

JUDGMENT OF THE GENERAL COURT (Fifth Chamber, Extended Composition)

27 November 2024 ([*1](#))

(Energy – Internal market in natural gas – Directive (EU) 2019/692 – Amendments to Directive 2009/73/EC – Legal certainty – Equal treatment – Proportionality – Misuse of powers – Procedural irregularities)

In Case T-526/19 RENV,

Nord Stream 2 AG, established in Steinhausen (Switzerland), represented by T. Winter and K. Hobér, lawyers,

applicant,

v

European Parliament, represented by A. Tamás, O. Denkov and J. Etienne, acting as Agents,

and

Council of the European Union, represented by K. Pavlaki, L. Vétillard and A. Jensen, acting as Agents,

defendants,

supported by

Republic of Estonia, represented by M. Kriisa, acting as Agent,

by

Republic of Latvia, represented by K. Pommere, acting as Agent,

by

Republic of Lithuania, represented by K. Dieninis, R. Dzikovič, S. Grigonis and V. Kazlauskaitė-Švenčionienė, acting as Agents,

by

Republic of Poland, represented by B. Majczyna, K. Rudzińska, S. Żyrek and M. Rzotkiewicz, acting as Agents,

and by

European Commission, represented by O. Beynet and B. De Meester, acting as Agents,

interveners,

THE GENERAL COURT (Fifth Chamber, Extended Composition),

composed of M. van der Woude, President, J. Svenningsen (Rapporteur), C. Mac Eochaidh, J. Martín y Pérez de Nanclares and M. Stancu, Judges,

Registrar: I. Kurme, Administrator,

having regard to the written part of the procedure,

having regard to the judgment of the Court of Justice of 12 July 2022,

further to the hearing on 11 April 2024,

gives the following

Judgment

- 1 By its action pursuant to Article 263 TFEU, the applicant, Nord Stream 2 AG, seeks the 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 contested directive').

I. Background to the dispute

A. Directive 2009/73/EC

- 2 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 2009 L 211, p. 94](#)) forms part of a wider regulatory scheme called the 'Third Energy Package'. Directive 2009/73 seeks 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.
- 3 Directive 2009/73 lays down a number of obligations for the achievement of that objective. In that regard, notably, Article 9 of that directive lays down the obligation to unbundle transmission systems and transmission system operators and Article 32 of that directive establishes a system of third-party access to the transmission and distribution systems and to liquefied natural gas (LNG) facilities based on published tariffs, which must be applied objectively and without discrimination between system users (together, 'the obligations laid down by Directive 2009/73').
- 4 Article 36 of Directive 2009/73, provides, in essence, that major new gas infrastructures, namely interconnectors, LNG facilities and storage facilities, may, upon request, be exempted, for a defined period of time, from the obligations laid down by that directive in accordance with the conditions set out in paragraph 1 of that article.

B. The applicant

- 5 The applicant is a company incorporated under Swiss law whose sole shareholder is the Russian public joint stock company (PJSC) Gazprom. It is responsible for the planning, construction and operation of the gas pipeline Nord Stream 2.
- 6 Like the Nord Stream 1 pipeline, which consists of a system of two lines, construction of which was completed in 2012 and the capacity of which is 55 billion cubic metres per year, the Nord Stream 2 pipeline, which also consists of two gas transmission lines crossing the Baltic sea, is intended to ensure the flow of gas between Ust-Luga (Russia) and Lubmin (Germany), bringing the overall transport capacity of the Nord Stream 1 and Nord Stream 2 pipelines to 110 billion cubic metres per year. From Lubmin, the gas conveyed by Nord Stream 2 has to be transported by onshore pipelines.

C. The contested directive

- 7 On 8 November 2017, the European Commission presented a proposal for a directive of the European Parliament and of the Council amending Directive 2009/73 concerning common rules for the internal market in natural gas (COM(2017) 660 final; 'the proposal for a directive').
- 8 On 17 April 2019, the European Parliament and the Council of the European Union adopted the contested directive, which entered into force on the twentieth day following that of its publication in the Official Journal, that is, on 23 May 2019.
- 9 Point 17 of Article 2 of Directive 2009/73, as replaced by Article 1(1) of 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 (a 'pipeline between a Member State and a third country').
- 10 However, as regards gas pipelines between a Member State and a third country completed before 23 May 2019, Article 49a(1) of Directive 2009/73, as added by Article 1(9) of the contested directive, provides that the Member State where the first connection point of such a pipeline with that Member

State's network is located may decide to derogate from the obligations laid down by Directive 2009/73 for the sections of such pipelines located in its territory and territorial sea ('Article 49a'). That derogation is granted for objective reasons, such as to enable the recovery of the investment made or for reasons of security of supply, provided that the derogation is not detrimental to competition or the effective functioning of the internal market in natural gas, or to security of supply in the European Union.

- 11 Article 49a also provides, first, that, derogations of that 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, secondly, that such derogations are not to apply to pipelines between a Member State and a third country which has the obligation of transposing Directive 2009/73 as amended into its legal order under an agreement concluded with the European Union.
- 12 Furthermore, Article 1(5)(a) of 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 same article must not be detrimental to security of supply of natural gas in the European Union ('Article 36, as amended').
- 13 Regarding the transposition of the amendments made by the contested directive to Directive 2009/73, Article 2 of the contested directive provides that Member States are to 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.

II. Earlier proceedings before the General Court and the Court of Justice

- 14 In point 4 of the operative part of the order of 20 May 2020, *Nord Stream 2 v Parliament and Council* ([T-526/19](#), [EU:T:2020:210](#)), the General Court dismissed the action brought by the applicant as inadmissible.
- 15 By judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council* ([C-348/20 P](#), [EU:C:2022:548](#)), the Court of Justice set aside that point 4 of the operative part of the order of 20 May 2020, *Nord Stream 2 v Parliament and Council* ([T-526/19](#), [EU:T:2020:210](#)). Secondly, the Court of Justice held that the applicant's action was admissible in so far as it was directed against Articles 36 and 49a of Directive 2009/73, as amended and inserted respectively by the contested directive.

III. Forms of order sought

- 16 The applicant claims that the General Court should:
- annul the contested directive in its entirety;
 - order the Parliament and the Council to pay the costs.
- 17 The Parliament and the Council, supported by the Commission, contend that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.
- 18 The Republic of Estonia, the Republic of Lithuania and the Republic of Poland contend that the General Court should dismiss the action.

IV. Law

A. Pleas in law seeking the annulment of the contested directive in its entirety

- 19 In response to a written question posed by the General Court, the applicant explained that, following the judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council* ([C-348/20 P](#), [EU:C:2022:548](#)), it continued to seek the annulment of the contested directive in its entirety on the ground that that judgment does not preclude it. In essence, it submits that that judgment only limited the General Court's review to an assessment of the legality of Article 36, as amended, and of

Article 49a. It considers that, if the General Court were to conclude that those two provisions, or one of them, did not comply with EU law, it would have to examine whether the illegality of those provisions could result in the annulment of the contested directive in its entirety. In that regard, the applicant stresses that, by its nature and objective, the contested directive is specifically directed against it and that, as a result, it is devoid of any legitimate legal basis and must be annulled in its entirety.

20 In that same response, the applicant added that, if the Court were to decide not to annul the contested directive in its entirety, it sought, in the alternative, the annulment of Article 49a.

21 At the hearing, the applicant confirmed that, in that case, namely if the Court were to decide not to annul the contested directive in its entirety, it did not seek the annulment of Article 36, as amended.

22 In that regard, it is true that, as the applicant submits, when the EU judicature finds that a provision of an act is unlawful and considers annulling that provision, it must examine whether that annulment must lead to the annulment of the act at issue in its entirety.

23 It is also true that, according to settled case-law, the partial annulment of an act of EU law is possible only if the elements whose annulment is sought may be severed from the remainder of the act (judgments of 27 June 2006, *Parliament v Council*, [C-540/03](#), [EU:C:2006:429](#), paragraph 27, and of 26 April 2022, *Poland v Parliament and Council*, [C-401/19](#), [EU:C:2022:297](#), paragraph 17).

24 However, in the present case, the Court of Justice held, in point 3 of the operative part of the judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council* ([C-348/20 P](#), [EU:C:2022:548](#)), that the applicant's action was admissible to the extent that it was directed against Articles 36 and 49a of Directive 2009/73, as they had been amended and inserted respectively by the contested directive.

25 In order to reach that conclusion, the Court of Justice found in particular, in paragraph 165 of the judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council* ([C-348/20 P](#), [EU:C:2022:548](#)), that Articles 36 and 49a were severable from the other provisions of Directive 2009/73, as amended by the contested directive.

26 In other words, the Court of Justice found that Article 1(5) of the contested directive, amending Article 36 of Directive 2009/73 and Article 1(9) of the contested directive, inserting Article 49a into Directive 2009/73 (see paragraphs 10 and 12 above), were severable from the other provisions of the contested directive and, in particular, from Article 1(1) thereof, which extends the scope of Directive 2009/73 to cover pipelines between a Member State and a third country by replacing point 17 of Article 2 of the latter directive (see paragraph 9 above).

27 In accordance with the second paragraph of Article 61 of the Statute of the Court of Justice of the European Union, where a case is referred back to the General Court, that court is bound by the decision of the Court of Justice on points of law.

28 It follows that the Court of Justice has given a final ruling that the applicant may not seek the annulment of the contested directive in its entirety. Furthermore, the General Court is bound by that point of law by application of the second paragraph of Article 61 of the Statute of the Court of Justice of the European Union.

29 In the light of the foregoing, the first head of claim in the action must be rejected in so far as it seeks the annulment of the contested directive in its entirety.

30 By contrast, the first head of claim in the action, as clarified by the applicant at the hearing (see paragraph 20 above), is admissible in seeking the annulment of Article 1(9) of the contested directive, which inserted an Article 49a into Directive 2009/73.

B. The forms of order seeking the annulment of Article 49a

31 In support of its action, the applicant puts forward six pleas in law, alleging: (i) an infringement of the principle of equal treatment; (ii) an infringement of the principle of proportionality; (iii) an infringement of the principle of legal certainty; (iv) a misuse of powers; (v) an infringement of essential procedural requirements; and (vi) an infringement of the obligation to state reasons.

- 32 At the hearing, the applicant stated that it was withdrawing its sixth plea.
- 33 As regards the other five pleas relied on by the applicant, the Court considers that, after making some preliminary observations, the third plea, alleging an infringement of the principle of legal certainty, should be examined first.

1. Preliminary observations

34 In the first place, the EU Courts have acknowledged that, in the exercise of the powers conferred on it, the EU legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations. However, even where it has such a discretion, the EU legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question, taking into account all the facts and the technical and scientific data available at the time of adoption of the act in question (judgment of 16 December 2008, Arcelor Atlantiqueet Lorraine and Others, [C-127/07](#), [EU:C:2008:728](#), paragraphs [57](#) and [58](#)).

35 In the present case, the contested directive is based on Article 194(2) TFEU which provides, in essence, that, without prejudice to the application of other provisions of the Treaties, the Parliament and the Council are to establish the measures necessary to achieve the objectives of the European Union policy on energy referred to in paragraph 1 of that article.

36 Thus the FEU Treaty empowers the Parliament and the Council to decide the content of their action in the energy field where the measures taken are necessary to achieve the objectives of EU policy.

37 Consequently, when reviewing the exercise of such a power, the EU Court may not substitute its own assessment for that of the EU legislature, and must confine itself to examining whether the legislature's assessment contains a manifest error or constitutes a misuse of powers or whether the legislature clearly exceeded the bounds of its legislative discretion (see, by analogy, judgments of 12 May 2011, Luxembourg v Parliament and Council, [C-176/09](#), [EU:C:2011:290](#), paragraph [35](#), and of 21 June 2018, Poland v Parliament and Council, [C-5/16](#), [EU:C:2018:483](#), paragraph [150](#)).

38 In the second place, according to established case-law, in an action for annulment, the legality of the contested act must be assessed on the basis of the facts and the law as they stood at the time when the act was adopted (see judgment of 10 September 2019, HTTS v Council, [C-123/18 P](#), [EU:C:2019:694](#), paragraph [37](#) and the case-law cited; judgment of 17 September 2007, Microsoft v Commission [T-201/04](#), [EU:T:2007:289](#), paragraph [260](#)).

