ORDER OF THE GENERAL COURT (Eighth Chamber)

20 May 2020 (*)

(Action for annulment — Energy — Internal market in natural gas — Directive (EU) 2019/692 — Application of Directive 2009/73/EC to gas lines to or from third countries — No direct concern — Inadmissibility — Production of documents obtained unlawfully)

In Case T-526/19,

Nord Stream 2 AG, established in Zug (Switzerland), represented by L. Van den Hende and J. Penz-Evren, lawyers, and M. Schonberg, Solicitor advocate,

applicant,

v

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

and

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

defendants,

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

THE GENERAL COURT (Eighth Chamber),

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

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

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common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57) was repealed and replaced by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 (OJ 2009 L 211, p. 94).

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

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

4 The applicant, Nord Stream 2 AG, 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 Nord Stream 2 pipeline, 50% of whose funding, which amounts to EUR 9.5 billion, is provided by the companies ENGIE SA (France), OMV AG (Austria), Royal Dutch Shell plc (Netherlands and United Kingdom), Uniper SE (Germany) and Wintershall Dea GmbH (Germany). Like the Nord Stream (now commonly known as Nord Stream 1) pipeline, which consists of a system of two lines, construction of which was completed in 2012 and which was to be operated for a period of 50 years, the Nord Stream 2 pipeline, also consisting of two gas transmission lines, will ensure the flow of gas between Vyborg (Russia) and Lubmin (Germany), near Greifswald (Germany), bringing the overall transport capacity of the Nord Stream 1 and Nord Stream 2 pipelines to 55 billion cubic metres per year. Once it reaches the German territory, the gas conveyed by Nord Stream 1 is transferred into the onshore pipelines NEL and OPAL, which are subject, under the supervision of the German regulatory authority, to the obligations of Directive 2009/73, while that conveyed by Nord Stream 2 is to be transported by the onshore pipeline ENEL and by the newly constructed onshore pipeline EUGAL, both of which are also regulated in Germany pursuant to Directive 2009/73.

5 In January 2017, works began to recover, in concrete, pipes intended for use as part of the Nord Stream 2 pipeline, final delivery of which was to take place in September 2018.

6 On 17 April 2019, acting on European Commission Proposal COM(2017) 660 final of 8 November 2017 (‘the proposal for a directive’), the European Parliament and the Council of the European Union adopted Directive (EU) 2019/692 amending Directive 2009/73 concerning common rules for the internal market in natural gas (OJ 2019 L 117, p. 1) (‘the contested directive’), which entered into force on the 20th day following that of its publication, that is, 23 May 2019. On that date, according to the statements made by the applicant, works to recover, in concrete, the Nord Stream 2 pipes 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 zone (EEZ) of Germany, Finland, Russia and Sweden. However, at the time the present action was brought, the applicant was yet to obtain authorisation from the Danish authorities concerning the route for the two Nord Stream 2 lines. That authorisation was, however, issued on 30 October 2019.

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

8 In that regard, Article 2(17) of Directive 2009/73, as amended by the contested directive, provides that the concept of an ‘interconnector’ covers not only ‘[any] transmission line which crosses or spans a border between Member States for the purpose of connecting the national transmission system of those Member States’, but also, now, ‘[any] transmission line between a Member State and a third country up to the territory of the Member States or the territorial sea of that Member State’.

9 However, under Article 49a(1) of Directive 2009/73, as added by the contested directive, ‘in respect of gas transmission lines between a Member State and a third country completed before 23 May 2019, the Member State where the first connection point of such a transmission line with [that] Member State’s network is located may decide to derogate from [certain provisions of Directive 2009/73] for the sections of such gas transmission line located in its territory and territorial sea, for objective reasons such as to enable the recovery of the investment made or for reasons of security of supply, provided that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas, or to security of supply in the Union’. That provision also states, first, that, derogations of this kind are to be ‘limited in time up to 20 years based on objective justification, renewable if justified and may be subject to conditions which contribute to the achievement of the above conditions’, and, second, that ‘such derogations shall not apply to transmission lines between a Member State and a third country which has the obligation to transpose [Directive 2009/73, as amended, into] its legal order under an agreement concluded with the Union’.

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

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

Procedure and forms of order sought

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

– annul the contested directive in its entirety;

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

13 By separate document also lodged at the Court Registry on 26 July 2019, the applicant requested that the present case be given priority treatment under Article 67(2) of the Rules of Procedure of the General Court, a request which was provisionally rejected by decision of the General Court (First Chamber) of 5 August 2019.

14 By letter of 4 September 2019 the applicant, pursuant to Article 66 of the Rules of Procedure, requested that the Court regard certain information set out in the application as confidential vis-à-vis the public.

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

16 By separate document lodged at the Court Registry on 10 October 2019, the Parliament, pursuant to Article 130(1) of the Rules of Procedure, raised a plea of inadmissibility in which it contends that the Court should:

– primarily,

  – dismiss the application as inadmissible;

  – order the applicant to pay the costs;

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

17 By separate document lodged at the Court Registry on 11 October 2019 pursuant to Article 130(2) of the Rules of Procedure (‘the application for a decision on a procedural issue’), the Council contended that the Court should:

– order that certain documents (‘the documents at issue’) not form part of the case file or, regarding the documents produced by the applicant, that they be removed from that file, in this instance [*confidential*] (1) (‘the first document at issue’), [*confidential*] (‘the second document at issue’ and [*confidential*] (‘the third document at issue’);

– disregard all the passages of the application and the annexes thereto that refer to those documents of the Council which are classified as ‘Restreint UE/EU Restricted’, describe their content, or rely thereon.

18 In the application for a decision on a procedural issue, the Council indicated that it had received several requests, pursuant to 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), for access to documents in its possession. Those requests concerned documents relating to negotiations on an agreement between the European Union and a third country, in this instance [*confidential*], and the legislative procedure for adopting the contested directive. In that regard, it specified that, on 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, no objection regarding the refusal to grant those requests for access to documents had been raised before the Court under Article 263 TFEU. In addition, it appended to the application for a decision on a procedural issue the documents which it had drawn up, as of 11 October 2019, in connection with those requests.

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

– dismiss the action as inadmissible;

– order the applicant to pay the costs.

20 On 4 November 2019 the applicant filed its observations regarding the application for a decision on a procedural issue, in which it claims that the Court should reject the request for the removal of documents made by the Council, retain in the file all the references contained in the documents which it had submitted to the Court, and accept a document, in this instance the first document at issue, as forming part of the case file.

