Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 6 October 2021 [1]

Case C-348/20 P

Nord Stream 2 AG
v
European Parliament

Council of the European Union

(Appeal – Energy – Internal market in natural gas – Directive (EU) 2019/692 – Application of Directive 2009/73/EC to gas lines to or from third countries – Fourth paragraph of Article 263 TFEU – *Locus standi* of an individual – Direct concern – Individual concern – Rules on the submission of evidence before the EU Courts – Admissibility of internal documents of the EU institutions)

I. Introduction

1. Nord Stream 2 AG ('the appellant') is challenging the order of the General Court [2] which dismissed as inadmissible its action under Article 263 TFEU seeking the 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 ('the contested measure'). [3] The contested measure is aimed at ensuring that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the European Union, to gas transmission lines to and from third countries. [4] In that order, the General Court also ordered that some documents produced by the appellant in the course of the proceedings be removed from the file.

2. The present appeal raises two important and distinct issues of a procedural nature. First, can an individual be *directly concerned*, within the meaning of Article 263 TFEU, by a directive? Second, what considerations should guide the assessment of the admissibility of written *evidence* produced by the parties in proceedings before the EU Courts, in particular the admissibility of internal documents of the EU institutions?

1 Original language: English.

2 Order of 20 May 2020, *Nord Stream 2* v *Parliament and Council* (T-526/19, EU:T:2020:210) ('the order under appeal').

3 OJ 2019 L 117, p. 1.

4 See, in particular, recital 3 of the contested measure.

II. Factual and legal background

3. The facts and the legal background of the present case can be summarised as follows.

4. Pursuant to its Article 1, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ('the Gas Directive')[5] establishes common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organisation and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas and the operation of systems.

5. In order to remove any conflict of interests between producers, suppliers and transmission system operators, and to create incentives for the necessary investments and also to guarantee the access of new market entrants under a transparent and efficient regulatory regime, the Gas Directive provides for the separation of networks from the activities of production and supply.[6] In particular, Article 9 of that directive lays down an obligation to unbundle transmission systems and transmission system operators.[7] In addition, the Gas Directive also 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 (Article 32), to be approved by the national regulatory authorities (Article 41).

6. Under Article 36 of the Gas Directive, major new gas infrastructure, including interconnectors, 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, 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.

7. The appellant 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. Construction of that pipeline started in 2018 and, at the date on which the appeal in the present case was lodged, had not been completed. Like the Nord Stream (now commonly known as Nord Stream 1) pipeline – whose construction was completed in 2012 – the Nord Stream 2 pipeline consists of two gas transmission lines intended to ensure the flow of gas between Vyborg (Russia) and Lubmin (Germany).

8. On 17 April 2019, acting on a Proposal of the European Commission of 8 November 2017, the European Parliament and the Council of the European Union adopted the contested measure.

9. Pursuant to recital 3 of the contested measure, that directive seeks to address obstacles to the completion of the internal market in natural gas which resulted from the non-application, until then, of EU market rules to gas transmission lines to and from third countries.

5 OJ 2009 L 211, p. 94.

6 See, in particular, recitals 6 to 9 of the Gas Directive.

7 In the context of network industries, the term 'unbundling' is used to refer to the separation of the activities that may potentially be subject to competition (such as production and supply) from those where competition is either not possible or not allowed (such as transportation). The objective of unbundling is to prevent operators of transmission system networks from giving an advantage to their own supply activities, to the disadvantage of independent suppliers.

10. In that regard, Article 2(17) of the Gas Directive, as amended by the contested measure, 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'.

11. Under Article 49a(1) of the Gas Directive, as added by the contested measure, 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, under certain conditions, decide to derogate from certain provisions of the Gas Directive for the sections of such gas transmission line located in its territory and territorial sea. Derogations of that kind are limited to a maximum of 20 years but are renewable.

12. Regarding the implementation of the amendments made to the Gas Directive by the contested measure, Article 2 of the latter requires that, with some exceptions, Member States 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 [the Gas Directive]'.

III. Proceedings before the General Court and the order under appeal

13. By its application of 26 July 2019, the appellant brought an action under Article 263 TFEU before the General Court, seeking the annulment of the contested measure.

14. In its application, the appellant argued that the stated objectives of the contested measure, namely to extend the application of the provisions of the Gas Directive to offshore import pipelines in order to improve the functioning of the internal market while allowing for derogation so as to protect existing investments, are not in fact its actual purpose. According to the appellant, the contested measure was adopted for the purposes of discouraging and placing at a disadvantage the exploitation of the Nord Stream 2 pipeline. As such, the lawfulness of that measure was, in the appellant's view, vitiated by an infringement of the principles of non-discrimination, proportionality and legal certainty, by a breach of essential procedural requirements, by a misuse of power and by a failure to state reasons.

15. On 10 and 11 October 2019, respectively, the Parliament and the Council each raised a plea of inadmissibility of the action. The appellant filed its observations on the pleas of inadmissibility on 29 November 2019, asking the General Court to reserve its decision until it ruled on the substance of the case or, in the alternative, to reject the pleas as unfounded.

16. On 11 October 2019, the Council asked the General Court, pursuant to Article 130(2) of the Rules of Procedure of the General Court ('the application for a decision on a procedural issue'), to: (i) order that certain documents not form part of the case file or, regarding three documents produced by the appellant, that they be removed from that file; and (ii) disregard all the passages of the application and the annexes thereto which refer to those documents of the Council that are classified as 'Restreint UE/EU Restricted', describe their content, or rely thereon. The three documents produced by the appellant, which the Council asked to have removed, were, first, an

opinion of the Council's Legal Service of 27 September 2017[8] ('the Legal Service Opinion' or 'Annex A.14'), second, the Recommendation, submitted by the Commission on 9 June 2017, for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline ('the Recommendation' or 'Annex O.20'), and third, the Negotiating Directives of 12 June 2017, appended to the Recommendation ('the Negotiating Directives').

17. On 4 November 2019, the appellant filed its observations regarding the application for a decision on a procedural issue, in which it asked the General Court to reject that application.

18. On 29 November 2019, the appellant also requested the General Court, pursuant to Article 88 of the Rules of Procedure of the General Court, 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'). That request concerned the production of *unredacted* versions of those documents, since a redacted version thereof had already been made available by the Council, following a request for access under Regulation (EC) No 1049/2001[9] by an employee of the appellant. In that context, the appellant annexed to its request two unredacted versions of the requested documents which it had previously obtained: certain comments from the German Government on the proposal for the contested measure ('the Unredacted Germany Documents' or 'Annexes M.26 and M.30').

19. On 17 January 2020, the Parliament and the Council filed their observations regarding the request for a measure of organisation of procedure. Inter alia, the Council requested that Annexes M.26 and M.30 be removed from the file.

20. On 20 May 2020, the General Court adopted the order under appeal. The operative part of the order under appeal reads as follows:

'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.

8 That opinion is entitled 'Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline – Allocation of competences and related legal issues'.

9 Regulation 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).

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.'

IV. Procedure before the Court of Justice

21. In its appeal before the Court, lodged on 28 July 2020, the appellant asks the Court:

– to set aside the order under appeal, in particular points 1, 3, 4 and 6 of the operative part;

– to the extent that the Court of Justice considers the state of the proceedings so permit, to reject the plea of inadmissibility, declare the action admissible and refer the case back to the General Court to rule on the substance or, in the alternative, to declare the contested measure to be of direct concern to the appellant and refer the case back to the General Court to rule on individual concern or join it to the substance; and

– order the Council and Parliament to pay the appellant's costs, including the costs before the General Court.

22. For their part, the Council and the Parliament ('the defendants') ask the Court to dismiss the appeal and order the appellant to pay the costs.

23. The Governments of Estonia, Latvia and Poland ('the interveners'), having been allowed to intervene in support of the form of order sought by the defendants, submitted their observations. The appellant submitted a response to those observations.

24. On 25 January 2021, the appellant submitted a reply, and on 5 March 2021 the defendants submitted a rejoinder.

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

V. Assessment

26. The appellant raises two grounds of appeal. The first ground challenges the General Court's findings as regards the lack of direct concern. The second ground of appeal concerns the General Court's decision in relation to the documents removed from the file.

27. This Opinion will deal with each of the two grounds of appeal in the order in which they are presented by the appellant. Accordingly, I shall first review the General Court's findings in relation to whether the appellant was directly concerned by the contested measure (A). Second, I shall review the General Court's decision regarding certain documents and information submitted by the appellant (B).

A. First ground of appeal: direct concern

28. By its first ground of appeal, directed against paragraphs 102 to 124 of the order under appeal, the appellant claims that the General Court erred in law in interpreting and applying the requirement of direct concern and, as a consequence, in finding that the appellant lacked standing to challenge the contested measure. The first ground of appeal is divided into two parts.

1. Argument of the parties

29. In the *first part* of its first ground of appeal, the appellant submits that the General Court erred in law by relying primarily on the fact that the contested measure is a *directive* in order to come to the conclusion that it did not directly affect its position. In the appellant's view, it follows from settled case-law that what matters for the purposes of Article 263 TFEU is the content of the measure, and not its form. In that connection, the appellant points to several cases in which the EU Courts have found actions for annulment against directives to be admissible.

30. In the *second part* of its first ground of appeal, the appellant criticises the General Court for concluding that the contested measure left the national authorities a margin of discretion in implementing the provisions of the contested measure with regard to: (i) the unbundling obligations provided for in Article 9 of the Gas Directive, (ii) the exemption regime set out in Article 36 of the Gas Directive, and (iii) the derogation regime laid down in Article 49a of the Gas Directive. In the appellant's view, the General Court failed to consider whether the contested measure left some *genuine* discretion to the Member States in that regard. Lastly, the appellant contends that the General Court failed to examine whether the provisions regarding third-party access (Article 32 of the Gas Directive) and tariff regulation (Article 41 of the Gas Directive) affect its legal position.

31. For their part, the defendants, supported by all the interveners, defend the reasoning adopted by the General Court to exclude direct concern. In particular, those parties emphasise that a directive cannot, *by definition*, produce legal effects vis-à-vis individuals unless transposed into national law. Those parties also maintain that the specific provisions of the contested measure referred to by the appellant could not directly affect that company given that, in order to become operational, they required the adoption of implementing measures at national level.

2. Analysis

32. Under the fourth paragraph of Article 263 TFEU, the admissibility of an action brought by a natural or legal person against an act which is not addressed to that person may arise in two situations. First, such proceedings may be instituted if the act is of direct and individual concern to that person. Second, he or she may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to him or her.

33. It is common ground between the parties that the contested measure is not a 'regulatory act' within the meaning of Article 263 TFEU, but a legislative act. [10] The standing of the appellant must, therefore, be examined under the first scenario mentioned in the previous point: the action lodged by the appellant before the General Court is admissible if that company is both *directly* and

[10] See also paragraph 82 of the order under appeal.

individually concerned by the contested measure. Since the General Court came to the conclusion that the appellant was not directly concerned, it did not go on to examine the issue of individual concern.

34. In the following sections, I shall first explain why I find the reasons given in the order under appeal unpersuasive. Those reasons can be grouped in two sets: those of a systemic, more abstract and theoretical nature (a), and those linked to the specific situation of the appellant (b). Subsequently, I shall explain how the General Court failed to address certain arguments put forward by the appellant (c). The conclusion I draw from the above is that the General Court erred in law in interpreting and applying the fourth paragraph of Article 263 TFEU to the situation at issue.

(a) The contested measure is a directive and therefore cannot be challenged by an individual

35. The General Court's first set of reasons concerns considerations of a systemic nature: the contested measure cannot be of direct concern to the appellant because it is a *directive*.

36. The relevant passages of the order under appeal read as follows: 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. … 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 [appellant] and liable, on that basis, to affect its legal situation directly for the purposes of the fourth paragraph of Article 263 TFEU … [In addition], 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 [appellant] and, in any event, not before the expiry of the deadline for transposition laid down in Article 2(1) thereof'. [11]

37. I find the reasoning of the General Court on this point to be incorrect.

38. To begin with, the statements of the General Court can hardly be reconciled with the case-law recalled earlier in the order under appeal, according to which the mere fact that an individual brings an action for annulment against a directive is not a sufficient ground for declaring such an action inadmissible. The General Court added that an action is thus admissible if a *directive* is of direct and individual concern to the applicant or if it constitutes a regulatory act which is of direct concern to him or her and does not entail implementing measures. [12]

39. I agree with those principles. However, they contradict the statements of the General Court, reproduced in point 36 above. Indeed, what the first-instance court states would result in the exclusion of standing of individual applicants to challenge *any* directive. With regard to that type of act, direct concern could never be established since, by definition, *all* directives (i) require some

11 Paragraphs 106 to 108 of the order under appeal.

12 Paragraphs 78 and 79 of the order under appeal.

measure of transposition, (ii) before transposition cannot impose obligations on individuals and be relied upon against them by the national authorities.[13] The latter is a fortiori true before the period given for transposition in the directive itself has expired.