39 Thus, the fact, alleged by the applicant, that other pipelines between a Member State and a third country, situated offshore and completed before 23 May 2019, all obtained a derogation on the basis of Article 49a after the adoption of the contested directive cannot be taken into consideration. The same is true for the fact, alleged notably by the Council, that the applicant's pipeline is still not in service.

40 It is in the light of those considerations that the merits of the applicant's pleas in law must be examined.

2. The third plea, alleging an infringement of the principle of legal certainty

41 The applicant submits that the fact that pipelines which were not completed before 23 May 2019 are the only pipelines between a Member State and a third country in respect of which operators cannot claim an exemption on the basis of Article 36, as amended, or a derogation on the basis of Article 49a, is a source of legal uncertainty. The applicant explains that, on the date of adoption of the contested directive, it had already made substantial and irreversible investments in the Nord Stream 2 pipeline, unlike operators which had not yet taken a final investment decision.

42 It states that, when it made those investments, the Nord Stream 2 pipeline, like the Nord Stream 1 pipeline, was not regarded as falling within the scope of Directive 2009/73. That is why it did not request an exemption under Article 36 of Directive 2009/73. It adds that it was entitled to trust that its

investments would not become uneconomic due to an unexpected and sudden change in the legislation.

43 Thus, the EU legislature should have taken account of its particular situation in order to adapt the application of the contested directive and, in particular, the temporal scope of Article 49a.

44 The Parliament and the Council, supported by the Republic of Estonia, the Republic of Lithuania, the Republic of Poland and the Commission, dispute the applicant's arguments.

45 The principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law (see judgment of 3 December 2019, *Czech Republic v Parliament and Council*, [C-482/17](#), [EU:C:2019:1035](#), paragraph 148 and the case-law cited). That is the case, in particular, where those rules may have negative consequences for individuals and undertakings (see, to that effect, judgment of 30 April 2019, *Italy v Council (Fishing quota for Mediterranean swordfish)* [C-611/17](#), [EU:C:2019:332](#), paragraph 111).

46 The right to rely on the principle of the protection of legitimate expectations extends, as a corollary of the principle of legal certainty, to any individual in a situation where EU authorities have caused him or her to entertain legitimate expectations. Information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes an assurance capable of giving rise to such expectations. However, a person may not plead a breach of the principle of the protection of legitimate expectations in the absence of specific assurances given to him or her by the administration. Similarly, if a prudent and alert economic operator can foresee that the adoption of an EU measure is likely to affect his or her interests, he or she cannot plead that principle if the measure is adopted (see, to that effect, judgment of 3 December 2019, *Czech Republic v Parliament and Council*, [C-482/17](#), [EU:C:2019:1035](#), paragraph 153 and the case-law cited).

47 Economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the EU institutions in the exercise of their discretionary power will be maintained (see judgment of 26 June 2012, *Poland v Commission*, [C-335/09 P](#), [EU:C:2012:385](#), paragraph 180 and the case-law cited).

48 In the present case, it is true that, in paragraph 80 of the judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council* ([C-348/20 P](#), [EU:C:2022:548](#)), the Court of Justice held, inter alia, that, at the time of the adoption and entry into force of the contested directive, the applicant had already made substantial investments with a view to the construction of its interconnector within the meaning of point 17 of Article 2 of Directive 2009/73, as amended, and that that interconnector was at an advanced stage.

49 Furthermore, in paragraphs 104 and 160 of the judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council* ([C-348/20 P](#), [EU:C:2022:548](#)), the Court of Justice held, in essence, that, on the date of adoption of the contested directive, the applicant could not benefit from an exemption under Article 36, as amended, or from a derogation under Article 49a. The Court of Justice pointed out, first, that the investments for the Nord Stream 2 gas pipeline had already been decided at the date of adoption of the contested directive, which excluded that pipeline from the benefit of an exemption under Article 36, as amended, and, secondly, that, at that date, it was clear that that pipeline could not be completed before 23 May 2019, thus preventing the grant of a derogation under Article 49a.

50 In that regard, it should be noted that the fact that the applicant could not benefit from either an exemption under Article 36, as amended, or a derogation under Article 49a at the date of adoption of the contested directive, as the Court of Justice held in the judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council* ([C-348/20 P](#), [EU:C:2022:548](#)), does not make it possible to demonstrate that the legislature infringed the principle of legal certainty and its corollary, namely the principle of the protection of legitimate expectations.

51 Whether the principle of legal certainty and its corollary have been complied with must be examined in the light of the knowledge which a prudent and alert economic operator could reasonably have had as to the development of the legal framework and the consequences which it needed to draw from it

in order to determine its conduct. That compliance must also be examined in the light of the circumstances surrounding that development and, in particular, of the conduct of the competent institutions.

(a) *The fact that the applicant cannot benefit from the exemption provided for in Article 36, as amended*

52 The evidence produced before the General Court does not make it possible to verify the applicant's claim that it took its final decision to invest in the Nord Stream 2 project in September 2015. The applicant does not rely on any annex to substantiate its claim. Moreover, other evidence in the case file suggests that that decision was taken, not in September 2015, but in 2016, and then implemented from spring 2017.

53 Irrespective of the precise date on which the applicant actually adopted a final investment decision, it should be observed that, first, the applicant decided to invest in a context in which it was foreseeable that the obligations laid down by Directive 2009/73 would be applied to pipelines between a Member State and a third country and, secondly, it continued its investments after that possibility materialised.

(1) *The context in which the applicant decided to invest*

54 The applicant decided to invest within a context in which several EU institutions had, clearly and for a long time, expressed their intention to apply the obligations laid down by Directive 2009/73, first, to pipelines between a Member State and a third country in general and, secondly, to the Nord Stream 2 pipeline in particular.

55 In that regard, first, the applicant decided to invest in a context characterised by numerous positions adopted by the Commission, the European Council, the Council and the Parliament, seeking to ensure that, in general, imports of energy into the European Union and pipelines between a Member State and a third country are, on the basis of the existing law or on the basis of law which would be amended, fully subject to the rules governing the internal energy market.

56 Recital 22 of Directive 2009/73 already explained that security of energy supply was an essential element of public security and inferred from this that persons from third countries should be allowed to exercise control over a transmission system or a transmission system operator only if they complied with the unbundling requirements applicable inside the European Union. In the same recital, the Commission was also encouraged, where appropriate, to submit recommendations with a view to negotiating relevant agreements with third countries addressing the security of energy supply in the European Union.

57 As early as 2010, the Commission, in response to questions put by the Russian Minister for Energy, made it known, in essence, that gas pipelines between a Member State and a third country were subject to the obligations laid down by Directive 2009/73 in the territory of that Member State, unless there was a modification of the legal framework by an international agreement.

58 Subsequently, the Parliament and the Council, in recital 3 of their Decision No 994/2012/EU of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy ([OJ 2012 L 299, p. 13](#)), explained that the proper functioning of the internal energy market required that the energy imported into the European Union be fully governed by the rules establishing the internal energy market.

59 In December 2013, a Commission representative publicly expressed that institution's view that the intergovernmental agreements concluded by several Member States with the Russian Federation concerning a project for a gas pipeline called 'South Stream', which was to link Russia to Italy and Austria via the Black Sea and for which certain construction work had started, did not comply with the obligations laid down in Directive 2009/73.

60 In response to a parliamentary question, the Commissioner for Energy stated on 31 March 2014 that the Commission would examine the decisions of the national regulatory authorities adopted following a request for exemption under Article 36 of Directive 2009/73 made by the promoters of the South Stream project.

- 61 In its Communication to the Parliament and the Council of 28 May 2014, entitled ‘European Energy Security Strategy’ (COM (2014) 330 final), the Commission stressed that, in the short term, new infrastructure investments, encouraged by dominant suppliers, must comply with all internal market and competition rules. In particular, the Commission stated that the South Stream project should be suspended until full compliance with EU legislation was ensured and re-evaluated in the light of the EU’s energy security priorities.
- 62 In its Communication to the Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank of 25 February 2015, entitled ‘A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’ (COM (2015) 80 final), the Commission stated that an important element in ensuring energy security is full compliance of agreements related to the buying of energy from third countries with EU law.
- 63 On 15 March 2015, the Commission also expressed its wish to make the operator of the Polish section of the Yamal-Europe pipeline, which transports gas from Russia, subject to the obligations laid down in Directive 2009/73.
- 64 In its resolution 2015/2113(INI) of 15 December 2015, entitled ‘Towards a European Energy Union’, the Parliament, for its part, considered notably that the European Union was heavily dependent on imports of energy from Russia, which had proven to be an unreliable partner and used its energy supplies as a political weapon. It added that the 2006 and 2009 gas disputes between Russia and Ukraine, a transit country, had resulted in severe shortages in many EU countries. According to the Parliament, those disruptions showed that the measures taken so far had been insufficient to eliminate the reliance on Russian gas. It therefore called on the Commission to enforce EU law in order to avoid distortions of the internal market.
- 65 Finally, the material in the case file shows that, in its conclusions of 18 December 2015 (EUCO 28/15), the European Council indicated that any new infrastructure should be fully in line with the ‘Third Energy Package’ and other legislative provisions applicable in the European Union, as well as with the European Union’s energy objectives.
- 66 Thus, it is apparent from paragraphs 56 to 65 above that, between 2009 and 2015, several EU institutions had taken a position in favour of applying the rules governing the internal energy market to all pipelines between a Member State and a third country.
- 67 Secondly, and in that context, several Member States, the Parliament and the Commission clearly expressed their desire for the Nord Stream 2 pipeline to be subject to the obligations laid down in Directive 2009/73 when they became aware of the existence of that project.
- 68 The evidence produced, inter alia, by the applicant shows that, in November 2015, and then in March 2016, a number of Member States were signatories to two letters sent to the Commission in which they expressed concerns with regard to the applicant’s pipeline project and requested the Commission to act in order, in essence, to make that future pipeline subject to the obligations laid down in Directive 2009/73.
- 69 On 15 December 2015, in response to a parliamentary question, the Commissioner for Energy explained that the applicant’s project was required fully to comply with EU competition law. He added that the European Union would support only infrastructure projects which comply with the European Union’s fundamental principles on energy. That Commissioner answered another parliamentary question on 21 January 2016 in the same vein.
- 70 On 15 December 2015, the Parliament adopted the resolution referred to in paragraph 64 above, from which it is clear that that institution wanted EU law to be applied to the Nord Stream 2 pipeline.
- 71 At a conference which took place in Parliament on 6 April 2016 and which concerned ‘Nord Stream II – Energy Union at the crossroads’, the Vice-President of the Commission stated that the construction of an infrastructure project as important as the Nord Stream 2 pipeline could not be carried out in a legal vacuum, nor could it be operated exclusively in accordance with Russian law. In

that regard, it stated that, if it were constructed, the Nord Stream 2 pipeline would have to be operated within a legal framework which took into account the key principles of the EU energy market.

72 Other documents in the file show that at the beginning of 2017 a number of Members of the European Parliament asked the Commission to take urgent measures concerning the applicant's project. In the same period of time, two Member States asked the Commission to act before granting the applicant the authorisations it had requested in respect of the Nord Stream 2 pipeline route in the Baltic Sea, pursuant to Article 79 of the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982.

73 It follows from the foregoing that the applicant decided to invest in a context which for a long time had been characterised by the firm and repeated intention of, inter alia, several Member States, the Parliament and the Commission to make gas pipelines between a Member State and a third country, in general, and the Nord Stream 2 pipeline, in particular, subject to the obligations laid down by Directive 2009/73.

74 Thus, at the time when the applicant claims to have taken its decision to invest, it had no assurance that EU law would continue not to be applied to the Nord Stream 2 pipeline.

75 On the contrary, it was foreseeable that the EU institutions would use the powers available to them in order to ensure that gas pipelines between a Member State and a third country, in general, and the Nord Stream 2 pipeline, in particular, would be brought within the scope of application of Directive 2009/73.

(2) The continuation of investments

76 The applicant continued to make its investments after the possibility that the Nord Stream 2 pipeline might be subject to the obligations laid down in Directive 2009/73 materialised in the form of proposals submitted by the Commission.

77 At the end of March 2017, the Commission recalled that there were difficulties with the Nord Stream 2 pipeline and announced that it was in the process of drawing up a draft mandate for the attention of the Council with a view to it being authorised to negotiate with the Russian Federation on the operation of that pipeline.

78 Thus, on 9 June 2017, the Commission publicly announced, by press release, that it had requested a mandate from the Member States to negotiate an agreement on the Nord Stream 2 pipeline with the Russian Federation. That request took the form of a recommendation adopted by the Commission on the same day for the attention of the Council with a view to adopting a decision authorising the opening of negotiations on an international agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline ('the request for a mandate').