21 On 29 November 2019 the applicant filed its observations regarding the pleas of inadmissibility raised by the Parliament and the Council, in which it claims, in essence, that the Court should:

– primarily,

  – reserve its decision on the pleas of inadmissibility until it rules on the substance of the case;

  – set a new time limit for lodging defences which is shorter than that laid down in Article 81 of the Rules of Procedure, in order to avoid further delay in the processing of the case;

  – reserve the costs;

– in the alternative,

  – reject the pleas of inadmissibility as unfounded;

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

22 By separate document also lodged at the Court Registry on 29 November 2019, the applicant requested the Court, pursuant to Article 88 of the Rules of Procedure, to adopt a measure of organisation of procedure or, if appropriate, a measure of inquiry, consisting in asking the ‘defendants’ to produce certain documents held by the Council (‘the request for a measure of organisation of procedure’). In connection with that request, the applicant revealed that the requests that had been submitted to the Council on 10 and 13 May 2019 pursuant to Regulation No 1049/2001, as referred to by the Council in the application for a decision on a procedural issue, were the work of one of the applicant’s employees, who is an EU citizen, a fact of which the Council had been unaware until that point (‘the requests from the applicant’s employee’). By those requests, that employee had requested access to all the documents held by the Council containing observations submitted by the Member States regarding the Commission’s proposal which led to the adoption of the contested directive, together with several other specifically designated working documents. In its initial reply of 5 June 2019, the Council refused to grant access to those documents. Following the submission by that employee of the applicant, on 23 June 2019, of a confirmatory application requesting the Council to reconsider its position, the Council, by decision of 8 November 2019, first, granted full access to 23 of the requested documents and partial access to another 25 of the requested documents, and, second, refused access to two of the requested documents.

23 On 6 December 2019 the applicant, pursuant to Article 66 of the Rules of Procedure, requested that certain information set out in the pleas of inadmissibility raised by the Parliament and the Council be regarded as confidential vis-à-vis the public.

24 On 19 December 2019 the applicant submitted observations regarding the state of the proceedings following the extension by the Court, at the request of the Council, of the time limit granted to the Parliament and to the Council for submitting their observations regarding the request for a measure of organisation of procedure. The Court agreed to add that document, which was not provided for by the Rules of Procedure, to the file.

25 On 17 January 2020 the Parliament and the Council filed their observations regarding the request for a measure of organisation of procedure.

26 On 27 January 2020 the applicant submitted additional observations, not provided for by the Rules of Procedure, which the Court agreed to add to the file.

27 On 5 February 2020 the Court, by way of a measure of organisation of procedure, requested the main parties to submit their observations regarding the consequences to be drawn, concerning the application for a decision on a procedural issue, from the judgment of 31 January 2020, *Slovenia* v *Croatia* (C-457/18, EU:C:2020:65). The main parties complied with that measure within the prescribed period.

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

29 On 6 April 2020 the Council produced further evidence, consisting of the decision of the European Ombudsman of 27 March 2020 by which that person, deciding on a complaint of 27 August 2019 regarding the Council's refusal to grant access to documents concerning the Nord Stream 2 pipeline, closed that complaint, considering that that refusal did not constitute an instance of maladministration, as that refusal was justified by the protection of the public interest as regards the international relations of the European Union as referred to in Article 4(1)(a) of Regulation No 1049/2001. The applicant and the Parliament were requested to submit their observations regarding that further evidence within 2 weeks, which they did, and, in the light of those observations, the Court decided to accept the further evidence and add it to the file.

Law

The procedural issue raised by the Council

30 Pursuant to Article 130(2) and (7) of the Rules of Procedure, where, by separate document, a party applies to the Court for a decision on a procedural issue, the Court must decide on the application as soon as possible, where necessary after it has opened the oral part of the procedure.

31 In the present case, the Court considers that it has sufficient information from the documents in the file, in particular from the observations of the other main parties regarding the application for a decision on a procedural issue and from the responses of the parties to the question put by the Court on 5 February 2020, and, consequently, decides to rule on that procedural issue by way of the present order, without it being necessary to open the oral part of the procedure.

32 In the application for a decision on a procedural issue, the Council, supported, in essence, by the Parliament in its response to the Court's question of 5 February 2020, argues that the documents at issue are and have always been, including at the time that request was submitted, documents classified as 'Restreint UE/EU Restricted' within the meaning of

Article 2(2)(d) of Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information (OJ 2013 L 274, p. 1), namely ‘information and material the unauthorised disclosure of which could be disadvantageous to the interests of the … Union or of one or more of the Member States’.

33 Furthermore, regarding, in particular, the second and third documents at issue, but also the first document at issue, the Council argues that, if the applicant were to be permitted to produce those documents in support of its action, this would amount to a circumvention of the procedures laid down under Regulation No 1049/2001, given that, regarding those documents, the Council, in response to the requests from the applicant’s employee, refused, in whole or in part, to grant access to those documents and given that those decisions were not subsequently challenged before the Court under Article 263 TFEU. Nor does the fact that, without authorisation from the Council, those documents were leaked on the website of a news outlet or by other means and that certain persons then, in full awareness of the fact that those documents were classified as ‘Restreint UE/EU Restricted’, drafted articles and comments in which they revealed the content of those documents authorise the applicant to use or refer to them in the present proceedings.

34 In particular, the Council argues that the harm caused to the EU institutions following the unauthorised production and use of the documents at issue greatly exceeds the harm caused by the authors who cite or use those documents in research publications or press articles. Indeed, such use in the judicial context of the present case would not only undermine the protection which the classification ‘Restreint UE/EU Restricted’ is supposed to confer, but could also encourage the applicant to use those documents in other judicial proceedings before other courts or bodies, in particular in the context of the arbitration proceedings initiated on 26 September 2019 by the applicant against the European Union in accordance with the provisions of the Energy Charter Treaty covered by Council and Commission Decision 98/181/EC, ECSC, Euratom, of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ 1998 L 69, p. 1).

35 In its observations regarding the procedural issue, the applicant argues that the Council’s application of 11 October 2019 must be dismissed in its entirety.

36 In that regard, the applicant submits that the documents at issue are manifestly relevant for the purpose of demonstrating its standing to bring an action for annulment of the contested directive, in particular the fact that that directive concerns it ‘specifically’, as well as for the purpose of supporting the substantive pleas relied on, in particular infringement of the principles of equal treatment and legal certainty and abuse of co-legislative powers. Furthermore, regarding the fact that those documents are classified as ‘Restreint UE/EU Restricted’, it considers that that classification is internal to the Council and does not impose any obligation on third parties such as the applicant, and that, in any event, that protection is extinguished de facto when, as is the situation in the present case, the Council having taken no measures to prevent the circulation of documents stamped with that classification or to ensure that its rules are observed outside its walls, those documents have been made available in the public domain — in this instance, online — and have been extensively cited in several published articles.