40. However, I do not believe that it is possible, in conceptual terms, to effectively equate *direct concern* with *direct effect*. Although the two concepts have certain similarities, they are nonetheless ontologically different and serve a different purpose. The fourth paragraph of Article 263 TFEU does not require that the challenged act have direct effect, let alone be capable of being invoked by the authorities against individuals. That provision merely requires that the challenged act 'produce legal effects vis-à-vis third parties'.

41. The latter concept is, however, different and, on the whole, logically a much broader category than direct effect. As stated in the case-law, the condition that a natural or legal person must be directly concerned by the decision against which the action is brought, laid down in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be met. First, the contested measure must *directly affect* the legal situation of the individual. 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 the EU rules alone without the application of other intermediate rules.[14]

42. In the present case, the contested measure is capable of *producing legal effects* by extending the scope of the rules of the Gas Directive to situations and addressees which were not previously caught by those rules. It is equally clear that, as a result of that extension, the *legal position* of the appellant is *altered*: a detailed body of rules, which governs its activities, has become applicable to its activities. The crux of the matter is really whether that alteration of the appellant's position stems directly from the contested measure or, conversely, whether it may arise only as a result of the adoption of implementing measures at national level.

43. In that regard, the case-law mentioned in point 41 above implies, essentially, that, for direct concern to exist, the legal effects of the act challenged must be produced by the act itself, *automatically*, without the subsequent adoption of any other measure, either by the European Union or the Member States, being necessary to that effect. Accordingly, the condition of direct concern is satisfied when the existence of a *direct causal link* between the contested EU act and the alteration in the legal position of the applicant can be established. The condition of direct concern is not satisfied if there is any additional intervention, by the EU institutions or by the national authorities, which is capable of breaking that link.[15]

44. Significantly, that assessment cannot be made in the abstract, by relying only on the type of act being challenged. It requires an examination, in particular, of the purpose, content, scope, substance of the specific measure challenged and the legal and factual context in which that

[13] That is certainly true in relation to the general principle; in practice, however, even before or failing their transposition, directives may (i) give rise to a blocking effect upon the national authorities that may have a negative effect on individuals – judgment of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraphs 35 to 50); or (ii) generate incidental effects on third parties – judgments of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paragraphs 54 to 61), and of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172, paragraphs 40 to 55); or (iii) lead to an interpretation of national law in conformity with such a directive that might be to the detriment of an individual – see, for example, judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 31 and the case-law cited).

[14] 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 and the case-law cited). My emphasis.

[15] See, with references to the relevant case-law and legal scholarship, my Opinion of in *Région de Bruxelles-Capitale* v *Commission* (C-352/19 P, EU:C:2020:588, point 48).

measure was adopted.[16] As Advocate General Hogan recently put it, when examining the effects of a measure on the legal situation of a natural or legal person, the EU Courts have adopted a 'holistic and pragmatic approach, [which] favours substance over form'.[17]

45. Those principles are applicable to *any* EU act that may be challenged before the EU Courts, whatever its form, and regardless of the name given, or the label affixed, to it. As the EU Courts have consistently stated, 'the form in which such acts or decisions are cast is, in principle, *immaterial*' as regards the question whether they are open to challenge in an action for annulment.[18] Indeed, in order to determine whether a contested act produces binding legal effects for the purposes of Article 263 TFEU, 'it is necessary to examine the *substance* of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act'.[19]

46. Consequently, the fact that the contested measure is a *directive* does not exclude that it may be of direct concern to the appellant.

47. It is true, in view of the particular characteristics of this form of legislation under Article 288 TFEU, that it will be very rare that some provision of a directive would, in respect of an individual, meet the requirement of direct concern. However, *very rare* is a different category from *systematically excluded*, as the reasoning of the General Court would imply. If the transversal dictum of the Court of Justice, that substance shall prevail over form, is to be respected,[20] then the type of EU law source chosen cannot, *in abstracto* and in and of itself, predetermine the nature of its substance. Indeed, well-established case-law has confirmed that the possibility that some provisions of a directive are of direct concern to a given individual cannot be excluded altogether.[21]

48. In that connection, it is immaterial that certain effects of the contested measure had not been triggered at the time the appellant brought the proceedings because the period for its transposition had not yet expired. According to case-law, the fact that the effects of an act do not materialise until a subsequent date determined in the same act does not preclude an individual from being directly affected by it as a result of an obligation entailed by that act.[22]

49. After all, if one were to embrace the reasoning of the General Court in that respect, almost no directive would ever be open to challenge before the EU Courts. The period for transposition given to the Member States is virtually always longer than the two-month period in which to

16 To that effect, see, inter alia, judgment of 22 June 2021, *Venezuela* v *Council* (C-872/19 P, EU:C:2021:507, paragraph 66).

17 Opinion of Advocate General Hogan in *Venezuela* v *Council* (C-872/19 P, EU:C:2021:37 point 105).

18 See judgments of 11 November 1981, *IBM* v *Commission* (60/81, EU:C:1981:264, paragraph 9), and of 12 September 2006, *Reynolds Tobacco and Others* v *Commission* (C-131/03 P, EU:C:2006:541). My emphasis. More recently, to that effect, see judgment of 31 January 2019, *International Management Group* v *Commission* (C-183/17 P and C-184/17 P, EU:C:2019:78, paragraph 51), and order of 2 September 2020, *ENIL Brussels Office and Others* v *Commission* (T-613/19, not published, EU:T:2020:382, paragraph 25).

19 See, among many, judgments of 20 February 2018, *Belgium* v *Commission* (C-16/16 P, EU:C:2018:79, paragraph 32 and the case-law cited), and of 9 July 2020, *Czech Republic* v *Commission* (C-575/18 P, EU:C:2020:530, paragraph 47). My emphasis.

20 With the same approach also being applied with regard to other issues, such as the existence of a challengeable act under Article 263 TFEU – see, for instance, judgment of 20 February 2018, *Belgium* v *Commission* (C-16/16 P, EU:C:2018:79, paragraph 19).

21 See, inter alia, judgments of 7 October 2009, *Vischim* v *Commission* (T-420/05, EU:T:2009:391, paragraphs 67, 78 and 79); of 7 October 2009, *Vischim* v *Commission* (T-380/06, EU:T:2009:392, paragraphs 57 to 59); and of 2 March 2010, *Arcelor* v *Parliament and Council* (T-16/04, EU:T:2010:54, paragraph 94 and the case-law cited).

22 See, inter alia, judgment of 25 September 2015, *PPG and SNF* v *ECHA* (T-268/10 RENV, EU:T:2015:698, paragraph 47 and the case-law cited).

institute proceedings provided for in the sixth paragraph of Article 263 TFEU.[23] The General Court's approach is, in fact, contradicted by various decisions of the EU Courts, in which the challenge against a directive was held to be admissible, despite being brought *before* the deadline for transposition of the directive had expired.[24]

50. Finally, a few closing remarks in relation to the statements made in paragraphs 108 and 109 of the order under appeal are called for.

51. On the one hand, the General Court found that the legal effects alleged by the appellant are insufficient to establish direct concern. They are 'in any event simply the result of [the appellant's] choice to develop and maintain its activity in the territory of the European Union'. Yet, I fail to understand why a company should not be allowed to challenge an EU measure that affects its position, merely because it could, in theory, re-locate to a country outside the Union, thereby escaping the reach of the internal market rules. Article 263 TFEU requires the act to produce legal effects in order to be open to challenge, not 'inescapable' legal effects.

52. Among other things, the General Court's statement can hardly be reconciled with the right to an effective remedy which Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') ensures to 'everyone' (and not only to physical and legal persons that are 'forced' to stay in the Union), and with the freedom to conduct a business and the right to property recognised in, respectively, Articles 16 and 17 of the Charter. If one were to take the General Court's reasoning to the extreme, virtually no company would ever be able to challenge an EU measure: companies can, in principle, always relocate outside the European Union.

53. The case-law referred to by the General Court on this point does not appear to be pertinent. The case cited – *Air Transport Association of America and Others* – does not concern an issue of procedure such as that raised by the present proceedings (the admissibility of an action for annulment by an individual), but concerns instead an issue of substance (the European Union's ability to adopt measures which some companies considered to have some extra-territorial effects).[25] Perhaps more pertinently, the EU Courts have made it clear that the existence of direct concern is not excluded by the fact that the impact on the legal position of the applicant by the EU act in question is also the result of certain choices made by the economic operators concerned,[26] or that the applicant could avoid the consequences stemming from the EU act being challenged by taking a different course of action.[27]

54. On the other hand, the General Court stated in paragraph 109 of the order under appeal that 'to accept the [appellant]'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 pipeline] 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

23 See also Articles 58 to 60 of the Rules of Procedure of the General Court.

24 See inter alia order of 13 October 2006, *Vischim* v *Commission* (T-420/05 RII, EU:T:2006:304, paragraph 33).

25 Judgment of 21 December 2011 (C-366/10, EU:C:2011:864, paragraphs 127 and 128).

26 See, to that effect, judgments of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159, paragraphs 41 to 64); of 15 December 2005, *Infront WM* v *Commission* (T-33/01, EU:T:2005:461, paragraphs 114 to 150); and of 25 October 2011, *Microban International and Microban (Europe)* v *Commission* (T-262/10, EU:T:2011:623, paragraph 28).

27 See, to that effect, judgment of 22 June 2021, *Venezuela* v *Council* (C-872/19 P, EU:C:2021:507, paragraph 71).

paragraph of Article 263 TFEU'. The General Court added that such a position would be at odds with the wording of Article 288 TFEU, according to which directives require national measures of implementation.

55. Having already explained why directives are not, in principle, excluded from a challenge under the fourth paragraph of Article 263 TFEU, I need not reiterate my arguments on that point. I add only that the General Court's position would also mean that the entitlement of non-privileged applicants to seek annulment of a prejudicial measure under Article 263 TFEU proceedings could easily be set at naught by the EU institutions, through the expedience of adopting that measure as a 'directive'. [28]

56. The General Court's suggestion that it would be all too easy for private applicants to challenge EU legislation if one were to accept the appellant's argument on direct concern can, therefore, be dispelled by recalling the difference between the concept of 'direct concern' and that of 'individual concern'. Those two, naturally cumulative, requirements play a different role in the context of the fourth paragraph of Article 263 TFEU. Direct concern is meant to check whether the position of the applicant is *immediately* affected. Individual concern is meant to determine whether the applicant is affected *because of specific circumstances* that distinguish it from any other person that may also be affected.

57. It is thus the fulfilment of the latter criterion – which, put simply, requires the applicant to be in a position equivalent to that of an addressee of the measure [29] – that excludes a situation such as that feared by the General Court. Indeed, new legislation (be it in the form of a regulation or of a directive) may affect several economic operators. However, only those that satisfy the strict '*Plaumann* formula' [30] may be recognised as having standing under fourth paragraph of Article 263 TFEU. The risk of creating an *actio popularis* against EU legislation, evoked by the General Court, is thus manifestly misplaced.

58. In summary, in my view, the first part of the appellant's first ground of appeal is well founded. However, that finding alone is not sufficient to set aside the order under appeal. Indeed, as mentioned above, the General Court's conclusion regarding a lack of direct concern relies also on another set of reasons.

(b) The Member States' authorities had discretion in transposing the relevant provisions of the directive

59. The second set of reasons given by the General Court to exclude direct concern is linked to the specific position of the appellant and the content of the legal provisions invoked. In paragraphs 111 to 123 of the order under appeal, the General Court excluded direct concern on the ground that the provisions of the contested measure, which the appellant considered to affect its legal position, required implementing measures at national level.

28 As the General Court itself points out, on the basis of well-established case-law, in paragraph 78 of the order under appeal. See also judgment of 2 March 2010, *Arcelor* v *Parliament and Council* (T-16/04, EU:T:2010:54, paragraph 94 and the case-law cited). More recently, see by analogy Opinion of Advocate General Hogan in *Venezuela* v *Council (Whether a third State is affected)* (C-872/19 P, EU:C:2021:37, point 119).

29 See, similarly, Lenaerts, K., Maselis, I. and Gutman, K., *EU Procedural Law*, Oxford University Press, Oxford, 2014, pp. 768 and 769.

30 See, inter alia, judgments of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17, p. 107), and, more recently, of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraph 93).

60. In this part of its reasoning, the General Court applied the test for direct concern, despite its own previous reservations based on the fact that the instrument is a directive. Nevertheless, with regard to this part of the order under appeal, I again cannot agree with the General Court.