79 As is apparent from its press release, the Commission, in its request for a mandate, explained that the Nord Stream 2 project did not contribute to the European Union's energy objectives because, first, it could facilitate the expansion of Gazprom's position on the main EU gas markets and, secondly, it would call into question the existing transmission routes.

80 Therefore, the Commission asked the Council to grant it a mandate to negotiate an international agreement that would take into account the fundamental principles of EU law in the field of energy and, in particular, the principles of transparency in the operation, the setting of non-discriminatory tariffs, an appropriate level of non-discriminatory third-party access and a degree of separation between activities of supply and those of transmission.

81 In August 2017, the Commissioner for Energy reiterated, in response to a parliamentary question, the Commission's desire for the Nord Stream 2 pipeline to be subject not only to the law of its country of origin, but also to EU law.

82 On 8 November 2017, the Commission adopted the proposal for a directive. That proposal already provided for the extension of the scope of Directive 2009/73 to cover gas pipelines, such as that of the applicant, as well as the possibility of obtaining a derogation for pipelines between a Member State and a third country completed before the date of entry into force of the future directive. The substance

of that proposal had been announced in September 2017. Furthermore, in October 2017, a Commission representative had stated that, in his view, that proposal would be submitted in November 2017, that it would follow a fast-track procedure and that, if the proposed amendments were accepted, it would enter into force by the end of 2018 at the latest.

83 It follows that, on the date of the request for a mandate and then on the date of the proposal for a directive, the possibility that the applicant might be subject to the obligations laid down in Directive 2009/73 had materialised and it could expect those obligations to apply in the short term to the Nord Stream 2 pipeline. Thus, the applicant was in a position to foresee, on the basis of the information available to it, that an EU measure that would affect its interests would be adopted.

84 The applicant has not shown that it was unable to make changes in order to be able to benefit from the exemption provided for in Article 36, as amended, when the contested directive entered into force.

85 First, the applicant does not claim that, on the date of the Commission's request to the Council for a mandate and no later than the date of the proposal for a directive, it attempted to interrupt or suspend performance of the contracts which it had previously concluded, or to renegotiate them.

86 Secondly, the applicant has not shown that, by those same dates, it was unable to interrupt or suspend its project and, more generally, that its investments had become irreversible.

87 In that regard, the Court observes that the applicant did not produce the contracts for the acquisition of pipes, the contract for the heavy concrete coating of pipes and the contract for the installation of pipes, which it explains it concluded on 6 April 2016, 6 September 2016 and 6 April 2017 respectively. Two annexes produced by the applicant merely attest to the fact that [*confidential*]. (¹)

88 Furthermore, as is apparent from a decision of the Bundesnetzagentur (Federal Networks Agency, Germany) of 22 February 2009 concerning a request for exemption under the provision of German law which transposed Article 36 of Directive 2009/73 (BK7-08-009), the conclusion of a contract for the acquisition of pipes for a high amount does not necessarily demonstrate the existence of a firm decision to invest and that an irreversible investment was made on the date on which such a contract was concluded, in particular on the ground that those pipes may still be resold.

89 Thus, the applicant has not shown that, on the date of the Commission's request to the Council for a mandate and, at the latest, on the date of the proposal for a directive, the investments linked to the contracts referred to in paragraph 87 above had become irreversible.

90 As regards the Gas Transportation Agreement which the applicant concluded on 23 April 2017, it should be noted that that agreement, which relates to the future operation of the Nord Stream 2 pipeline, does not provide any guidance on the chronology and extent of the investments made by the applicant. In addition, that agreement was concluded on a date before which the Commission had already announced that it was preparing a request for a mandate (see paragraph 77 above). Furthermore, the applicant has not shown, by means of specific references to the only extracts from that agreement which it produced as an annex to the application, that it was impossible for it to interrupt or suspend its implementation or to renegotiate its terms a few weeks after its signature, that is to say, after the Commission actually submitted its request for a mandate on 9 June 2017. Moreover, given that that agreement had been signed with Gazprom Export LLC, a company governed by Russian law which was a wholly owned subsidiary of the applicant's sole shareholder, the possibility of renegotiating that agreement on the date of the request for a mandate and on the date of the proposal for a directive could not be ruled out.

91 The financing agreements concluded by the applicant in April and June 2017 also do not provide any guidance on the timing and extent of the investments it made. Furthermore, the explanations provided by the applicant and the extracts from those agreements it produced do not make it possible to assess with the requisite precision the date on which they actually entered into force. Moreover, those agreements were signed on a date on which the Commission had already announced, in March 2017, that it was preparing a draft negotiating mandate for the conclusion of an agreement with the Russian Federation and a few weeks or, as regards the agreement of June 2017, a few days before the request for a mandate had actually been sent to the Council. Finally, and more generally, the explanations

provided by the applicant before the Court do not show that it was impossible for it to renegotiate those agreements as at the date of the request for a mandate and, at the latest, as at the date of the proposal for a directive. In addition, it must be observed that half of the financing guaranteed by those agreements was provided by its sole shareholder, PJSC Gazprom.

92 Consequently, the applicant has not shown that the fact that it could not benefit from the exemption provided for in Article 36, as amended, on the date of adoption of the contested directive is the direct consequence of an unforeseeable change in the rules and that it was not in a position to adapt to such a situation in time.

93 On the contrary, the evidence available to the Court shows that the applicant made and continued without interruption to make its investments despite the fact that it could reasonably have foreseen a future application of the obligations laid down in Directive 2009/73 to pipelines between a Member State and a third country, including the Nord Stream 2 pipeline.

94 Having regard to the context in which the contested directive was adopted and, in particular, the applicant's situation prior to its adoption, the fact that the applicant could not benefit from the exemption provided for in Article 36, as amended, on the date of adoption of that directive did not oblige the EU legislature to adapt the scope of Article 49a to its particular situation in order to comply with the principle of legal certainty.

(b) *The fact that the applicant cannot benefit from the derogation provided for in Article 49a*

95 In the first place, it should be noted that the criterion of completion before the date of entry into force of the contested directive, compliance with which was a condition for eligibility for the derogation provided for in Article 49a, was already included in the proposal for a directive and the applicant was in a position to foresee that the Nord Stream 2 pipeline would not be completed before the date of adoption and entry into force of that directive.

96 In that regard, it is apparent from information in the case file that, on the date of the proposal for a directive, 8 November 2017, the actual construction of the Nord Stream 2 gas pipeline, namely, inter alia, the laying of pipes on the bottom of the Baltic Sea, had not yet begun.

97 It was only between 2 November 2017 and 27 March 2018 that the applicant obtained, from the competent German authorities, the various permits necessary for the installation and operation of its infrastructure in the territorial sea and in the exclusive economic zone (EEZ) of the Federal Republic of Germany.

98 Furthermore, the construction work of installing the pipes and building the arrival terminal in the area for which that Member State is responsible began only in February 2018 and was continued in the territorial sea and the German EEZ only from mid 2018.

99 In addition, the necessary authorisations from the Russian, Finnish and Swedish authorities concerned by the Nord Stream 2 pipeline route were issued only between 5 April 2018 and 14 August 2018.

100 In those circumstances, on the date of adoption of the contested directive, namely 17 April 2019, a large part of each of the two lines comprising the Nord Stream 2 pipeline had not yet been placed on the seabed, as demonstrated by the figures, expressed in kilometres, put forward by the applicant. In particular, on the date of adoption and the date of entry into force of the contested directive, the applicant was still awaiting authorisation for the 147 km of pipes for which the Danish authorities were responsible. That authorisation was ultimately granted on 30 October 2019 and became final on 28 November 2019. On the date of adoption and on the date of entry into force of the contested directive, the pipes had therefore not been deployed in Danish waters. On those same dates, the sections of pipes already deployed on the seabed had not all been connected by means of the 'above water tie-in' process, at least in the territorial sea and the EEZ of Germany and in Russian waters.

101 Consequently, the applicant was able to foresee that, if the Commission's proposal to insert a derogation for pipelines completed before the entry into force of the contested directive were followed by the EU legislature, it would not be in a position to benefit from it at the date of its entry into force.

- 102 In the second place, the fact that, at the date on which the contested directive was adopted, the applicant could not benefit from a derogation under Article 49a was not only foreseeable by the applicant, but is also the result of applying a criterion which is consistent with the principle of legal certainty and the principle of the protection of legitimate expectations.
- 103 The criterion of completion before the date of entry into force of the contested directive is clear, precise and objective.
- 104 In that regard, that criterion reflects the principle that a new rule of law applies with effect from the entry into force of the act introducing it. While it does not apply to legal situations that have arisen and become definitive under the old law, it applies to the future effects of a situation which arose under the old rule, as well as to new legal situations. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (see judgment of 22 June 2022, Volvo and DAF Trucks, [C-267/20](#), [EU:C:2022:494](#), paragraph 32 and the case-law cited).
- 105 The approach of taking the date of entry into force of an act to delimit the temporal scope of a provision in the field of gas had, moreover, already been followed by 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](#)). Point 33 of Article 2 of Directive 2003/55 defined ‘new infrastructure’ as infrastructure which had not been completed by the date of entry into force of that directive. New infrastructure was eligible for an exemption under Article 22 of that directive, which has become Article 36 of Directive 2009/73.
- 106 The objective criterion of completion before the date of entry into force of the directive shows that the legislature took into account the specific situation of completed pipelines by allowing such pipelines to apply for the derogation provided for in Article 49a.
- 107 As regards the particular situation of the Nord Stream 2 pipeline, it is clear from paragraph 100 above that it was still under construction on the date of entry into force of the contested directive and therefore that the applicant’s situation was not definitively established on that date, within the meaning of the case-law referred to in paragraph 104 above.
- 108 Furthermore, the applicant was not only in a position to foresee that it would not be able to benefit from the derogation provided for in Article 49a on the date of entry into force of the contested directive, but it also had an additional period of time within which to amend the proposed arrangements for the operation of the Nord Stream 2 pipeline, given that the deadline for transposition of that directive had been set for no later than 24 February 2020, that is to say 10 months after its adoption.
- 109 In that regard, it should be added that the fact that the applicant cannot benefit from the derogation provided for in Article 49a does not prevent it from operating the Nord Stream 2 pipeline in economic conditions and obtaining an appropriate return on its investments, as is apparent in particular from Article 13(1)(a) of Directive 2009/73 and Article 13 of 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 2009 L 211, p. 36](#)).
- 110 Consequently, the applicant has not shown that the legislature infringed the principle of legal certainty and its corollary, the principle of the protection of legitimate expectations, when it provided, in Article 49a, that only pipelines between a Member State and a third country completed before 23 May 2019 could benefit from a derogation under that provision.
- 111 In the light of all of the foregoing, the fact that the applicant could not benefit from either an exemption under Article 36, as amended, or a derogation under Article 49a on the date of adoption of the contested directive is not capable of demonstrating that the legislature infringed the principle of legal certainty and its corollary, namely the principle of the protection of legitimate expectations.
- 112 The third plea in law is therefore rejected.

3. The first plea in law, alleging an infringement of the principle of equal treatment

113 The general principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 16 December 2008, Arcelor Atlantique et Lorraine and Others, [C-127/07](#), [EU:C:2008:728](#), paragraph [23](#) and the case-law cited).

114 It is appropriate to examine, in turn, the applicant's arguments alleging the existence of different treatment of comparable situations and those alleging a lack of objective justification.

(a) *The alleged different treatment of comparable situations*

115 The applicant submits that the Nord Stream 2 pipeline is clearly in a situation comparable to that of gas pipelines between a Member State and a third country which are situated offshore and which were completed before the date of entry into force of the contested directive, which fall within the scope of Article 49a.

116 First, the Nord Stream 2 pipeline and the completed gas pipelines are all 'transmission line[s] between a Member State and a third country' within the meaning of point 17 of Article 2 of Directive 2009/73, as amended, and fall within the scope of that directive, on the ground that they are 'interconnectors'.

117 Secondly, the Nord Stream 2 pipeline and the completed offshore pipelines between a Member State and a third country are all gas pipelines to which Article 36, as amended, cannot objectively be applied and in respect of which that article could not fulfil its role of providing certainty 'before' the investment. With regard to the Nord Stream 2 pipeline and the completed offshore pipelines between a Member State and a third country, the investment made is irreversible and cannot be discontinued in the same way as for pipelines in the planning phase. In that regard, nearly all of the investments in the Nord Stream 2 pipeline had already been made and the pipeline was almost completed. Accordingly, the Nord Stream 2 pipeline is in a situation comparable with that of completed offshore pipelines between a Member State and a third country, in the light of the objective of Article 49a which is to enable the investment made to be recovered.