37 In addition, the applicant claims that the Council’s argument that the Court should refuse to allow a party to produce a document while access to that document is the subject of administrative proceedings or pending judicial proceedings should be rejected. Regulation No 1049/2001 does not apply directly in the exercise of jurisdiction by the Courts of the European Union. Furthermore, because of the time frames for obtaining a decision from the

Council under Regulation No 1049/2001 and a subsequent ruling from the Court under Article 263 TFEU regarding the lawfulness of a Council decision of that kind refusing to grant access to a document, the Council's position, if it were to be endorsed, would make it impossible in practice to produce before the Courts of the European Union a document which an EU institution refuses to disclose until completion of the main judicial proceedings in which that document is relevant and useful as a piece of evidence. In the alternative, the applicant considers that the grounds relied on by the Council against the requests from the applicant's employee, which it seeks to reproduce in the present case, are not sufficiently detailed and that, in any event, the alleged harmful effects of disclosing the content of the first document at issue have already been triggered by public statements made by the Commission.

Preliminary observations

38 As a preliminary point, first, it must be pointed out that, in the present case, it is common ground that the applicant did not request authorisation beforehand from the Council and/or the Commission to produce before the Court the documents at issue, of which those EU institutions are the authors and/or addressees; second, it is necessary to rule on the procedural issue without prejudice to the request for a measure of organisation of procedure made by the applicant on 29 November 2019, which will be examined subsequently; third, it should be noted that, on the date of filing of the application for a decision on a procedural issue and at the stage of examining the procedural issue raised in that application, the Court had not ordered the production of the documents at issue in the main proceedings; and, fourth, it must be pointed out that those documents had not been disclosed by the Council, the Parliament or the Commission in part or in full, whether of their own free will or in response to a request for public access to documents of the institutions submitted pursuant to Regulation No 1049/2001.

39 Next, it must be pointed out that, even though the provisions of Regulation No 1049/2001 are not applicable in the present proceedings, the applicant nonetheless produced the documents at issue in the present case without authorisation from their authors and/or addressees. Thus, those provisions have a certain indicative value for the purposes of the weighing up of interests that is required in order to rule on the application for a decision on a procedural issue seeking the removal of those documents from the file (see, to that effect, order of 14 May 2019, *Hungary* v *Parliament*, C-650/18, not published, EU:C:2019:438, paragraphs 9, 12 and 13, and judgment of 31 January 2020, *Slovenia* v *Croatia*, C-457/18, EU:C:2020:65, paragraph 67).

40 In that regard, first of all, Article 4(2) of Regulation No 1049/2001 provides that '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'. It would be contrary to the public interest, which must be taken into account under that provision, which states that the institutions may benefit from the advice of their legal service, given in full independence, to allow internal documents, which are in the nature of legal advice, to be produced in proceedings before the Court unless their production has been authorised by the institution concerned or ordered by the Court (see order of 14 May 2019, *Hungary* v *Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 8 and the case-law cited; judgment of 31 January 2020, *Slovenia* v *Croatia*, C-457/18, EU:C:2020:65, paragraph 66).

41 The foregoing applies, *mutatis mutandis*, regarding the interests protected by Article 4(1)(a) of Regulation No 1049/2001. That provision lays down very general criteria in the light of which access must be refused vis-à-vis the public, as is apparent from the wording of that

provision, if disclosure of the document concerned would ‘undermine’ the protection of the ‘public interest’ as regards, inter alia, ‘public security’ or ‘international relations’, and not only, as had been proposed during the legislative procedure which preceded the adoption of that regulation, when that protection has actually been ‘significantly’ undermined (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraphs 36 to 38, and of 7 February 2018, *Access Info Europe* v *Commission*, T-851/16, EU:T:2018:69, paragraph 39).

42 Thus, it would be contrary to the public interest relating to the protection of the ‘public interest’ as regards, inter alia, ‘public security’ or ‘international relations’, to allow internal documents falling within the scope of that provision to be produced in proceedings before the Court unless their production has been authorised by the institution concerned or ordered by the Court (see, to that effect, judgment of 31 January 2020, *Slovenia* v *Croatia*, C-457/18, EU:C:2020:65, paragraph 66).

43 Furthermore, the mere fact that the applicant is relying on some of the documents at issue in proceedings before the Court against a party other than the institution from which those documents originate, in this instance the institution to which those documents are addressed, has no bearing on the protection of the public interests of the institutions, as protected by Article 4(1) to (3) of Regulation No 1049/2001, and does not therefore render superfluous the weighing up of interests that is required in order to rule on the request that those documents be removed from the case file (see judgment of 31 January 2020, *Slovenia* v *Croatia*, C-457/18, EU:C:2020:65, paragraph 69 and the case-law cited).

44 Lastly, the fact, relied on by the applicant, that it had access to the documents at issue through a website referred to in a legal academic article, or that it was made aware of their content through elements reported by authors of legal academic articles, cannot call the foregoing considerations into question (see, to that effect, judgment of 31 January 2020, *Slovenia* v *Croatia*, C-457/18, EU:C:2020:65, paragraph 72 and the case-law cited).

45 It is in the light of those considerations that the requests set out by the Council in the application for a decision on a procedural issue must be examined.

The requests for the Court to remove the documents at issue from the case file

46 The Council’s application refers to three documents, which must each be examined in turn, taking account of the fact, confirmed by the applicant, that, regarding the first two documents at issue, those documents were referred to in the requests from the applicant’s employee, which gave rise to the Council’s decisions refusing those requests which, according to the applicant, were adopted in breach of Regulation No 1049/2001.

– *The first document at issue*

47 Regarding the first document at issue, the Council emphasises that the legal advice which it contains had not been made public on the ground that its unauthorised dissemination could adversely affect the proper functioning of the institution. Although that text was not appended to the application, the applicant cites and analyses the content of that document, making reference to authors’ articles which not only describe the content of that text, but also provide hyperlinks to the website of a news outlet giving access to that advice.

48 In that regard, it must be pointed out that the applicant had not initially appended the first document at issue to the application. However, although the Council had requested on 11 October 2019 that that document not form part of the file, the applicant took the liberty of

producing that document as an annex to its observations regarding the application for a decision on a procedural issue.

49 Thus, even if, regarding the first document at issue, the application for a decision on a procedural issue could not initially seek the removal of that document from the case file but, at most, had to be regarded as a request for the Court, in respect of the remainder of the proceedings, to neither admit that document nor require it to be produced, it must however be pointed out that, as the applicant subsequently produced that document and the Council argued that it was inadmissible in its observations of 17 January 2020, the Court is now required to rule on the admissibility of that document.