61. It must be borne in mind that the criterion relating to the absence of implementing measures does not mean that *any* act of implementation whatsoever would immediately and necessarily exclude direct concern. In particular, as rightly noted in paragraphs 102 and 103 of the order under appeal, the condition of direct concern is satisfied, inter alia, where implementation measures exist but, in reality, the relevant authorities have *no genuine discretion* as to the manner in which the main EU act must be implemented. As Advocate General Wathelet stated, in order to exclude direct concern, 'the discretion of the author of the intermediate measure intended to implement the European Union act cannot be purely formal. It must be the source of the applicant's legal concern'. [31]

62. There is abundant case-law illustrating that point. For example, direct concern was found to exist in circumstances where the EU act in question exhaustively regulated the *manner* in which the national authorities were required to take their decisions [32] or the *result* to be attained, irrespective of the content of the specific mechanisms which the national authorities put in place to attain that result; [33] where the role of the national authorities was extremely minor and of a clerical nature [34] or purely mechanical; [35] or where Member States were mainly adopting ancillary measures additional to the EU act in question. [36]

63. Moreover, the EU Courts have also stated that the question whether an applicant is directly concerned by an EU measure that is not addressed to it must also be examined 'in the light of the purpose of that measure'. [37] This means that it is irrelevant whether other effects of the EU act challenged can, in practice, come into existence only *after* the adoption of implementing measures, to the extent that the legal effects invoked by the applicant stem directly and automatically from that act. [38]

64. In my view, the General Court captured the logic underpinning that case-law well in one of its past decisions: 'where [an EU] measure is addressed to a Member State by an institution, if the action to be taken by the Member State in response to the measure is automatic or is, at all events, *a foregone conclusion*, then the measure is of direct concern to any person affected by that

31 Opinion of Advocate General Wathelet in *Stichting Woonlinie and Others* v *Commission* (C-133/12 P, EU:C:2013:336, point 41). Recently cited also in judgment of 28 November 2019, *Banco Cooperativo Español* v *SRB* (T-323/16, EU:T:2019:822, paragraph 51).

32 See judgments of 6 November 1990, *Weddel* v *Commission* (C-354/87, EU:C:1990:371, paragraph 19), and of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 70).

33 See, to that effect, judgment of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159, paragraph 62), and of 17 February 2011, *FIFA* v *Commission* (T-385/07, EU:T:2011:42, paragraph 41).

34 See judgment of 13 May 1971, *International Fruit Company and Others* v *Commission* (41/70 to 44/70, EU:C:1971:53, paragraphs 23 to 26). To that effect, see also judgment of 28 November 2019, *Banco Cooperativo Español* v *SRB* (T-323/16, EU:T:2019:822, paragraphs 60 to 63).

35 See, to that effect, judgments of 17 September 2009, *Commission* v *Koninklijke FrieslandCampina* (C-519/07 P, EU:C:2009:556, paragraph 49), of 26 September 2000, *Starway* v *Council* (T-80/97, EU:T:2000:216, paragraphs 61 to 65); of 1 July 2009, *ISD Polska and Others* v *Commission* (T-273/06 and T-297/06, EU:T:2009:233, paragraph 68).

36 See, to that effect, judgments of 29 June 1994, *Fiskano* v *Commission* (C-135/92, EU:C:1994:267, paragraph 27), and of 25 October 2011, *Microban International and Microban (Europe)* v *Commission* (T-262/10, EU:T:2011:623, paragraph 29).

37 Judgment of 3 April 2003, *Royal Philips Electronics* v *Commission* (T-119/02, EU:T:2003:101, paragraph 276).

38 Ibid., paragraphs 277 to 281. See also the case-law cited in footnote 21 above.

action. … In other words, the measure in question must not depend for its effect on the exercise of a discretionary power by a third party, unless it is obvious that any such power is bound to be exercised in a particular way.'[39]

65. Yet again, as already stated above,[40] the bottom line of the approach is substance over form: if, following the adoption of the EU measure and stemming directly therefrom, the act that will later be adopted at national level is already a foregone conclusion, it would be rather formalistic to suggest that the individual must still nevertheless wait for weeks, months, or even years to challenge, in this situation, by way of a preliminary ruling, the content of the measure that was already known before.[41]

66. It is in the light of these principles that the statement of reason set out in paragraphs 111 to 123 of the order under appeal must be reviewed.

67. Before the General Court, the appellant argued that the contested measure would have three consequences for its legal position, by making three provisions applicable to it, thereby imposing new obligations upon it. Those provisions were the ones relating to: (i) unbundling, (ii) third-party access and (iii) tariff regulation. The appellant further argued that, whereas the Gas Directive included in Articles 36 and 49a the possibility of granting, respectively, an exemption and a derogation[42] from the application of those rules, those provisions were manifestly not applicable to its situation.

68. The key question is thus whether the General Court was correct to find that *none* of the *three* types of legal effect, which the appellant complained of, flowed directly from the contested measure.

69. In the first place, it is appropriate to start the analysis by looking at an element that the General Court dealt with almost in passing, but which is, in my view, quite relevant to all three of the points raised by the appellant. In paragraphs 119 to 123 of the order under appeal, the General Court held that, in order to determine whether the appellant is directly concerned by the contested measure, it was irrelevant that that company could not be granted the exemption and/or the derogation set out in, respectively, Article 36 and Article 49a of the Gas Directive. The General Court stated, in essence, that, even if the provisions of the contested measure are inapplicable to the appellant, that company could still have requested such derogation and/or exemption and subsequently challenged the negative decision(s) before the national courts, and in that context pleaded the invalidity of the EU act, thereby triggering a preliminary ruling procedure on the validity of the contested measure.

39 Order of 10 September 2002, *Japan Tobacco and JT International* v *Parliament and Council* (T-223/01, EU:T:2002:205, paragraph 46). My emphasis.

40 See above, points 45 to 47 of this Opinion.

41 Admittedly, such a decision could be taken also as a matter of judicial policy. The underlying vision in that regard would, in essence be to channel any and all questions on validity of any EU measures requiring some future national involvement, however marginal, to the Court by way of requests for a preliminary ruling on validity under Article 267 TFEU, instead of allowing them to proceed to the General Court under the fourth paragraph of Article 263 TFEU. For a critical view of the soundness of such case-flow management, in view of the institutional structure of the EU Courts today, see my Opinions in *Région de Bruxelles-Capitale* v *Commission* (C-352/19 P, EU:C:2020:588, points 137 to 147), and in *Joined Cases Germany and Hungary* v *Commission and Commission* v *Ville de Paris and Others* (C-177/19 P to C-179/19 P, EU:C:2021:476, points 108 and 109).

42 For the sake of clarity, it must be pointed out that, whereas certain language versions of the regulation use different terms to refer to those two situations (such as the English version, 'derogation' and 'exemption', and the German version, 'Ausnahme' and 'Abweichung'), other language versions use one and the same term (such as the French version, 'dérogation', and the Italian version, 'deroga').

70. Those statements appear to downplay, rather significantly, the overall importance of the provisions relating to the granting of exceptions.

71. Logically, if the appellant, who had already started building the infrastructure to which the new legislation was to apply, could be exempted from the application of the new legal framework by virtue of a discretionary decision of the national authorities, the possibility for it to be directly concerned by the contested measure could fall away. Indeed, there could then reasonably be the possibility that a discretionary exception would be granted by the competent national authorities. Therefore, the assessment of the possible applicability of Articles 36 and 49a of the Gas Directive to the appellant's situation is clearly important in the present case.

72. The General Court's statements in that regard are thus puzzling. To begin with, they cannot be reconciled with the case-law referred to in points 61 to 65 above, according to which the requirement for direct concern is excluded by the existence of *genuine* discretion on the part of the national authorities.

73. Yet again, in more structural terms, it seems unreasonable (and burdensome, costly, and time-consuming) to oblige a company to request a decision of the national authorities where the response can only be in the negative, in order to challenge a clear and exhaustive rule included in an EU act. The 'complete system of legal remedies and procedures' to which the General Court refers in paragraph 120 of the order under appeal is not meant to be a lengthy obstacle race for applicants. That system is based on a rational and constitutionally oriented division of tasks between the national courts and the EU Courts. Put simply, it is the 'paternity' of the measure actually affecting the applicant that determines the court before which he or she must turn to challenge that measure.

74. In the present case, as far as Articles 36 and 49a of the Gas Directive are concerned, that paternity cannot but be attributed to the EU legislature. None of the options offered by those provisions appears to be applicable to the appellant. The EU legislature decided that (i) the derogation is only applicable to gas transmission lines between a Member State and a third country 'completed before 23 May 2019', and (ii) the exemption is only available to major infrastructure projects in respect of which no final investment decision has been taken.[43] As a matter of fact, at the time of the adoption of the contested measure (17 April 2019), the Nord Stream 2 pipeline had passed the pre-investment stage,[44] but was not going to be completed, let alone operational, before 23 May 2019.[45]

75. Therefore, whereas those provisions do give some leeway to national authorities to grant an exemption or a derogation to certain operators in the future, that is not the case in respect of the appellant. In that regard, the (in)applicability of those provisions is entirely pre-determined by the EU rules, since the national authorities *lack any room for manoeuvre* and must thus act as a *longa manus* of the Union. In that regard, I recall that the mere existence, in the abstract, of derogations or exceptions to the rules laid down in an EU act, cannot have any bearing on the position of an applicant if that applicant cannot manifestly avail himself of those exceptions or derogations.[46]

43 One of the conditions for the exemption is, according to Article 36(1)(b) of the Gas Directive that 'the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted'.

44 That is undisputable given the very advanced stage of construction of the pipeline. According to the appellant, the final decision on the main investment was adopted in September 2015.

45 That is, within about one month from the adoption of the contested measure. On the latter aspect, see also the decision of 20 May 2020 BK7-19-108 of the Bundesnetzagentur (Federal Network Agency, Germany).

46 Cf. judgment of 22 June 2021, *Venezuela* v *Council* (C-872/19 P, EU:C:2021:507, paragraph 90).

76. In the second place, given that the appellant cannot escape the application of rules of the Gas Directive by virtue of an exemption or derogation, it must be ascertained whether the obligations which that directive now places upon the appellant flow from the adoption of the contested measure or rather from the national acts implementing that measure.

77. The appellant criticises, in particular, the extension, brought about by the contested measure, of the unbundling obligations set out in Article 9 of the Gas Directive. The General Court did not dispute that, in principle, the contested measure gave rise to such an extension, by enlarging the scope of the full ownership unbundling rule set out in Article 9(1) of the Gas Directive.[47] However, it found that the extension did not follow from the contested measure, since Member States were allowed to provide two *alternatives* to full ownership unbundling: the so-called 'independent system operator' (or 'ISO') model[48] and the 'independent transmission operator' (or 'ITO') model,[49] provided for in Article 9(8) and in Article 9(9) of the Gas Directive, respectively.

78. The General Court's finding that, under Article 9 of the Gas Directive, Member States have three options to achieve unbundling is no doubt correct. The appellant itself acknowledged that.[50] However, that finding fails to address the real argument put forward by the appellant.

79. The appellant did not contest the full ownership unbundling only. The appellant considers both the *result* to be achieved under Article 9 of the Gas Directive (the unbundling), and the three *methods* of achieving that result (full ownership, ISO or ITO), to be unlawful.

80. In that respect, it is uncontested that, *regardless of the option* ultimately *chosen* by the national authorities, the legal position of the appellant will inevitably be altered. Indeed, the appellant will have to: (i) sell the entire Nord Stream 2 pipeline, (ii) sell the part of the pipeline falling under German jurisdiction, or (iii) transfer the ownership of the pipeline to a separate subsidiary. Regardless of the differences between those three models, each requires a transfer of ownership and/or of the running of the pipeline or part thereof, thus obliging the appellant to amend its corporate structure.

81. In those circumstances, and in view of that unique situation, I am bound to conclude that it is the contested measure which immediately affects the position of the appellant and not merely the (subsequent) transposition measures. The manner in which the appellant is affected is exhaustively regulated in the contested measure. Member States do not have any discretion as far as the end result to be achieved is concerned. They may only oversee a (limited) choice in terms of how to achieve it, by opting for one of the three models of unbundling provided for by the EU legislature. Nevertheless, irrespective of which of the three models they choose, the appellant will be affected. In summary, Member States have no discretion over the *whether* and the *what*, as they are permitted only to choose one of the three pre-determined forms of the *how*.

47 That rule involves a full separation between the ownership and operation of gas transmission networks, and the gas production and supply activities.

