

Nord Stream 2 Investor Initiates ECT Arbitration Proceedings Against European Union



On 26 September 2019, the Russian energy giant *Gazprom* issued, through its Switzerland-based subsidiary *Nord Stream 2 AG*, a notice for arbitration against the European Union alleging that recent amendments brought to [Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC](#) (the **Gas Directive**) damaged its investments in the Nord Stream 2 pipeline and thus violated the Energy Charter Treaty 1994 (the **ECT**).

The issuing of this notice for arbitration appears to mark the first time that investment arbitration proceedings under the ECT are to take place against the European Union itself and serves as the latest saga in the area of inter-mixity of investment dispute settlement and EU law.

The Nord Stream 2 pipeline aims to transport natural gas from Russia into the European Union in order to enhance the EU's security of supply.

In order to make the construction of such major gas infrastructure economically and financially possible, Article 36 of the Gas Directive, adopted in 2009, originally provided that such projects could be exempted from EU rules on third party access, tariff regulation and ownership unbundling. However, *Nord Stream 2 AG* now alleges that, through the adoption of [Directive 2019/692/EC amending Directive 2009/73/EC concerning common rules for the internal market in natural gas \(Directive 2019/692\)](#), the European Union modified the Gas Directive in such a way as to create discriminatory measures between gas infrastructure projects. More particularly, [it alleges that the amendments brought to the Gas Directive creates a gap](#) between, on the one hand, the scope of the exemption under Article 36 of the Gas Directive (which, according to *Nord Stream 2 AG*, only concerns future projects for which the investment risk *has not yet been undertaken*) and, on the other hand, the scope of a new Article 49a in the Gas Directive which provides for a derogation to EU rules on third party access, tariff regulation and ownership unbundling for gas infrastructure projects completed prior to 23 May 2019.

In the case at hand, *Nord Stream 2 AG* argues that it fell outside the scope of the exemption schemes since (i) its investment risk had already been taken prior to the adoption of Directive 2019/692; and (ii) that the project was not completed by 23 May 2019. According to *Nord Stream 2 AG*, this exclusion was discriminatory and disproportionate, and it violated Article 10 of the ECT.

The notice of arbitration served on 26 September 2019 is the follow-up of a notice of dispute submitted by *Nord Stream 2 AG* to the EU on 12 April 2019. Pursuant to Article 26 ECT, the parties attempted to amicably settle the dispute during a 3-month “cooling-off” period. This “cooling-off” period, however, lapsed on 12 July 2019 after negotiations between *Nord Stream 2 AG* and the European Commission failed to arrive

at an amicable settlement.

In addition to the present case, *Nord Stream 2 AG* brought, in July earlier this year, actions for annulment against the amendments to the Gas Directive before the General Court of the European Union (see [here](#) and [here](#)). Under those actions for annulment are the claims that the amendments to the Gas Directive breach the principles of equal treatment and proportionality, and it predominantly serves to impede the construction of the pipeline.

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