Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

12 July 2022 *

(Appeal – Energy – Internal market in natural gas – Directive 2009/73/EC – Directive (EU) 2019/692 – Extension of the application of Directive 2009/73 to gas lines to or from third countries – Fourth paragraph of Article 263 TFEU – Action for annulment – Condition that an applicant must be directly concerned by the measure that forms the subject matter of its action – Lack of discretion as to the obligations imposed on an applicant – Condition that an applicant must be individually concerned by the measure that forms the subject matter of its action – Arrangements for the exemptions and derogations excluding the appellant as the sole operator from their benefit – Request that documents be removed from the case file – Rules on the production of evidence before the EU Courts – Documents internal to the European Union institutions)

In Case C-348/20 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 28 July 2020,

Nord Stream 2 AG, established in Zug (Switzerland), represented, for the written and oral procedure, by L. Van den Hende, advocaat, L. Malý, solicitor-advocate, J. Penz-Evren, Rechtsanwältin, and by M. Schonberg, solicitor-advocate,

appellant,

the other parties to the proceedings being:

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

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

defendants at first instance,

supported by:

Republic of Estonia, represented by N. Grünberg, acting as Agent,

Republic of Latvia, represented initially by K. Pommere and V. Soņeca, and subsequently by K. Pommere, acting as Agents,

* Language of the case: English.

Republic of Poland, represented by B. Majczyna, acting as Agent,

interveners in the appeal,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, A. Prechal (Rapporteur), K. Jürimäe, C. Lycourgos, S. Rodin, I. Jarukaitis and N. Jääskinen, Presidents of Chambers, J.-C. Bonichot, M. Safjan, F. Biltgen, P.G. Xuereb, N. Piçarra, L.S. Rossi and A. Kumin, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2021,

gives the following

Judgment

1 By its appeal, Nord Stream 2 AG seeks to have set aside the order of the General Court of the European Union of 20 May 2020, *Nord Stream 2* v *Parliament and Council* (T-526/19, EU:T:2020:210) ('the order under appeal'), in so far as it, first, rejected as inadmissible its action for 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 directive at issue') and, second, ordered, inter alia, removal from the file of certain documents produced by the appellant.

Legal context

The directive at issue and Directive 2009/73/EC

2 The directive at issue amended 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). Recitals 1 to 4 and 9 of the directive at issue are worded as follows:

'(1) The internal market in natural gas, which has been progressively implemented throughout the [European] Union since 1999, aims to deliver real choice for all final customers in the Union, be they citizens or businesses, new business opportunities, fair conditions of competition, competitive prices, efficient investment signals and a higher standard of service, and to contribute to security of supply and sustainability.

(2) Directives 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),] and [2009/73] have made a significant contribution towards the creation of the internal market in natural gas.

(3) This Directive seeks to address obstacles to the completion of the internal market in natural gas which result from the non-application of Union market rules to gas transmission lines to and from third countries. The amendments introduced by this Directive are intended to ensure that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the Union, to gas transmission lines to and from third countries. …

(4) To take account of the lack of specific Union rules applicable to gas transmission lines to and from third countries before the date of entry into force of this Directive, Member States should be able to grant derogations from certain provisions of Directive [2009/73] to such gas transmission lines which are completed before the date of entry into force of this Directive. …

…

(9) The applicability of Directive [2009/73] to gas transmission lines to and from third countries remains confined to the territory of the Member States. As regards offshore gas transmission lines, 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.

…'

3 In accordance with Article 1(1) thereof, Directive 2009/73, as amended by the directive at issue ('Directive 2009/73') lays down the common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organisation and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas and the operation of systems.

4 Recital 13 of Directive 2009/73 states that 'the setting up of a system operator or a transmission operator that is independent from supply and production interests should enable a vertically integrated undertaking to maintain its ownership of network assets whilst ensuring an effective separation of interests, provided that such independent system operator or such independent transmission operator performs all the functions of a system operator and detailed regulation and extensive regulatory control mechanisms are put in place'.

5 Since the entry into force of the directive at issue, Article 2(17) provides that the concept of 'interconnector' covers not only 'a 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 henceforth also 'a 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'.

6 Article 9 of Directive 2009/73, entitled, 'Unbundling of transmission systems and transmission system operators', provides:

'1. Member States shall ensure that from 3 March 2012:

(a) each undertaking which owns a transmission system acts as a transmission system operator;

(b) the same person or persons are entitled neither:
(i) directly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor
(ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply;

(c) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply; and

(d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.

…

8. Where on 3 September 2009 the transmission system belonged to a vertically integrated undertaking, a Member State may decide not to apply paragraph 1. As regards the part of the transmission system connecting a Member State with a third country between the border of that Member State and the first connection point with that Member State's network, where on 23 May 2019 the transmission system belongs to a vertically integrated undertaking, a Member State may decide not to apply paragraph 1.

In such case, the Member State concerned shall either:

(a) designate an independent system operator in accordance with Article 14, or

(b) comply with the provisions of Chapter IV.

9. Where on 3 September 2009 the transmission system belonged to a vertically integrated undertaking and arrangements are in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter IV, a Member State may decide not to apply paragraph 1 of this Article.

As regards the part of the transmission system connecting a Member State with a third country between the border of that Member State and the first connection point with that Member State's network, where on 23 May 2019 the transmission system belongs to a vertically integrated undertaking and arrangements are in place which guarantee more effective independence of the

transmission system operator than the provisions of Chapter IV, that Member State may decide not to apply paragraph 1 of this Article.'

7 Article 32 of that directive, entitled 'Third-party access', provides in paragraph 1:

'Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and [liquid natural gas (LNG)] facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those tariffs – and the methodologies, where only methodologies are approved – are published prior to their entry into force.'

8 Article 36 of the same directive, entitled, 'New infrastructure', provides in paragraph 1, that major new gas infrastructure, namely interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of, inter alia, Articles 9 and 32 under the conditions that it lays down, which include, in point (b), that the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted. Furthermore, since the entry into force of the directive at issue, Article 36(1)(e) of Directive 2009/73 provides that the exemption granted pursuant to that provision to new infrastructures must not, inter alia, be detrimental to the 'security of supply of natural gas in the Union'.

9 Article 41(6), 8 and 10 of Directive 2009/73, that article being entitled 'Duties and powers of the regulatory authority', provides:

'6. The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

(a) connection and access to national networks, including transmission and distribution tariffs, and terms, conditions and tariffs for access to LNG facilities. Those tariffs or methodologies shall allow the necessary investments in the networks and LNG facilities to be carried out in a manner allowing those investments to ensure the viability of the networks and LNG facilities;

…

(c) access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.

…

8. In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.

…

10. Regulatory authorities shall have the authority to require transmission, storage, LNG and distribution system operators, if necessary, to modify the terms and conditions, including tariffs and methodologies referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner. …'

10 Article 49a of that directive, entitled 'Derogations in relation to transmission lines to and from third countries' was inserted by the directive at issue and provides:

'1. In respect of gas transmission lines between a Member State and a third country completed before 23 May 2019, the Member State where the first connection point of such a transmission line with a Member State's network is located may decide to derogate from Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) for the sections of such gas transmission line located in its territory and territorial sea, for objective reasons such as to enable the recovery of the investment made or for reasons of security of supply, provided that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas, or to security of supply in the Union.

The derogation shall 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.

…

3. Decisions pursuant to paragraphs 1 and 2 shall be adopted by 24 May 2020. Member States shall notify any such decisions to the Commission and shall publish them.'

11 In accordance with Article 2(1) of the directive at issue, Member States were required 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 of Directive 2009/73.

Regulation (EC) No 1049/2001

12 Pursuant to Article 4(1) and (2) 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):

'1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

…

– international relations,

…

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

…

– court proceedings and legal advice,

…

unless there is an overriding public interest in disclosure.'

Background to the dispute

13 The background to the dispute, as set out in paragraphs 1 to 11 of the order under appeal, may, for the purposes of the present proceedings, be summarised as follows.