118 Thirdly, the investments made in the Nord Stream 2 pipeline are underpinned by the same type of long-term gas transportation contract as those underpinning the completed offshore pipelines and which were concluded a number of years before the adoption of the contested directive.

119 Fourthly, the fact that it is easier to assess the impact of completed pipelines already in operation on the functioning of the internal market, on competition and on security of supply does not mean that the Nord Stream 2 pipeline is not comparable with completed pipelines. A similar assessment is required by Article 36, as amended, in respect of planned pipelines and that provision has given rise to a decision-making practice.

120 Fifthly, and for the same reason, it cannot be argued that the 'final investment decision' criterion is unclear, unlike the 'completion' criterion set out in Article 49a. Article 36, as amended, presupposes that no final investment decision has been taken.

121 The Parliament and the Council, supported by the Republic of Estonia, the Republic of Lithuania, the Republic of Poland and the Commission, dispute the applicant's arguments.

122 An infringement of the principle of equal treatment as a result of different treatment presupposes that the situations concerned are comparable, having regard to all the elements which characterise them. The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (see judgment of 16 December 2008, Arcelor Atlantique et Lorraine and Others, [C-127/07](#), [EU:C:2008:728](#), paragraphs [25](#) and [26](#) and the case-law cited).

123 In the present case, as regards the principles and objectives of the field to which the contested directive relates, Article 194(1) TFEU provides that, in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, EU policy on energy is to aim to ensure the functioning of the energy market, ensure

security of energy supply in the European Union, promote energy efficiency and energy saving and the development of new and renewable forms of energy, and promote the interconnection of energy networks (see, to that effect, judgment of 4 May 2016, Commission v Austria, [C-346/14](#), [EU:C:2016:322](#), paragraph 72 and the case-law cited).

- 124 The objective of the contested directive as a whole is to extend the scope of Directive 2009/73 to gas pipelines between a Member State and a third country.
- 125 As is apparent from recital 3 thereof, the general aim pursued by the contested directive is to address the obstacles to the completion of the internal market which result from the non-application of EU market rules to gas pipelines between a Member State and a third country. That recital states that the amendments made aim, first, to ensure that the rules applicable to pipelines connecting two or more Member States are also applicable to pipelines between a Member State and a third country; secondly, to ensure consistency in the legal framework while avoiding distortions of competition and negative effects on security of supply; and, thirdly, to enhance transparency and provide legal certainty to market participants, in particular investors in gas infrastructure and system users, as regards the applicable legal regime.
- 126 The purpose of Article 49a is to allow the Member State in which the first connection point of a pipeline completed before 23 May 2019 between that Member State and a third country is located to decide to derogate from the obligations laid down by Directive 2009/73. That derogation must be based on objective reasons, such as to enable the recovery of the investment made or for reasons of security of supply, provided that the derogation is not detrimental to competition or the effective functioning of the internal market in natural gas, or to security of supply in the European Union.
- 127 As is apparent from recital 4 of the contested directive, the purpose of Article 49a is to take account of the lack of specific EU rules applicable to pipelines between a Member State and a third country before the date of entry into force of that directive.
- 128 In that regard, it should be noted, as a preliminary point, that it is common ground that Article 49a leads to a difference in treatment between, on the one hand, gas pipelines completed before 23 May 2019, which may apply to benefit from a derogation on the basis of that provision and, on the other hand, pipelines which were not completed before that date and which cannot apply for such a derogation.
- 129 In the first place, it must be pointed out that a completed gas pipeline is a pipeline which possesses all the attributes necessary to transport gas because its construction has been completed. A completed pipeline can therefore be put into service and operated. Furthermore, in the explanatory memorandum to its proposal for a directive, the Commission described completed pipelines, covered by the derogation now provided for in Article 49a, as being existing infrastructure which was already in service.
- 130 By comparison, a gas pipeline which has not been completed does not possess all the attributes of a pipeline and is therefore not capable of transporting gas and being operated.
- 131 In the second place, in the light of the purpose of Article 49a, which is to take account of the lack of specific EU rules applicable to pipelines between a Member State and a third country before the date of entry into force of the contested directive, a pipeline which was not yet completed before 23 May 2019 is not in a situation comparable to that of a pipeline which was completed before that date.
- 132 A pipeline which was completed before the date of entry into force of the contested directive and which is in service necessarily entailed a prior investment which can no longer be abandoned. Furthermore, a gas pipeline completed before that date will have commenced operation under a legal regime which did not provide for the application, to its situation, of the obligations laid down by Directive 2009/73 or the possibility of benefiting from an exemption under Article 36, as amended, applicable to new gas infrastructure.
- 133 By contrast, first of all, an investor in a pipeline which was not completed before the date of entry into force of the contested directive may have incurred a lower level of expenditure or have greater

- opportunities to make changes to its investment, terminate contractual obligations already entered into, amend those obligations or resell goods already acquired for the construction of its gas pipeline.
- 134 Next, even if a gas pipeline which was not completed before the date of entry into force of the contested directive has entailed significant investments and construction work, decisions as to those investments and that work could have been made with full knowledge of the facts and in a context in which an amendment to the legislation applicable on the date of entry into force of such an amendment was foreseeable.
- 135 In the present case, it is apparent in particular from paragraphs 75, 83, 93 and 101 above that the applicant actually decided to invest in full knowledge of the facts, in a context which enabled it to understand, even before the submission of the proposal for a directive by the Commission and, at the latest, at that time, that the Nord Stream 2 pipeline would be subject to the obligations laid down in Directive 2009/73.
- 136 Finally, and more generally, an investor in a pipeline which was not completed before the date of entry into force of the contested directive, such as the Nord Stream 2 pipeline, has the time to adapt to the legislative changes provided for by the latter. The possibilities and time available to an investor in a pipeline which has not been completed for adapting to the consequences of a legislative change made by means of a directive are all the greater since, first, that investor is informed, many months before the adoption of the legislative act at issue, of the subject matter and purpose of the legislative changes envisaged and, secondly, the Member States have a period within which to transpose such changes into national law.
- 137 In the third place, in the light of the subject matter of Article 49a, but also of the subject matter and objectives of the contested directive and of the principles and objectives of the European Union's policy on energy, the situation of a pipeline completed before the date of entry into force of that directive differs from the situation of a gas pipeline whose construction was not completed before that date.
- 138 Indeed, the impact of a pipeline already completed on the functioning of the internal market, in particular in terms of effects on competition and security of supply, can be assessed *ex post*. That *ex post* assessment is carried out on the basis of experience acquired during the operation of the pipeline in question and on the basis of empirical data obtained in the course of that operation. Thus, it is easier to make an assessment of the impact of a completed pipeline on the internal market and therefore that assessment may be carried out quickly, by means of a simple procedure under the sole responsibility of the competent Member States.
- 139 In addition, the application of the obligations laid down by Directive 2009/73 to pipelines completed and already operated on the date of entry into force of the contested directive presents a risk of disrupting the capacity and flow of supply and thus harming competition and security of supply. That risk also justifies a rapid examination of their situation having regard to the conditions laid down in Article 49a.
- 140 By contrast, in the case of a pipeline which was not completed before the date of entry into force of the contested directive, such as the Nord Stream 2 pipeline, an assessment of its impact on the internal market and security of supply can only be prospective and based on assumptions. Thus, even if such an assessment is indeed possible, it requires more in-depth and complex assessments of the impact of the operation of the future pipeline on the achievement of the objectives pursued by the contested directive as a whole and by EU energy policy.
- 141 In addition, since a gas pipeline which has not been completed, such as the applicant's pipeline, is not capable of transporting gas and being operated, the application of the contested directive to such a category of pipelines does not present a risk of disruption to the flow of supply, or even of disruption to supply itself.
- 142 In the light of the foregoing, it must be held that gas pipelines completed before 23 May 2019, on the one hand, and pipelines not completed before that date, including those under construction such as the

Nord Stream 2 pipeline, on the other hand, are not in a comparable situation having regard to all the elements which characterise them.

143 Thus, Article 49a leads to different situations being treated differently and, inter alia, leads to the Nord Stream 2 pipeline being treated differently from completed pipelines, since, on the date of entry into force of the contested directive, that pipeline was in a different situation from them.

144 Even if Article 49a were to lead to comparable situations being treated differently, on the ground that the applicant had already made substantial investments with a view to the construction of the Nord Stream 2 pipeline, that difference in treatment and the resulting disadvantage would, in any event, be justified (see paragraph 145 et seq. below).

(b) *Justification for any difference in treatment of comparable situations*

145 The applicant submits that the different treatment of the Nord Stream 2 pipeline is not objectively justified.

146 The applicant argues that the fact that the Nord Stream 2 pipeline was not completed before 23 May 2019 cannot constitute an objective justification for that pipeline to be treated differently. Such a justification is inconsistent with the specific purpose of Article 49a. That purpose relates to investment risks which have already been taken and consists of complementing Article 36, as amended, which applies to investment risks which have not yet been taken. Limiting the temporal scope of Article 49a to infrastructure ‘completed before 23 May 2019’ creates a temporal gap in relation to the scope of Article 36, as amended.

147 The applicant maintains that it had the same legitimate expectations as the operators of infrastructure which was already in operation, on the ground that it had already made significant investments before the entry into force of the contested directive on 23 May 2019. Like those operators, it took a decision to implement its project, made irreversible investments and concluded most of the binding contractual arrangements on the basis of the legal situation which existed before the entry into force of the directive.

148 Furthermore, the criterion of ‘completion’ is not an objective criterion. It is not clear why it was necessary to set such an early deadline in order to ensure that completed infrastructure was not left in a legally uncertain situation. The legislature could have set a later deadline without affecting the situation of completed infrastructure. The applicant points out that, in the course of the legislative procedure, the application of Article 49a to pipelines on which work had started before the date of the entry into force of the contested directive had been proposed as an alternative to the option which was ultimately chosen.

149 The Parliament and the Council, supported by the Republic of Poland and the Commission, dispute the applicant’s arguments.

150 It should be recalled that a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, [C-127/07](#), [EU:C:2008:728](#), paragraph 47).

151 As a preliminary point, it should be noted that, contrary to the applicant’s submissions, the specific aim of Article 49a does not relate solely to investment risks. Indeed, Article 49a has a broader aim, which is to take account of the lack of rules applicable to gas pipelines between a Member State and a third country before the date of entry into force of the contested directive. That is why, according to that provision, the derogation for which it provides must be based on objective reasons, such as to enable the recovery of the investment made or for reasons of security of supply.

152 In the present case, in the first place, it should be noted that the criterion of completion before the date of entry into force of the contested directive is an objective criterion which reflects the principles that govern the temporal application of an EU act (see paragraph 104 above). Furthermore, that criterion is closely linked to the objective pursued by Article 49a, namely to take account of the lack of specific

EU rules applicable to pipelines between a Member State and a third country before the date of entry into force of the contested directive. That criterion had, moreover, already been applied in point 33 of Article 2 of Directive 2003/55 in order to define a ‘new infrastructure’ (see paragraph 105 above).