50 In that regard, the first document at issue is, as its title indicates, an opinion given by the Council's Legal Service and addressed to the permanent representatives of the Member States of the European Union to that institution. It is entitled '[*confidential*]'. Therefore that document undeniably contains legal advice for the purposes of Article 4(2) of Regulation No 1049/2001.

51 Next, in relying upon and producing, in the present action, that legal opinion, issued by the Legal Service of one of the defendants and containing a legal assessment of questions of law relevant to the subject matter of the action, the applicant seeks to confront the defendants with that opinion in the present proceedings. However, to allow that legal opinion to be retained in the case file, when its disclosure has not been authorised by the Council, which refused the requests from the applicant's employee, would effectively permit the applicant to circumvent the procedure for applying for access to such a document as introduced by Regulation No 1049/2001 (see, to that effect, order of 14 May 2019, *Hungary* v *Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 14, and judgment of 31 January 2020, *Slovenia* v *Croatia*, C-457/18, EU:C:2020:65, paragraph 68).

52 In this instance, there is a foreseeable, far from hypothetical, risk that, on account of the unauthorised production in the present proceedings of the first document at issue, the Council and, to a lesser extent, the Parliament, will be compelled to take a position publicly on a legal opinion that was quite clearly intended for internal use within an EU institution. Such a prospect would inevitably have negative consequences as regards the interest of the institutions, in particular the Council, in seeking legal advice and in receiving frank, objective and comprehensive advice (see, to that effect, judgment of 31 January 2020, *Slovenia* v *Croatia*, C-457/18, EU:C:2020:65, paragraph 70; see also, by analogy, judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42, and order of 14 May 2019, *Hungary* v *Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 16).

53 The Council is therefore right to rely, in the application for a decision on a procedural issue, on the protection of legal advice, as provided for in the second indent of Article 4(2) of Regulation No 1049/2001. In that regard, contrary to the applicant's assertions, having regard to the evidential and instrumental function of annexes (see, to that effect, order of 8 November 2007, *Belgium* v *Commission*, C-242/07 P, EU:C:2007:672, paragraph 41), the Council could substantiate its assertions in the application for a decision on a procedural issue by producing, as an annex to its observations regarding the request for a measure of organisation of procedure, the decision refusing to grant access to the first document at issue relied on by that institution against a natural person who turned out, in the course of the proceedings, to be a person employed by the applicant who had acted in the interests of the applicant.

54 So far as concerns the existence of an overriding public interest justifying retention of the first document at issue in the file for the present case, besides the fact that, contrary to the applicant's assertions, the legal advice contained in that document does not relate to a legislative procedure in respect of which increased openness is required (see, to that effect, judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 46, 47, 67 and 68), since it concerns only, at that stage, [*confidential*], it should be noted that, for the applicant, the interest in retaining that document consists in being in a position to rely on that legal advice in support of its application and its observations regarding the pleas of inadmissibility raised by the Parliament and the Council. That being so, the production of that legal advice appears to be guided by the applicant's own interests in substantiating its arguments regarding the admissibility and substance of the action and not by any overriding public interest (see, to that effect, order of 14 May 2019, *Hungary* v *Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 18, and judgment of 31 January 2020, *Slovenia* v *Croatia*, C-457/18, EU:C:2020:65, paragraph 71).

55 Furthermore, the fact, relied on by the applicant, that it had access to the documents at issue through a website referred to in a legal academic article or that it was made aware of their content through elements reported by authors of legal academic articles, or that other institutions, such as the Parliament or the Commission, referred, in statements or documents put online via their websites, to the first document at issue, possibly while revealing in part the conclusions reached in the legal advice set out therein, cannot call into question the foregoing considerations concerning the Council's interest, and not the interest of those other institutions, in maintaining its prerogative to seek legal advice from its Legal Service and in receiving frank, objective and comprehensive advice (see, to that effect, judgment of 31 January 2020, *Slovenia* v *Croatia*, C-457/18, EU:C:2020:65, paragraph 72 and the case-law cited).

56 Regarding the applicant's criticism of the Council's inability to control the leak, from within its walls, of the first document at issue and of its sluggishness in ensuring that the confidential nature which it intended to confer on that document by its 'Restreint UE/EU Restricted' classification was respected, the Court considers that, even if it were in fact open to the Council to take steps aimed at, in particular, having that web document de-referenced, the fact remains that the lack of initiative or lack of success on the part of the Council in that regard cannot permit the conclusion that it implicitly authorised the disclosure of that document under Regulation No 1049/2001.

– *The second document at issue*

57 Regarding the second document at issue, it constitutes, as its title indicates, recommendations made by the Commission and addressed to the Council for the adoption of a decision concerning international negotiations with a third country relating specifically to [*confidential*].

58 In that regard, the Council argues, in the application for a decision on a procedural issue, that the second document at issue was thus still being examined by the Council. That document had not been disclosed to the public, including after the submission of requests for access to documents under Regulation No 1049/2001, because such disclosure would undermine the protection of the public interest as regards international relations and would impair the Council's decision-making process, in particular by weakening the position of the Council and of the European Union in court proceedings, including arbitration proceedings, as referred to in Article 4(1) and (2) of that regulation.

59 The applicant again considers, regarding the second document at issue, that the Court must confine itself to the matters set out by the Council in the application for a decision on a procedural issue, without being able to rely on the grounds for refusing to grant access to that document as set out in the Council's decision, which it attached to its observations, refusing to grant a natural person such access. In the alternative, regarding the Council's assertion, in that decision refusing access, that disclosure of the second document at issue would undermine the European Union's international relations by revealing [*confidential*], the applicant considers, while noting that it would be the first time that a document of that nature would not be disclosed to the public, that, from the moment it has allowed a document or information to escape from its walls, the Council may neither rely on such grounds nor claim that the disclosure of that document would adversely affect the discussions regarding that file or [*confidential*]. In any event, the reference to an alleged weakening of the European Union's position in the arbitration proceedings initiated against it by the applicant is also not sufficient grounds for the removal of the second document at issue from the file. Indeed, those proceedings are separate from the present judicial proceedings. According to the applicant, neither Regulation No 1049/2001 nor the Rules of Procedure are applicable in those arbitration proceedings, just as the decision of the Court regarding the procedural issue in the present case will not be enforceable in those proceedings.

60 In that regard, it should be borne in mind that the principle that the exceptions referred to in Article 4 of Regulation No 1049/2001 are to be construed strictly, as acknowledged by case-law (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 63; of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 36; and of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 30), does not, in respect of the public-interest exceptions referred to in Article 4(1)(a) of that regulation, preclude the institution concerned from enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 64, and of 7 February 2018, *Access Info Europe* v *Commission*, T-851/16, EU:T:2018:69, paragraph 40).