14 The appellant, Nord Stream 2, is a company incorporated under Swiss law whose sole shareholder is the Russian public joint stock company Gazprom. It is responsible for the planning, construction and operation of the offshore gas pipeline Nord Stream 2, 50% of whose funding, which amounts to EUR 9.5 billion, is provided by the companies ENGIE SA, OMV AG, Royal Dutch Shell plc, Uniper SE and Wintershall Dea GmbH.

15 In January 2017, works began to recover, in concrete, pipes intended for use as part of that offshore pipeline, final delivery of which was to take place in September 2018.

16 That offshore pipeline, which consists of two gas transmission lines, will ensure the flow of gas between Vyborg (Russia) and Lubmin (Germany). Once it reaches German territory, the gas conveyed by that offshore pipeline is transferred into the onshore gas pipeline ENEL and the onshore gas pipeline EUGAL.

17 On 17 April 2019, acting on the proposal of the Commission (proposal for a directive of the European Parliament and the Council amending Directive 2009/73 concerning common rules for the internal market in natural gas COM(2017) 660 final), the European Parliament and the Council of the European Union adopted the directive at issue, which entered into force on the 20th day following that of its publication, that is, 23 May 2019. On that date, according to the statements made by the appellant, works to recover, in concrete, the Nord Stream 2 pipelines were 95% complete, while 610 km and 432 km, respectively, of the two lines of the pipeline had been laid at the bottom of the territorial sea and/or the exclusive economic zones of Germany, Finland, Russia and Sweden.

The procedure before the General Court

18 By application lodged at the Registry of the General Court on 26 July 2019, the appellant brought an action seeking the annulment of the directive at issue in its entirety, which raised six pleas in law.

19 By separate documents lodged at the Court Registry on 10 October and 14 October 2019 the Parliament and the Council, respectively, each raised a plea of inadmissibility against the application for the annulment of the directive at issue.

20 In addition, by a separate document lodged at the Court Registry on 11 October 2019, the Council asked the General Court to order that certain documents should not form part of the case file or, regarding those documents produced by the appellant, that they be removed from that file. In the context of that application for a decision on a procedural issue, the Council indicated that it had received several requests, pursuant to Regulation No 1049/2001, for access to documents relating to the negotiations with a view to reaching an agreement between the European Union and the Russian Federation and the legislative procedure for adopting the directive at issue, that, as at the date the application for a decision on a procedural issue was submitted, it had not granted access to any of those documents, and that, on the date the present action was brought by the appellant, no objection regarding the refusal to grant those requests for access to documents had been raised before the General Court.

21 By separate document lodged at the Court Registry on 29 November 2019, the appellant requested that the General Court adopt a measure of organisation of procedure ordering the production of certain documents held by the Council.

22 On 17 January 2020 the Parliament and the Council filed their observations regarding that request for a measure of organisation of procedure, the Council also requesting, on that occasion, that certain documents annexed by the appellant to the request referred to in the preceding paragraph be removed from the case file.

The order under appeal

The applications for the removal of documents and for a measure of organisation of procedure

23 By the order under appeal, the General Court, first, in respect of the application for the removal of documents made by the Council on 11 October 2019, ordered that the documents produced by the appellant in Annexes A.14 (recommendation adopted by the Commission on 9 June 2017 for a Council 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 Commission recommendation') and O.20 (opinion of the Council's legal service of 27 September 2017 on that recommendation addressed to the permanent representatives of the Member States of the European Union to that institution, ('the opinion of Council's legal service')) should be removed from the file, and that there was no need to take account of the passages of the application and annexes in which extracts of those documents are reproduced. In respect, secondly, of the request for the removal of documents, made by the Council on 17 January 2020 in its observations on the application for a measure of organisation of procedure made by the appellant, the General Court ordered that the two documents produced by the appellant in annexes M.26 and M.30 (documents containing observations of the Federal Republic of Germany made in the context of the legislative procedure for adopting the directive at issue ('observations of the Federal Republic of Germany')) be removed from the file.

24 In that regard, first of all, the General Court held, in essence, in paragraphs 38 to 45 of the order under appeal, relying in particular on the order of 14 May 2019, *Hungary* v *Parliament* (C-650/18, not published, EU:C:2019:438) and on the judgment of 31 January 2020, *Slovenia* v *Croatia* (C-457/18, EU:C:2020:65), that, even if the provisions of Regulation No 1049/2001 were not applicable in the proceedings before it, those provisions nevertheless had a certain indicative

value for the purpose of the weighing up of interests that is required in order to rule on the request for the removal from the file of those documents referred to in paragraph 23 of this judgment.

25 Next, in paragraphs 47 to 56 of the order under appeal, the General Court examined the opinion of Council's legal service and found that the Council was right to rely, in respect of that opinion, on the protection of legal advice, as provided for in Article 4(2) of Regulation No 1049/2001.

26 Furthermore, in paragraphs 57 to 64 of the order under appeal, the General Court examined the Commission recommendation and reached the conclusion that the Council was fully entitled to consider that disclosure of that document would specifically and actually undermine the protection of the public interest as regards international relations, for the purposes of Article 4(1) of Regulation No 1049/2001, which justified, in itself, the exclusion of that recommendation from the file.

27 Finally, in paragraphs 125 to 135 of the order under appeal, the General Court examined the observations of the Federal Republic of Germany. Taking the view, first, that the appellant had not established that the non-redacted versions of the two documents containing those observations had been obtained lawfully and, second, that disclosure of those two documents would be capable of specifically and actually undermining the protection of the public interest as regards the European Union's international relations for the purposes of Article 4(1) of Regulation No 1049/2001, in particular by weakening the European Union's position in the arbitration proceedings initiated against it by the appellant, the General Court held that the Council's application for those documents to be removed from the file must be upheld, whilst also stating that those two documents were not, in any event, such as to demonstrate that the appellant was directly concerned by the directive at issue, within the meaning of the second limb of the fourth paragraph of Article 263 TFEU, meaning that there was no need for the General Court to require the Council to produce those documents.

Admissibility of the action

28 Ruling on the objections of inadmissibility raised by the Parliament and the Council, the General Court began by recalling, first, in paragraph 78 of the order under appeal, that the fact that the action had been brought against a directive was not a sufficient ground in itself for declaring the action inadmissible and, second, in paragraphs 79 to 85 of that order, that the directive at issue constituted a legislative act whose addressees were the Member States and which applies generally to the economic operators concerned, such that the admissibility of the action was subject, pursuant to the second limb of the fourth paragraph of Article 263 TFEU, to the condition that the appellant was directly and individually concerned by that directive.

29 Following the reasoning set out in paragraphs 102 to 124 of the order under appeal, the General Court declared that action inadmissible on the ground that the appellant was not directly concerned by the directive at issue.

30 In that regard, first of all, the General Court found, in essence, in paragraphs 106 and 107 of the order under appeal, that a directive cannot, in itself, impose obligations on an individual and may therefore not be relied upon as such by the national authorities against operators in the absence of previously adopted measures transposing that directive. Thus the provisions of the directive at issue cannot, before the adoption of the national transposing measures, be a direct or immediate source of obligations for the appellant and liable, on that basis, to affect its legal situation directly.

31 In paragraphs 108 and 109 of the order under appeal, the General Court observed, citing the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), that the fact that the appellant's activities were now partly governed by Directive 2009/73 was simply the result of its choice to develop and maintain its activity in the territory of the European Union. To uphold the arguments relied on by the appellant would be tantamount to considering that, each time the EU legislature subjects operators in a given area to obligations to which they were not previously subject, the EU legislation would necessarily directly affect those operators for the purposes of the second limb of the fourth paragraph of Article 263 TFEU.

32 In paragraphs 110 and 111 of the order under appeal, the General Court found that, in the present case, it was consequently only through the intermediary of the national measures transposing the directive at issue that operators such as the appellant will be subject to obligations under Directive 2009/73 and that, on the date the appellant's action was brought before the General Court, there were no such transposing measures in the Federal Republic of Germany.

