection products containing that chemical substance. Thus, that factual situation is in no way comparable to the situation in the present case.

53 It follows from all the foregoing considerations that the applicant is not directly concerned either by the contested directive or by the provision of that directive in respect of which it seeks partial annulment in the present case.

Whether the applicant is individually concerned

54 The Parliament argues that the applicant is not individually concerned. Regarding the fact that a limited number of operators are affected by the contested directive, it considers, first, that the possibility of determining more or less precisely the number, or even the identity of the persons to

whom that directive applies is not sufficient to establish that the applicant is individually concerned, and, second, that that limited number is explained by the oligopolistic characteristics of the sector concerned, namely the gas transmission lines sector. In any event, the applicant had not, on the date the contested directive was adopted, acquired specific rights to operate its gas infrastructure, in this instance the right to operate it free of EU law outside the land territory of the Member States. Furthermore, the applicant has not demonstrated that it has attributes which are peculiar to it or which are supposed to distinguish the Nord Stream dual pipeline system from all other cross-border interconnectors which are, actually or potentially, in an identical or similar situation. As regards the economic repercussions of the contested directive on the applicant's activities, such effects cannot establish that it is individually concerned by that directive.

55 The Council argues that the applicant is not individually concerned by the contested directive because, even accepting that that directive may have legal consequences for the applicant's situation, it appears that the provisions of that directive apply to objectively determined legal situations and that they do not distinguish the applicant individually as in the case of the addressee of an individual decision. The contested directive applies to all gas transmission lines between a Member State and a third country, whether on-shore or off-shore, pre-existing, completed or new, or even transmission lines which, following the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, have become lines between a Member State and a third country, or lines that will be included in the scope of that directive due to the accession of new Member States to the European Union.

56 Furthermore, according to the Council, the applicant cannot claim to be the holder of an acquired right to maintain its alleged earlier status as an operator of infrastructure not governed by EU law. Indeed, this would be tantamount to prohibiting the EU co-legislature from adopting any new rule of general application for the operation of gas transmission lines between a Member State and a third State up to the territory of the Member States or the territorial sea of that Member State. In any event, the contested directive has not adversely affected the extent or the exercise by the applicant of a specific or exclusive pre-existing right.

57 The applicant maintains that it is individually concerned by the contested directive, because it belongs to a closed and limited circle of five operators affected by that directive, namely owners and operators of pipelines already completed and operational as of 23 May 2019, connecting third countries and Member States of the European Union by sea and including an interconnection point located in the territory of the European Union. According to the applicant, the contested directive has had the effect of causing all those operators to fall within the scope of all the legislative obligations of Directive 2009/73 and set out in the national transposing legislation, at a time when all investment decisions relating to their infrastructure had been made a long time ago and that infrastructure was already constructed and operational. Thus, unlike operators of infrastructure that will be constructed in the future taking account of that new regulatory constraint, operators such as the applicant have been deprived, by the contested directive, of their status as operators of unregulated infrastructure. The conditions for the exercise of their activities is undoubtedly less favourable than has previously been the case as referred to in paragraph 61 of the judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100), since they are affected by a fundamental change in the law applicable to their infrastructure and this has had significant consequences for the way in which funding for that infrastructure is structured and for their partnerships with gas suppliers such as Gazprom export, the applicant's sole customer. In addition, those operators are distinct from future operators because, for the latter, the infrastructure which they will construct in the future will not be, by definition, infrastructure which was operational on 23 May 2019 for the purposes of the contested directive.

58 In that regard, it should be borne in mind that, according to settled case-law, natural or legal persons other than those to whom a European Union act is addressed satisfy the condition of individual concern for the purposes of the second scenario referred to in the fourth paragraph of Article 263

TFEU only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors, distinguishes them individually just as in the case of the person addressed (judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 72).

59 In the present case, the applicant considers itself to be individually concerned by the contested directive and, in particular, by the provision of that directive in respect of which it seeks partial annulment, on the ground that it belongs to a limited circle of economic operators who are particularly affected by the contested directive just as in the case of the addressees of individual decisions. That circle comprises owners and operators of pipelines already completed and operational as of 23 May 2019, located in the territorial sea of a third country and including an interconnection point located in the territory of the European Union. Thus, there are only five pipelines affected by the contested directive, namely that operated by the applicant, and the Greenstream, Medgaz, Maghreb-Europe Gas Pipeline and Transmed pipelines.

60 In that regard, it should be borne in mind that the possibility of determining more or less precisely the number, or even the identity of the persons to whom an EU measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it (see judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 64 and the case-law cited).

61 Regarding the pipelines referred to by the applicant, including the pipeline which it operates, it must be held that the contested directive is applied to those pipelines by virtue of an objective legal and factual situation provided for by that directive. According to the objective criterion used by the legislature in paragraph 1 of Article 49a of Directive 2009/73, as added by the contested directive, that provision applies to gas transmission lines which were completed before 23 May 2019, the date on which the contested directive entered into force. In addition, as the Parliament, in essence, contends, the limited number of operators concerned by the contested directive is explained, first, by the fact that it governs particularly expensive major gas infrastructure of which, in view of the spatial, economic and geopolitical constraints, there are a limited number in the territory of the European Union, and, second, by the fact that that directive governs only those — an even smaller number — which connect the European Union with third States.