48 Under the ISO model – set out in Article 14 of the Gas Directive – a vertically integrated undertaking owns a transmission system network, but the operator of the transmission system must be an independent entity.

49 Under the ITO model – set out in Chapter IV of the Gas Directive – a vertically integrated undertaking owns a legally separate entity that owns and operates the transmission system (namely, the ITO). The latter entity must operate independently from the vertically integrated undertaking.

50 See paragraph 113 of the order under appeal.

82. The case at hand thus falls within those situations [51] in which the EU Courts have consistently found direct concern to exist. In this respect, I fail to understand why the present case differs, for example, from that examined by the EU Courts in *Infront*, [52] a case on which the appellant did indeed rely before the General Court. In a rather apodictic statement, the General Court found that case to be legally and factually different from the present case, on the ground that the former involved a decision (and not a directive) and that the latter is 'not atypical'. [53]

83. It is not clear to me what the General Court meant when it referred to the present case as 'not atypical' and how that element plays a role under Article 263 TFEU. [54] Again, in my view, the key element is rather whether one accepts that the name and form of an act is of little relevance under that provision. If that is the case, then the crucial issue is simply a matter of whether the alleged impact upon the legal position of the appellant is the result of the EU act being challenged or the result of a subsequent act of implementation.

84. Against this backdrop, the General Court's finding, in paragraph 118 of the order under appeal, that the appellant was not directly concerned by the contested measure, because the provision on unbundling required national measures of implementation, is vitiated by an error of law.

85. In the light of the above, since I find that neither of the two sets of reasons given by the General Court in the order under appeal to exclude direct concern (the contested measure is a directive, and the provision on unbundling does not immediately affect the legal position of the appellant) to be correct, I conclude that the General Court erred in law when, in paragraph 116 of the order under appeal, it held that the appellant is not directly concerned, leading it to an erroneous conclusion thereafter on standing under Article 263 TFEU in paragraph 124 of the order under appeal.

86. Those errors of law are in themselves sufficient to set aside point 4 of the operative part of the order under appeal, which dismissed the action as inadmissible. However, for reasons of completeness and in order to fully assist the Court in this appeal, I shall also address another argument put forward by the appellant in the first ground of appeal.

(c) The failure to address further arguments of the appellant

87. Before the General Court, the appellant argued that the contested measure directly affected its legal position because that measure had, in particular, three types of effect. Aside from creating an obligation regarding unbundling, discussed in the previous section of this Opinion, it also requires the appellant to apply rules on third-party access and tariff regulation. Throughout its submissions before the General Court (and especially its application and its observations on the defendants' pleas of inadmissibility), the appellant consistently referred to the (allegedly prejudicial) effects resulting from the application of those three provisions to its situation.

51 Referred to above, in points 61 to 65 of this Opinion.

52 Judgments of 15 December 2005, *Infront WM* v *Commission* (T-33/01, EU:T:2005:461).

53 Paragraph 117 of the order under appeal.

54 If the General Court meant that the challenged directive is a *real* directive, and not a disguised decision (as the Council argues in the present appeal), I would merely refer to the case-law according to which 'the mere fact that the contested provisions form part of a measure of general application *which constitutes a real directive and not a decision*, within the meaning of the fourth paragraph of [Article 263 TFEU], taken in the form of a directive is not of itself sufficient to exclude the possibility that those provisions may be of direct and individual concern to an applicant'. See judgment of 2 March 2010, *Arcelor* v *Parliament and Council* (T-16/04, EU:T:2010:54, paragraph 94 and the case-law cited). My emphasis.

88. In the order under appeal, the General Court acknowledged that much.[55] It then nonetheless rejected the requirement of direct concern by looking only at provisions on unbundling. The General Court failed to examine whether – irrespective of the alleged effects flowing from the rules on unbundling – the legal position of the appellant could be affected by the provisions on third-party access and/or on tariff regulation.

89. Far from being ancillary considerations that could be ignored or impliedly dismissed by the General Court, the arguments developed by the appellant on third-party access and tariff regulation constituted two elements of its three-pronged explanation as to why it was directly affected by the contested measure. Each of those three elements could, individually, be sufficient to justify a finding of direct concern. In particular, irrespective the form of unbundling ultimately chosen by the national authorities, the obligations on third-party access and tariff regulation imposed on the appellant remain unaffected.

90. In those circumstances, the order under appeal is, inevitably, also vitiated by a failure to state reasons. That error of law is one of public order. It may be[56] raised by the Court of Justice *ex officio*,[57] in particular where it concerns the admissibility of an action before the General Court.[58]

91. Therefore, regardless of the errors of law identified above concerning the interpretation and application of the provisions on unbundling (Article 9 of the Gas Directive), and on the derogation and the exemption (set out, respectively, in Article 49a and Article 36 of the Gas Directive), point 4 of the operative part of the order under appeal is to be set aside also for a failure to state reasons.

92. Furthermore, had the General Court properly assessed the provisions on third-party access and tariff regulation, it would have come to the conclusion that those provisions also directly affect the appellant.

93. Again, it is true that – as the defendants and the interveners point out – the provisions of both Articles 32 and 41 of the Gas Directive require the Member States to 'ensure' their implementation.

94. However, in this context too, it can hardly be disputed that the appellant does not contest the specific manner in which the obligations stemming from those provisions will be made operational. The appellant challenges the very core of the obligations imposed upon it as a result of the adoption of the contested measure.

95. In a nutshell, Article 32 of the Gas Directive requires transmission system operators to allow access to their capacity on a non-discriminatory basis to potential customers based on published tariffs. For its part, Article 41(6), (8) and (10) of the Gas Directive provides, in essence, that the tariffs charged by transmission system operators for the use of their transport capacity must be approved by the national regulatory authority of the Member State concerned.

55 See paragraphs 96 and 98 of the order under appeal.

56 The appellant has duly raised the General Court's failure on this point in the context of its arguments concerning an erroneous interpretation and application of the fourth paragraph of Article 263 TFEU, although it has not referred to it as a 'failure to state reason'. See above, point 67 of this Opinion.

57 See, to that effect, judgment of 20 December 2017, *EUIPO* v *European Dynamics Luxembourg and Others* (C-677/15 P, EU:C:2017:998, paragraph 36 and the case-law cited).

58 See, inter alia, order of 5 September 2013, *ClientEarth* v *Council* (C-573/11 P, not published, EU:C:2013:564, paragraph 20).

96. By virtue of those provisions, the appellant will, to the extent foreseen by those rules, be legally precluded from acting as a normal market operator that is free to choose its customers and pricing policy. The appellant will thus face a number of new regulatory constraints that limit its right to property and the freedom to conduct a business. Those constraints are new, in view of the fact that the legislation in force at the time of the investment, the time when building on the infrastructure began, and the time when the appellant entered into contracts for its financing and future operation,[59] did not provide for mandatory third-party access and tariff approval by the national regulator.

97. That does not mean that when a company makes an investment and prepares itself to enter into a market under a certain regime, regardless of how large that investment may be, the legislature is unable validly to amend that regime. Indeed, that is certainly not the case.

98. However, whether or not the changes introduced to that regime, which create new obligations and restrictions that were not previously in existence, are reasonable, amounts to an assessment pertaining *to merits* of the appellant's action. In terms of *admissibility*, the only relevant question is whether those obligations and restrictions flow directly from the contested measure, and not whether they are reasonable or justified. Do those restrictions and obligations already affect the appellant's legal and economic position, and its capacity to discharge its obligations under pre-existing agreements,[60] irrespective of any measures that may eventually be adopted at national level?

99. Finally, two additional arguments put forward by the defendants and the interveners ought to be addressed.

100. First, I find untenable the argument, put forward by the Polish Government, that the appellant's legal position cannot be affected by the contested measure because the Gas Directive was already applicable to pipelines such as the Nord Stream 2 pipeline. It seems to me that that pipeline – connecting a Member State (Germany) to a non-Member State (Russia) – was evidently not covered by the previous definition of 'interconnector' laid down in Article 2(17) of the Gas Directive, as originally adopted. That legislative definition referred to 'a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States'.

101. The contested measure thus enlarged that definition so as to cover also 'a transmission line between a Member State *and a third country* up to the territory of the Member States or the territorial sea of that Member State'.[61] Moreover, the very wording of the contested measure appears to refute the argument of the Polish Government: according to recital 3, that measure sought 'to address obstacles to the completion of the internal market in natural gas which result from the *non-application* of Union market rules to *gas transmission lines to and from third countries*.'[62]

59 I refer, in particular, to the 'Gas Transportation Agreement' concluded on 7 March 2017 with Gazprom Export LLC and the 'Long Term Debt Financing Agreements' concluded in April and June 2017 with Gazprom, ENGIE SA, OMV AG, Royal Dutch Shell plc, Uniper SE and Wintershall Dea GmbH. Relevant excerpts of those agreements have been submitted before the General Court.

60 See, *mutatis mutandis*, Opinion of Advocate General Bot in *Sahlstedt and Others* v *Commission* (C-362/06 P, EU:C:2008:587, points 66 to 76).

61 My emphasis.

62 My emphasis.

102. Second, I also find the argument, put forward by the Parliament and the Polish Government, concerning an alleged lack of impact on the appellant on the ground that its commercial activities have not yet started, to be unpersuasive. The Gas Directive, made applicable to the appellant by the contested measure, does not only regulate the activities of companies that are currently operating in the market, but also of companies that intend to enter the market. For example, Articles 36 and 49a of the Gas Directive govern situations in which a company has not yet started to provide its services. The former provision, in particular, concerns situations where the construction of the infrastructures in question has not even started.

103. However, perhaps more significantly, as a matter of basic economic reality, pipelines are not clementines.[63] Such a major infrastructure project is not a business activity that begins overnight. In the present case, given the pipeline's advanced stage of construction and the significant investment made by the appellant over a number of years, the contested measure will have numerous consequences on the appellant's corporate structure and manner in which it can operate its business. Some of the changes required of the appellant will necessarily have to be implemented even *before* its commercial activities begin. Accordingly, it cannot be argued that the impact is purely hypothetical, or at any rate linked to future events.

104. In the light of the foregoing, I take the view that the second part of the appellant's first ground of appeal is also well founded. The General Court misinterpreted Article 9 of the Gas Directive, failed to appreciate the significance of Articles 36 and 49a thereof, and failed to consider the impact of Articles 32 and 41 thereof. Those provisions give rise to new obligations on the part of the appellant. The essential part of those obligations (which is, importantly, the very part complained of by the appellant[64]) cannot be substantially affected by the national measures of implementation.

105. I thus conclude that the appellant must be found to be directly concerned by the contested measure.

B. Second ground of appeal

106. The second ground of appeal is directed against paragraphs 38 to 72 and 125 to 135 of the order under appeal.

107. In paragraphs 38 to 72 of the order under appeal, the General Court dealt with the Council's request on a procedural issue.[65] It ordered the removal from the file of two of the documents contested by the Council (Annexes A.14 and O.20). It further held that the passages from those documents reproduced in the appellant's submissions should no longer be taken into account. By contrast, the General Court ruled that there was no need to adjudicate on the removal of a third document (the Negotiating Directives), in so far as that document had not been produced.

108. In paragraphs 125 to 135 of the order under appeal, the General Court then dealt with the appellant's request for a measure of organisation of procedure, asking the General Court to order the defendants to produce the unredacted version of certain documents.[66] The General Court first

63 Judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17), even if, in that case, the nature of the business activity at issue was rather relevant for the concept of individual concern.

64 See, similarly, Opinion of Advocate General Bot in *Commission* v *Infront WM* (C-125/06 P, EU:C:2007:611, point 84)

65 See above, points 16 and 17 of this Opinion.

66 See above, points 18 and 19 of this Opinion.

found that there was no need to rule on that request. It noted that the documents in question were allegedly meant to establish that the appellant was individually concerned by the contested measure. However, it considered that the action could be dismissed as inadmissible without there being a need to examine the requirement of individual concern.

109. The General Court next examined the Council's request that two of the appellant's documents, annexed to its request for a measure of organisation of procedure (the Unredacted Germany Documents), be removed from the file. It found that request to be well founded.

110. In its appeal, the appellant claims that the General Court erred in law in ordering (i) the removal of the annexes at issue from the file, and (ii) that the passages in the appellant's application which reproduced passages from two of those annexes be disregarded.

1. Arguments of the parties

111. The appellant argues that the General Court erred in law in, essentially, basing its reasoning entirely on the application of the rules on access to documents set out in Regulation No 1049/2001. Although that instrument may provide certain guidance as regards interests that the EU Courts may need to consider when ruling on the admissibility of evidence produced in pending proceedings, it cannot be applied *ipso facto* to those situations. The General Court should have assessed the admissibility of the annexes at issue by also taking into account other, different, interests to those set out in Regulation No 1049/2001. In particular, a consistent body of case-law requires the EU Courts to examine whether the documents produced by a party may be relevant, or even decisive, for the resolution of the dispute.