33 Next, in paragraph 111 and in paragraphs 112 to 115 of the order under appeal, the General Court found, in essence, that in any event, Member States had a wide margin of discretion in implementing the provisions of Directive 2009/73. In that regard it observed, first, that since the entry into force of the directive at issue, Member States had the possibility, under the first subparagraph of Article 9(8) and under Article 9(9) of that directive, to decide not to apply, to interconnectors, the transmission system and transmission system operator unbundling obligation laid down in Article 9(1) of that directive. Second, under the amendments introduced by the directive at issue, in particular those concerning Article 36 and Article 49a of Directive 2009/73, the national authorities were now able to decide to grant to major new gas infrastructures and to gas transmission lines between the Member States and third countries completed before 23 May 2019 exemptions or derogations from certain articles of Directive 2009/73.

34 Lastly, in paragraph 117 of the order under appeal, the General Court found that the appellant could not, in order to substantiate its submission that it is directly concerned by the directive at issue, rely on the solution adopted by the Court of Justice in the judgment of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159), since the legal and factual situation in that case is in no way comparable to the situation in the present case, which concerns only a directive and which, moreover, is not 'atypical', having regard to the third paragraph of Article 288 TFEU.

Forms of order sought and procedure before the Court of Justice

35 By its appeal, the appellant claims that the Court should:

– set aside the order under appeal;

– reject the plea of inadmissibility, declare the action admissible and refer the case back to the General Court to rule on the substance;

– in the alternative, declare that it is directly concerned by the directive at issue and refer to case back to the General Court for it to rule on the question of whether it is individually concerned by that directive or to join that question to the substance, and

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

36 The Parliament and the Council contend that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs.

37 By orders of the President of the Court of Justice of 22 October, 12 November and 19 November 2020, the Republic of Estonia, the Republic of Latvia and the Republic of Poland were granted leave to intervene in support of the forms of order sought by the Parliament and the Council.

38 On 16 July 2021, in compliance with a measure of organisation of procedure adopted by the Judge Rapporteur and the Advocate General pursuant to Article 62(1) of the Rules of Procedure of the Court of Justice, the appellant submitted to the Court of Justice the documents that it had previously lodged before the General Court as Annexes A.14, O.20, M.26 and M.30.

39 By letter dated 17 March 2022, the appellants' representatives informed the Court of the fact that, since 1 March 2022, they no longer represented the appellant, while also stating that one of those representatives could remain the point of contact between the Court and the appellant until the latter appointed a new representative.

The appeal

40 The appellant puts forward two grounds in support of its appeal. The first ground of appeal, which is divided into two parts, alleges errors of law in the General Court's assessment that the appellant was not directly concerned by the directive at issue for the purposes of the fourth paragraph of Article 263 TFEU.

41 The second ground of appeal alleges that several errors of law vitiate the examination by the General Court of the requests for removal of documents made by the Council.

The first ground of appeal

Preliminary observations

42 For the purposes of examining the appeal, it must be recalled that the admissibility of the action brought by the appellant for the annulment of the directive at issue must be examined having regard to the conditions laid down in the second limb of the fourth paragraph of Article 263 TFEU, under which such an action is admissible only if the appellant is directly and individually concerned by the act being challenged. Since the appellant is not, according to the General Court, directly concerned by the directive at issue and since those conditions are cumulative, the General Court rejected the action as inadmissible without ruling on the question whether the appellant was individually concerned by that directive.

43 According to settled case-law, recalled by the General Court in paragraph 102 of the order under appeal, the condition that a natural or legal person must be directly concerned by the measure being challenged requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of that person and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules (judgment of 28 February 2019, *Council* v *Growth Energy and Renewable Fuels Association*, C-465/16 P, EU:C:2019:155, paragraph 69 and the case-law cited).

44 The same applies, as the General Court also stated in paragraph 103 of the order under appeal, where the possibility for addressees not to give effect to the contested European Union act is purely theoretical and their intention to act in conformity with it is not in doubt (judgments of 23 November 1971, *Bock* v *Commission*, 62/70, EU:C:1971:108, paragraphs 6 to 8, and of 4 December 2019, *PGNiG Supply & Trading* v *Commission*, C-117/18 P, not published, EU:C:2019:1042, paragraph 30 and the case-law cited).

45 By the two parts of the first ground of appeal, the appellant challenges, respectively, the application by the General Court of the first and second conditions referred to in paragraph 43 of this judgment.

First part of the first ground of appeal

– *Arguments of the parties*

46 By the first part of the first ground of appeal, which refers to paragraphs 106 to 111 of the order under appeal, the appellant submits that the General Court committed an error of law in concluding that the directive at issue did not directly affect its legal situation since it is a directive.

47 In that regard, first, the appellant submits that the General Court's reasoning in the order under appeal that a directive cannot by itself, before the adoption of transposing measures by the Member State concerned or the expiry of the time limit laid down in that respect, directly affect the legal situation of an operator, is inherently wrong. That approach would preclude any action on the basis of the fourth paragraph of Article 263 TFEU against a directive, since, in practice, the time limit for bringing an action would systematically expire prior to the adoption of the necessary transposing measures. By relying on that reasoning, the General Court failed to apply the case-law, which was however cited in paragraph 78 of the order under appeal, pursuant to which the fact that an act was adopted in the form of a directive is not in itself sufficient to exclude the possibility of its provisions being of direct and individual concern to a private party.

48 Secondly, the appellant submits that the fact, relied on by the General Court in paragraph 111 of the order under appeal, that, at the date on which the action was brought, the directive at issue had not yet been transposed by the Federal Republic of Germany was irrelevant. According to the appellant, whether a person's legal situation is directly affected by a directive depends on the content of that directive and not on the possible adoption of measures transposing that directive. In that regard, the appellant adds that the condition for admissibility that an applicant must be directly concerned by the act being challenged, within the meaning of the fourth paragraph of Article 263 TFEU, is identical whether the second or the third limb of that provision is concerned, which necessarily means that the condition requiring that the contested act 'does not

entail implementing measures', within the meaning of the third limb of the fourth paragraph of Article 263 TFEU, is subject to an additional condition, separate from that condition of admissibility.

49 Thirdly, the appellant submits that, at the date on which it brought its action for annulment, the effect of the directive at issue was that it would become subject to the rules under Directive 2009/73, whereas it was not covered by those rules before its adoption. That change in legal status has profound and serious legal effects for the appellant. Where the Member States concerned are not left with any discretion with respect to the implementation of an EU measure, as is the case here, the time period for Member State transposition is akin to a mere temporal delay to the measure becoming fully applicable.

50 Lastly, fourthly, the appellant considers that there was nothing that could lead the General Court to suggest, as it appears to have considered in paragraph 109 of the order under appeal, that to acknowledge that the appellant was directly affected by the directive at issue would result in enabling every operator to challenge every legislative measure that imposed new obligations on it, since the main restriction that prevents the 'opening the floodgates' in relation to legislative measures is the condition for admissibility according to which an applicant must be individually concerned by the measure being challenged by its action.

51 By contrast, the Parliament and the Council subscribe to the General Court's reasoning.

52 According to the Parliament, the General Court was correct to hold that a directive, including the directive at issue, could not, by itself, prior to the adoption of transposing measures or the expiry of the time limit prescribed to that end, directly affect the legal situation of an operator, for the purposes of the fourth paragraph of Article 263 TFEU.

53 In addition, the Parliament considers that the appellant's argument that the time limit for transposition of the measure in question is akin to a 'mere temporal delay to the measure becoming fully applicable' is incorrect. That argument rests on the premiss that that measure would, generally, be capable of directly affecting the legal situation of an applicant, which is not the case.

54 Furthermore, the Parliament shares the General Court's analysis that to uphold the appellant's submission would have the consequence of depriving the condition that an applicant must be directly concerned by the measure which is the subject of its action of any effectiveness. Every new piece of legislation would thus directly concern every natural or legal person active in the field that it governs.

55 The Council submits that the appellant's argument rests on a misreading of the order under appeal, in so far as the General Court did not hold that the fact that the measure at issue took the form of a directive was in itself sufficient to exclude the possibility of the appellant's legal situation being directly affected by the directive at issue. On the contrary, the General Court concluded, as it was fully entitled to do, that the directive at issue did not directly affect the appellant's situation, since the German regulatory authority, the Bundesnetzagentur (Federal Network Agency, Germany) could not, in the absence of the adoption by the Federal Republic of Germany of measures transposing the directive at issue, require the appellant to comply with the obligations laid down in that directive.