61 Indeed, the Court has held that it must be accepted that the particularly sensitive and essential nature of those interests, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care and that such a decision therefore requires a margin of discretion (judgment of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 35). This is corroborated by the fact that the exceptions set out in Article 4(1) of Regulation No 1049/2001 are framed in mandatory terms and it follows that the institutions are obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist and that there is no need to balance the protection of the public interest against an overriding general interest in disclosure (see judgments of 7 February 2018, *Access Info Europe* v *Commission*, T-851/16, EU:T:2018:69, paragraph 38 and the case-law cited, and of 7 February 2018, *Access Info Europe* v *Commission*, T-852/16, EU:T:2018:71, paragraph 38 and the case-law cited).

62 In that regard, it has previously been held, in essence, that the disclosure of elements connected with the objectives pursued by the European Union and its Member States in decisions, in particular when they deal with the specific content of an international agreement envisaged or the strategic objectives pursued by the European Union in

negotiations, would damage the climate of confidence in the negotiations which were ongoing at the time of the decision refusing access to documents containing those elements (judgment of 7 February 2018, *Access Info Europe* v *Commission*, T-852/16, EU:T:2018:71, paragraph 44; see also, to that effect, judgment of 4 May 2012, *In 't Veld* v *Council*, T-529/09, EU:T:2012:215, paragraphs 35, 36 and 39).

63 In the light of the foregoing considerations and the content of the second document at issue, it must be held that the Council is 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, in this instance in relations between the European Union and [*confidential*], which justifies, in itself, the exclusion of that document from the file, without it being necessary either to weigh the protection of that public interest against an overriding general interest or to examine the other two grounds relied on by the Council against the possibility of the applicant producing the second document at issue, namely those relating to the protection of court proceedings and the protection of the Council's internal decision-making process as referred to in the second indent of Article 4(2) of that regulation and Article 4(3) thereof, respectively.

64 Furthermore, it should be reiterated that that conclusion cannot be called into question by the arguments already set out and rejected in paragraphs 55 and 56 above.

– *The third document at issue*

65 Regarding the third document at issue, the applicant argues that it makes no reference thereto in the application and that, in fact, the Council's complaint must be understood as referring to a legal academic article, produced as Annex A. 19. However, in so far as the applicant's line of argument follows only from what is set out in the application and not from what is attached as an annex to that application and to which no reference is made in that application, the Council's request concerning the third document at issue is devoid of purpose.

66 In that regard, it must be pointed out that, in fact, although the second and third documents at issue, as referred to by the Council in the application for a decision on a procedural issue, are both dated 12 June 2017 and the third is appended to the second, it nonetheless appears that the applicant has not produced, as such, the third document at issue. Accordingly, there is no need to adjudicate on the primary request for that document to be removed from the file.

67 Regarding the Council's request, apparently in the alternative, for the Court to order that the third document at issue 'not form part' of the file, it appears that that request is intended pre-emptively to express that institution's position in the event of the Court contemplating adopting a measure of organisation of procedure whereby the Council would be asked to produce that document. However, such a request does not reflect the existence of a procedural issue, so that there is also no need to adjudicate on it.

68 It follows from all the foregoing considerations that, inasmuch as they were produced without the authorisation, as the author or addressee, of the institution concerned, and without the Court having, at this stage, ordered that they be produced, the first document at issue, produced as Annex O. 20 to the applicant's observations regarding the application for a decision on a procedural issue, and the second document at issue, produced as Annex A. 14 to the application, must be excluded from the file.

The request for the Court to disregard certain passages of the application and the annexes

69 Regarding the Council's related request for the Court to disregard the passages of the application which refer to the documents at issue, in particular, paragraphs 50 to 53, paragraph 112(a)(iii), paragraph 139 and paragraph 158(d), the applicant considers that that request should be rejected. It notes that, in those paragraphs (with the exception of the last paragraph, in which no express reference is made to the first document at issue), it merely explained that the origin of the contested directive was the legal analysis set out in the first document at issue. That origin is explained in paragraph 2 of the proposal for a directive, which is a public document. In addition, the Council's assertion seems to refer more to the alleged possibility, for the applicant, of relying on a document published by the Parliament, entitled 'Common Rules for Gas Pipelines entering the EU Internal Market', even though, because of the public nature of that document, the applicant could refer to it and to the information revealed thereby. As to the remainder, the Court cannot deprive the applicant of the possibility of referring to academic writing, even if such writing was itself required, in full or in part, to rely on or refer to confidential documents or to reveal, directly or indirectly, the content of such documents.

70 In that regard, following the removal of the first and second documents at issue from the file, it is appropriate to consider, consequently, that the applicant's assertions, as set out in the application and referring to those documents, are no longer substantiated by evidence confirming their content and veracity. As regards the legal academic articles produced by the applicant and referring to the first two documents at issue or revealing extracts thereof, first, those publications have not themselves been declared unlawful by an administrative or judicial authority and, second, given that the probative value of publications and other comments voiced by legal writing is, generally, limited, it should be held that, a fortiori, those produced in the present case, even if it is unnecessary to exclude them from the file, have even less probative value where the applicant has not lawfully produced the source documents whose content they are alleged to reveal.

71 In those circumstances, the application for a decision on a procedural issue requesting the Court to disregard certain passages of the application and the annexes must be upheld only as regards those passages in which extracts of the first and second documents at issue are reproduced (see, to that effect, orders of 30 April 2010, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, T-18/10 R, not published, EU:T:2010:172, paragraph 23, and of 21 February 2013, *Besselink* v *Council*, T-331/11, not published, EU:T:2013:91, paragraph 16). That application must be dismissed as to the remainder.

72 Having regard to all the foregoing considerations, it is necessary to rule on the application for a decision on a procedural issue as follows:

– the documents produced by the applicant as Annexes A. 14 and O. 20 are removed from the file and account should no longer be taken of the passages of the application and the annexes in which extracts of those documents are reproduced;

– there is no need to adjudicate as regards the third document at issue;

– the application for a decision on a procedural issue is dismissed as to the remainder.

The pleas of inadmissibility raised by the Parliament and the Council

73 In support of their pleas of inadmissibility, the Parliament and the Council contend that the applicant does not have standing to bring an action seeking annulment of the contested directive, because it is neither directly nor individually concerned by that directive. Accordingly, the present action is inadmissible.

74 For its part, the applicant maintains that it has standing to bring an action for annulment of the contested directive.

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

76 In the present case, the Court considers that it has sufficient information from the documents before it and decides to rule by way of the present order on the pleas of inadmissibility raised by the Parliament and the Council, without it being necessary to open the oral part of the procedure.