112. The Council takes the view that this ground of appeal is inadmissible since, in essence, the appellant seeks to have the Court of Justice review a factual assessment made by the General Court, namely whether the production of the annexes at issue was appropriate and necessary. In addition, both defendants – supported by the interveners – contend that this ground of appeal is unfounded since the General Court correctly applied the principles on the admissibility of evidence flowing from the case-law of the EU Courts. The defendants emphasise that the annexes at issue were internal documents that were never released to the public.

2. Analysis

113. At the outset, the Council's argument regarding the inadmissibility of the second ground of appeal should be rejected. Indeed, the appellant is not asking the Court of Justice to re-evaluate the General Court's assessment on the relevance of the annexes at issue. Rather, the appellant is criticising the legal framework applied for assessing the admissibility of the documents in question. That is an issue of law and, as such, is capable of being reviewed on appeal.

114. As regards the substance of the second ground of appeal, I agree with the appellant. The General Court has erred in law in its approach to examining whether the annexes at issue could be admitted as evidence.

115. In order to explain that conclusion, I will begin by summarising the principles governing the production of evidence before the EU Courts, pointing out the open-minded approach enshrined in the relevant provisions and case-law (a). I will then turn to the possible exceptions to that regime, for which some limited inspiration may be drawn from the provisions of Regulation

No 1049/2001 (b). Next, I will emphasise an additional, but important, difference between the regime governing access to documents and that governing the production of evidence before the EU Courts: the consequences flowing from the discovery of documents. It is against that background that I will then set out the specific reasons why, in the order under appeal, the General Court erred in law when considering the admissibility of the annexes at issue (d). Finally, I will briefly take a position on the relevance of those annexes in the present proceedings (e).

(a) The generally open-minded approach to the admissibility of evidence

116. The Statute of the Court of Justice of the European Union contains no specific provision on the admissibility of evidence produced by the parties. However, Article 24 thereof provides that the EU Courts may require the parties to produce *all documents and to supply all information* which the Court considers desirable. Furthermore, the Court may also require Member States and EU institutions, bodies, offices and agencies to supply *all information* considered necessary for the proceedings, even when they are not parties to the case.

117. Similarly, no general provision on the (in)admissibility of types of evidence can be found in the Rules of Procedure of the General Court and of the Court of Justice. Those bodies of rules regulate only *when* and *how* (and not *what*) evidence may be submitted by the parties or acquired by the Court.

118. Accordingly, the Court has consistently held that 'the principle of equality of arms, which is a corollary of the very concept of a fair hearing, implies that each party must be afforded a reasonable opportunity to present his case, *including his evidence*, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[67] In addition, the Court has also stated that, 'the principle which prevails in EU law is that of the *unfettered evaluation of evidence*' and that 'it is only the reliability of the evidence before the Court which is decisive when it comes to the assessment of its value'.[68]

119. More specific case-law further confirms that there is no a priori preclusion as regards certain *forms* or *origin* of the evidence.[69] With regard to the *manner* in which evidence was obtained, the EU Courts have made it clear that, normally, only evidence obtained lawfully can be freely submitted,[70] in line with the generally accepted legal principle *nemo auditur propriam turpitudinem allegans*. However, similar to other apex jurisdictions,[71] the EU Courts too have not excluded that, exceptionally, unlawfully (or improperly) obtained evidence may also be

67 See judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 96 and the case-law cited).

68 See, recently, order of 12 June 2019, *OY* v *Commission* (C-816/18 P, not published, EU:C:2019:486, paragraph 6 and the case-law cited). My emphasis.

69 See, to that effect, judgments of 29 February 1996, *Lopes* v *Court of Justice* (T-280/94, EU:T:1996:28, paragraphs 56 to 59); of 6 September 2013, *Persia International Bank* v *Council* (T-493/10, EU:T:2013:398 paragraph 95); and of 12 September 2013, *Besselink* v *Council* (T-331/11, not published, EU:T:2013:419, paragraphs 11 and 12 and the case-law cited). See also, by analogy, judgments of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraphs 46 to 51), and of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 57).

70 See, by analogy, judgment of 26 September 2018, *Infineon Technologies* v *Commission* (C-99/17 P, EU:C:2018:773, paragraph 65 and the case-law cited).

71 See, with reference to the case-law of the International Court of Justice on the same issue, Quintana, J.J., *Litigation at the International Court of Justice*, Leiden, Brill, 2015, p. 385.

admissible.[72] That is even more so where the authenticity of the documents has not been called into question,[73] and where it is not established that the party which submitted the evidence was the one that had unlawfully obtained it.[74]

120. It follows from the above that, in principle, *any* evidence can be submitted before the EU Courts.[75] However, the EU Court concerned may take into account the existence of *other interests* which may, by way of exception, justify the refusal to accept the evidence, and balance those interests against those that plead for its acceptance.

(b) The exceptions relating to the admissibility of evidence

121. As regards the interests which may require protection – and thus allow exceptions to the principle of the free production of evidence – some inspiration may be drawn from those which the EU legislature expressly mentioned in Regulation No 1049/2001. As the Court has held, that instrument has 'a certain indicative value for the purpose of the weighing up of interests that is required in order to rule' on requests for the removal from the file of documents submitted before the EU Courts.[76]

122. Nevertheless, whereas that instrument is a complete, exhaustive regime as far as access to documents is concerned, it clearly cannot be so with regard to the production of evidence. The EU Courts may and, where appropriate, should, take into account other ('intra-judicial' or 'extra-judicial') interests.

123. In general, I would caution against an automatic or in any event excessive reliance on the provisions of Regulation No 1049/2001 in this context. It is by no means accidental that that instrument is not applicable in relation to documents held by the Court of Justice of the European Union, and that the institutions covered by that instrument are to refuse access to documents 'where disclosure would undermine the protection of … court proceedings'.[77]

124. That is quite logical. Indeed, most legal systems provide for special regimes of discovery in the context of judicial procedures. It is thus reasonable that the EU legislature decided that the general rules on access to documents *should not interfere* with those special regimes. It is a fortiori unthinkable that an instrument such as Regulation No 1049/2001 would then be allowed, de facto, to *govern* the rules on the production of evidence before the Court of Justice of the European Union.

72 See, in particular, judgment of 12 May 2015, *Dalli* v *Commission* (T-562/12, EU:T:2015:270, paragraphs 47 and 48 and the case-law cited), and orders of 23 March 2017, *Troszczynski* v *Parliament* (T-626/16, not published, EU:T:2017:237, paragraphs 27 and 28), and of 23 March 2017, *Gollnisch* v *Parliament* (T-624/16, not published, EU:T:2017:243, paragraphs 27 and 28).

73 See, to that effect, judgment of 8 November 2018, *QB* v *ECB* (T-827/16, EU:T:2018:756, paragraph 67). See also, *a contrario*, judgment of 17 December 1981, *Ludwigshafener Walzmühle Erling and Others* v *Council and Commission* (197/80 to 200/80, 243/80, 245/80 and 247/80, EU:C:1981:311, paragraph 16).

74 Judgments of 12 May 2015, *Dalli* v *Commission* (T-562/12, EU:T:2015:270, paragraph 49), and of 8 November 2018, *QB* v *ECB* (T-827/16, EU:T:2018:756, paragraphs 68 to 72).

75 That appears also to be the prevailing view among legal commentators: see, inter alia, Lasok, K.P.E, *The European Court of Justice: Practice and Procedure*, 2ndedition, Buttersworth, 1994, p. 344; and Barbier de la Serre, E., and Sibony, A.-L., 'Expert Evidence Before the EC Courts', *Common Market Law Review*, 2008, pp. 958 and 959; and Lenaerts, K., Maselis, I., and Gutman, K., *EU Procedural Law*, Oxford University Press, Oxford, 2014, pp. 768 and 769.

76 See, for example, judgment of 31 January 2020, *Slovenia* v *Croatia* (C-457/18, EU:C:2020:65, paragraph 67), and order of 14 May 2019, *Hungary* v *Parliament* (C-650/18, not published, EU:C:2019:438, paragraphs 9, 12 and 13).

77 Article 4(2) of Regulation No 1049/2001.

125. Admittedly, both sets of rules – access to documents and production of evidence – rely on a similar '*rule versus exception*' system. The rule is disclosure, and the exception is non-disclosure. However, this is where any appropriate parallel between the two regimes, and above all the overall balance to be achieved within either of them between the competing values and interests, ends.

126. The two sets of rules (i) concern activities of a different kind, (ii) pursue a different objective, which thus (iii) require the institutions to carry out a rather different evaluation when deciding on the disclosure of the document in question.

127. First, I do not think it is necessary to delve into why the activity of *disclosing* a certain document to the *public* is hardly comparable to the activity of *lodging* a document with (and thus disclosing such a document to) a *court*. It is unthinkable that the Court of Justice of the European Union – the sole supervisor and enforcer of legality over the EU institutions and bodies – should, when reviewing the lawfulness of an EU act, have the same level of access to the documents of those institutions and bodies as, to provide but a few examples, journalists, academics or non-governmental organisations.

128. Second, it is also important to point out that, in view of the difference between those activities, the *objectives* pursued by the relative sets of rules are also rather different.

129. The objective of Regulation No 1049/2001, as captured in its second recital, is to increase openness and transparency in the public administration, in order to enable citizens to participate more closely in the decision-making process, and to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable. The overarching aim is to strengthen the principles of democracy and respect for fundamental rights.

130. For their part, the rules on evidence seek to ensure the proper administration of justice, enabling the Court of Justice of the European Union to carry out its mission under Article 19 TEU. The overarching aim is to guarantee to everyone the right to an effective remedy enshrined in Article 47 of the Charter.

131. Third, those (different) objectives necessarily shape the assessment to be carried out by the EU institution charged with the task of deciding on the fate of a contested document in different ways. In particular, there are few similarities between, first, the ways in which the competing interests are weighed in the two systems, and, second, the results of weighing the values and interests at stake in both cases.

132. The rules in Regulation No 1049/2001 attempt to strike a balance between the interests of the citizens in having an open and transparent public administration, and the need to safeguard the ability of the EU institutions to perform their tasks effectively.[78] Accordingly, the institution faced with a request to release a document has to assess whether, in the specific circumstances of the case, granting the public access to the document in question would not compromise the institution's ability to pursue one of the interests set out in the regulation. Furthermore, even if that ability could be affected, the institution would have to assess the possible existence of an overriding interest requiring disclosure.

[78] See, in particular, recitals 6 and 11 of Regulation No 1049/2001.

133. It is stating the obvious that a decision on the production of evidence in the context of judicial proceedings involves a different kind of analysis. The rules on evidence are meant to determine what sources of information the court may or may not consider in order to establish the relevant facts when adjudicating on a dispute. It is not easy to find good reasons as to why the EU Courts should disregard certain (potentially relevant) sources of information, thereby increasing the risk of judicial errors.

134. Naturally, this is not to say that, in certain cases, the need to protect a certain specific interest would not justify the refusal to admit evidence produced by the parties, regardless of its relevance. Indeed, the case-law provides some examples of situations in which the EU Courts have accepted some exceptions to the principle of the free production of evidence. Three examples might be mentioned for illustration purposes.

135. First, indeed, a party may not use court proceedings to 'by-pass' the rules on *access to documents*. That would be the case if a party were to start specious litigation with the very view of obtaining access to, otherwise confidential, documents.[79] It may well also be that, in the context of a real dispute, a party requests access to a confidential document in the possession of an EU institution whose disclosure could in fact prejudice that institution's ability to perform its duties outside the courtroom.

136. Second, the need to protect the internal deliberations of the European Union or national institutions – and in particular, their capacity to *seek legal advice* and to receive frank, objective and comprehensive advice – may also warrant some limitations to the parties' ability to submit documents that were not, and were not meant to be, released publicly.[80] Indeed, legal advisers could be reluctant to provide detailed advice in writing if they are aware that the EU institution may ultimately choose not to follow it, and that they may later be confronted with their own advice in a courtroom, when defending that institution's decision.