56 Furthermore, according to the Council, the directive at issue, as a directive within the meaning of third paragraph of Article 288 TFEU, could not in itself be enforced against private individuals, which the appellant does not moreover contest.

57 The Council adds that, first, there is no support in the case-law for the interpretation advanced by the appellant according to which the condition that an applicant's legal situation must be directly affected by the measure which forms the subject matter of its action must be examined having regard to the substance of the measure at issue. Second, the condition relating to acts which '[do] not entail implementing measures' only applies to regulatory acts for the purposes of the third limb of the fourth paragraph of Article 263 TFEU. The latter condition cannot therefore alter the condition that an applicant must be directly concerned by the measure that forms the subject matter of the action for the purposes of the second limb of the fourth paragraph of Article 263 TFEU.

58 The Estonian, Latvian and Polish Governments support, in essence, the arguments relied on by the Parliament and the Council.

59 The Polish Government adds that, first, Directive 2009/73 was already applicable to the Nord Stream 2 gas pipeline before the adoption of the directive at issue, the latter merely laying down the practical arrangements for the transposition and implementation of Directive 2009/73 as regards gas pipelines such as the Nord Stream 2 pipeline.

60 Second, according to that government, the condition that an applicant must be directly affected by the measure which forms the subject matter of its action must be satisfied on the date on which the action is brought, which was necessarily absent in the present case. It is common ground that the Nord Stream 2 gas pipeline was not completed either at the date of entry into force of the directive at issue or at the date on which the action brought by the appellant was lodged.

– *Findings of the Court*

61 The first part of the first ground of appeal relates to whether the General Court erred in law in finding that the directive at issue did not produce direct effects for the appellant's legal situation and, therefore, the first of the two conditions set out in the case-law recalled in paragraph 43 of this judgment is not satisfied.

62 In the first place, it should be recalled that it is settled case-law that the action for annulment provided for in Article 263 TFEU is available in the case of all measures adopted by the institutions, whatever their form, which are intended to have binding legal effects (judgment of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 37 and the case-law cited).

63 In order to determine whether an act produces such effects and may, accordingly, form the subject matter of an action for annulment under Article 263 TFEU, it is necessary to examine the substance of that act and to assess those effects in the light of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act (judgment of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 38).

64 Accordingly, whether an act is capable of directly affecting the legal situation of a natural or legal person cannot be assessed with regard solely to the fact that that act takes the form of a directive.

65 Notwithstanding the fact that the General Court underlined, in paragraph 78 of the order under appeal, that the fact that the action had been brought against a directive was not a sufficient ground in itself for declaring the action inadmissible, it nevertheless appears, in the next part of its reasoning, in particular in paragraphs 106 and 107 of the order under appeal, that in order to reach the conclusion that the directive at issue did not directly affect the appellant's legal situation the General Court principally relied on the fact that a directive cannot, in itself, create obligations for an individual or be the direct and immediate source of such obligations, in the absence of transposing measures.

66 In that regard, as the appellant correctly submits, to the extent that all directives are characterised by their lack of capacity, in themselves, to impose obligations on individuals or to be relied upon against individuals (see, to that effect, judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 42 and the case-law cited), the reasoning adopted by the General Court involved categorically excluding the possibility that directives may directly affect the legal situation of individuals and, thereby, form the subject matter of an action pursuant to the fourth paragraph of Article 263 TFEU.

67 That approach ultimately results – in breach of the approach set out in paragraphs 63 and 64 of this judgment – in according primary importance, for the purpose of examining the condition that the measure that forms the subject matter of the action must directly affect the legal situation of an applicant, to the form of the measure at issue, namely that of a directive, over the substance of that measure.

68 In the second place, the same applies to the General Court's reasoning in paragraphs 110 and 111 of the order under appeal, according to which, as a general rule, an individual's legal situation is affected not by a directive but only by the measures transposing that directive, whereas, on the date on which the action for annulment was lodged, no such measures had been adopted by the Member State concerned, in this case the Federal Republic of Germany.

69 It is true that, according to a settled line of case-law, each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective that it pursues (judgment of 8 May 2008, *Danske Svineproducenter*, C-491/06, EU:C:2008:263, paragraph 28).

70 However, to uphold the approach of General Court as set out in paragraph 68 of this judgment would equally result in a finding that directives could never directly affect the legal situation of individuals, since those effects would always be connected with the measures adopted with a view to transposing them and not to the directives themselves.

71 Furthermore, the same paragraphs of the order under appeal disregard the distinction that must be made between the condition that the act which forms the subject matter of the action must directly concern an applicant and the condition that such an act must not entail implementing measures, which appears in the third limb of the fourth paragraph of Article 263 TFEU.

72 Thus, the third limb of that paragraph, which concerns the right to bring actions against regulatory acts, imposes both the condition that an applicant must be directly concerned by the act which forms the subject matter of its action and the condition requiring that, for the action to be admissible, those acts do not entail implementing measures, the second condition accordingly being added to the first and therefore not to be confused with it.

73 As the condition that an applicant must be directly concerned by the act being challenged appears, in identical terms, both in the second limb of the fourth paragraph of Article 263 TFEU and in the third limb of that provision, it must have the same meaning for each of those limbs of that provision. The objective assessment of that condition cannot vary depending on which of the different limbs of that provision is being considered.

74 Consequently, any act, whether regulatory or another type of act, may, in principle, directly concern an individual and thus directly affect its legal situation, irrespective of whether it entails implementing measures, including, in the case of a directive, transposing measures. Accordingly, in a case where the directive in question has such effects, the fact that measures transposing that directive have been adopted or have yet to be adopted is not, in itself, relevant since they do not call into question the direct nature of the connection between that directive and its effects, provided that that directive does not leave any discretion to the Member States as to the imposition of those effects on that individual. That latter condition is the subject of the assessment of the second part of the first ground of appeal.

75 In the third place, as regards the examination of whether the directive at issue was capable of directly affecting the appellant's legal situation, in accordance with the criteria set out in paragraph 63 of this judgment, it must be observed that the directive at issue, by extending the scope of application of Directive 2009/73 to interconnectors located between the Member States and third countries, such as the interconnector that the appellant intends to operate, has the consequence of subjecting the operation of that interconnector to the rules laid down in that directive, thus rendering applicable to the appellant the specific obligations that it lays down on that matter, including, inter alia, those relating to the unbundling of transmission systems and transmission system operators, pursuant to Article 9 of Directive 2009/73, and those relating to the regime of third-party access to the system based on published tariffs approved by the regulatory authority concerned or calculated on the basis of methods approved by that authority, laid down in Article 32 of Directive 2009/73.

76 In that regard, as held in paragraph 74 of this judgment, it is irrelevant, in itself, that the implementation of those obligations requires the adoption of transposing measures by the Member State concerned, in the present case the Federal Republic of Germany, to the extent that that Member State has no discretion, as regards those transposing measures, capable of preventing those obligations from being imposed on the appellant. In the absence of such discretion, those transposing measures do not call into question the direct nature of the link between the directive at issue and the imposition of those obligations.

77 Having regard to the foregoing considerations, it must be held that the General Court erred in law in holding that the directive at issue did not directly affect the legal situation of the appellant.

78 It is necessary also to reject the arguments of the Polish Government that seek to demonstrate that the appellant was not directly concerned by the directive at issue for reasons other than those given by the General Court in the order under appeal.

79 Thus, first, as regards the argument that Directive 2009/73 already applied, before the entry into force of the directive at issue, to interconnectors such as that of the appellant, that argument is, in any event, clearly contradicted both by the object of the latter directive, as set out in recitals 3 and 4 thereof, and by the amendment of the definition of the concept of 'interconnector' laid down in Article 2(17) of Directive 2009/73.

80 Second, contrary to the submission made by the Polish Government, the fact that the directive at issue directly affects the legal situation of the appellant also cannot be ruled out on the ground that the appellant's interconnector had not yet been completed either at the date of entry into force of that directive or at the date on which the action against it was lodged. The appellant had, at the time of the adoption and entry into force of that directive, already made substantial investments with a view to the construction of that interconnector, which was at an advanced stage. Furthermore, Directive 2009/73, in particular Article 36 thereof, which permitted, subject to conditions, the granting of an exemption for gas infrastructure projects, specifically takes into account the possibility that new gas pipelines may be constructed and consequently is intended also to govern possible gas pipelines that are planned but not yet completed.

