

[Outside the scope of the request]

counsel then outlined the main concerns regarding Directive 2019/692. [redacted] is attached) This was followed by a statement of the EU [redacted] and a questions and answers session. [Outside the scope of the request]

Background

Directive 2019/692 extends to pipelines to/from third countries the rules of the Gas Directive (2009/73/EC) previously applicable only to EU pipelines, including competition-related provisions concerning separation of ownership between supply of gas and operation of the transmission network (unbundling), allowing competitors' access to the pipeline (third party access) and charging prices set by the regulators (tariff regulation). There are however exceptions to these rules: (1) Member States can grant **derogations** to pipelines completed before 23 May 2019 (date of entry into force of Directive 2019/692); (2) Member States/Commission can grant **exemptions** to new pipeline projects before the investment is made, provided that certain conditions are fulfilled.

NS2 position

NS2 made the following points:

- The application of rules on unbundling, third party access and tariff regulation make the investment significantly more risky and less profitable. The derogation and exemption regimes recognise this and respectively seek to protect existing investors in view of their legitimate expectations and to incentivise new investments.
- By carving out pipelines for which the investment risk was taken but the construction was not completed by 23 May 2019, the EU creates a gap between the protection of new investments (exemption) and of existing pipelines (derogation). This temporal gap does is not objectively justified.
- NS2 is the only pipeline falling within the temporal gap created by the 2019 Directive. It was clear to the EU legislator that NS2 would not be completed by the time of entry into force of the 2019 Directive, and therefore, unless NS2 is granted a derogation, the Directive discriminates between NS2 and other investors in similar or like situations.
- It is unclear to NS2 what objectives the 2019 Directive tries to achieve and whether it is effective to fulfil the aims declared in the recitals, i.e. to increase competition and develop an integrated wholesale market for gas in the EU. These objectives can be achieved by regulating the entry points in the EU transmission system and extending the Gas Directive rules beyond this point is ineffective if the entry point in the third country is also not covered. An impact assessment would have been beneficial in clarifying the objectives and instruments to achieve them.
- The 2019 Directive is also ineffective because the rules do not apply to pipelines laid down in the ground (onshore), "completed" pipelines (derogation regime), and pipeline laid down in the water (offshore) which are regulated by international agreements with the third countries. The only pipeline to which the rules would apply is NS2, which however represents only 15% of the EU total pipeline capacity.

- On the ECT, NS2 essentially claims that should a derogation or equivalent treatment not be available to it, the EU would breach the fair and equitable treatment obligation under Article 10 ECT, with the legislation being unreasonable and discriminatory. It noted that clear evidence exists of the EU's discriminatory intent and that it expects more evidence to surface in the document discovery phase during the arbitration.

EU position

The Commission made the following points on substance:

- Accepting to hold consultations is no indication that the EU considers NS2 to have standing to bring a claim. NS2 is a subsidiary of Gazprom, and Russia is not a contracting party of the ECT. Moreover, NS2 has not shown evidence that it has substantial business operations in Switzerland, although it claims to be a Swiss company, and on this basis the EU intends to deny the benefits from the application of the ECT investment protection rules, in accordance with Art. 17 of the ECT.
- Directive 2019/692 is not discriminatory and in line with EU international obligations under the ECT. At the time of the investment NS2 was in a position to reasonably anticipate the application of Gas Directive rules, at least to the EU parts of the pipeline.
- On the question whether NS2 is eligible for a derogation, we noted that it is up to the relevant MS authorities (in this case, Germany) to decide on the grant of derogations, based on the national rules transposing the 2019 Directive and individual applications.

We also informed NS2 of the EU transparency approach, which entails making public the exchange of letters between NS2 and the Commission up to now (except for personal data and justified business confidential information), and publishing the documents of the dispute in case it is decided to proceed to arbitration. NS2 promised to follow up on these points after the meeting and requested a copy of the EU statement.

Q&A session

A number of questions were asked by NS2 on the application of the derogation regime, in particular: whether the Commission considers NS2 eligible for a derogation; whether the Commission will interfere with the decision of the German authorities; whether MS authorities will have discretion in transposing the Directive and interpreting the requirements for derogation; what would the Commission do in case NS2 is granted a derogation. In reaction to these questions, we avoided engaging in an interpretation of the Directive in the abstract and systematically referred to the framework of the Directive, which provides that decisions on derogations are to be taken by the relevant national authorities based on specific applications. It will be up to NS2 to decide whether or not to apply for a derogation. The Commission's role would be in general to ensure compliance with the framework of the Directive.

In reply to questions related to the ECT, we recalled our position that Directive 2019/692 is compatible with the ECT but avoided entering into a more detailed discussion, noting that NS2 does not claim that the legislation is incompatible with the ECT as such, but that it appears to consider that an issue of incompatibility could arise only if NS2 does not obtain a derogation / is not eligible.

We added that the points made by NS2 were noted, and that the Commission is available to keep the channels of communication open going forward.

NS2 expressed disappointment to the fact that the Commission could not provide explicit guidance on the question whether NS2 is eligible for derogation, noting that on other aspects of the third energy package the Commission had issued guidance documents.

It concluded hinting to the possibility that the company may launch arbitration proceedings.