137. Third, there may well be situations in which certain documents contain sensitive information, such as *sensitive personal data*, which could, if released, prejudice the private or professional life of a certain individual. *Mutatis mutandis*, the situation may be similar in relation to *business secrets*. In those cases, the EU Courts may need to weigh up a party's interest in submitting (or obtaining) the evidence necessary to allow him or her properly to exercise his or her right to an effective judicial remedy, on the one hand, against the disadvantages that the disclosure of such evidence is likely to give rise to with respect to an individual's privacy or any other protected interests, on the other.[81]

138. In all of the situations mentioned above, the EU Court concerned must weigh up the competing interests at stake, in order to decide on the admissibility of the document. That means evaluating the likely consequences stemming from, respectively, the admissibility and the non-admissibility of the document.[82] On the one hand, the EU Court is to determine whether the interest(s) pleading for non-disclosure are real and warrant protection, and is to estimate the type and magnitude of the possible harm caused, should the production of the document be

79 Cf. paragraph 128 of the order under appeal and the case-law cited.

80 See, inter alia, orders of 23 October 2002, *Austria* v *Council* (C-445/00, EU:C:2002:607, paragraphs 12 and 13), and of 23 March 2007, *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten* (C-221/06, EU:C:2007:185, paragraphs 20 to 22), and judgment of 31 January 2020, *Slovenia* v *Croatia* (C-457/18, EU:C:2020:65, paragraph 70).

81 See, for example, judgment of 23 September 2015, *Cerafogli* v *ECB* (T-114/13 P, EU:T:2015:678, paragraph 43).

82 In that regard, in general, see Barents, R., *Remedies and Procedures Before the EU Courts*, 2nd edition, Wolters Kluwer, 2020, pp. 651 and 652.

authorised.[83] On the other hand, the Court must assess whether and to what extent its role as the 'trier of fact' may negatively be affected if the document is not produced: is the document at issue possibly important, or even decisive, in order to establish certain facts, or is it simply one of several documents that may be useful to that end?[84] In addition, is there some other 'intra-judicial' interest, such as the economy of procedure, fairness of the proceedings, or respect for the rights of the defence, that could, depending on the circumstances, plead in favour of accepting or not accepting certain documents?[85]

139. It must, however, clearly be emphasised that the rules on the production of evidence in the context of judicial proceedings, and those under Regulation No 1049/2001, overlap, to a limited degree, in terms of input – the nature of interests that may be balanced against the disclosure. By contrast, as regards the balancing exercise itself, and above all, as regards its likely outcome, they are very different. In fact, it is quite likely that, with regard to a large number of documents, the protection of certain interests may justify the refusal of an application to access documents within the meaning of Regulation No 1049/2001, while the same reasons would not be enough to justify a removal from the file in a dispute before the EU Courts.[86]

140. If it were otherwise, the de facto amalgamation of both regimes would lead to a number of very questionable results, to say the least. First, the only court entitled to fully monitor the EU institutions would be left with the same level of access to information when performing that task as any other Tom, Dick, and Harry. Second, deciding on the admissibility of evidence before the EU Courts would, to a great extent, effectively be left to the EU institutions, who would themselves select the documents which they wish to be reviewed. Third, all of the foregoing would have, as its rather onerous consequence, the result of leading the Court of Justice of the European Union to censor or silence entirely, a party who would normally have an unfettered right to speak freely to it, potentially to the detriment of that party's right to be heard under Article 47 of the Charter.

141. All of the foregoing is, in my view, with account also being taken of the new social reality in terms of dissemination of, and access to, information,[87] not beneficial to the operation and perception of the Court. More and more frequently, the EU Courts are being asked by the other EU institutions to feature in a rather strange *commedia dell'arte*, with Pulcinella's Secret effectively known to everybody but the Court, or rather with the Court being the only one not allowed to tell that secret. With all due respect and affection for *commedia dell'arte*, that can hardly be a healthy role for any court.

142. In short, the admissibility of the evidence in judicial proceedings depends solely on the relevant circumstances of each case. The EU Courts are unconstrained by any rigid rule and can freely determine whether a document is relevant and, that notwithstanding, whether specific

83 See, for example, judgment of 12 May 2015, *Dalli* v *Commission* (T-562/12, EU:T:2015:270, paragraphs 50 to 53).

84 See, to that effect, order of 13 February 2014, *Commission* v *Council* (C-425/13, not published, EU:C:2014:91, paragraphs 22 to 24); and judgments of 6 March 2001, *Dunnett and Others* v *EIB* (T-192/99, EU:T:2001:7, paragraphs 33 and 34); of 11 July 2014, *Esso and Others* v *Commission* (T-540/08, EU:T:2014:630, paragraph 61); and of 12 May 2015, *Dalli* v *Commission* (T-562/12, EU:T:2015:270, paragraph 51).

85 See, for example, judgments of 11 July 2014, *Esso and Others* v *Commission* (T-540/08, EU:T:2014:630, paragraph 62), and of 4 July 2017, *European Dynamics Luxembourg and Others* v *European Union Agency for Railways* (T-392/15, EU:T:2017:462, paragraphs 52 to 56), and order of 25 February 2015, *BPC Lux 2 and Others* v *Commission* (T-812/14 R, not published, EU:T:2015:119, paragraph 14).

86 See, to that effect, judgment of 21 July 2011, *Sweden* v *MyTravel and Commission* (C-506/08 P, EU:C:2011:496, paragraph 118). See also, by analogy, Opinion of Advocate General Kokott in *Dragnea* v *Commission* (C-351/20 P, EU:C:2021:625, point 92).

87 In particular, more and more documents are appearing in the public domain, in one way or another, without that being attributable to the party later seeking to rely on those.

circumstances exist that plead against production. As the Court recently held, 'the evaluation of evidence is not the result of an abstract analysis, but rather of an examination of the facts and circumstances on a case-by-case basis'. [88]

143. In that respect, it must also be borne in mind that, although the Court can raise an issue of admissibility of evidence of its own motion, it is normally for the party who opposes the production of a document to explain to the Court, with clarity and detail, [89] and in a timely fashion, [90] how the interest invoked would specifically be harmed by a disclosure. Vague or generic statements in that regard are not sufficient. [91]

(c) The different consequences in the case of the production of evidence, on the one hand, and access to documents, on the other

144. At this juncture, it becomes important to highlight another aspect that distinguishes the regime of access to documents from that of production of evidence before the EU Courts. It concerns the potential *consequences* stemming from the 'discovery' of the documents in question. Unlike the, indeed quite binary, outcome under Regulation No 1049/2001 (access is either granted or not), the procedures before EU Courts allow for other, much more proportionate solutions than that of a complete removal of a document from the file.

145. An EU institution can no longer control or limit the circulation of a document to which it has granted access under Regulation No 1049/2001. By contrast, specific rules exist, in the EU legal order, to safeguard the confidentiality of documents and information submitted by the parties in the context of judicial proceedings. [92] In particular, ad hoc rules governing access to the case files, [93] ensure that confidential information is not reproduced in the documents to which the public has access, [94] and permit confidential information to be excluded from the service or communication to the other parties. [95]

146. In that respect, it must be borne in mind that the EU Courts have a variety of instruments at their disposal which can be used to satisfy the need to protect the confidentiality of documents (or parts thereof), lodged in the context of judicial proceedings vis-à-vis the other parties, whilst at the same time respecting the rights of the defence of all parties. For example, in some cases, the EU Courts have requested a party to produce a non-confidential version of the documents in question or a summary thereof, in order for those documents to be communicated to the other

88 Order of 12 June 2019, *OY* v *Commission* (C-816/18 P, not published, EU:C:2019:486, paragraph 7).

89 See, to that effect, judgment of 8 November 2000, *Ghignone and Others* v *Council* (T-44/97, EU:T:2000:258, paragraph 45), and, by analogy, judgment of 21 July 2011, *Sweden* v *MyTravel and Commission* (C-506/08 P, EU:C:2011:496, paragraph 115).

90 See, to that effect, judgment of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission* (C-74/00 P and C-75/00 P, EU:C:2002:524, paragraphs 60 and 61).

91 See, by analogy, judgment of 21 July 2011, *Sweden* v *MyTravel and Commission* (C-506/08 P, EU:C:2011:496, paragraph 116 and the case-law cited).

92 See, *in primis*, Article 15(3) TFEU.

93 See, in particular, Article 38 of the Rules of Procedure of the General Court, and Article 22(2) of the Rules of Procedure of the Court of Justice.

94 See, in particular, Article 66 of the Rules of Procedure of the General Court. See also judgment of 1 July 2010, *AstraZeneca* v *Commission* (T-321/05, EU:T:2010:266, paragraph 25).

95 See, in particular, Article 68(5)(4), Article 103, Article 104, and Article 144 of the Rules of Procedure of the General Court, and Article 131(2) to (4) of the Rules of Procedure of the Court of Justice. See also judgment of 12 May 2010, *Commission* v *Meierhofer* (T-560/08 P, EU:T:2010:192, paragraph 72 and the case-law cited).

parties.[96] Moreover, in exceptional situations, the EU Courts may decide that only the parties' counsel can have access to certain pieces of evidence[97] or, in extreme cases, that no access to certain documents is granted to the other parties to the proceedings.[98]

147. In a way, each of these potential solutions would still be more proportionate and respectful, not only of the rights of the parties under Article 47 of the Charter, but also of the role of the EU Courts, than a blunt exclusion of the evidence submitted. This shows once more that the EU Courts cannot simply 'borrow' *en bloc* the rules on access to documents and use them as if they also applied to the production of evidence before them. In circumstances where there are genuine reasons to keep certain documents (in part or *in toto*) confidential vis-à-vis the general public, or even the parties, the EU Courts are indeed able to adopt various measures to ensure that confidentiality while at the same time permitting a party to produce the evidence that it deems relevant.

148. With that being said, I shall now review whether the assessment made by the General Court in the present case with regard to the admissibility of the annexes at issue is consistent with the principles set out above.

(d) The errors in law relating to the production of evidence

149. I take the view that the appellant's second ground of appeal is, in principle, well founded.

150. In paragraph 39 of the order under appeal, the General Court (rightly) stated that Regulation No 1049/2001 can have *an indicative value*. However, it then went on to apply those rules to the situation, rather mechanically, without any regard for the fact that the problem at hand and the legal issue to be resolved before that court was whether the annexes at issue had to be removed from the case file, and not whether public access to those documents had to be granted.

151. In other words, nowhere in the order under appeal – that is, neither in the section entitled 'The procedural issue raised by the Council'[99] nor in the section entitled 'The request for a measure of organisation of procedure'[100] – is there any indication that the General Court carried out an assessment that would in fact be different from that required by Regulation No 1049/2001. It does not seem that the General Court took into account the different values (or undertook a balancing exercise) that underpin the admissibility of evidence before EU Courts.

152. To begin with, the General Court identified the interests whose protection could justify a removal from the file on the basis of Article 4(1), (2) and (3) of Regulation No 1049/2001. In particular, the General Court referred to the need to (i) ensure that EU institutions receive frank,

96 See, for example, judgment of 12 May 2011, *Missir Mamachi di Lusignano* v *Commission* (F-50/09, EU:F:2011:55, paragraph 156).

97 See judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission* (T-301/16, EU:T:2019:234, paragraphs 48 to 51).

98 See Article 105(2) of the Rules of Procedure of the General Court, and Article 190a of the Rules of Procedure of the Court of Justice. See also Decision (EU) 2016/2386 of the Court of Justice of 20 September 2016 concerning the security rules applicable to information or material produced before the General Court in accordance with Article 105 of its Rules of Procedure (OJ 2016 L 355, p. 5), and Decision (EU) 2016/2387 of the General Court of 14 September 2016 concerning the security rules applicable to information or material produced in accordance with Article 105(1) or (2) of the Rules of Procedure (OJ 2016 L 355, p. 18).

99 That section is composed of some 'preliminary observations', in which the General Court sought to lay down the applicable legal framework (paragraphs 38 to 46) and of three specific subsections in which, in turn, it applied that framework to examine the admissibility of the various documents concerned by the Council's request (paragraphs 47 to 56 as regards the first document at issue, paragraphs 57 to 64 as regards the second document at issue, and paragraphs 65 to 68 as regards the third document at issue).

100 Paragraphs 125 to 135 of the order under appeal.

objective and comprehensive legal advice,[101] (ii) avoid circumvention of the rules on public access to documents,[102] and (iii) not undermine the European Union's international relations.[103] In that respect, I agree with the General Court that, as a matter of principle, those same interests could also justify a refusal by the EU Courts to accept certain documents as evidence.

153. By contrast, the manner in which the General Court then went on to assess whether and how those interests could, in the present case, be harmed if the annexes at issue were kept in the case file, fails to convince. In the course of that examination, the General Court gave no consideration to any 'intra-judicial' interests that could, possibly, have provided that court with grounds to dismiss the Council's request. It is, therefore, in this context that the General Court's blind reliance on the provisions of Regulation No 1049/2001 led that court to err in law. The following aspects are particularly illustrative in that regard.