81 In those circumstances, the first part of the first ground of appeal must be upheld.

The second part of the first ground of appeal

– *Arguments of the parties*

82 By the second part of the first ground of appeal, which refers to paragraphs 111 to 115 of the order under appeal, the appellant submits that the General Court committed an error of law in concluding that the directive at issue accorded discretion to the Member States.

83 The appellant submits, first, that the approach taken by the General Court in that regard is wrong to the extent that it carried out a general assessment, without the extent to which the appellant's legal situation was directly affected by the directive at issue having been specifically examined having regard to the subject matter of its action, in accordance with the case-law resulting from the judgments of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraphs 30 and 31), and of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraphs 50 and 51).

84 The appellant submits, secondly, as regards the unbundling obligations to which it would be subject following the entry into force of the directive at issue, that, while it is true that Directive 2009/73 accords Member States the possibility of introducing other solutions than that of full ownership unbundling, the two alternative models that could be relevant in this case, namely the 'independent system operator' model and the 'independent transmission operator' model, would, in the same way as full ownership unbundling, have a considerable negative impact on its legal situation. The same applies as regards the rules on third-party access and on the regulation of tariffs which would, in any event, apply to it. Accordingly, the appellant submits, in the words of the judgment of 13 March 2008 *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159), the prejudice to its legal situation is due to the directive at issue, to Directive 2009/73 which it amends, and, in particular, to the requirement to attain the result laid down by those directives.

85 Thirdly, the appellant submits, regarding the existence of the possible discretion that the Member State concerned has in the context of implementing the exemptions and derogations provided for in Articles 36 and 49a of Directive 2009/73, that that discretion should have been assessed by reference to its specific position and the subject matter of its action, which referred essentially to Article 49a of Directive 2009/73 introduced by the directive at issue. As regards the derogation laid down in that latter provision, by restricting it to gas transmission lines 'completed before 23 May 2019', the EU legislature wished to leave no discretion to the Federal Republic of Germany, the date of that restriction having been chosen in order to exclude the appellant from

benefiting from that derogation. Similarly, it is common ground that its pipeline is not eligible for the exemption provided for in Article 36 of Directive 2009/73, without the German authorities having any discretion in that regard.

86 By contrast, the Parliament and the Council subscribe to the General Court's reasoning.

87 The Parliament submits that, first, as the case-law flowing from the judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100), cited by the appellant, concerns regulatory acts and not legislative acts, that case-law cannot call into question the restrictive approach that prevails as regards actions by individuals against legislative acts.

88 Secondly, in the Parliament's view, the wording of the directive at issue leaves Member States a wide discretion, in particular in Article 9(8) and (9) of Directive 2009/73 and in Article 49a thereof. In that context, it is necessary to examine all of the provisions of the directive at issue and not only the possibility of obtaining a derogation pursuant to Article 49a of Directive 2009/73.

89 Thirdly, the judgment of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159), cited by the appellant concerned a case in which, unlike the present case, the contested act did not leave any discretion to the national authorities.

90 The Council submits, first, that the appellant's action was directed against the directive at issue as a whole, with the result that the discretion left to the Member States should have been analysed in the light of the directive as a whole.

91 Secondly, the Council submits that the argument that there was no doubt as to the manner in which the Federal Republic of Germany would transpose the directive at issue is fundamentally flawed. According to the Council, the Court of Justice held, in the judgment of 4 December 2019, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission* (C-342/18 P, not published, EU:C:2019:1043), that Article 36 of Directive 2009/73 accords the national regulatory authorities discretion for the purposes of granting exemptions from the rules laid down by that directive. The same logic applies, it submits, to the derogation provided for in Article 49a of that directive.

92 Thirdly, according to the Council, the General Court was also correct to conclude that the appellant's legal and factual situation was not comparable to the situation in the case that gave rise to the judgment of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159). By contrast with the contested act in that case, the directive at issue, by its form and its content, is a 'typical' directive, for the purposes of the third paragraph of Article 288 TFEU, that is to say that it is 'binding, as to the result to be achieved, upon each Member State to which it is addressed' but that it leaves 'to the national authorities the choice of form and methods'. There is therefore no causal link between the directive at issue and the effects produced on the legal situation of the appellant.

93 The Estonian, Latvian and Polish Governments support, in essence, the arguments relied on by the Parliament and the Council.

– *Findings of the Court*

94 The second part of the first ground of appeal concerns the question whether the General Court erred in law in finding that the directive at issue leaves discretion to the Member States in the context of its implementation, in accordance with the second of the two conditions set out in the case-law recalled in paragraph 43 of this judgment.

95 In the first place, first, it follows from the finding made in paragraph 63 of this judgment that the question whether an act leaves discretion to the addressees responsible for its implementation must be examined by reference to the substance of that act.

96 Second, the mere fact that the act being challenged must be the subject of implementing measures, including, as regards a directive, transposing measures, for the purposes of its implementation does not necessarily mean that there is a discretion as regards the addressees of that act, as has been observed in paragraph 74 of this judgment.

97 In the second place, where, as in the present case, a given act is capable of producing a variety of legal effects depending on the various situations to which it is intended to apply, the existence of discretion must necessarily be assessed with regard to the specific legal effects referred to in the action and that it may actually have on the legal situation of the person concerned.

98 Thus, in order to assess whether an act leaves its addressees discretion with a view to its implementation, it is necessary to examine the legal effects produced by that act's provisions, as referred to in the action, on the situation of the person pleading the right to bring proceedings, pursuant to the second limb of the fourth paragraph of Article 263 TFEU (see, by analogy, judgments of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraphs 50 and 51, and of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraphs 38 and 39).

99 Contrary to the submissions made by the Parliament and the Council, that is also the case in a situation where the action refers, formally, to the act in question as a whole, if the pleas in law raised in support of that action make it possible to establish that the subject matter of that action in fact concerns specific aspects of that act.

100 In the third place, it must be observed that, in order to substantiate its argument that the lack of discretion left to Member States by the directive at issue as regards the effects produced by that directive on its legal situation, the appellant submitted in its action, in essence, that the directive at issue had the effect, following the amendment that it makes to the definition of 'interconnector' laid down in Article 2(17) of Directive 2009/73, of subjecting it to specific obligations under that directive relating to the unbundling of transmission systems and transmission system operators, provided for in Article 9 of that directive, and to the obligations relating to third-party access and the regulation of tariffs, laid down in Article 32 of that directive, without it having the possibility of benefiting from an exemption or derogation from those rules under either Article 36 or Article 49a of Directive 2009/73, as inserted by the directive at issue.

101 Therefore, it is with regard to those provisions and the specific legal situation of the appellant that it must be assessed whether, following the adoption and entry into force of the directive at issue, Directive 2009/73 leaves the Federal Republic of Germany discretion with a view to the implementation of those provisions and, in particular, their application to the appellant.

102 In that respect, as regards, first, the exemptions and derogations provided for in Articles 36 and 49a of Directive 2009/73, the General Court recalled, in paragraphs 114 and 115 of the order under appeal, the existence of those possibilities of exemption or derogation, whilst stating that the national regulatory authorities had, for the purposes of implementing the derogation provided for in Article 49a, a wide discretion as regards the grant of such a derogation.

103 In so doing, the General Court however failed to examine, by taking into account the appellant's situation and by having regard to the substance of those exemptions and derogations, whether they were capable of applying to the appellant's situation and whether the directive at issue left the Member State concerned a margin of discretion in its implementation as regards the appellant.

104 As regards the existence of such a discretion in respect of the exemptions and derogations laid down in Articles 36 and 49a of Directive 2009/73, it must be held, as the Advocate General also observed, in essence, in points 74 and 75 of his Opinion, that it was not possible to apply any of the exemptions or derogations to the appellant's situation, since, first, the investments for the Nord Stream 2 gas pipeline had already been decided at the date of the adoption of the directive at issue, which excluded that pipeline from the benefit of an exemption under Article 36 of Directive 2009/73, which applies to major new gas infrastructures or to significant increases of capacity in existing infrastructure, and, second, at that date, it was clear that that pipeline could not be completed by 23 May 2019, thus preventing the grant of a derogation under Article 49a of that directive.