- 153 The criterion of completion before the date of entry into force of the contested directive is therefore an objective and reasonable criterion.
- 154 In the second place, any difference in treatment resulting from the application of the criterion of completion before 23 May 2019 is appropriate for achieving the objective of taking account of the lack of rules applicable to pipelines between a Member State and a third country before the date of entry into force of the contested directive.
- 155 First, it allows pipeline owners easily to assess whether their gas pipeline falls within the scope of the derogation provided for in Article 49a.
- 156 Secondly, that criterion can be easily applied by the Member States in order quickly to assess whether a request for derogation is in fact made regarding a pipeline that falls or does not fall within the scope of Article 49a. In other words, that criterion makes it easy to identify the pipelines for which flexibility might be necessary in the light, first, of the principle of legal certainty and the protection of the legitimate expectations of their owner and, secondly, of the risks of disruption to supply which could arise from the application of the obligations laid down by Directive 2009/73 to those pipelines which are already in service.
- 157 In the third place, any difference in treatment that results from the application of the criterion of completion before 23 May 2019 does not exceed the limits of what is necessary to achieve the objective pursued by Article 49a.
- 158 The applicant’s argument that the objective pursued by Article 49a could be achieved by widening the derogation provided for in that provision to include pipelines for which the works had started before 23 May 2019, or which had already given rise to a final investment decision before that date, must be rejected.
- 159 In that regard, it is true that the criteria referred to by the applicant would also allow pipelines completed before 23 May 2019 to apply for a derogation on the basis of Article 49a.
- 160 However, first of all, those criteria did not have the same level of precision, given that the concepts of ‘commencement of works’ and ‘final investment decision’ were likely to give rise to complex interpretation work in order to assess whether or not a pipeline fell within the scope of the derogation provided for in Article 49a.
- 161 Next, those criteria had the effect of bringing within the scope of the derogation provided for in Article 49a gas pipelines which were not yet in operation. The assessment of whether the conditions laid down in Article 49a were complied with could not therefore have been easily carried out by the Member States despite the fact that the procedure established by that provision was specifically intended to be a simple procedure which had to be implemented swiftly by the Member States and which was not to give rise to prospective and complex analyses.
- 162 Finally, unlike the criterion of completion before 23 May 2019, the criteria referred to by the applicant had the effect of extending the scope of Article 49a to gas pipelines which had given rise to investments and the commencement of construction work, such as the Nord Stream 2 pipeline, at a time when the extension of the scope of Directive 2009/73 to cover pipelines between a Member State and a third country was foreseeable.
- 163 As regards the constraints borne by investors in unfinished pipelines, in general, and by the applicant, in particular, it must be pointed out that the application of the obligations laid down by Directive 2009/73 does not prevent investors in pipelines between a Member State and a third country from operating their pipeline in economic conditions and obtaining an appropriate return on their investments (see paragraph 109 above).
- 164 That assessment is, moreover, confirmed by the numerous examples, cited by the Commission, of pipelines between a Member State and a third country which had already been subject, sometimes for

many years, to the obligations laid down by Directive 2009/73 before the entry into force of the contested directive.

165 Therefore, the importance of the objective of taking account of the foreseeable lack of rules applicable to pipelines between a Member State and a third country completed before 23 May 2019 justified the constraints borne by investors in pipelines which were not completed before that date, such as the applicant.

166 Moreover, as is apparent, in essence, from paragraphs 261 to 263 below, the applicant has not demonstrated that the constraints to which it is subject as a result of the application of the obligations laid down by Directive 2009/73 to the Nord Stream 2 pipeline are manifestly inappropriate in the light of the objectives pursued by the contested directive.

167 In the light of the foregoing, the applicant has not established that the choice made by the legislature in Article 49a, which consists of defining the scope of the derogation provided for in that provision by means of the criterion of completion before 23 May 2019, is manifestly inappropriate or that any difference in treatment is unjustified.

168 The first plea in law is therefore rejected.

4. *The second plea in law, alleging an infringement of the principle of proportionality*

169 In the first place, in the application the applicant submits that the extension of the scope of the obligations laid down in Directive 2009/73 to cover offshore pipelines between a Member State and a third country is not proportionate to the objectives pursued by the contested directive or by Directive 2009/73.

170 The applicant also submits that, if the application of the obligations laid down by Directive 2009/73 to pipelines between a Member State and a third country constituted a solution to a real problem, those obligations should apply equally to all pipelines between a Member State and a third country. However, it argues, the obligations laid down by Directive 2009/73 apply only to a fraction of the import capacity of third countries, namely the capacity of the Nord Stream 2 pipeline, and not to the capacity of all gas pipelines between a Member State and a third country.

171 In the second place, in the reply the applicant submits, first, that it has not been demonstrated that subjecting a small section of a single gas pipeline from a third country, namely the Nord Stream 2 pipeline, to the obligations laid down in Directive 2009/73 is necessary in order to achieve the objectives pursued by the contested directive.

172 Secondly, the applicant states that the obligations laid down by Directive 2009/73 apply only to a fraction of the third-country import capacity, namely the capacity of the Nord Stream 2 pipeline, and not to the capacity of all gas pipelines between a Member State and a third country. It is difficult to see how the application of those obligations to such a small fraction of the total capacity of import pipelines could achieve the objectives of the contested directive.

173 Thirdly, the applicant submits that the quantitative and qualitative aspects of the objective of ensuring security of supply could be guaranteed even by bringing the Nord Stream 2 pipeline within the scope of Article 49a. The exemption and the derogation provided for in Article 36, as amended, and Article 49a respectively, which are granted in particular in the light of a condition relating to security of supply, show that that security is not only ensured by the application of the obligations laid down in Directive 2009/73.

174 In the third place, the applicant submits that, even if the contested directive could be considered to have a marginal advantage for the internal market, which is not the case, that advantage would be less than the very significant disadvantages which that directive imposes on the European Union, the Member States and owners, like the applicant, of offshore pipelines between a Member State and a third country.

175 The applicant notes that the economic effects of the directive on its situation are significant and unreasonable on the ground that that directive precludes it from being able to recover the investments

made prior to its adoption. It is unable lawfully to perform key aspects of the Gas Transportation Agreement that it has concluded with Gazprom and its financial position is very negatively affected.

176 The Parliament and the Council, supported by the Republic of Estonia, the Republic of Lithuania, the Republic of Poland and the Commission, dispute the applicant's arguments.

177 The principle of proportionality requires acts of the EU institutions to be appropriate for attaining the legitimate objectives pursued by the legislation at issue and not to go beyond what is necessary in order to achieve those objectives (see, to that effect, judgment of 12 July 2012, Association Kokopelli, [C-59/11](#), [EU:C:2012:447](#), paragraph 38 and the case-law cited).

178 As a preliminary point, it should be noted that, as the applicant observes, the general objective provided for by the contested directive is indeed to ensure the functioning of the internal market.

179 However, recital 3 of the contested directive refers to more specific objectives, which are not limited to preventing distortions of competition and negative impacts on the security of supply, but also seek, first, to ensure that the rules applicable to gas pipelines connecting two or more Member States are also applicable to gas pipelines between a Member State and a third country and, more generally, to establish consistency of the legal framework, and, secondly, to provide legal certainty to market participants.

180 The general objective and the more specific objectives pursued by the contested directive are clearly legitimate objectives. Moreover, reference is made to the establishment and functioning of the internal market in Article 194 TFEU and the objectives of ensuring the functioning of the energy market and the security of supply in the European Union are referred to in that provision.

181 It is in the light of those considerations that it must be assessed whether the contested directive is appropriate for achieving the objectives it pursues and does not exceed the limits of what is necessary to attain them, in that the Nord Stream 2 gas pipeline is the only gas pipeline between a Member State and a third country which cannot benefit either from the exemption provided for in Article 36, as amended, or from the derogation provided for in Article 49a.

(a) Whether the contested directive is appropriate for attaining the objectives pursued in so far as the applicant cannot benefit from either an exemption or a derogation

182 It is necessary to examine, as a first step, whether the contested directive is appropriate for attaining the objectives of legal certainty and consistency of the legal framework and, as a second step, whether that directive is appropriate for preventing distortions of competition and negative impacts on the security of supply.

(1) Whether the contested directive is appropriate for attaining the objectives of legal certainty and consistency of the legal framework

183 In the first place, it must be observed that the contested directive is appropriate for attaining the objective of legal certainty which it pursues.

184 Indeed, in the explanatory memorandum to the proposal for a directive, the Commission explained that EU law did not explicitly set out a legal framework for gas pipelines between a Member State and a third country.

185 In that regard, the extension of the concept of an 'interconnector' to cover gas pipelines to and from third countries, effected by the contested directive by means of the amendment of the concept of 'interconnector' which appears in point 17 of Article 2 of Directive 2009/73, ensures a clear delimitation of the material scope of that latter directive and provides clarification of its territorial scope.

186 First, the contested directive extends the scope of Directive 2009/73 to all gas pipelines between a Member State and a third country, including the Nord Stream 2 gas pipeline, namely existing or future onshore and offshore pipelines.

187 Secondly, recital 9 of the contested directive states that, as regards offshore pipelines, Directive 2009/73 should be applicable in the territorial sea of the Member State where the first interconnection

point with the Member States' network is located.

- 188 Thus, the contested directive has, inter alia, the effect of providing that the obligations laid down by Directive 2009/73 apply to the section of offshore gas pipelines between a Member State and a third country passing through the territorial waters of a Member State, such as the section of the Nord Stream 2 gas pipeline which passes through German territorial waters. The contested directive therefore avoids a legal vacuum in that regard.
- 189 In the second place, the extension of the scope of Directive 2009/73 to cover all pipelines between a Member State and a third country, such as the Nord Stream 2 pipeline, also ensures consistency of the legal framework within the European Union.
- 190 First, as the Commission had already explained, in essence, in the explanatory memorandum to the proposal for a directive, the extension of the scope of Directive 2009/73 to cover gas pipelines between a Member State and a third country ensures that operators of such pipelines are subject to the same legal regime as other market participants to which Directive 2009/73 already fully applies, namely operators of pipelines connecting different Member States or transmission system operators in the Member States.
- 191 Secondly, as the Commission also explained in the explanatory memorandum to the proposal for a directive, the fundamental principles of the regulatory framework established in Directive 2009/73 are reflected in several international agreements concluded between Member States and third countries or between the European Union and third countries, and are systematically applied to onshore pipelines between a Member State and a third country.
- 192 The application of the obligations laid down by Directive 2009/73 to all gas pipelines between a Member State and a third country thus contributes to the consistency of the applicable law between, on the one hand, pipelines between a Member State and a third country which were already subject to those obligations under other legal instruments, such as international agreements, and, on the other hand, pipelines between a Member State and a third country which were not subject to those obligations, such as the Nord Stream 2 pipeline.
- 193 Furthermore, as the Commission explained, in essence, in the explanatory memorandum to the proposal for a directive concerning due regard to the principle of subsidiarity, extending the scope of Directive 2009/73 to all pipelines between a Member State and a third country ensures a uniform application of the obligations laid down in Directive 2009/73 and avoids a fragmented approach based on national measures. In particular, that extension avoids a situation in which an interconnector passing through a number of Member States would be governed by different national regimes, and also makes it possible for the Commission to supervise compliance with the relevant rules.
- 194 Therefore, the contested directive is appropriate for attaining the objectives of legal certainty and consistency of the legal framework which it essentially pursues, in that it extends the scope of Directive 2009/73 and therefore of the obligations which that directive lays down.
- 195 In that regard, the fact that the applicant is the only one not to be able to benefit from either an exemption under Article 36, as amended, or a derogation under Article 49a has no bearing on the appropriateness of the contested directive to attain the objectives which it pursues by extending the scope of Directive 2009/73.

(2) Whether the contested directive is appropriate for preventing distortions of competition and negative impacts on the security of supply

- 196 As a preliminary point, as regards problems in terms of competition and security of supply, which were the reasons for proposing a directive, the Commission explained, inter alia, in the explanatory memorandum to that proposal, that the European Union is largely dependent on imports of gas from third countries and that it is in the interest of the European Union and of gas customers that transparency and competitiveness should also be the rule for gas pipelines from those countries.
- 197 The Commission also justified the proposal for a directive in the light of the subsidiarity principle by the fact that gas pipelines between a Member State and a third country are, in most cases, capable of

having an impact on the internal gas market and security of supply in a number of Member States.