62 Thus, taking into account the specific economic area concerned, the fact that the contested directive was supposed to govern only a limited number of operators, identified or identifiable at the time that directive was adopted, does not permit a finding that those operators were individually concerned by that directive just as in the case of addressees of that act or addressees of individual decisions.

63 It is true that, in the judgment of 18 May 1994, *Codorniu* v *Council* (C-309/89, EU:C:1994:197), the Court of Justice acknowledged that a legislative provision may, in certain circumstances, individually concern certain interested economic operators. However, that case-law may not be relied on in the present case since, unlike the regulation contested in that case, the directive contested in the present case has not adversely affected specific rights of the applicant (see, to that effect, order of 23 November 1995, *Asocarne* v *Council*, C-10/95 P, EU:C:1995:406, paragraph 43). The same is true as regards the reference made to the judgment of 27 February 2014, *Stichting Woonlinie and Others* v *Commission* (C-133/12 P, EU:C:2014:105).

64 Indeed, in the present case, contrary to the applicant's assertions and as has been pointed out in paragraph 42 above, it did not have a right to operate and/or to continue to operate the Nord Stream dual pipeline system free from any regulatory constraints of the European Union, at the very least as regards the part of that gas transmission line located in the territory of the European Union, in this instance in the territorial sea of a Member State. Thus, the fact that, when the contested directive was adopted, the applicant was part of a limited, identified or identifiable, circle of operators concerned by

the extension of the territorial and/or material scope of Directive 2009/73 does not permit a finding that it is individually concerned by the contested directive, given that it is common ground that it is applied by virtue of an objective legal and factual situation defined by the EU legislature in the act in question. In addition, the applicant has not shown that that legislature adopted the contested directive taking account of the particular circumstances of the applicant's situation or that of the other four pipelines, referred to by the applicant, which were already operational as of 23 May 2019.

65 Lastly, regarding the applicant's line of argument based on the significant economic impact of the contested directive on its activities as operator of the Nord Stream pipeline, it should be borne in mind that the fact that certain operators are more affected economically by a measure of general application than others is not sufficient to distinguish them individually from those other operators where, as in the present case, that measure is applied, in any event, by virtue of an objectively determined situation (see, to that effect, order of 18 December 1997, *Sveriges Betodlares and Henrikson* v *Commission*, C-409/96 P, EU:C:1997:635, paragraph 37; judgments of 2 March 2010, *Arcelor* v *Parliament and Council*, T-16/04, EU:T:2010:54, paragraph 106, and of 16 December 2011, *Enviro Tech Europe and Enviro Tech International* v *Commission*, T-291/04, EU:T:2011:760, paragraph 110).

66 In addition, the mere fact that the applicant may lose a major source of revenue as a result of new EU legislation does not prove that it is in a specific situation and is not sufficient to establish that that legislation applies to it individually. Indeed, in that regard, the applicant must adduce proof before the Court, which it has failed to do in the present case, of circumstances which make it possible to consider that the harm allegedly suffered is such as to distinguish it from all other economic operators concerned by that legislation in the same way as it is (judgment of 16 December 2011, *Enviro Tech Europe and Enviro Tech International* v *Commission*, T-291/04, EU:T:2011:760, paragraph 110).

67 It follows from all of the foregoing that the applicant is also not individually concerned by the contested directive.

68 Accordingly, without there being a need to rule on whether the applicant has an interest in bringing proceedings or on the admissibility of the heads of claim inasmuch as they seek only partial annulment of the contested directive, the action must be dismissed as inadmissible.

The applications for leave to intervene

69 Pursuant to Article 144(3) of the Rules of Procedure, where the defendant lodges a plea of inadmissibility or of lack of competence, as provided in Article 130(1), a decision on the application to intervene is not to be given until after the plea has been rejected or the decision on the plea reserved. In addition, pursuant to Article 142(2) of those rules, the intervention is to become devoid of purpose if, inter alia, the application is declared inadmissible.

70 Given that the pleas of inadmissibility have been upheld in the present case and that the present order therefore concludes the proceedings, there is no longer a need to adjudicate on the applications for leave to intervene submitted by the Republic of Estonia, by the Republic of Latvia, by the Republic of Lithuania, by the Republic of Poland and by the Commission.

Costs

71 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament and the Council have made such an application, it is appropriate to order the applicant to pay the costs.

72 Pursuant to Article 138(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. In addition, pursuant to Article 144(10) of those rules, if the proceedings in the main case are concluded before the application to intervene has been decided, the applicant for leave to intervene and the main parties are each to bear their own costs relating to the application to intervene. Consequently, the applicant, the Parliament and the Council, as well as the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland and the Commission, must bear their own costs in relation to the applications for leave to intervene.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby orders:

1. **The action is dismissed as inadmissible.**

2. **There is no need to adjudicate on the applications for leave to intervene submitted by the Republic of Estonia, by the Republic of Latvia, by the Republic of Lithuania, by the Republic of Poland and by the European Commission.**

3. **Nord Stream AG is ordered to pay the costs of the European Parliament and of the Council of the European Union, except for those relating to the applications for leave to intervene.**

4. **Nord Stream, the Parliament and the Council, as well as the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland and the Commission, are to bear their own costs in relation to the applications for leave to intervene.**

Luxembourg, 20 May 2020.

E. Coulon
Registrar

J. Svenningsen
President