105 In those circumstances, while it is true that the Member States enjoy a margin of discretion in relation to the grant of such exemptions and derogations to gas undertakings that meet the conditions laid down in Articles 36 and 49a of Directive 2009/73 respectively, they do not however have any discretion as regards the possibility of granting those exemptions or derogations to the appellant, which does not satisfy those conditions. Therefore, there is a direct link between the entry into force of the directive at issue and the imposition, by the latter, on the appellant of the obligations laid down by Directive 2009/73 referred to in paragraph 75 of this judgment.

106 Secondly, accordingly, it is necessary to examine whether the Member State concerned enjoyed, as regards the appellant, a discretion for the purposes of determining the result to be achieved capable of having the consequence that the appellant would nevertheless avoid those obligations.

107 In that respect, as regards the unbundling obligation laid down in Article 9 of Directive 2009/73, the General Court found, in paragraph 112 of the order under appeal, that the Member States have, under certain conditions, the possibility, under points (a) and (b) of the second subparagraph of Article 9(8) and under Article 9(9) of that directive, of not applying that obligation, including to interconnectors such as the Nord Stream 2 gas pipeline. In such a case, those Member States must, instead of unbundling the structures of ownership and of supply and production, designate either an independent system operator under Article 14 of that directive, or an independent transmission system operator. The Member States therefore have, according to the General Court, a discretion in that regard.

108 That finding does not however suffice to establish the existence of a discretion for the national authorities as regards the unbundling obligation laid down in Article 9 of Directive 2009/73.

109 It follows from recital 13 of Directive 2009/73 that, while the two alternative options offered as regards the unbundling obligation laid down in Article 9(1) of that directive should 'enable a vertically integrated undertaking to maintain its ownership of network assets', it should nonetheless '[ensure] an effective separation of interests', with the independent system operator or the independent transmission operator being required to '[perform] all the functions of a system operator' and be subject to 'detailed regulation and extensive regulatory control mechanisms'.

110 It follows that, as the Advocate General also observed, in essence, in points 80 and 81 of his Opinion, that whichever option were finally chosen from amongst those referred to in paragraph 107 of this judgment, the legal situation of the appellant will inevitably be changed, as Article 9 of Directive 2009/73 only offers Member States the choice of means by which the clearly defined result, namely that of the effective separation of the structures of transmission and those of supply and production, must be achieved. Thus, even though the Member States are not deprived of all room for manoeuvre in implementing Article 9, they do not have any discretion as regards the unbundling obligation laid down in that provision, such that the appellant cannot avoid it, irrespective of which one of the three methods provided for by that provision is chosen.

111 The same applies as regards the obligations flowing from Article 32 of Directive 2009/73, read together with Article 41(6), (8) and (10) thereof. Those obligations require the transmission system operators subject to that directive, inter alia, to grant third parties access to their system on the basis of a regime that is applied objectively and without discrimination, and based on published tariffs that are proportionate and approved by the competent regulatory authority. That authority must, in the context of approving those tariffs, inter alia, provide for appropriate incentive measures to encourage operators to improve their performance.

112 While the practical realisation of those obligations requires the adoption, in particular by the national regulatory authorities, of measures of a technical nature, it remains the case that those measures cannot alter the result that those obligations entail, namely that the transmission system operators guarantee to third parties access without discrimination to that system under the conditions laid down by Directive 2009/73, with the aim of ensuring that all actors on the market have effective access to that market.

113 In that regard, the General Court was also wrong to hold, in paragraph 117 of the order under appeal, that the appellant could not rely on the judgment of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159). Even though the case that gave rise to that judgment may be distinguished from the present case in that it concerned the legal effects produced by a decision adopted by the Commission pursuant to a directive, it remains the case that the binding force of that decision resulted, ultimately, from that directive and that, in any event, that decision determined, in the same way as the provisions of the directive at issue referred to in paragraphs 110 and 111 of this judgment, the result to be achieved with regard to which the Member States do not have any discretion.

114 Consequently, the General Court erred in law in finding that the directive at issue accorded a discretion to the Member States, without taking into account the appellant's situation and the fact that the entry into force of the directive at issue had had the direct consequence of subjecting the latter to obligations the result of which could not be changed. In those circumstances, the second part of the first ground of appeal must equally be upheld.

115 Having regard to the forgoing considerations, it must be concluded that the first ground of appeal is well founded, as the General Court wrongly held that the appellant was not directly concerned by the directive at issue. It follows that point 4 of the operative part of the order under appeal must be set aside since, in that point, the action brought by the appellant was rejected as inadmissible for that reason.

The second ground of appeal

– *Arguments of the parties*

116 By the second ground of appeal the appellant submits that the General Court made several errors of law in its examination of the request for the removal of the Council's documents which led it wrongly to order that the opinion of the Council's legal service, the Commission recommendation and the observations of the Federal Republic of Germany be removed from the file and that account need not be taken of the passages of the application and the annexes thereto in which extracts of those documents are reproduced.

117 In that regard, first, the appellant submits that the General Court erred in law in basing its assessment entirely on the framework under Regulation No 1049/2001, which governs public access to documents, and in failing to consider whether the documents at issue were manifestly relevant for the determination of the dispute, as required by the case-law stemming from the judgment of 12 May 2015, *Dalli* v *Commission* (T-562/12, EU:T:2015:270).

118 Secondly, the appellant submits that the General Court also erred in law in applying to the documents at issue the restrictive framework established by the Court of Justice in the specific and serious circumstances of the cases that gave rise to the order of 14 May 2019, *Hungary* v *Parliament* (C-650/18, not published, EU:C:2019:438), and the judgment of 31 January 2020, *Slovenia* v *Croatia* (C-457/18, EU:C:2020:65). It considers in particular that all of the documents form part of the legislative history of the directive at issue, meaning that they fall within the scope of the increased transparency established by the judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374). The appellant submits that the General Court also failed to respond to the argument that certain passages of the opinion of the Council's legal service had been referred to extensively by the EU institutions themselves in the proposal for a directive of the European Parliament and the Council amending Directive 2009/73 concerning common rules for the internal market in natural gas.

119 Thirdly, the appellant submits that the General Court erred in law in attaching significant weight to the separate arbitration that it had brought under the Energy Charter Treaty, signed in Lisbon on 17 December 1994 (OJ 1994 L 380, p. 24), approved on behalf of the European Communities by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 (OJ 1998 L 69, p. 1). According to the appellant, the General Court justifies the approach it took by the need for protection of the public interest as regards international relations, for the purposes of Article 4(1) of Regulation No 1049/2001, but does not explain how this could be undermined by the production of the documents at issue. The appellant submits that arbitration proceedings are not 'international relations', within the meaning of that provision.

120 The Council contends that the second ground of appeal is inadmissible because it seeks a re-examination of the assessment of the facts undertaken by the General Court.

121 Furthermore, the Parliament and the Council contend that the second ground of appeal must in any event be rejected as unfounded.

122 First, the Parliament submits that all the appellant's arguments rest on the incorrect premiss that the General Court failed to examine whether the documents at issue were 'manifestly relevant for the determination of the dispute', the Council adding, in that context, that the General Court did not apply the provisions of Regulation No 1049/2001 either exclusively or directly. According to the Council, the General Court in fact weighed up the interests at stake, in accordance with the case-law stemming from the judgment of the General Court of 12 May 2015, *Dalli* v *Commission* (T-562/12, EU:T:2015:270).

123 Secondly, the Council states that the General Court did not find, as a general rule, that documents could only be used in proceedings if the author or defendant institution authorised their production. On the contrary, the General Court analysed in detail all the circumstances of the case before it and concluded that the removal from the file of the documents at issue was necessary for reasons of public interest.