- 198 In the working document accompanying its proposal for a directive, the Commission stated that, in 2016, 70.4% of the European Union's demand for gas had been met by imports and that 87% of those imports were carried out by means of pipelines.
- 199 In that context, it should be noted, in the first place, that, irrespective of the length of the section of the pipeline or pipelines between a Member State and a third country covered by the obligations laid down by Directive 2009/73, the application of those obligations to pipelines between a Member State and a third country, taken as a whole, and to the Nord Stream 2 pipeline in particular, is appropriate for achieving the objective of completing the internal market in natural gas by avoiding distortions of competition and negative impacts on security of supply.
- 200 Directive 2009/73 lays down, *inter alia*, first, an unbundling obligation to separate the transmission system and the transmission system operator, secondly, an obligation to provide third-party access to the system and, thirdly, other obligations relating, *inter alia*, to tariff and non-tariff transparency.
- 201 First, as regards the unbundling obligation laid down in Article 9 of Directive 2009/73, the Court of Justice has already held, in essence, that, in a situation where the natural gas produced outside the European Union by an undertaking is transported within the European Union through a transmission system that is owned by the same undertaking, there is an obvious risk of discriminatory conduct in the operation of that network (see, to that effect, judgment of 2 September 2021, *Commission v Germany* (Transposition of Directives 2009/72 and 2009/73), [C-718/18](#), [EU:C:2021:662](#), paragraph 37).
- 202 In that regard, it is apparent, in essence, from recitals 6, 8 and 22 of Directive 2009/73 that the unbundling obligation prevents dominant gas suppliers from controlling the transmission infrastructure and thus favouring their own supply activity, on the one hand, and that that obligation is an effective and stable means of resolving the inherent conflict of interest and ensuring security of supply, on the other.
- 203 The appropriateness of the unbundling obligation for achieving the objectives pursued by the contested directive is reinforced by the fact that compliance with the unbundling obligation must be verified as part of the certification procedure for the transmission system operator provided for in Article 10 of Directive 2009/73. Certification is a precondition for the owner of a gas pipeline between a Member State and a third country to carry out transactions relating to the transport of gas to the European Union.
- 204 Pursuant to Article 11 of Directive 2009/73, the examination carried out by the competent national regulatory authority in the context of the certification procedure also takes into account the risks that the pipeline concerned may pose to the security of supply in the European Union.
- 205 Under a combined application of Articles 10 and 11 of Directive 2009/73, it may be possible for the certification procedure to be reopened in the event of a failure to comply with the unbundling obligations or a risk to security of supply.
- 206 Secondly, as regards the third-party access obligation laid down in Article 32, it is true that gas pipelines between a Member State and a third country and, in particular, the Nord Stream 2 pipeline do not necessarily have an interconnection point and a request for access from a third party may only be a possibility.
- 207 However, the third-party access obligation laid down in Article 32 of Directive 2009/73 covers existing and future requests for access and has two aspects: the obligation to permit the physical connection to the pipeline and the obligation to permit access to transport capacities under fair conditions.
- 208 It follows that third parties are entitled to request to connect to or access pipeline transmission capacity between a Member State and a third country, as regards the section of those pipelines which falls within the territorial scope of EU law. It is apparent from Article 41(6), (8) and (10) of Directive

- 2009/73 that the conditions for third-party connection or access are to be objective, non-discriminatory and based on proportionate tariffs, approved by the competent regulatory authority.
- 209 Thirdly, as the Commission pointed out in the working document accompanying its proposal for a directive, the extension of the obligations laid down in Directive 2009/73 to cover gas pipelines between a Member State and a third country has the effect of making the requirements of tariff and non-tariff transparency that it lays down applicable to those pipelines. Those transparency requirements are apparent, in particular, from Article 41(1)(a) and (7) of that directive, or from the more general provisions of Article 16(3) of that directive.
- 210 In that regard, in the working document accompanying its proposal for a directive, the Commission explained, *inter alia*, that a lack of transparency in the operation of gas pipelines between a Member State and a third country could be a risk factor from the point of view of security of supply. It inferred therefrom that it was important to ensure that information relating to the operation and maintenance of important infrastructure was made available to the market and could be used by the national and EU authorities concerned.
- 211 It follows from the foregoing that the obligations laid down by Directive 2009/73 relate to the method of operating gas pipelines, their transmission capacity, and the tariff or non-tariff transparency in the context of their operation. Taking into account the purpose of those obligations, the fact that they apply only to a section of gas pipelines between a Member State and a third country in no way affects the appropriateness of those obligations for preventing distortions of competition and negative impacts on security of supply and thus achieving the objectives pursued by the contested directive, as explained by the Parliament, the Council and the Commission in response to measures of organisation of procedure.
- 212 In the second place, the fact, alleged by the applicant, that the contested directive applies only to a fraction of the import capacity of third countries, namely the capacity of the Nord Stream 2 pipeline, is not capable of calling into question the appropriateness of the contested directive for preventing distortions of competition and negative impacts on security of supply.
- 213 In that regard, first, it must be pointed out that the Nord Stream 2 pipeline project was launched in a particular context. Indeed, on several occasions before that project was launched, many Member States had faced gas shortages due to disputes involving the Russian Federation. The three main routes used by gas from that third country were, at the time, the Ukrainian transit system, the Nord Stream 1 pipeline and the Yamal-Europe pipeline, which passes through Belarus.
- 214 Furthermore, the Nord Stream 2 pipeline is chronologically the second offshore pipeline which, after the Nord Stream 1 pipeline, directly connects Russia to Germany. The Nord Stream 2 gas pipeline thus has the effect of doubling the capacity of gas which may be transported using a route situated solely at sea (see paragraph 6 above). The Nord Stream 1 and Nord Stream 2 pipelines therefore have the capacity to transport more than 80% of the gas imported from Russia, given that imports of gas from Russia accounted for 42% of imports into the European Union in 2016.
- 215 It follows, first of all, that the applicant's project is likely to result in a concentration of gas sources. Indeed, it has the potential to strengthen the place of imports from Russia since it contributes to increasing gas import capacity from that third country. Consequently, it is liable to deter the construction or development of infrastructure linking the European Union to other third countries.
- 216 Next, the applicant's project presents the risk of leading to a greater concentration of gas suppliers in the European Union. That project is likely to strengthen Gazprom's position on the EU wholesale and retail markets, as a vertically integrated operator.
- 217 In that regard, it is true that the applicant is neither the shipper of the gas nor a party to the contracts for the supply of gas, in relation to the gas transported through the Nord Stream 2 pipeline. However, the gas shipper and the signatory of the gas supply contracts are either its sole shareholder or a subsidiary of the latter.
- 218 Finally, the applicant's project leads to a concentration of the entry points of gas imported into the European Union and of the transmission routes. That project is likely to result in a concentration,

within a single Member State, of the entry of gas from Russia and to alter the direction of flows of gas within the European Union. That project may therefore lead to the diversion of the existing terrestrial pipelines and routes, which are subject to the obligations laid down by Directive 2009/73, in favour of a corridor represented by the Nord Stream 1 and Nord Stream 2 pipelines. That risk is all the greater since, as is apparent from the documents in the file submitted to the Court, the capacity of the pipelines in service, which already transported gas from Russia, was not fully exploited.

- 219 Secondly, the contested directive applies to all existing and future gas pipelines, whether onshore or offshore.
- 220 In that regard, the fact that pipelines completed before 23 May 2019 may request a derogation under Article 49a and that new gas infrastructure may request an exemption under Article 36, as amended, does not mean that those pipelines automatically obtain a derogation or an exemption. The exemption and derogation provided for in Article 36, as amended, and Article 49a respectively are granted only after a case-by-case examination by the competent authorities. Moreover, they are limited in time and may be made subject to compliance with certain conditions.
- 221 Thirdly, it must be pointed out that the contested directive was adopted in a context in which many pipelines completed between a Member State and a third country, in particular onshore pipelines, were already subject to the obligations laid down by Directive 2009/73 as a result of other legal instruments, such as international agreements.
- 222 Therefore, even if, on the date of adoption and entry into force of the contested directive, the Nord Stream 2 pipeline was the only pipeline which could not benefit from an exemption or a derogation, that directive increases the import capacity from third countries covered by the obligations laid down in Directive 2009/73.
- 223 At the same time, the contested directive ensures a level playing field between, on the one hand, gas pipelines between a Member State and a third country which were already subject to the obligations laid down by Directive 2009/73 and, on the other hand, pipelines between a Member State and a third country which, like the Nord Stream 2 pipeline, will be subject to those obligations as a result of the contested directive.
- 224 It follows from the foregoing that the application of the obligations laid down by Directive 2009/73 to pipelines between a Member State and a third country in general, and to the Nord Stream 2 pipeline in particular, is appropriate for preventing distortions of competition and negative impacts on security of supply.
- 225 That conclusion is not called into question by the other arguments put forward by the applicant.
- 226 The applicant submits that the application of the obligations laid down by Directive 2009/73 to offshore pipelines between a Member State and a third country, and in particular to the Nord Stream 2 pipeline, does not help to achieve an integrated market for the wholesale sale of gas within the European Union.
- 227 In that regard, it must be pointed out that, admittedly, the third countries concerned do not seek to integrate their wholesale markets with each other.
- 228 However, operators in those third countries seek to sell their gas wholesale within the European Union and to transport that gas via pipelines between a Member State and a third country of which at least one section is located within the territory of the European Union.
- 229 The applicant also submits that offshore pipelines between a Member State and a third country and, in particular, the Nord Stream 2 gas pipeline are inherently different from gas transmission networks within the meaning of Directive 2009/73 and bear more similarity to upstream pipelines.
- 230 In that regard, it must be noted that point 2 of Article 2 of Directive 2009/73 defines an ‘upstream pipeline network’ as any pipeline or network of pipelines operated and/or constructed as part of an oil or gas production project, or used to convey natural gas from one or more such projects to a processing plant or terminal or final coastal landing terminal.

- 231 First, the applicant has not demonstrated that gas pipelines between a Member State and a third country, such as the Nord Stream 2 gas pipeline, are designed in the context of a gas production project in particular or are designed to transport natural gas from production sites to a processing plant or terminal or a final coastal landing terminal.
- 232 As regards, in particular, the Nord Stream 2 pipeline, the production fields situated in Russia are connected to that pipeline not directly, but solely via the gas transmission network of the Russian Federation. Thus, the Nord Stream 2 pipeline connects the Russian transmission network and the transmission system of a Member State and is potentially capable of transporting, from its point of departure, gas which has been collected by various means from various sources.
- 233 Secondly, the contested directive is specifically intended to address the problems in terms of competition and security of supply concerns posed by the fact that pipelines between a Member State and a third country, such as the Nord Stream 2 pipeline, are owned, directly or indirectly, by dominant gas suppliers and used solely by those suppliers.
- 234 Furthermore, Directive 2009/73 applies to upstream pipelines in the territory of the European Union and Article 34 guarantees third-party access to those pipelines.
- 235 Consequently, the applicant has not shown that the contested directive and, more specifically, the application of the obligations laid down by Directive 2009/73 to pipelines between a Member State and a third country are not appropriate for attaining all the objectives which it pursues (see paragraphs 179 and 180 above), in that the Nord Stream 2 gas pipeline is the only pipeline between a Member State and a third country which cannot benefit either from the exemption provided for in Article 36, as amended, or from the derogation provided for in Article 49a.

(b) The limits of what is necessary are not exceeded in that the applicant cannot benefit from either an exemption or a derogation

- 236 It is necessary to examine, first, the applicant's argument that the rules governing the first point of entry into the European Union are sufficient and, secondly, the applicant's argument relating to the constraints to which it is subject on the ground that it cannot benefit from an exemption under Article 36, as amended, or from a derogation under Article 49a.

(1) The alleged sufficiency of the rules governing the first point of entry into the European Union

- 237 The applicant submits that the rules governing the entry point to the gas transmission system in the European Union were sufficient to achieve the objectives pursued by the contested directive.
- 238 In that regard, it should be noted that that argument is based on the premiss, rejected in paragraphs 229 to 234 above, that pipelines between a Member State and a third country, such as the Nord Stream 2 pipeline, may be treated in the same way as upstream pipelines.
- 239 Therefore, the applicant has not demonstrated that the rules governing the first point of entry into the European Union made it possible for the objectives pursued by the contested directive to be achieved.
- 240 In any event, it is apparent, on the contrary, from Directive 2009/73 that the obligations laid down therein apply not only to the specific point of entry into a transmission network but, more generally, to transmission systems, transmission system operators or transmission lines. In addition, those obligations, which apply to the transport of gas, make an additional contribution compared with a rule on the supply of gas alone, which is limited to the first point of entry into the European Union.
- 241 Thus, the information available to the Court establishes that the rules on the first point of entry into the European Union alone did not change the situation that prevailed before the adoption of the contested directive and that the applicant was therefore in a position to operate the Nord Stream 2 pipeline and to transport the gas supplied by its sole shareholder without being subject to EU law, which is not the objective pursued by that directive.