Preliminary observations

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

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

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

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

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

82 In the present case, it is common ground that the contested directive was adopted under Article 194(2) TFEU and in accordance with the ordinary legislative procedure, as described in Article 294 TFEU. Consequently, that directive constitutes a legislative act for the purposes of the FEU Treaty.

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

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

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

Whether the applicant is directly concerned

86 The Parliament considers that the applicant is not directly concerned by the contested directive because it is a legislative act of general application which applies in the abstract to objectively determined situations. In addition, it will not affect the applicant’s legal situation before the Member States, to which the contested directive is addressed, implement the laws, regulations and administrative provisions necessary to comply with that directive or, as the case may be, before expiry of the deadline for transposition.

87 In particular, the Parliament considers that, taking into account the fact that the Member States have the option to derogate from the obligations laid down by Directive 2009/73, as amended by the contested directive, and the fact that it is possible for the national regulatory authorities to regard such derogations as justified and to define the obligations that should be

attached thereto, it is appropriate to consider, as the General Court did in the judgment of 27 June 2000, *Salamander and Others* v *Parliament and Council* (T-172/98 and T-175/98 to T-177/98, EU:T:2000:168, paragraphs 67 to 70), that the contested directive leaves the Member States a margin of discretion which is such as to exclude the applicant being directly concerned by that directive.

88 In addition, the Parliament notes that, in any event, at the time when the present action was brought, the route which the Nord Stream 2 dual gas transmission line was supposed to take within the EEZ of Denmark, off the island of Bornholm, had not yet been decided. This confirms that, in order to show that it is directly concerned, the applicant is relying on the potential and future effect of the contested directive on its — also future — status. However, direct concern must exist at the time when the action is brought, which is, necessarily, not the situation in the present case.

89 The Council contends that the applicant is not directly concerned by the contested directive for the purposes of the second scenario referred to in the fourth paragraph of Article 263 TFEU, which must be interpreted strictly, as was emphasised by the Court of Justice in the judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 59).

90 In that regard, the Council considers that the contested directive is not, in itself, prior to and irrespective of the adoption of national measures transposing that directive, such as to affect the applicant's legal situation. In particular, in the light of the wording and content of the contested directive, no obligation is directly imposed on the applicant, given that any obligation regarding unbundling, third-party access or regulated tariffs could arise only from national measures transposing that directive. The applicant, moreover, acknowledged that state of affairs in letters exchanged before it initiated arbitration proceedings against the European Union under the Energy Charter, since it indicated that 'when [the contested directive] comes into force and is transposed into German law, the section of the Nord Stream 2 within the geographical scope of the Directive (i.e. on German territory and in the German territorial sea) in principle becomes subject to the [Directive 2009/73, as amended by the contested directive,] rules on, inter alia, unbundling rules, third party access and tariff regulation'.

91 Regarding the measures for transposing the contested directive, the Member States have a wide discretion as regards the way in which they wish to implement that directive, as regards, in particular, first, the choice between three unbundling models (the full ownership unbundling model, the independent system operator model, and the independent transmission system operator model), second, the option of granting derogations and exemptions from the obligations laid down by Directive 2009/73, as amended by the contested directive, and third, the possibility of using the empowerment procedure to conclude or amend agreements with third countries in order to ensure that those international agreements comply with EU law. Regarding, specifically, the derogations and exemptions that may be granted, the national regulatory authorities have a margin of discretion in adopting those decisions but also in defining the conditions conducive to competition, the effective functioning of the internal market or security of supply to which they may make such derogations and exemptions subject.

92 In addition, the contested directive requires the adoption of additional implementing measures by the national regulatory authorities, for example as regards the setting, methods of calculating and approval of tariffs, in respect of which they have a margin of discretion.

93 In any event, the Council argues that, even assuming, for the purposes of legal proof, that the Member States have no discretion in adopting national measures transposing the contested directive, the applicant's legal situation would in any case not be directly affected, given that the contested directive produces its legal effects vis-à-vis an operator, such as the applicant, only through the intermediary of measures adopted by the national authorities.

94 The Council also considers that the applicant's demonstration that it is directly concerned by the contested directive is based on the — incorrect — premiss that it would have no possibility of obtaining a derogation under Article 49a of Directive 2009/73, newly introduced into that directive by the contested directive, or even an exemption under Article 36 thereof. First, contrary to what the applicant suggests, the contested directive does not compel the national regulatory authorities to require that requests for exemption or derogation be submitted before an investment decision is taken or before construction of the gas infrastructure concerned begins. Second, the decision to grant or refuse such an exemption or derogation is a matter for the national regulatory authorities, which act on the basis of the legislation transposing the contested directive. In addition, in that regard, those authorities have the option of attaching specific conditions to such exemptions or derogations, which it is for them to define.

95 Lastly, the Council recalls that, in any event, any effects which the contested directive may have on the applicant's economic situation cannot be regarded as demonstrating that it is directly affected by that directive in terms of its legal position.

96 In the application and in its observations regarding the pleas of inadmissibility raised by the Parliament and the Council, the applicant maintains that it is directly concerned by the contested directive. In its view, irrespective of the alleged possibility of obtaining a derogation from the German regulatory authority under Article 49a of Directive 2009/73, as added to that directive by the contested directive, or even an exemption under Article 36 thereof, which can in any event apply only to 'new infrastructure', which is not the case with Nord Stream 2, the requirements of Directive 2009/73 would henceforth be applicable to it. The same is true of the obligations concerning the unbundling of transmission systems and transmission system operators as laid down by Article 9 of Directive 2009/73, the obligation to grant third parties access to its pipeline as laid down in Article 32 of that directive, and tariff obligations as laid down in Article 41(1) and (6) thereof and in the corresponding German transposing legislation.

97 Those new obligations must lead to significant changes in the applicant's case, since, in order to comply with them, it must sell the whole of the Nord Stream 2 pipeline to a third party or entirely alter its organisational and business structure, which fundamentally weakens the basis for funding that infrastructure, funding with which, moreover, European undertakings have been associated.

98 According to the applicant, the contested directive does not confer on the Federal Republic of Germany, the Member State in whose territorial sea the section of the Nord Stream 2 pipeline concerned is located, any genuine discretion in implementing that directive, because the rules on unbundling, third-party access and tariff regulation are to be applied to the applicant without any possibility for it to obtain a derogation from the corresponding provisions of Directive 2009/73 under Article 49a thereof, newly introduced into that directive by the contested directive.

99 Each of the options unbundling options provided by the contested directive would have a significant impact on the applicant's situation by fundamentally affecting its ownership and business structure. Thus, 'since Germany would be required to demand that the Applicant

complies with at least one of these three options, Germany is not “free to act or not to act”’, according to the wording used by the General Court in paragraph 53 of the order of 22 June 2006, *Sahlstedt and Others* v *Commission* (T-150/05, EU:T:2006:172), and, thus, ‘the prejudice to the legal situation of [the Applicant] is due to the requirement to attain that result’ according to the wording used by the Court of Justice in paragraph 63 of the judgment of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159).