124 Thirdly, the Parliament contends that the General Court correctly, in accordance with the case-law stemming from the order of 14 May 2019, *Hungary* v *Parliament* (C-650/18, not published, EU:C:2019:438) and the judgment of 31 January 2020, *Slovenia* v *Croatia* (C-457/18, EU:C:2020:65), found that, by relying in the present case on the opinion of the Council's legal service, the appellant sought in reality to confront the Council with the legal opinion that it had received from its legal service and thus compel it to take a position publicly on that opinion which would have negative consequences as regards the interests of that institution to be able to benefit from legal opinions.

125 The Parliament and the Council state in that context that none of the documents at issue, including the opinion of the Council's legal service, relates to a legislative procedure, all those documents pre-dating the proposal for a directive of the European Parliament and the Council amending Directive 2009/73 concerning common rules for the internal market in natural gas.

126 Fourthly, the Council submits that the General Court ordered the removal of the observations of the Federal Republic of Germany, inter alia, on the ground that the disclosure of their content would undermine the protection of the public interest as regards international relations for the purposes of Article 4(1) of Regulation No 1049/2001, thus re-establishing the earlier position by which the EU judicature is the only court with the power to order parties to produce documents or to assess their relevance.

– *Findings of the Court*

127 The plea of inadmissibility raised by the Council against the second ground of appeal which, according to it, invites the Court of Justice to rule on the findings of fact made by the General Court, must be rejected. While the General Court does, in principle, have exclusive jurisdiction to find and appraise the relevant facts, the second ground of appeal does not invite the Court of Justice to re-examine the facts on which the General Court based its decision in this case, but concerns a question of law relating to the legal framework that it applied for the purpose of assessing those facts.

128 In order to assess the merits of the second ground of appeal, in the first place, it should be recalled, on the one hand, that the principle of equality of arms, which is a corollary of the very concept of a fair hearing, guaranteed in particular by Article 47 of the Charter of Fundamental Rights of the European Union, requires that each party must be afforded a reasonable opportunity to present his or her case, including his or her evidence, under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent (judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 96).

129 On the other hand, according to well established case-law, the applicable principle in EU law is that of the unfettered evaluation of evidence, from which it follows that the admissibility of evidence produced in good time can be contested before the European Union Courts only on the ground that it has been improperly obtained (judgment of 30 September 2021, *Court of Auditors* v *Pinxten*, C-130/19, EU:C:2021:782, paragraph 104).

130 Thus, where evidence has been improperly produced by a party, such as internal documents covered by Regulation No 1049/2001, the production of which has been neither authorised by the institution concerned nor ordered by an EU Court, it is necessary to weigh the interests of the respective parties to the proceedings in connection with their right to a fair hearing, taking into account the interests protected by the rules that have been breached or circumvented in obtaining that evidence.

131 It follows that, as the Advocate General also observed, in essence, in points 119 and 138 of his Opinion, the EU Court hearing a request for the withdrawal of such evidence, must weigh in the balance, on the one hand, the interest of the applicant who produced those items of evidence, having regard, inter alia, to their usefulness for the purposes of assessing the merits of the action brought before it and, on the other hand, the interests of the opposing party which the retention in the file of those items of evidence could specifically and effectively harm.

132 In the second place, for the purpose of examining a request for the removal from the file of internal documents covered by Regulation No 1049/2001, that regulation, although not applicable in an action such as that brought by the appellant before the General Court, thus has a certain indicative value for the purpose of the weighing up of interests that is required in order to rule on such a request (see, to that effect, order of 14 May 2019, *Hungary* v *Parliament*, C-650/18, not published, EU:C:2019:438, paragraphs 12 and 13).

133 However, it cannot be held that Regulation No 1049/2001 exhaustively governs the weighing up of interests required for the purposes of the examination of a request for the removal of documents from a case file.

134 Whereas the aim of that regulation is to improve the transparency of the decision-making process at EU level by implementing the right of access to documents under the first subparagraph of Article 15(3) TFEU and enshrined in Article 42 of the Charter of Fundamental Rights (see, to that effect, judgment of 22 February 2022, *Stichting Rookpreventie Jeugd and Others*, C-160/20, EU:C:2022:101, paragraphs 35 and 36), the admissibility of the items of evidence depends ultimately on the weighing up of the interests present, having regard to the objective of guaranteeing the parties' right to a fair hearing, as the Advocate General also observed, in essence, in points 129 and 130 of his Opinion.

135 In the third place, as regards the examination of the documents at issue in the light of the principles set out above, first, it must be held that the General Court did not commit an error of law in ordering that the opinion of the Council's legal service be removed from the file and that passages in the application and the annexes thereto, in which extracts of that opinion are reproduced, should not be taken into account.

136 In that regard, it is clear from the settled case-law of the Court that it would be contrary to the public interest, which requires that the institutions should be able to benefit from the advice of their legal services, given in full independence, to allow such internal documents to be produced in proceedings before the Court unless their production has been authorised by the institution concerned or ordered by the Court (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 53 and the case-law cited).

137 By producing such a legal opinion without authorisation, an applicant is confronting the institution concerned, in proceedings concerning the lawfulness of a contested measure, with an opinion issued by its own legal service during the drafting of that measure. In principle, to allow an applicant to put before the Court a legal opinion from an institution the disclosure of which has not been authorised by that institution would be contrary to the requirements of a fair hearing (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 54 and the case-law cited).

138 However, the Court has held that, exceptionally, the principle of openness will be capable of justifying, in judicial proceedings, the disclosure of a document of an institution that has not been released to the public and which contains a legal opinion where that legal opinion relates to a legislative procedure in respect of which enhanced openness is required (see, to that effect, judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraphs 56 to 59).

139 That openness does not, however, preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, issued in the context of a given legislative process, but which is of a particularly sensitive nature or has a particularly wide scope that goes beyond the context of that legislative process, in which case it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 60).

140 In the present case, as the General Court found in paragraphs 50 and 54 of the order under appeal, the opinion of the Council's legal service, the production of which had not been authorised by it, did not, contrary to the appellant's submission, relate to a legislative procedure but to a Commission recommendation to the Council on the opening of negotiations between the European Union and a third State with a view to concluding an international agreement. In addition, that subject matter is not affected by the mere fact that that opinion was referred to by the EU institutions themselves in the context of the adoption of the Directive of the European Parliament and the Council amending Directive 2009/73 concerning common rules for the internal market in natural gas.

141 In those circumstances, it was sufficiently established that, first, to retain that opinion in the case file would harm the Council's right to a fair hearing and its interest in receiving frank, objective and comprehensive advice, and, second, there was no overriding public interest capable of justifying the production by the appellant of the legal opinion at issue. Furthermore, to the extent that the appellant's sole interest, however legitimate, of substantiating its argument with the

support of that advice does not suffice to justify that harm to the rights and interests of the Council (see, to that effect, order of 14 May 2019, *Hungary* v *Parliament*, C-650/18, not published, EU:C:2019:438, paragraphs 15 to 18, and judgment of 31 January 2020, *Slovenia* v *Croatia*, C-457/18, EU:C:2020:65, paragraphs 70 and 71), all the more so given that the merits of that argument and therefore the possibility of its succeeding does not depend in any way on the production of that opinion, it must therefore be concluded that the balance of interests recalled in paragraph 131 of this judgment weighs in favour of the protection of the rights and interests of the Council.

142 By contrast, as regards, secondly, the Commission recommendation and the observations of the Federal Republic of Germany, it appears that, even though the General Court itself recalled, in paragraph 39 of the order under appeal, the merely indicative value of Regulation No 1049/2001 for the purposes of the examination of a request for the removal of documents, it in fact based its decision, despite that premiss and the matters set out in paragraphs 131 and 133 of this judgment, exclusively on the provisions of that regulation and, in particular, on the third indent of Article 4(1)(a) thereof concerning the protection of international relations, in order to justify the removal of those documents.

143 In that regard, first, while acknowledging that the interest relating to the protection of international relations enshrined in that provision has an indicative value in this context, it is still the case that, for the purpose of weighing up the interests referred to in paragraph 131 of this judgment, it is necessary to establish that the retention of those documents in the file would be likely to cause specific and actual harm to the interest relied on to justify the removal of those documents.

