

Nord Stream 2 AG, Baarerstr. 52, CH-6300 Zug

European Commission
Directorate-General for Trade
Directorate F – WTO, Legal Affairs and Trade in
Goods
F2: Dispute Settlement and Legal Aspects of Trade
Policy
Attn.: [REDACTED]

B-1049 Brussel

Date: 08.07.2019

Subject: Directive 2019/692 (the "Amending Directive") amending Directive 2009/73/EC (the "Gas Directive"): Request for clarification on the application of the derogation regime to the Nord Stream 2 Pipeline ("Nord Stream 2") and notification of possible breach of the Energy Charter Treaty ("ECT")

Amicable Settlement Meeting pursuant to Article 26 of the ECT on 25 June 2019

Dear [REDACTED]

NSP2AG is writing to seek further clarification of the position that the EU adopted in the amicable settlement meeting held pursuant to Article 26 ECT at the premises of the European Commission in Brussels on 25 June 2019.

On 14 June 2019 we provided the EU with the attached document further developing NSP2AG's legal concerns regarding the Amending Directive, as initially outlined in our letter of 12 April 2019. At the meeting on 25 June 2019 we made a presentation on the same topic. In all of our communications with the EU since 12 April 2019 we have asked the EU to confirm that NSP2AG and its investment would be eligible for a derogation pursuant to Article 49a of the amended Gas Directive (by being considered "*completed before 23 May 2019*") or that the EU would otherwise grant NSP2AG treatment equivalent to pipelines eligible for such a derogation. We noted that were such a derogation or equivalent treatment not to be available, this would amount to clear discriminatory treatment as compared to all other offshore import pipelines.

At the meeting on 25 June 2019 the EU, represented by 15 members of the European Commission's staff and one member of the European External Action Service, made a brief oral statement containing the following three short points:

1. NSP2AG has not provided evidence, and the EU does not accept, that NSP2AG has substantial business activities in Switzerland and therefore the EU intends to dispute NSP2AG's standing to bring a claim under the ECT.
2. Even if NSP2AG were to have standing, according to the EU it does not have a valid claim under the ECT because (i) the Amending Directive does not discriminate against NSP2AG; and (ii) NSP2AG could have reasonably anticipated that the rules of the Gas Directive would apply to it.
3. The EU could not confirm or deny whether Nord Stream 2 could be considered "*completed before 23 May 2019*" and, therefore, whether NSP2AG is eligible for a derogation pursuant to Article 49a. The EU stated that this could only be determined by Germany once NSP2AG had filed a request to obtain such a derogation.



No further explanation for the EU adopting these positions, and no counterarguments to NSP2AG's arguments have been provided. In relation to the third point, NSP2AG asked whether the EU took the view that Germany had, as a matter of EU law, the possibility to consider the Nord Stream 2 pipeline "*completed before 23 May 2019*" so that it becomes eligible for a derogation pursuant to Article 49a. The EU delegation did not provide an answer to this question, stating only that "*of course, the Member State has to comply with the law*" (i.e. with the amended Gas Directive) and that, if a Member State does not do so, the European Commission could be expected to use its normal enforcement powers.

NSP2AG makes the following points in response to the EU's oral statement:

1. Substantial business activities: As to the EU's first point, we note that in our letter of 27 May 2019, we asked that if the EU had any questions that it considered would be useful for NSP2AG to consider in advance of our meeting, the EU should let NSP2AG know. It is unfortunate that having failed to do so, the EU would argue during our meeting that NSP2AG had failed to provide any evidence that NSP2AG has substantial business activities in Switzerland.
2. As we explained at the meeting, NSP2AG is a Swiss company with 172 employees (out of a total of approximately 220), including its management team, based at Zug in Switzerland, where NSP2AG maintains office space of around 2,800 square metres. From the very beginning of the project, all of the activities on the project were co-ordinated from Zug. All of the main procurement, construction, and operating contracts for the Nord Stream 2 pipeline have been negotiated and concluded by NSP2AG from its premises in Zug, and it is intended that the Nord Stream 2 pipeline will be operated from an operations building in Zug – as indeed has been and is the case with the Nord Stream 1 pipeline. Indeed, in early 2017 NSP2AG concluded a long-term contract for a new building in Zug of around 2,600 square metres for the operations of the Nord Stream 2 pipeline. The EU delegation is invited to visit NSP2AG's premises in Zug, where it will see for itself the substantial nature of the business activities conducted there. There can be no doubt that NSP2AG is a Swiss "*Investor*" for the purposes of Article 1(7)(b) of the ECT (a "*company ... organised in accordance with the law applicable in [a] Contracting Party*"), that it conducts "*substantial business activities*" in Switzerland for the purposes of Article 17(1) of the ECT, and that it therefore has standing to bring a claim against the EU under the ECT.
3. Discrimination: As to the EU's second point, how can the EU claim that the Amending Directive does not discriminate against NSP2AG if the EU (allegedly) does not know, or does not want to reveal, whether the Nord Stream 2 pipeline could be considered "*completed before 23 May 2019*", and therefore does not know, or does not want to reveal, if Nord Stream 2 will be treated differently to all other import pipelines? Further, how can the EU argue that NSP2AG could have reasonably anticipated that the rules of the Gas Directive would apply to it, while at the same time claiming that the EU, as the author of the legislation, does not know, or does not want to reveal, whether NSP2AG is eligible for a derogation pursuant to Article 49a?
4. Refusal to explain its own legislation: As to the EU's third point, "*completed before 23 May 2019*" is an objective concept, the meaning of which cannot depend on whether or not NSP2AG has filed an application for a derogation. In the same vein, it does not seem credible that the EU is objectively incapable of explaining the meaning of "*completed before 23 May 2019*" in a measure that was recently adopted by its legislature. The EU's refusal to do so puts both Member States and investors in a difficult position, and constitutes a further breach of the ECT:
 - a. In the case of Germany, it is left in a position of uncertainty about the correct implementation and practical application of the Amending Directive, with all the legal risks this may entail. How can a Member State know whether its implementation and application of the Amending Directive is consistent with EU law where, in a situation of uncertainty, the EU does not provide any interpretative guidance?



- b. The EU's failure to provide clarity on this point at a time when (as the EU is well aware) NSP2AG is engaged in very substantial ongoing investment and requires to take significant and timely decisions concerning that investment, including in relation to preparing for operations of the entire pipeline, is itself an additional breach of the ECT. In particular, the EU's refusal:
- i. Is a breach of the obligation at Article 10(1) to create "*transparent*" conditions for Investors; and
 - ii. Is neither fair nor equitable, and in particular is a breach of due process, in breach of the EU's obligation at Article 10(1) of the ECT to provide fair and equitable treatment.

We regret that despite our best efforts to engage in a substantial exchange to achieve an amicable settlement, and despite our presentation and substantiated submissions, no substantiated responses have been received from the EU in written or oral form. NSP2AG again requests that the EU confirm or clarify in writing that Nord Stream 2 may be treated as "*completed*" and falling within the Derogation regime like other offshore import pipelines in which investments have been made before adoption of the Amending Directive (or that it will otherwise receive equivalent treatment). Alternatively, the EU may confirm that, if Germany decides that NSP2AG should be considered as completed and thus eligible for a derogation pursuant to Article 49a, such decision would be consistent with EU law.

In the absence of such confirmation or the required clarification, NSP2AG reserves the right to take all necessary measures to protect its interests, including having recourse to arbitration proceedings against the EU pursuant to Article 26 of the ECT. NSP2AG notes that the three month period referred to at Article 26(2) of the ECT will expire on 12 July 2019.

Yours faithfully,