100 In any event, it cannot be disputed that a company in a situation such as that of the applicant, wishing to comply with the requirements of the contested directive in order to be ready to operate a pipeline such as Nord Stream 2 on the date of expiry of the period prescribed for the transposition of that directive by the Member States, namely 24 February 2020, was required immediately to begin to make the necessary changes, which shows that that directive has legal effects on the applicant’s situation.

101 In addition, regarding the possibility of the applicant obtaining a derogation from the German regulatory authority under the new Article 49a of Directive 2009/73, added to that directive by the contested directive, a derogation which, according to the Parliament and the Council, could, in practice, eliminate all the legal effects of the contested directive on its situation, the applicant considers that a request on its part to obtain such a derogation would be bound to fail. Indeed, such a derogation could be granted only if the gas infrastructure concerned was ‘completed before 23 May 2019’, which was not the case for Nord Stream 2. In fact, the real substantive issue is the extent of the condition limiting the scope *ratione materiae* of Article 49a of Directive 2009/73, which justifies the Court deciding to reserve its decision on the pleas of inadmissibility until it rules on the substance of the case and to set a time limit for the filing by the Parliament and the Council of their respective defences.

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

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

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

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

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

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

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

109 Moreover, to accept the applicant's point of view that its legal situation has been directly affected by the entry into force of the contested directive, on the ground that the operation of its Nord Stream 2 double pipeline system would otherwise have fallen outside the material scope of Directive 2009/73, would be tantamount to considering that, each time the European Union enacts new legislation in a given area, making operators subject to obligations to which they were not previously subject, that legislation, even if adopted in the form of a directive and according to the ordinary legislative procedure, would necessarily directly affect those operators for the purposes of the fourth paragraph of Article 263 TFEU. Such an approach would however be at odds with the very wording of the third paragraph of Article 288 TFEU, according to which '[directives] shall be binding, as to the result to be achieved, upon each Member State to which [they are] addressed, but shall leave to the national authorities the choice of form and methods', and would thus be at odds with the fact that the operators are, in principle, affected, as regards their legal situation, by the national measures transposing any directive.

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

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

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

113 The applicant moreover acknowledges that option, emphasising that 'it is also correct that in relation to ownership unbundling [Directive 2009/73, as amended by the contested directive,] allows Member States to introduce alternatives to full ownership unbundling, namely the [independent operator] and [independent transmission system operator] models'. Similarly, it should be pointed out that, under Article 14(1) of Directive 2009/73, as added by the contested directive, Member States may decide not to apply Article 9(1) thereof and to designate, upon a proposal from the owner of the transmission system concerned and with the Commission's approval, an independent system operator.

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

115 In that regard, it is for the Member States to adopt national measures enabling the operators concerned to ask to benefit from those derogations, determining precisely the conditions for obtaining those derogations in the light of the general criteria laid down by Article 49a of Directive 2009/73, as amended, and regulating the procedure enabling their national regulatory authorities to decide on such requests within the periods laid down by the

contested directive. In addition, for the purpose of implementing those conditions, the national regulatory authorities have a wide discretion as regards the grant of such derogations and any specific conditions to which those derogations may be subject (see, by analogy, judgment of 4 December 2019, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission*, C-342/18 P, not published, EU:C:2019:1043, paragraphs 48 to 53).

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

117 Lastly, the applicant cannot 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). That case concerned a decision of the Commission addressed to the Member States other than the United Kingdom of Great Britain and Northern Ireland, by which the Commission had approved the measures taken by that — at that time — Member State of the European Union, which had had the effect of imposing on national television broadcasters a certain number of limits when planning to broadcast designated events in respect of which the applicant at first instance had acquired exclusive rights. Thus 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.

118 It follows from all the foregoing considerations that the applicant is not directly concerned by the contested directive. Given that the conditions laid down in the second scenario referred to in the fourth paragraph of Article 263 TFEU are cumulative, that finding means that the applicant cannot have standing to bring an action for annulment of the contested directive on the basis of that second scenario (see, to that effect, judgment of 4 December 2019, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission*, C-342/18 P, not published, EU:C:2019:1043, paragraph 37 and the case-law cited).

119 It should be added that, contrary to the applicant's assertions, the fact that the Parliament and the Council adopted the contested act in the form of a directive or that they decided to grant a derogation under the new Article 49a of Directive 2009/73, as amended, only to pipelines 'completed before 23 May 2019' is not such as to restrict its right to an effective judicial remedy under Article 47 of the Charter of Fundamental Rights of the European Union.

120 Indeed, the FEU Treaty has established, by Articles 263 and 277 thereof, on the one hand, and Article 267 thereof, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union (judgments of 23 April 1986, *Les Verts* v *Parliament*, 294/83, EU:C:1986:166, paragraph 23; of 25 July 2002, *Unión de Pequeños Agricultores* v *Council*, C-50/00 P, EU:C:2002:462, paragraph 40; and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 92).

121 Accordingly, natural or legal persons such as the applicant who cannot, by reason of the conditions of admissibility stated in the fourth paragraph of Article 263 TFEU, challenge directly European Union acts of general application do have protection against the application to them of those acts (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 93).

122 In the applicant's case, it is open to it to request, from the German regulatory authority, a derogation under Article 49a of Directive 2009/73, as amended, or even an exemption under Article 36 thereof and, as the case may be, to challenge that authority's decision before a German court by claiming that the contested directive is invalid and causing that court to put

questions to the Court of Justice by way of questions referred for a preliminary ruling regarding the validity of the contested directive on the basis of Article 267 TFEU (see, to that effect, judgments of 16 May 2019, *Pebagua* v *Commission*, C-204/18 P, not published, EU:C:2019:425, paragraphs 67 and 68, and of 4 December 2019, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission*, C-342/18 P, not published, EU:C:2019:1043, paragraph 63 and the case-law cited).

123 In that regard, contrary to the applicant's assertions, there is no reason why such a reference for a preliminary ruling should be declared inadmissible on the ground that the applicant would be 'undoubtedly entitled' to bring an action for annulment of the contested directive under Article 263 TFEU for the purposes of the case-law resulting from the judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90), and recently clarified in the judgment of 25 July 2018, *Georgsmarienhütte and Others* (C-135/16, EU:C:2018:582, paragraph 43). On the contrary, the dismissal of the present action as inadmissible confirms that the applicant does not have standing to bring proceedings under Article 263 TFEU.