154. First, no consideration was given to the possible need for the General Court itself to have access to the documents in question so as to make an informed view of the alleged facts,[104] nor to the limitation of the appellant's right of defence (which includes its freedom to produce evidence) that would ensue from a possible removal from the file of the annexes at issue. That absence is even more surprising in view of the fact that the appellant had argued that some of the annexes at issue were 'decisive' in order to prove one of its arguments.

155. Second, the alleged harm to the interests invoked by the Council flows – in the view of the General Court – from the mere fact that the annexes at issue could be kept in the file and examined by the General Court. The Council was not required by the General Court to explain in detail, let alone to prove to the requisite standard, the manner in which, and the degree to which, the interests invoked could be specifically harmed.

156. Even if one were to consider that mere assumptions on the part of the General Court could be deemed sufficient with regard to the need to avoid circumvention of the rules on access to documents[105] and to the protection of legal advice (*quod non*),[106] the same could hardly be said of such assumptions with regard to the protection of the European Union's international relations. Indeed, the General Court appears to overlook the fact that the appellant is already in possession of the annexes at issue and could thus make use of them in any other *forum* that it pleases. In any event, while there might conceivably be a risk that the annexes at issue could reveal the European Union's strategic objective in future negotiations with Russia, thereby undermining the ability of the EU institutions to conclude a satisfactory agreement, if the documents at issue were to be publicly disclosed, this certainly does not mean that such a risk would arise as a result of those documents being produced in judicial proceedings.

157. Moreover, the statement of the General Court that the disclosure of the content of the Unredacted Germany Documents in the present proceedings could undermine the protection of the European Union's international relations also cannot be considered to be correct.[107] To begin with, neither in the order under appeal, nor in the submissions of the defendants and the

101 Paragraphs 40, 52 and 55 of the order under appeal.

102 Paragraph 51 of the order under appeal.

103 Paragraphs 41, 42 and 135 of the order under appeal.

104 Some brief consideration on that point may, perhaps, be considered 'implicit' in paragraph 129 of the order under appeal with regard to the Unredacted Germany Documents.

105 See in particular paragraph 51 of the order under appeal.

106 See in particular paragraph 52 of the order under appeal.

107 Paragraph 135 of the order under appeal.

interveners, is any clear explanation given as to why the commencement of arbitration under Article 26 of the Energy Charter Treaty [108] by the appellant (a private investor) against the European Union should concern *international* relations *stricto sensu* (that is, relations between the European Union and third States, international organisations or similar entities). At first sight, that appears to be a private dispute.

158. In addition, the mere fact that the EU judicature could examine those documents does not, automatically, 'confer legitimacy' on those documents. That would happen only if the General Court were to *rely* on those documents and endorse their content.

159. Moreover, and rather importantly, there is something inherently questionable in perceiving the provisions on transparency and openness of Regulation No 1049/2001 as representing a body of rules which allows the institutions to refuse disclosure each time there is a document that could potentially be used in proceedings against the European Union. One of the very aims of that body of rules is to permit a public oversight over the actions of the EU institutions. A fortiori, that must be valid with regard to the rules on the production of evidence, rules which can hardly be seen to be favouring a (public) party over another (private) party.

160. Third, in assessing *specifically* whether an exception (removal from the file of the annexes at issue) to the rule (admissibility of the evidence) should be made, the General Court basically applied the provisions of, and the case-law on, Regulation No 1049/2001. The reasoning followed by the General Court with regard to the removal of the Recommendation is particularly indicative of that approach. The statement of reasons concerns only the disclosure of the document to the public, and not the removal from the file. Since the refusal to publicly disclose the document was found to be justified, it *inevitably* followed – according to the General Court – that the production of that document in the context of judicial proceedings also had to be precluded. [109] By the same token, the removal from the file of the Unredacted Germany Documents was based solely on an alleged detrimental impact that the disclosure of those documents in the proceedings could have for the protection of the European Union's international relations 'for the purposes of Article 4(1) of Regulation No 1049/2001'. [110] That, as explained in point 139 above, cannot be correct.

161. Fourth, the same problematic approach was followed in the only instance where, having concluded that production of the annexes at issue could actually harm the public interests invoked by the Council, the General Court sought to evaluate whether there were reasons which could, nonetheless, justify the *documents being kept in the file*. In paragraph 54 of the order under appeal, the General Court required, in essence, that the appellant provide proof of the existence of an 'overriding public interest' in keeping the first document at issue in the file. Failing any such superior public interest, the General Court concluded that the appellant's right to submit evidence did not deserve protection since the appellant was only pursuing its own private interest.

162. However, whereas the requirement of proving an 'overriding public interest' is reasonable in the context of an assessment relating to whether or not a document must be publicly disclosed by an institution, it makes no sense in the context of judicial proceedings. A private applicant is by

[108] Arbitration proceedings commenced on 26 September 2019 pursuant to Article 26(4)(b) of the Energy Charter Treaty and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) 1976.

[109] Paragraphs 57 to 63 of the order under appeal. Paragraph 63 is particularly telling in that regard: the General Court concluded the analysis by stating 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 … 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 …'. My emphasis.

[110] Paragraph 135 of the order under appeal.

definition pursuing its own private interest in bringing judicial proceedings.[111] It would hardly be compatible with the principle of equality before the law if applicants bringing proceedings for 'noble' causes[112] were to enjoy stronger procedural rights and guarantees than applicants bringing proceedings for their own private interests.

163. In any event, even if one were to follow the problematic reasoning of the General Court, it would not be difficult to identify some important public interests which would be better served by a court capable of examining all relevant documents. For example, better informed courts are more effective in ensuring the good administration of justice (as they are less likely to commit certain judicial errors), and in strengthening the rule of law (by ridding the EU legal order of potentially unlawful acts). It seems to me that those interests are inherent in all judicial proceedings, not only those brought by 'good Samaritans'.[113]

164. Lastly on this point, the General Court also failed to give any consideration to the fact that, at least some of the annexes at issue (the Unredacted Germany Documents), concern a legislative procedure which, according to case-law, require increased transparency and thus wider access.[114] In paragraph 131 of the order under appeal, the General Court acknowledged that fact but then failed to assess whether, in the case at hand, that fact could have had any impact.

165. Fifth, the same erroneous approach by the General Court can also be found in the passages where that court assessed the *evidence* produced by the parties to corroborate their arguments on admissibility. In paragraph 53 of the order under appeal, the General Court accepted that one party, the Council, had substantiated its arguments on the need to remove a document from the file *by producing its own decision refusing access* to it.

166. I am naturally not implying that the Council decision should be of no relevance in this context. However, it certainly cannot be *decisive* as the General Court seems to have considered. That decision merely reflected the view of its author – the same party that submitted it before the Court – on a related but, as mentioned, not identical matter: the non-accessibility of the document under Regulation No 1049/2001. Yet again, as mentioned in point 139 above, even a legitimate decision of non-disclosure under Regulation No 1049/2001 does not lead to the automatic inadmissibility of the document in question as evidence before the EU Courts.

167. In addition, for all practical purposes, endorsing the approach of the General Court would mean permitting the self-selection of admissible evidence by the respondent institution.[115] Indeed, by means of the non-disclosure of a document under Regulation No 1049/2001, an institution would be in a position to choose the evidence that any party wishing to challenge its act before the EU Courts would be able to use. That is quite problematic from the point of view of the principles of equality of arms and effective judicial review.

111 I hardly need to point out, in this context, that one of the requirements for the standing of private applicants is, precisely, the existence of an interest in bringing proceedings.

112 Without even entering into the issue of who would be in a position to decide (and how) what is a noble cause worthy of special rights, and what is simply normal individual egoism.

113 For the sake of completeness, it might be added that the case-law to which the General Court made reference in this context concerned different types of actions and (partly) also different types of documents. Both rulings cited at the end of paragraph 54 of the order under appeal were delivered in disputes between *privileged applicants* that, under the rules of the Treaties and of the Statute of the Court of Justice of the European Union, are by definition in a position different from that of private applicants (such as the appellant in the present proceedings).

114 See, in particular, recital 6 of Regulation No 1049/2001. See also judgments of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 45 to 47), and of 4 September 2018, *ClientEarth* v *Commission* (C-57/16 P, EU:C:2018:660, paragraphs 84 to 95).

115 See already above, point 140 of this Opinion.

168. Furthermore, it is true that, generally, internal documents of the institutions containing legal advice may be submitted only if production has been authorised by the institution in question or ordered by the EU Court concerned.[116] However, it is also true that, according to a consistent line of case-law, even confidential or internal documents of the EU institutions may, in certain cases, be lawfully placed in the file, despite opposition from the relevant institution.[117] There can indeed be circumstances in which the unlawfulness of a particular EU act can be proven solely on the basis of internal or confidential documents.[118] The General Court simply 'ignored' the latter case-law and the related arguments of the appellant.

169. The error in terms of the requirement that the parties corroborate their arguments is even more striking with regard to the assessment made vis-à-vis the Unredacted Germany Documents: documents which were not authored by the EU institutions but (presumably) by the German Government. The General Court followed the Council's request and ordered them to be removed from the file solely on the basis of two assumptions. First, the General Court presumed that they were confidential, without even asking for the German Government's confirmation on that point.[119] Secondly, the General Court presumed that the appellant had obtained those documents unlawfully, simply because the appellant had not provided evidence to demonstrate that they had been obtained lawfully, despite that party having denied any wrongdoing.[120] Yet, in line with the general principles on the burden of proof, it should have been for the Council to prove its allegations.

170. In conclusion, the appellant's second ground of appeal is also well founded. The General Court erred in law by applying a wrong analytical framework when reviewing the admissibility of the annexes at issue.

171. The General Court has, essentially, applied the rules laid down in, and the logic followed by, Regulation No 1049/2001, in order to assess the admissibility of the annexes at issue. Far from merely taking, where appropriate, some inspiration from those rules, the General Court has simply treated the appellant's production of the annexes at issue *as if* it concerned a request for access to documents under Regulation No 1049/2001. It would appear that the obvious differences between the two legal frameworks were not taken into account. Nor was consideration given to any possible 'intra-judicial' interest which may have suggested that those documents ought to be maintained in the file. In doing so, or rather, more accurately, in failing to do so, the General Court erred in interpreting and applying the principles governing the production of evidence referred to above, in disregard of well-established case-law.

172. Accordingly, the order under appeal must also be annulled in so far as the General Court ordered the removal of the annexes at issue from the file and decided that there was no need to take into account the passages of the submissions in which extracts of those documents were reproduced (points 1 and 3 of the operative part).

116 See, inter alia, orders of 23 October 2002, *Austria* v *Council* (C-445/00, EU:C:2002:607, paragraph 12), and of 14 May 2019, *Hungary* v *Parliament* (C-650/18, not published, EU:C:2019:438, paragraph 8).

117 See, to that effect, judgment of 8 November 2018, *QB* v *ECB* (T-827/16, ECLI:EU:T:2018:756, paragraph 65 and the case-law cited). See also judgment of 3 October 1985, *Commission* v *Tordeur* (C-232/84, EU:C:1985:392), and order of 15 October 1986, *LAISA* v *Council* (31/86, not published in the ECR).

118 That may be the case where actions are brought on the ground of misuse of power, following leaks by whistle-blowers, or where actions may involve some criminal liability on the part of some members of the staff of the institutions.

119 Which, as mentioned in point 116 above, it had the power to do.

120 Paragraphs 131 to 135 of the order under appeal.

(e) The annexes at issue are not relevant for the present proceedings

173. As mentioned in point 25 above, following a measure of organisation of procedure adopted under Article 62(1) of the Rules of Procedure of the Court of Justice by the Reporting Judge and the Advocate General, the appellant submitted the annexes at issue.

174. Having examined those documents, I do not consider them to be relevant for the purposes of the present appeal proceedings.

175. In the light of the arguments put forward by the appellant both at first instance and on appeal, it seems to me that, by means of those documents, the appellant pursued essentially two objectives. First, the appellant sought to 'strengthen' certain legal arguments made in the case at hand, by showing the position taken in that regard by some EU institutions or Member States' governments. Second, the appellant sought to corroborate its allegation that its pipeline was the main target of the contested measure.

176. However, I am not persuaded that the annexes at issue are really of any assistance to the Court in either of those regards.

177. First, in my view, the factual situation before this Court is quite clear and, in any case, not open to re-examination on appeal. As far as potential legal arguments contained in those annexes are concerned, *iura novit curia*. It is for the Court to interpret the law. It hardly needs to be pointed out that the legal arguments put forward by the appellant, even those potentially taken from a different document,[121] do not become more credible for the Court by the mere fact that they have also been endorsed or even previously voiced by an EU institution or a Member State. The question is rather whether those arguments are persuasive on their own merits.[122]

178. Second, as regards the appellant's intention to corroborate its arguments that it is 'individually concerned' by the contested measure, I think that the Court has sufficient information and evidence in the case file in that respect. As I shall explain in the following section, I am of the view that, indeed, the appellant is both directly and individually concerned by the contested measure, and that the information necessary for that conclusion is, in fact, already found in the case file or the public domain.

