



Press and Information

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Advocate General's Opinion in Case C-348/20 P  
Nord Stream 2 AG v Parliament and Council

## **Advocate General Bobek: Nord Stream 2 AG can challenge before the EU Courts the directive extending the scope of the Gas Directive to pipelines connecting the EU with third countries**

*The adoption of the directive altered the legal position of Nord Stream 2 AG, which, in addition, was the only company actually affected by that legal act*

In April 2019, by adoption of a directive (the amending directive),<sup>1</sup> the EU legislature modified the Gas Directive<sup>2</sup> with a view to ensuring that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the European Union, to gas transmission lines to and from third countries.

Nord Stream 2 AG, a Swiss subsidiary of Gazprom, is responsible for the planning, construction and operation of the Nord Stream 2 pipeline. It challenged the amending directive before the General Court of the European Union, which, by order of 20 May 2020,<sup>3</sup> dismissed the company's action as inadmissible.

Nord Stream 2 AG has brought an appeal against the General Court's order before the Court of Justice.

In today's Opinion, first of all, Advocate General Mr Michal Bobek **finds to be incorrect** the General Court's reasoning **that the amending directive cannot be of direct concern to Nord Stream 2 AG because it is a directive**. In this regard, the Advocate General recalls that, although the Treaty FEU does not expressly deal with the admissibility of actions for annulment brought by natural or legal persons against a directive, this fact alone is not a sufficient ground for declaring such actions inadmissible. Indeed, according to a well-established case law, in order to determine whether an EU act is open to challenge, it is the **substance of the act** that must be examined, the form thereof being irrelevant. Therefore, it cannot *a priori* be excluded that a directive may produce binding legal effects *vis-à-vis* individuals. In those cases, they may bring an action for annulment against the directive, if it is of direct and individual concern to them.

As to the question of whether the amending directive is of direct concern to Nord Stream 2 AG, the Advocate General finds that **it is capable of producing legal effects by extending the scope of the Gas Directive to situations**, such as that peculiar to this company, **which were not previously caught by that legal act**.

As regards the General Court's finding that the amending directive cannot be of direct concern to Nord Stream 2 AG since it required the adoption of implementing measures at national level, the Advocate General stresses that **this circumstance does not mean that any act of implementation whatsoever would immediately and necessarily exclude direct concern**. In

<sup>1</sup> 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).

<sup>2</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94–136).

<sup>3</sup> Order of the General Court of 20 May 2020, Nord Stream 2 v Parliament and Council, [T-526/19](#); see [Press Release No 62/20](#)).

particular, the condition of direct concern is satisfied, inter alia, where implementation measures exist but, in reality, the relevant authorities have **no genuine discretion** as to the manner in which the main EU act must be implemented.

In this context, the Advocate General analyses whether the rules of the amending directive relating to unbundling<sup>4</sup>, third-party access<sup>5</sup> and tariff regulation<sup>6</sup>, which Nord Stream 2 AG considers as imposing new obligations upon it, are of a self-implementing nature.

With regard to the rules relating to unbundling, the Advocate General, whilst recognising that Member States have three different options to achieve the goal set by the EU legislature, emphasises that **the choosing of any of these options will inevitably lead to Nord Stream 2 AG's legal position being altered**. In fact, it will have to either sell the entire Nord Stream 2 pipeline or sell the part of the pipeline falling under German jurisdiction, or transfer the ownership of the pipeline to a separate subsidiary. Therefore, the Advocate General considers that **it is the amending directive itself that immediately affects Nord Stream 2 AG's position and not merely the subsequent national transposition measures**. Consequently, **the General Court's finding that the amending directive was not of direct concern to Nord Stream 2 AG because the provision on unbundling required national measures of implementation is vitiated by an error of law**.

Moreover, the Advocate General finds **that the General Court failed to examine whether the provisions of the amending directive relating to third-party access and/or to tariff regulation could affect Nord Stream 2 AG's legal position**. In this regard, the Advocate General takes the view **that these provisions entail for Nord Stream 2 AG new regulatory constraints that alter its legal position and are, therefore, of direct concern to it**.

Furthermore, the Advocate General finds that the General Court erred in **ordering**, on the one hand, **the removal from the file** of two documents submitted as evidence by Nord Stream 2 AG and, on the other hand, that the passages of the application and annexes in which those documents were reproduced should not be taken into account. In the view of the Advocate General, the General Court **applied a wrong analytical framework** when reviewing the admissibility of the documents at issue. Instead of applying the **principles governing the production of evidence before the EU Courts**, the General Court essentially applied the rules and system laid down in the Access to Documents Regulation.<sup>7</sup>

Under these conditions, the Advocate General considers that **the Court should annul the General Court's order in its entirety**. In addition, he is of the view that **the Court should establish that the amending directive is not only of direct but also of individual concern to Nord Stream 2 AG**.

In fact, **the amending directive affected only the pipeline Nord Stream 2**, the construction of which had not only started, but had reached a very advanced stage at the time of the adoption of that legal act. In that regard, the Advocate General stresses that, unlike comparable former and future projects, Nord Stream 2 could not benefit from any derogation or exemption from the provisions of the Gas Directive, **which places it in a unique position vis-à-vis both those projects and the amending directive itself**.

In the light of the above, the Advocate General concludes that, **being both directly and individually concerned, Nord Stream 2 AG is entitled to challenge the amending directive**.

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<sup>4</sup> In the context of network industries, the term 'unbundling' is used to refer to the separation of the activities that may potentially be subject to competition (such as production and supply) from those where competition is either not possible or not allowed (such as transportation). The objective of unbundling is to prevent operators of transmission system networks from giving an advantage to their own supply activities, to the disadvantage of independent suppliers.

<sup>5</sup> The Gas Directive requires transmission system operators to allow access to their capacity on a non-discriminatory basis to potential customers based on published tariffs (95).

<sup>6</sup> The Gas Directive provides, in essence, that the tariffs charged by transmission system operators for the use of their transport capacity must be approved by the national regulatory authority of the Member State concerned (95).

<sup>7</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

As to the merits of Nord Stream 2 AG's action aiming to have annulled the amending directive, the Advocate General finds that **the state of the proceedings does not permit the Court to give final judgment on that point in the present case and, therefore, suggests that the case be referred back to the General Court.**

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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*The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.*

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