(2) The constraints borne by the applicant

- 242 In the first place, it is true that, as is apparent from the explanatory memorandum to the proposal for a directive and the working document accompanying that proposal, the derogation provided for in Article 49a contributes to the proportionality of the contested directive on the ground that it ensures sufficient flexibility to avoid any negative impact of the application of the obligations laid down in Directive 2009/73.
- 243 However, the fact that the applicant cannot benefit either from the exemption provided for in Article 36, as amended, or from the derogation provided for in Article 49a does not lead to the conclusion that the contested directive exceeds the limits of what is necessary in order to attain the objectives which it pursues.
- 244 First, the applicant's situation is explained by the fact that it decided to invest and to continue to make investments in the Nord Stream 2 pipeline in a context in which it was foreseeable that the obligations laid down by Directive 2009/73 would apply to all gas pipelines between a Member State and a third country, including the Nord Stream 2 pipeline (see paragraphs 54 to 94 above).
- 245 Secondly, the fact that the applicant cannot benefit from the Article 49a derogation does not result in an unjustified difference in treatment to its detriment. Since the Nord Stream 2 pipeline was not completed before 23 May 2019, the applicant was not in a situation comparable to the pipelines completed before that date (see paragraphs 122 to 143 above). In any event, any difference in treatment was objectively justified in the light of Article 49a's objective of taking account of the lack of specific EU rules before the date of entry into force of the contested directive (see paragraphs 150 to 168 above).
- 246 In the second place, the fact that the applicant cannot operate the Nord Stream 2 pipeline as it had initially envisaged does not demonstrate that the contested directive imposes disproportionate constraints on it.
- 247 First, Directive 2009/73 provides for a choice between three unbundling models which have all been transposed into German law, namely the model of full ownership unbundling, the independent system operator model and the independent transmission system operator model.
- 248 It should be added that the adoption of the contested directive was foreseeable by the applicant and that the Member States were under an obligation to transpose that directive by 24 February 2020 at the latest. The applicant therefore had a sufficiently long period of time within which to foresee and anticipate the certification obligation and the related procedure.
- 249 Secondly, it is true that the obligation to provide access to the Nord Stream 2 pipeline to third parties prevents the applicant from reserving 100% of the transport capacity of that gas pipeline in the long term for the benefit of a subsidiary of its sole shareholder.
- 250 However, it is not apparent from the extracts from the Gas Transportation Agreement produced by the applicant that that agreement provided for a capacity reservation of 100%. In any event, the applicant acknowledges that, even if the obligations laid down in Directive 2009/73 are applicable to it, it retains the right to reserve 80% of the capacity of the Nord Stream 2 pipeline for a maximum period of 15 years.
- 251 Thirdly, as regards the impact of the tariff regulation on its situation, the applicant's argument is based on the assumption, which is unsubstantiated but beneficial to third parties, that the Federal Network Agency (Bundesnetzagentur) will approve tariffs considerably lower than the tariff agreed in the Gas Transportation Agreement.
- 252 Furthermore, the tariff regulation provided for by Directive 2009/73 does not prevent the applicant from operating the Nord Stream 2 pipeline in economic conditions and obtaining an appropriate return on its investments (see paragraph 109 above).
- 253 Fourthly, the applicant submits that the application of the obligations laid down in Directive 2009/73 will have significant consequences for its situation owing to the terms of the Gas Transportation Agreement and the financing agreements which it concluded before the adoption of the contested directive.

- 254 However, the applicant concluded the Gas Transportation Agreement with a subsidiary of its sole shareholder and it has not shown that it is impossible for it to renegotiate that agreement.
- 255 It is true that the financing agreements are closely linked to the Gas Transportation Agreement. However, half of the financing guaranteed by those financing agreements was provided by the applicant's sole shareholder.
- 256 Fifthly, the applicant has not demonstrated the financial consequences of applying the obligations laid down by Directive 2009/73 to the Nord Stream 2 pipeline.
- 257 In that regard, given that applying the obligations laid down by Directive 2009/73 to the Nord Stream 2 pipeline does not prevent the applicant from operating that pipeline in economic conditions and obtaining an appropriate return on its investments, the figures put forward by the applicant as to the extent of its investments at the date of adoption of the contested directive or the figure of EUR 8 billion put forward at the hearing do not make it possible for the Court to assess those financial consequences.
- 258 Those financial consequences clearly cannot be assessed having regard to the level of investments made. Those consequences correspond solely to the costs that the applicant will have to bear in order to comply with the contested directive and, inter alia, to the possible loss of profitability resulting from the application of the obligations laid down by Directive 2009/73 to the Nord Stream 2 pipeline.
- 259 However, the applicant has not provided those figures.
- 260 In the third place, the contested directive does not preclude the Commission from negotiating an international agreement with the Russian Federation in order to address the specific situation of the Nord Stream 2 pipeline.
- 261 Consequently, first, the applicant has not shown that obligations are imposed on it by the contested directive which are not necessary in the light of the objective of completing the internal market.
- 262 Secondly, the applicant has not shown that the disadvantages, for it or for the European Union and its Member States, resulting from the application of the obligations laid down by Directive 2009/73 are manifestly disproportionate to the importance of the objectives pursued and the advantages derived by the European Union from those obligations.
- 263 In the light of the foregoing and having regard to the legislature's margin of discretion (see paragraphs 34 to 37 above), the applicant has not established that the application of the obligations laid down by Directive 2009/73 to pipelines between a Member State and a third country, in general, and to the Nord Stream 2 pipeline, in particular, is manifestly inappropriate for attaining the objectives pursued by the contested directive.
- 264 The second plea in law is therefore rejected.

5. *The fourth plea in law, alleging a misuse of powers*

- 265 According to the applicant, it is apparent from the second plea in law, which alleges an infringement of the principle of proportionality, that the contested directive is unable to contribute effectively to achieving its stated objectives and, in any event, does not contribute to the achievement of those objectives.
- 266 On the contrary, according to the applicant, the actual objective of the contested directive is simply to disadvantage and discourage the Nord Stream 2 project, seemingly in order to protect the transportation of gas through Ukraine and eastern European Member States of transit, such as Poland, Slovakia, Czech Republic, Hungary and Romania, and in order to pursue certain objectives related to the European Union's common foreign and security policy. In that regard, the applicant relies on statements by the Commission, the Council and the Parliament, letters from a group of Member States opposing the project, a Commission information sheet accompanying the proposal for a directive and, finally, the fact that the contested directive was proposed solely in order to circumvent the legal difficulties raised by the request for a mandate referred to in paragraph 78 above.

- 267 The Parliament and the Council, supported by the Republic of Estonia, the Republic of Lithuania and the Commission, dispute the applicant's arguments.
- 268 In that regard, a measure is vitiated by misuse of power only if it appears, on the basis of objective, relevant and consistent evidence to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaties for dealing with the circumstances of the case (see judgment of 16 April 2013, *Spain and Italy v Council*, [C-274/11](#) and [C-295/11](#), [EU:C:2013:240](#), paragraph 33 and the case-law cited).
- 269 In the present case, it should be recalled that the contested directive is based on Article 194 TFEU and that the applicant does not claim that the legal base of that directive is incorrect.
- 270 The mere fact that the contested directive adversely affects the Nord Stream 2 pipeline cannot, in itself, be interpreted as meaning that the legislature's intention was to pursue an objective different from those referred to in Article 194(1) TFEU.
- 271 As is apparent from the examination of the second plea, which alleges infringement of the principle of proportionality, the applicant has not established that the contested directive was adopted in order to pursue objectives other than those referred to in that directive or that the intention of placing the Nord Stream 2 pipeline at a disadvantage was an objective pursued by the contested directive.
- 272 On the other hand, the aim of the contested directive is indeed to address wider problems which the applicant's project, amongst other circumstances, had helped to bring to light.
- 273 The contested directive deals with obstacles to the completion of the internal market in natural gas, namely, in essence, one of the objectives set out in Article 194(1) TFEU. To that end, that directive achieves the more specific objectives of legal certainty, consistency of the legal framework and prevention of distortions of competition and adverse impacts on the security of supply by extending the obligations laid down in Directive 2009/73 to all gas pipelines to and from third countries, irrespective of whether they are existing or future, onshore or offshore pipelines.
- 274 Furthermore, the applicant has not shown that the contested directive, which does not prevent it from operating its pipeline in economic conditions and obtaining an appropriate return on its investments, exceeds the limits of what is necessary to achieve the objectives pursued in that it cannot benefit from the derogation provided for in Article 49a.
- 275 Finally, without prejudice to the division of competences between the European Union and the Member States, the contested directive seeks to draw the appropriate consequences from the applicability of the principles of Directive 2009/73 to existing and future gas pipelines for existing or future international agreements concluded or to be concluded between the European Union or a Member State, on the one hand, and a third country, on the other hand.
- 276 The applicant's claim that the purpose of the contested directive is to circumvent the legal difficulties raised by the request for a mandate sent by the Commission to the Council in order to be authorised to negotiate an international agreement with the Russian Federation concerning the Nord Stream 2 pipeline is also unfounded.
- 277 As is apparent from the explanatory memorandum to the proposal for a directive, the contested directive does not replace a Council decision authorising the Commission to negotiate such an agreement. The contested directive and the negotiation of an international agreement by the Commission are complementary instruments.
- 278 Furthermore, the statements and adopted positions relied on by the applicant were specifically based on one or more of the objectives referred to in Article 194 TFEU and pursued by the contested directive.
- 279 The fourth plea in law is therefore rejected.

6. *The fifth plea in law, alleging an infringement of an essential procedural requirement*

- 280 The fifth plea in law relied on by the applicant comprises three parts.
- 281 By the first part, the applicant refers to the failure to consult widely, in accordance with Article 2 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and the FEU Treaty. Moreover, the Commission failed to carry out a quality check of the existing legislation. According to the applicant, the proposal for a directive is not based on an established and consistent practice of applying the obligations laid down in Directive 2009/73 vis-à-vis third countries.
- 282 By the second part, the applicant invokes the lack of an impact assessment. It argues that such an assessment was clearly necessary and was an essential precondition for the proposal for a directive to be valid owing, in essence, to its considerable effects, in particular on the applicant.
- 283 The failure to carry out extensive consultations and an impact assessment constitutes a breach of essential procedural requirements.
- 284 By the third part, the applicant submits that the true objectives of the proposal for a directive and its implications were not clarified, in particular by means of an impact assessment. Accordingly, a legally useful consultation could not have taken place, contrary to Protocol No 1 on the Role of National Parliaments in the European Union, annexed to the EU Treaty and to the FEU Treaty.
- 285 Furthermore, the proposal for a directive did not include any substantive justifications in accordance with Article 5 of Protocol No 2 with regard to the principles of subsidiarity and proportionality.
- 286 The Parliament and the Council, supported by the Republic of Estonia, the Republic of Lithuania, the Republic of Poland and the Commission, dispute the applicant's arguments.
- 287 As a preliminary point, it must be pointed out that, even where the EU judicature carries out a judicial review of limited scope owing to the EU legislature's broad discretion, such a review requires that the EU institutions which have adopted the act in question are able to show, before the EU courts, that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate. It follows that those institutions must at the very least be able to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended (see, to that effect, judgment of 3 December 2019, *Czech Republic v Parliament and Council*, [C-482/17](#), [EU:C:2019:1035](#), paragraph 81).
- 288 Furthermore, it is apparent, first, from Protocol No 2 and, in particular, from Article 2 thereof and, secondly, from the Interinstitutional Agreement, of 13 April 2016, between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making ([OJ 2016 L 123, p. 1](#)), that wide consultations, *ex post* evaluations of existing legislation and impact assessments are intended to ensure the quality of legislation and to enable the various actors involved in the legislative procedure to make an informed assessment having regard, according to their respective competences, to the principles of subsidiarity and/or proportionality.
- 289 In the present case, first of all, it is common ground that the Commission did not, on the one hand, undertake extensive consultations relating to the specific subject matter of the proposal for a directive before submitting that proposal or, on the other hand, justify its approach on the basis of exceptional urgency.
- 290 Next, in the explanatory memorandum to the proposal for a directive, the Commission considered that an *ex post* evaluation process separate from the existing legislation was not necessary.
- 291 Finally, in the explanatory memorandum to the proposal for a directive and in the working document accompanying that proposal, the Commission explained that its proposal did not require a detailed impact assessment.
- 292 In order to assess whether the procedure followed in the present case is lawful, it is necessary to deal with the three parts of the fifth plea together and to examine, first, the factors taken into account by

the Commission in drawing up the proposal for a directive and then provided to the other actors involved in the legislative process and, secondly, the additional information available to the Parliament and the Council at the time when they examined that proposal for a directive and then adopted the contested directive.

(a) *The factors taken into account by the Commission in drawing up the proposal for a directive*

293 In the first place, it must be borne in mind that the proposal for a directive followed political directions which were clearly expressed, sometimes on several occasions, by the EU institutions and the European Council, as is apparent from paragraphs 56 to 72 above. In addition, those political directions were reflected in the Commission's request to the Council for a mandate, and then in the proposal for a directive (see paragraphs 78 to 82 above).