179. For those reasons, I find it unnecessary for the Court to examine whether or not, once a correct legal framework is applied, the annexes at issue should be deemed admissible. For the purposes of this appeal, they are irrelevant.

180. However, as explained in the previous sections of this Opinion, in reaching its conclusion on the inadmissibility of the annexes at issue, the General Court applied an incorrect legal test. Moreover, should the Court of Justice agree with the analysis carried out in this Opinion, the General Court will be bound to hear the case again.

[121] Which will, in practical terms, remain possible. Even if the Court may, in exceptional cases, indeed exclude a certain document from the case file, it is hardly its role to run a censorship office and vet the submissions of a party as to its contents, double-checking whether or not a legal argument put forward by a party was possibly already included in another document.

[122] The baseline thus necessarily remains the difference between a reference to an external authority ('this is correct because an EU institution has said so, and here is where they said it'), and a free-standing merit-based argument, metaphorically standing on its own two feet, without any need to rely on an external authority.

181. In such circumstances, I find it also appropriate to suggest to the Court of Justice that points 1 and 3 of the operative part of the order under appeal should be annulled. That should allow the General Court to carry out, should the need arise, a fresh and case-specific assessment as to the admissibility of those annexes as evidence, in view of the elements invoked before it, this time around using the correct yardstick.

VI. Consequences of the assessment: how the present case should be disposed of

182. The first and second grounds of appeal are well founded. As a consequence, points 1, 3 and 4 of the operative part of the order under appeal should be set aside. Since the other parts of the order under appeal are ancillary, the order under appeal should, in my view, be set aside in its entirety.

183. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, after setting aside a decision of the General Court, refer the case back to the General Court for judgment or, where the state of the proceedings so permits, it may itself give final judgment in the matter.

184. In the present case, I am of the view that the state of the proceedings permits the Court to take a final position on the standing of the appellant to bring proceedings (A). However, it does not permit the Court to deal with the merits of the action (B).

A. Individual concern

185. Having concluded that the appellant was directly concerned, in order to take a final decision on its standing to challenge the contested measure, it is necessary to determine whether the appellant is also *individually* concerned by that measure. Although the General Court did not examine that point, I take the view that – the issue being legal and, moreover, rather straightforward – the Court of Justice may itself carry out that assessment.

186. According to settled case-law, persons other than those to whom a measure is addressed may claim to be individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, only if that measure affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed by such a measure. [123]

187. Applicants are, in principle, not considered to be individually concerned by measures which apply to objectively determined situations and produce legal effects with respect to categories of persons viewed generally and in the abstract. [124] In addition, the mere possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure

[123] See, inter alia, judgments of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17, p. 107), and, more recently, of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraph 93).

[124] See, to that effect, 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 31 and the case-law cited). .

applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it. [125]

188. However, the Court has also made clear that the fact that a contested measure is, by its nature and scope, a measure of general application or of a legislative nature inasmuch as it applies to the economic operators concerned in general, does not of itself prevent it being of individual concern to some of them. [126]

189. That is so where the applicant is able to establish 'the existence of a situation which from the point of view of the contested provision differentiates it from all other [economic operators]'. [127] Yet, this does not mean that an applicant must be the only person particularly affected by the contested measure in order to be considered individually concerned. Indeed, the Court has held that, where a measure 'affects a group of persons who were *identified or identifiable* when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a *limited class* of [economic operators]'. [128] Put differently, the Court has consistently accepted individual concern where the EU institutions were in a position to know, when they adopted the contested measure, which undertakings, whose number and identity were clearly discernible, would be specifically affected by the measure. [129]

190. In that regard, the Court has given particular weight to the circumstance that the category of persons to which an applicant belongs is composed of a *fixed number* of persons that *cannot be enlarged after adoption of the contested measure*. [130] That was found to be the case, in particular, when the contested measure altered the rights acquired by the applicant prior to its adoption. [131] Moreover, the Court found individual concern to exist when the contested act affected 'a fixed number of [economic operators] identified by reason of the individual course of action' which they had pursued or were regarded as having pursued. [132]

191. However, other circumstances could also be relevant under the '*Plaumann* formula'. That test is certainly strict, but, at least on the face of it, also relatively open and flexible. For example, in order to determine whether applicants were sufficiently individualised by a challenged measure, the Court has taken into account – alone or in combination with other elements – whether (i) the

125 See, among others, judgment of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraph 47 and the case-law cited).

126 See judgment of 17 September 2009, *Commission* v *Koninklijke Friesland Campina* (C-519/07 P, EU:C:2009:556, paragraph 51 and the case-law cited). See also judgment of 18 May 1994, *Codorniu* v *Council* (C-309/89, EU:C:1994:197, paragraph 19).

127 See judgment of 18 May 1994, *Codorniu* v *Council* (C-309/89, EU:C:1994:197, paragraph 22).

128 See, to that effect, judgments of 17 January 1985, *Piraiki-Patraiki and Others* v *Commission* (11/82, EU:C:1985:18, paragraph 31); of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416, paragraph 60); and of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraphs 59 and 60).

129 Opinion of Advocate General VerLoren van Themaat in *Piraiki-Patraiki and Others* v *Commission* (11/82, EU:C:1982:356, p. 218).

130 Opinion of Advocate General Lenz in *Codorniu* v *Council* (C-309/89, EU:C:1992:406, point 38). My emphasis.

131 See judgments of 13 March 2008, *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159, paragraph 72), and of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraph 59).

132 See judgment of 18 November 1975, *CAM* v *EEC* (100/74, EU:C:1975:152, paragraph 18). Similarly, judgment of 13 May 1971, *International Fruit Company and Others* v *Commission* (41/70 to 44/70, EU:C:1971:53, paragraphs 17 and 18).

applicants had participated in the procedure which led to the adoption of the measure,[133] (ii) their market position was '*substantially affected*' by a *targeted* measure,[134] and/or (iii) the author of the contested measure was required to take into account the specific situation of the applicants.[135]

192. Against that background, has the appellant established that it is individually concerned by the contested measure?

193. I am of the view that it has.

194. First, the appellant belongs to a group of persons that was *closed and identifiable* at the time when the contested measure was adopted. In fact, only two pipelines were, in theory, to be immediately affected by the extension of the scope of the Gas Directive: Nord Stream 2 and the Trans-Adriatic. Nevertheless, since an extension had already been obtained for the latter pipeline, it is more appropriate to speak of the appellant as the *only* company belonging to that (purely theoretical) group of individuals affected by the contested measure.[136]

195. Second, in the light of its factual situation, the appellant was in many ways in a *unique position* vis-à-vis the contested measure. At the time of the adoption of that measure and of its entry into force, the construction of its pipeline had not only started, but had reached a very advanced stage. At the same time, however, that pipeline could not be completed before the deadline set out in Article 49a of the Gas Directive. Consequently, the new regime would immediately apply to the appellant, which was caught between two stools: neither the derogation nor the exemption set out in the Gas Directive were applicable.

196. It can hardly be disputed that *only* the appellant was in that position when the measure was adopted. No other company will ever be in that position in the future. Any other pipeline, whether built in the past or to be built in the future, could in principle benefit from either the derogation or the exemption.

197. Third, not only were the EU institutions *aware* that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the *very intention* of subjecting the appellant to that new regime.[137] In addition, I note that the appellant has provided, at first instance, several documents, other than those excluded by the

133 See judgment of 28 January 1986, *Cofaz and Others* v *Commission* (169/84, EU:C:1986:42, paragraphs 24 and 25).

134 See, to that effect, judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 50 to 57). Similarly, judgment of 12 December 2006, *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* (T-95/03, EU:T:2006:385, paragraphs 52 to 55).

135 See, to that effect, judgments of 10 April 2003, *Commission* v *Nederlandse Antillen* (C-142/00 P, EU:C:2003:217, paragraphs 71 to 76 and the case-law cited), and of 3 February 2005, *Comafrica and Dole Fresh Fruit Europe* v *Commission* (T-139/01, EU:T:2005:32, paragraph 110). See also judgments of 6 November 1990, *Weddel* v *Commission* (C-354/87, EU:C:1990:371, paragraphs 20 to 22), and of 15 June 1993, *Abertal and Others* v *Commission* (C-213/91, EU:C:1993:238, paragraph 23).

136 As acknowledged, for example, by the Commission itself when it put forward its proposal for the contested measure: see European Commission Fact Sheet, 'Questions and Answers on the Commission proposal to amend the Gas Directive (2009/73/EC)', MEMO/17/4422, 8 November 2017 (answer to question 10).

137 See, amongst other freely accessible documents, (i) European Commission Fact Sheet, 'Questions and Answers on the Commission proposal to amend the Gas Directive (2009/73/EC)', MEMO/17/4422, 8 November 2017 (answers to questions 8 to 11), (ii) European Parliament Questions, Answer given by Mr Arias Cañete on behalf of the European Commission (E-004084/2018(ASW)), 24 September 2018, and (iii) European Parliament Research Service Briefing, EU Legislation in Progress, 'Common rules for gas pipelines entering the EU internal market', 27 May 2019, p. 2.

General Court, which suggest that the extension of the EU gas rules to the activities of the appellant was in fact one of the *main* reasons, if not the main reason, that prompted the EU institutions to adopt the contested measure.[138]

198. I would add, in passing, that all of this appears to be a matter of common knowledge. A cursory look at the press and academic articles concerning the adoption of the contested measure would seem to confirm the appellant's argument on this point. In that regard, I hardly need to point out that, in order to establish the relevant facts, the Court may also rely on matters of common knowledge.[139] Justice is often depicted as being blind. However, at least in my recollection, that allegory is not meant to be interpreted as Justice being unable to see something that is blindingly obvious to everyone else.

199. Fourth, given the advanced stage in the construction of the project and the investment already made by the appellant at the time of adoption of the contested measure, it is evident that the adoption of the contested measure has the effect of requiring the appellant to introduce profound changes to its corporate and financial structure and to its business model – all in a relatively short time frame since the contested measure needed to be transposed within approximately 10 months from its adoption.[140] It is thus rather clear that the contested measure does not only have the capacity, but was also intended, to *affect significantly* the appellant's market position. The appellant has also alleged – without being contradicted either by the defendants or the interveners – that the contested measure will require changes to be made to various agreements which it had previously entered into, thereby affecting an already established legal position.[141]

200. On the basis of all the above considerations, it is difficult to envisage a situation where, despite the contested measure being of general application, a more clear and specific connection between the appellant's situation and the contested measure could be identified. Due to certain characteristics specific to the appellant, and the particular circumstances relating to the adoption of the contested measure, the position of the appellant vis-à-vis that measure can be distinguished from the position of any other undertaking that is, or will be, subject to the rules of the Gas Directive by virtue of the contested measure.

201. In the light of the above, I conclude that, being both directly and individually concerned, the appellant has standing to challenge the contested measure under the fourth paragraph of Article 263 TFEU.

B. Merits of the action

202. In its application before the General Court, the appellant raised six pleas in law against the contested measure.

138 See, especially, Answer given by Energy Commissioner Cañete, and the Parliament briefing referred to in the previous footnote. See also the decision of the Bundesnetzagentur referred to in footnote 43 above.

139 See, for example, judgments of 28 February 2018, *Commission* v *Xinyi PV Products (Anhui) Holdings* (C-301/16 P, EU:C:2018:132, paragraph 78), and of 20 March 2014, *Commission* v *Lithuania* (C-61/12, EU:C:2014:172, paragraph 62).

140 See Article 2 of the contested measure. Interestingly, the Member States were granted a period around twice that amount of time to transpose the Gas Directive (see Article 54 thereof), and even longer to apply the provision on unbundling (see Article 9 thereof).

141 See also above, point 96 of this Opinion.

203. In order to assess those pleas, a detailed assessment in law and in fact of the arguments put forward by all parties to the proceedings, in the light of the evidence produced by them, would be required.

204. Failing any such assessment in the order under appeal, the state of the proceedings does not permit the Court of Justice to give final judgment in the present case.

205. Accordingly, the case must be referred back to the General Court and the costs reserved.

VII. Conclusion

206. I propose that the Court of Justice should:

– set aside the order of 20 May 2020, *Nord Stream 2* v *Parliament and Council* (T-526/19, EU:T:220:210);

– declare Nord Stream 2 AG's action for annulment admissible;

– refer the case back to the General Court for a decision on merits; and

– order that the costs be reserved.