124 Accordingly, the action must be dismissed as inadmissible inasmuch as the applicant cannot base its standing to bring an action for annulment of the contested directive on any of the scenarios referred to in the fourth paragraph of Article 263 TFEU.

The request for a measure of organisation of procedure

125 In its request for a measure of organisation of procedure, the applicant indicates that numerous passages in the 25 documents to which only partial access was granted by the Council in response to the requests from the applicant's employee have been redacted. Thus, it claims that it has reason to believe that those redacted passages were highly relevant to the outcome of the present action, as they probably contain information showing that the contested directive, adopted by the EU legislature, was specifically aimed at the applicant. As proof of this, the applicant refers to the fact that it has obtained, visibly via another source, the non-redacted versions of two of the 25 documents in respect of which full access had been refused. Those two documents, containing the Federal Republic of Germany's observations regarding the proposal for a directive, show that the contested directive was specifically aimed at the applicant.

126 Thus, the applicant asks the Court to order the Council to produce non-redacted versions of the 25 documents to which only partial access was granted to its employee and the two documents which the Council refused to disclose, while making clear that those versions may conceal any passages relating to advice given by the Council's Legal Service or to personal data.

127 In its observations regarding the request for a measure of organisation of procedure, the Council, supported, in essence, by the Parliament, requests the Court, primarily, to reject that request, as the requested documents are manifestly irrelevant as regards the applicant's *locus standi*. Furthermore, it emphasises that, in the present case, the Court cannot review, even indirectly, the legality of the decisions which it adopted, in response to the requests from the applicant's employee, under Regulation No 1049/2001, and that the Court should, on the contrary, reject the applicant's attempt to initiate an improper document discovery procedure and to circumvent the definitive nature, in the absence of an action under Article 263 TFEU, of the decisions refusing to grant access taken in respect of its employee. The Council also requests the Court, in any event, to order the removal from the file of the documents produced as Annexes M. 26 and M. 30 to the request for a measure of

organisation of procedure, on the ground that those documents were unlawfully obtained by the applicant and, consequently, unlawfully produced and attached to its request.

128 While emphasising that the Court of Justice was faced with a related issue in the case which gave rise to the judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236), in which the applicant was seeking to use the procedure laid down by Regulation No 1049/2001 for the purpose of obtaining documents from an institution in order to substantiate its claims as a private party to proceedings against the European Union, the Council indicates that it is concerned, in essence, that, in the present case, the applicant is seeking to obtain regularisation, from the General Court, with a view to using them subsequently in the arbitration proceedings which it has initiated against the European Union, of the possession, by the applicant, of documents revealing the internal discussions and preliminary positions of the Member States concerning the contested directive, even though the applicant was refused access to the non-redacted versions of those documents by the Council under Regulation No 1049/2001.

129 In that regard, it must be pointed out that the documents concerned by the request for a measure of organisation of procedure are capable of establishing, from the applicant's point of view, that the applicant is individually concerned by the contested directive. However, in so far as the fact that the applicant's legal situation is not directly affected, as previously stated, is sufficient reason to consider that it does not have standing to bring an action for annulment of the contested directive, the present action may be dismissed as inadmissible without there being a need to rule on the request for a measure of organisation of procedure.

130 Regarding the Council's request that the two documents produced by the applicant as Annexes M. 26 and M. 30 be removed from the file, it should be emphasised that, contrary to the applicant's assertions in its letter of 27 January 2020, in which it spontaneously adopted a position on that additional request by the Council, such a procedural issue need not necessarily be raised by separate document under Article 130(2) of the Rules of Procedure and may, in addition, be raised at any stage of the proceedings. The Council's request, as set out in its observations regarding the request for a measure of organisation of procedure, is, therefore, admissible.

131 In that regard, it should be emphasised that the two documents at issue contain positions of the Federal Republic of Germany in the context of the legislative procedure which led to the adoption of the contested directive.

132 In its letter of 27 January 2020, the applicant denies unlawful possession of those documents. First, it emphasises that those documents were not stamped 'Restreint UE/EU Restricted' and indicated only that they were intended for use within a community of addressees and that the processing and subsequent dissemination of those documents was solely the responsibility of the members of that community. Second, it indicated that, 'if such a community member [were to share] a document with [the applicant], it [would be] very difficult to see how this could result in [the latter] breaching the law'.

133 In that regard, it must be pointed out that, in its letter of 27 January 2020, the applicant did not indicate which of the permanent representatives of the Member States of the European Union belonging to the community of addressees of the two documents in question would have authorised those documents being made available to the applicant. Nor did it rely on the consent of the permanent representative of the Federal Republic of Germany in its capacity as the author of those documents. Furthermore, it does not appear that, under Article 4(5) of Regulation No 1049/2001 (see, in relation to that option, judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraphs 85 to

89), that Member State tacitly or explicitly gave its consent to those comments being sent to the applicant either before or after the partial refusal by the Council to grant the requests from the applicant's employee.

134 In those circumstances, it must be held that the applicant has not established that the non-redacted versions of the comments submitted by the Federal Republic of Germany in the context of the procedure for adopting the contested directive had been obtained lawfully.

135 Accordingly, the Council's request for the documents produced by the applicant as Annexes M. 26 and M. 30 to be removed from the file must be upheld, it being emphasised, in any event, first, that those documents are not such as to demonstrate that the applicant is directly concerned under the second scenario referred to in the fourth paragraph of Article 263 TFEU, so that there was no need for the Court to require the Council to produce those documents in order to rule on the pleas of inadmissibility, and, second, that disclosure of the content of those documents, including in the present proceedings, 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 applicant because, inter alia, the adoption by the Court of the measure of organisation of procedure proposed by the applicant would tend to confer legitimacy on the applicant's possession of the non-redacted versions of those documents.

The applications for leave to intervene

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

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

Costs

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

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

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby orders:

1. **The documents produced by Nord Stream 2 AG as Annexes A. 14 and O. 20 are removed from the file and there is no need to take account of the passages of the application and annexes in which extracts of those documents are reproduced.**

2. **The application for a decision on a procedural issue submitted by the Council of the European Union is dismissed as to the remainder.**

3. **The documents produced by Nord Stream 2 as Annexes M. 26 and M. 30 are removed from the file.**

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

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

6. **Nord Stream 2 is ordered to pay the costs of the European Parliament and of the Council, except for those relating to the applications for leave to intervene.**

7. **Nord Stream 2, the Parliament and the Council, as well as the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland and the Commission, are to bear their own costs in relation to the applications for leave to intervene.**

Luxembourg, 20 May 2020.

E. Coulon J. Svenningsen

Registrar President

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* Language of the case: English.

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1 Confidential data redacted.