294 In the second place, first of all, the contested directive resulted in the extension of the principles and mechanisms which, in accordance with Directive 2009/73, were already applicable to gas pipelines which crossed or spanned the border between two Member States, for the sole purpose of connecting the transmission systems of those Member States.

295 Next, as regards gas pipelines between a Member State and a third country, it should be noted that the Commission's proposal for a directive had been preceded by the adoption of Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012 ([OJ 2017 L 99, p. 1](#)).

296 In the course of the procedure preceding the adoption of Decision 2017/684, the Commission had taken numerous steps, organised numerous meetings and held a public consultation between July and October 2015. Furthermore, it had carried out an impact assessment from which it is apparent that it had a thorough knowledge of the issues addressed in the proposal for a directive. The Commission had a detailed knowledge of the features of the existing gas pipelines to which the proposed directive was likely to apply. In the course of its examination of the intergovernmental agreements, which had been notified to it by the Member States under Decision No 994/2012, the Commission had been in a position to analyse the effect of making gas pipelines between a Member State and a third country subject to the obligations laid down by Directive 2009/73.

297 In that regard, it is true that, of the approximately 50 intergovernmental agreements relating to the supply, importation or transportation of energy products, which had been notified to it pursuant to Decision No 994/2012, the Commission had expressed doubts as to the compatibility of 17 agreements with the 'Third Energy Package' or with competition law.

298 However, six of those agreements concerned the South Stream project, which was abandoned.

299 Moreover, the requirements laid down by Directive 2009/73 were contained in numerous other intergovernmental agreements. Those requirements were systematically applied to onshore pipelines between a Member State and a third country.

300 In addition, some third countries were already obliged to comply with EU law owing to their membership of the European Economic Area or the Energy Community.

301 It was in that context that, in the explanatory memorandum to the proposal for a directive, the Commission emphasised, in essence, that there was a practice of applying the obligations laid down by Directive 2009/73 in relation to third countries, notably by means of intergovernmental agreements.

302 Thus, first, prior to adopting the proposal for a directive, the Commission had already conducted consultations and carried out an impact assessment on issues closely related to those addressed in that proposal. Secondly, the Commission was justified in relying on an existing practice consisting of applying the obligations laid down by Directive 2009/73 to pipelines between a Member State and a third country.

- 303 In the third place, as is apparent from the examination of the second plea, alleging an infringement of the principle of proportionality (see paragraphs 181 to 263 above), the working document accompanying the proposal for a directive contained a presentation of the problems raised by the pre-existing situation and an assessment of the legal and economic impact of the proposal for a directive.
- 304 Thus, it is true that the proposal for a directive was not accompanied by a separate assessment of the quality of the existing legislation and a detailed impact assessment of the proposed amendments.
- 305 However, the Commission was justified in considering that it was sufficiently informed, in the light of the context of the proposal for a directive, of the subject matter of the proposed amendments to the existing legislation, of the consultations and the impact assessments which it had previously carried out and, finally, of the assessment of the impact of its proposal set out in the working document accompanying that proposal.
- 306 For the same reasons, the Committee of the Regions, the European Economic and Social Committee (EESC), the national parliaments and the Parliament and the Council had sufficient information on the basis of which to make an assessment of the proposal for a directive within the framework of their respective powers.
- 307 The finding set out in the preceding paragraph is not called into question by the applicant's arguments based, first, on the opinions issued by the Committee of the Regions and by the EESC and, secondly, on the fact that the information communicated to the national parliaments did not enable them to deliver an opinion in full knowledge of the facts and therefore to exercise their power of review.
- 308 First, it should be noted that, admittedly, in its opinion on the proposal for a directive, the Committee of the Regions mentioned the importance of an impact assessment, in view of the Interinstitutional Agreement on Better Law-Making. For its part, the EESC pointed out that the absence of an impact assessment was regrettable.
- 309 However, those two advisory bodies did not indicate that they were unable to provide an opinion on the proposal for a directive. Those bodies supported the proposal for a directive while recommending some amendments that they considered necessary. A reading of the opinions adopted by those two bodies shows that they were sufficiently informed of the problems which the proposal for a directive sought to resolve and of its impact, in particular on investment in existing or future infrastructure. The EESC also pointed out that some of the factual elements, which supported the arguments put forward in favour of the proposed amendments, were contained in the working document accompanying the proposal for a directive or in the in-depth analyses carried out by the Commission, such as the impact assessment of Directive 2009/73. The EESC also stressed that it was clear that the proposal was intended to establish a possibility of a major intervention which could limit the increased dependence on Russian gas, and thus stimulate diversification of supply.
- 310 Secondly, as regards the national parliaments, it must be observed that, as the Council submits, the protocols relied on by the applicant confer a role on national parliaments only as regards compliance with the principle of subsidiarity.
- 311 Therefore, in so far as the applicant maintains that the national parliaments were not 'sufficiently' consulted with regard to observance of the principle of proportionality, that argument must be rejected.
- 312 Next, as regards the applicant's arguments directed against the reasons for the proposal for a directive having regard to the principle of subsidiarity, it should be observed that the explanatory memorandum to that proposal clearly sets out the reasons why action at EU level was necessary (see paragraphs 193 and 197 above).
- 313 The working document accompanying the proposal for a directive contains additional explanations as to the need for legislative action at EU level.
- 314 Accordingly, the proposal for a directive was sufficiently reasoned with regard to the principle of subsidiarity.

315 The content of the reasoned opinion issued by the French Senate confirms that, on the basis of the information available to them, the national parliaments were put in a position to adopt a position on compliance with the principle of subsidiarity. Moreover, during the proceedings before the General Court, the Council produced the opinions of three other national parliaments in which those parliaments did not raise any objections with regard to that principle.

316 Consequently, the absence of consultations specifically on the proposal for a directive and the absence of a separate and detailed assessment of the quality of the existing legislation and of the impact of the proposal for a directive before its submission are not capable of affecting the legality of the contested directive.

317 That is all the more so since the Parliament and the Council gathered additional information after the proposal for a directive had been submitted (see paragraph 318 et seq. below).

(b) *The additional information gathered after the proposal for a directive was submitted*

318 When the contested directive was adopted, the Parliament and the Council were in possession not only of the information referred to in paragraphs 293 to 303 above, but also of information obtained after the proposal for a directive had been submitted.

319 Indeed, the Commission conducted a public consultation on the proposal for a directive between 6 December 2017 and 31 January 2018. In response to that consultation, the Commission received 37 contributions from, inter alia, public authorities, non-governmental organisations, professional associations and private undertakings such as the applicant. In that regard, the Council states, without being contradicted by the applicant, that that feedback was taken into account during its examination of the legislative file.

320 Furthermore, a public hearing on the ‘revision of the Gas Directive’ was organised by the Parliament on 21 February 2018.

321 Finally, it is apparent from the documents produced by the applicant that several studies and publications relating to the proposal for a directive were available to the legislature.

322 In the light of the foregoing, the applicant has not shown that the absence of extensive consultations specifically on the proposal for a directive prior to its adoption and of a separate assessment of the existing legislation and of a detailed impact assessment is capable of affecting the legality of the contested directive.

323 In so far as the applicant claims that the irregularities of which it complains led the legislature to misuse its powers or infringe the principles of equal treatment and proportionality, that line of argument has already been rejected in paragraphs 113 to 279 above.

324 As regards the alleged infringement of the principle of subsidiarity, the applicant has not put forward any evidence capable of demonstrating such an infringement. Furthermore, in the light of Article 7 of Protocol No 2, the reasoned opinion issued by the French Senate, which was of an isolated nature, did not call for a specific answer from the legislature.

325 The fifth plea in law must therefore be rejected, as must, therefore, the head of claim seeking the annulment of Article 49a in its entirety.

C. The request for measures of organisation of procedure

326 By separate document lodged on 29 November 2019, the applicant requested the Court to adopt measures of organisation of procedure requiring the Council to produce the unredacted versions of 25 documents, which contained, inter alia, the observations submitted by the Member States on the proposal for a directive and to which one of its employees had obtained only partial access on the basis of 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](#)). That request also covered two other documents to which access had been refused to that employee.

- 327 In that regard, following the order of 17 February 2023, *Nord Stream 2 v Parliament and Council* (T-526/19 RENV, not published, EU:T:2023:85), there is no longer any need to adjudicate on the request for measures of organisation of procedure in so far as it seeks the production of unredacted versions of the observations of the Federal Republic of Germany of 11 December 2017 and 21 January 2019.
- 328 As regards the other documents covered by the applicant's request, it should be noted, first, that that request seeks to demonstrate that the applicant's specific status was at the heart of the grounds for the contested directive and that that directive targeted the applicant.
- 329 In that regard, taking account of the reasons on the basis of which the fourth plea, alleging misuse of powers, was rejected (see paragraphs 269 to 278 above), the fact that the Member States took the applicant's situation into account and that that fact may be supported by a greater number of documents than those already in the applicant's possession would not be capable of demonstrating a misuse of powers.
- 330 Secondly, in so far as the request for measures of organisation of procedure also seeks to demonstrate the merits of the other pleas relied on by the applicant and, in particular, infringement of the principle of equal treatment, it must be held that the applicant holds and produced before the Court a not insignificant number of documents relating to the discussions which took place within the Council during the procedure for the adoption of the contested directive and that, on the basis of those documents, the applicant was in a position to put forward its arguments.
- 331 Moreover, despite the fact that, after the application was lodged, the applicant, through its employee, obtained full access from the Council to 23 documents which it had requested and partial access to 25 other documents, the applicant did not, in the reply, make use of those documents in support of its various pleas. The applicant made use of only three of those documents, in order to argue that Article 36, as amended, and Article 49a were not severable from the remainder of the contested directive (see paragraph 19 above).
- 332 Thirdly, it is apparent from the examination of the first, second and third pleas in law relied on by the applicant that the legislature did not infringe the principles of equal treatment, proportionality and legal certainty when it decided that the derogation provided for in Article 49a was applicable to pipelines completed before 23 May 2019.
- 333 In that regard, the fact that, in the context of the open and evolving exchanges which took place during the legislative process, certain Member States, including the Federal Republic of Germany, expressed doubts as to the legality of various versions of the proposal for a directive in the light of the general principles of law invoked by the applicant does not mean that that directive is necessarily unlawful. Moreover, it is clear from a document produced by the Council that 27 Member States voted in favour of the directive and that one Member State, which is not the Federal Republic of Germany, abstained.
- 334 In the light, first, of the reasons on which the request for measures of organisation of procedure is based, secondly, of the documents to which the applicant had access and of the use which it has made of them and, thirdly, of the grounds upon which the various pleas in law relied on by the applicant have been rejected, the request for measures of organisation of procedure relating to the documents must be rejected in respect of which that request has not become devoid of purpose.
- 335 In the light of all of the foregoing, the action is dismissed in its entirety.

Costs

- 336 In accordance with Article 195 of the Rules of Procedure of the General Court, it is for the General Court to rule in the present judgment, first, on all the costs relating to the proceedings instituted before it, namely the proceedings in Cases T-526/19 and T-526/19 RENV, and, secondly, on the costs relating to the proceedings on the appeal, namely the proceedings in Case C-348/20 P.

- 337 In that regard, since the Parliament and the Council have, in essence, been unsuccessful in the appeal proceedings, they must be ordered to pay the costs relating to Cases T-526/19 and C-348/20 P, in accordance with the form of order sought by the applicant.
- 338 Since the applicant has been unsuccessful in the present case, except as regards the Council's cross-claim that certain documents should be removed from the file (see paragraph 327 above), it must be ordered to pay the costs relating to that case, in accordance with the form of order sought by the Parliament and the Council.
- 339 Furthermore, pursuant to Article 138(1) of the Rules of Procedure, 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.

On those grounds,

THE GENERAL COURT (Fifth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**
2. **Orders the European Parliament and the Council of the European Union to bear their own costs and to pay those incurred by Nord Stream 2 AG in Cases T-526/19 and C-348/20 P;**
3. **Orders Nord Stream 2 to bear its own costs and to pay those incurred by the Parliament and the Council in Case T-526/19 RENV;**
4. **Orders the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland and the European Commission to bear their own costs.**

Van der Woude

Svenningsen

Mac Eochaidh

Martín y Pérez de Nanclares

Stancu

Delivered in open court in Luxembourg on 27 November 2024.

V. Di Bucci

S. Papasavvas

Registrar

President

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(*1) Language of the case: English.

(1) Confidential information redacted.