144 Thus, the Court has held, as regards Article 4 of Regulation No 1049/2001, that the mere fact that a document concerns an interest protected by an exception to the right of access laid down in that provision is not sufficient to justify the application of that provision and that the institution concerned is obliged to explain how disclosure of that document could specifically and actually undermine that interest, irrespective of the fact that that institution has a wide discretion in applying the third indent of Article 4(1)(a) of Regulation No 1049/2001 (see, to that effect, judgment of 3 July 2014, *Council* v *in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 51, 52, 63 and 64).

145 However, it does not appear anywhere in the order under appeal that the General Court examined the explanations provided by the Council with respect to those requirements. On the contrary, the General Court confined itself, as regards the Commission recommendation, to deducing, in paragraphs 57 and 60 to 63 of the order under appeal, that the interest concerned would specifically and actually be undermined from the mere fact that that document dealt with the adoption of a decision relating to international negotiations with a third State.

146 As regards the observations of the Federal Republic of Germany, the General Court simply considered, in order to justify the removal of those observations from the file, that their disclosure would specifically and actually undermine the protection of the public interest as regards international relations, for the purposes of Article 4(1) of Regulation No 1049/2001, 'in particular by weakening the European Union's position in the arbitration proceedings initiated against it by the [appellant]', without explaining how those arbitration proceedings, which appear to be private in nature, relate to the EU's international relations, as the Advocate General also

observed in point 157 of his Opinion, and without seeking to establish, furthermore, that the protection of that public interest would actually be undermined by retaining those observations in the file.

147 Secondly, even if it were established that that public interest would be undermined by the retention in the file of the Commission recommendation and the observations of the Federal Republic of Germany, it remains the case that the General Court should have weighed up the interests at stake, as set out in paragraph 131 of this judgment, which it failed to do.

148 In those circumstances, it must be concluded that, by ordering that the Commission recommendation and the observations of the Federal Republic of Germany be removed from the file and that no account need be taken of the passages of the application and the annexes thereto in which extracts of those documents are reproduced, the General Court committed errors of law in that, first, it exclusively applied the provisions of Regulation No 1049/2001 in order to examine the request for the removal of those documents from the file without weighing up the interests at stake and, second, failed to assess, taking into account the explanations provided in that regard by the Council, whether the retention of those documents in the file could specifically and actually undermine the protection of the public interest as regards international relations, for the purposes of Article 4(1) of Regulation No 1049/2001.

149 Having regard to the foregoing considerations, the second ground of appeal must also be upheld to the extent that it relates to the Commission recommendation and the observations of the Federal Republic of Germany. It follows that point 1 of the operative part of the order under appeal, to the extent that that point covers the Commission recommendation (Annex A.14), and point 3 of the operative part must also be set aside.

150 The appeal must be dismissed as to the remainder.

The action before the General Court

151 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, if the decision of the General Court is set aside, give final judgment in the matter where the state of the proceedings so permits.

152 In the present case, while the Court of Justice is not in a position, at this stage of the proceedings, to rule on the merits of the action before the General Court, it does however have the necessary elements before it to give a final ruling on the plea of inadmissibility raised by the Parliament and the Council in the course of the proceedings before the General Court

153 In the first place, as regards the question whether the directive at issue is of individual concern to the appellant, the latter submits, in essence, that the Nord Stream 2 offshore gas pipeline is the only advanced new gas pipeline concerned by that directive for which a final investment decision had been taken and a very significant investment had been made long before the adoption of that directive and yet its owner is not eligible for a derogation under Article 49a of Directive 2009/73.

154 The Parliament and the Council contend, in essence, that the directive at issue is not of individual concern to the appellant. According to those institutions, the fact that it is possible to determine, at a given moment, the number or identity of the persons falling within its scope in no way alters the fact that that directive concerns, in the same way, all gas pipelines, whether onshore or

offshore, pre-existing or completed, new or yet to be built, which connect the European Union with third countries. It therefore concerns an open class of economic operators. In any event, they contend, the appellant fails to specify how the Nord Stream 2 gas pipeline differs from any other cross-border interconnector with a third country.

155 The Council adds, first, that the appellant challenges the directive at issue in its entirety, so that its action is not limited to the validity of the conditions for derogation set out in Article 49a of Directive 2009/73, which was inserted by the directive at issue. Second, according to the Council, the judgments of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159), and of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100), referred to by the appellant, are not relevant to the present case, since those judgments concern operators who have a previously acquired right which differentiates them from all other operators.

156 In that regard, it should be borne in mind that persons other than those to whom a decision is addressed may claim to be individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed by such a decision (judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107, and of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 93).

157 In that context, it follows from established case-law, that the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it (judgment of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 94 and the case-law cited).

158 However, it is equally apparent from settled case-law that, where a measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of that group, those persons may be individually concerned by that measure inasmuch as they form part of a limited class of economic operators (see, to that effect, judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 59).

159 In the present case, it is true that the directive at issue is drafted in general terms and applies without distinction to all operators of a gas transmission line between a Member State and a third country, by subjecting those operators to the obligations laid down by Directive 2009/73. The fact that those operators are limited in number is not, in that context, capable of establishing that they are individually concerned by the directive at issue, that fact being explained not by the nature of the legal effects produced by that directive, but by the characteristics of the market concerned.

160 However, as has been pointed out in paragraph 104 of the present judgment, the appellant could not benefit from an exemption or derogation either under Article 36 of Directive 2009/73 or under Article 49a of that directive.

161 In that context, it should be observed that, amongst both existing interconnectors and interconnectors which are yet to be constructed, the Nord Stream 2 gas pipeline is the only pipeline which is, or which could be, in such a situation, in so far as the operators of all the other

interconnectors covered by Directive 2009/73 have had or will have had the possibility of being granted an exemption or derogation under one of the provisions of that directive referred to in the preceding paragraph, as the appellant submits without being contradicted.

162 It follows that, after the entry into force of the directive at issue, the relationship between, on the one hand, the extension of the scope of Directive 2009/73 to interconnectors between Member States and third countries provided for in Article 2(17) of that directive and, on the other hand, the arrangements for the conditions for exemption and derogation laid down in Articles 36 and 49a of that directive, produced effects for the appellant's legal situation in such a way as to distinguish it individually in a manner analogous to that of the addressee of a decision.

163 In those circumstances, it must be held that the appellant is individually concerned by the conditions for exemption and derogation under Articles 36 and 49a of Directive 2009/73, as amended and inserted, respectively, by the directive at issue.

164 In the second place, it follows from the considerations set out in paragraphs 61 to 81 and 94 to 115 of this judgment that those provisions are also of direct concern to the appellant.

165 In the third place, it should be noted that those provisions are severable from the other provisions of Directive 2009/73, as amended by the directive at issue.

166 It follows from all the foregoing considerations that the action for annulment brought by the appellant before the General Court must be declared admissible within the limits referred to in paragraph 163 of this judgment.

167 The case is referred back to the General Court for a decision on the merits of the action for annulment.

Costs

168 As the case is to be referred back to the General Court, the costs relating to the present proceedings must be reserved.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside point 1 of the operative part of the order of the General Court of the European Union of 20 May 2020, *Nord Stream 2* v *Parliament and Council* (T-526/19, EU:T:2020:210) to the extent that that point pertains to the recommendation adopted by the European Commission on 9 June 2017 for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline (Annex A.14), as well as points 3 and 4 of the operative part of that order;**

2. **Dismisses the remainder of the appeal;**

3. **Declares the action for annulment brought by Nord Stream 2 AG against 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, admissible, to the extent that it is directed against the provisions of**

Articles 36 and 49a of 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, as amended and inserted, respectively, by Directive 2019/692;

4. **Refers the case back to the General Court of the European Union for a decision on the merits concerning the action for annulment referred to in point 3 of the present operative part;**

5. **Reserves the costs.**

Lenaerts	Arabadjiev	Prechal
Jürimäe	Lycourgos	Rodin
Jarukaitis	Jääskinen	Bonichot
Safjan	Biltgen	Xuereb
Piçarra	Rossi	Kumin

Delivered in open court in Luxembourg on 12 July 2022.

A. Calot Escobar	K. Lenaerts
Registrar	President