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Mr Jean-Claude Juncker
President of the European Commission
European Commission
Rue de la Loi 200
1049 Brussels
Belgium

Date: 12.04.2019

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

Dear President,

1. Nord Stream 2 AG (**"NSP2AG"**) addresses this letter to you, as President of the European Commission, and, therefore, the representative of the European Union (the **"EU"**) for the purposes of the ECT. We also refer in this regard to Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.
2. NSP2AG wishes to raise its concerns regarding the impact of the Amending Directive on the Nord Stream 2 Pipeline. The purpose of the letter is:
    a. To seek clarification on the application of the derogation regime proposed by the Amending Directive; and
    b. To provide notice to the European Commission as representative of the EU of a possible breach of the ECT, and to request that the EU attempts to reach an amicable settlement with NSP2AG in accordance with Article 26(1) of the ECT.

Background to NSP2AG's Investment in the EU

3. NSP2AG is a company incorporated in Zug, Switzerland.
4. Since it was established in 2015, NSP2AG has been engaged in the planning and construction of the Nord Stream 2 Pipeline, a pipeline which is being built in order to transport natural gas from Ust-Luga in Russia to Lubmin in Germany via the Baltic Sea.
5. NSP2AG is the owner and operator of the entire pipeline.
6. This pipeline, once operational, will significantly expand European gas supply capacity. It is anticipated that EU wholesale gas prices will be up to 13 percent lower by 2020 due to the additional gas which Nord Stream 2 will be able to make available to the European market.

7. The pipeline will also have a positive economic impact on the EU. Construction and operation of the pipeline are expected to create over 31,000 jobs in the EU and investments associated with the project will likely contribute €5 billion to the gross domestic product of the EU.
8. Since construction of the pipeline began, the Nord Stream 2 project has already contributed at least €3 billion to the economies of the EU and its Member States, including through contracts with EU companies, employment of EU citizens and the purchase of materials for the project.
9. The construction of Nord Stream 2 in the German territorial sea has been finalised. The pipeline is expected to become operational by the end of 2019.

The proposal for the Amending Directive and the derogation regime

10. On 8 November 2017 the European Commission tabled the proposal for the Amending Directive with the aim of extending the Gas Directive and certain associated rules to gas pipelines to and from third countries ("**Import Pipelines**"). Such Import Pipelines were previously outside the scope of the Gas Directive, as explained in the Commission proposal.[1]
11. Following discussions in the Council of the EU, the European Parliament and in "trilogue" discussions, on 14 February 2019, the Council published a compromise text of the Amending Directive. A final text of the Amending Directive was approved by the European Parliament on 4 April 2019 but still needs to be approved by the Council of the EU. It is understood that the aim is for the Amending Directive to enter into force by summer 2019.
12. Pursuant to the Amending Directive, Nord Stream 2 would fall within the scope of the Gas Directive on the territory of the Member States and in the territorial sea of the Member State of first interconnection with an EU Member State's network, i.e. the German territorial sea.
13. Under the Amending Directive, Article 49a allows for a derogation in relation to Import Pipelines "completed" before the entry into force of the Amending Directive (a "**Derogation**"). This Derogation allows Member States not to apply key provisions of the Gas Directive concerning unbundling rules, third party access and tariff regulation to such pipelines for objective reasons, including enabling the recovery of the investment made. Any decision on a Derogation must be taken within one year after entry into force of the Amending Directive.
14. The rationale of the Derogation is "*to take into account the legitimate expectations of existing operators and the previous lack of specific Union rules applicable to gas pipelines from third countries*".[2]

The potential impact of the Amending Directive on Nord Stream 2

15. When and if the Amending Directive comes into force and is transposed into German law, the section of Nord Stream 2 within the geographic scope of the Directive (i.e. on German territory and in the German territorial sea) in principle becomes subject to the Gas Directive rules on, *inter alia*, unbundling rules, third party access and tariff regulation.
16. The Derogation would allow Germany to derogate from these rules but this depends on the interpretation of the concept of a "completed" transmission line. The relevant section of Nord Stream 2 will be substantially "completed" if the amendment enters into force by summer 2019 but it will not be operational.
17. The difference between being able to benefit from a Derogation or not (i.e. between being considered "completed" or not) is significant. The Amending Directive and the legislative history demonstrate that the Derogation is provided for to allow recovery of the investment made and to protect legitimate expectations of investors. Such concerns are not materially different for a "completed", "half-completed" or "almost completed" pipeline. The problem is the same in all these scenarios,

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[1] Explanatory Memorandum, COM(2017) 660 final, p. 2.

[2] Questions and Answers on the Commission proposal to amend the Gas Directive (8 November 2017), Question 3. See also recital (4) of the Amending Directive.

namely that considerable financial resources have been invested in infrastructure and investment risk undertaken and that the rules for owning and operating this infrastructure are suddenly fundamentally changed by new regulation. In the case of Nord Stream 2 the final investment decision was taken several years ago, billions of euros have been spent and almost all commitments have been entered into. The design of construction and operation of the pipeline was based on existing legislation.

18. The exemption regime of Article 36 of the Gas Directive would not be a suitable alternative for a Derogation. We note in this respect that the European Commission has stated: *"[t]he logic of the derogation is [ ] very different than the one used in exemption procedure under Article 36*".[3] These fundamental differences include at least the following:

    a. An Article 36 exemption is available where investment is contemplated, not where it has already been undertaken.

    b. In the case of an Article 36 exemption an investor is given clarity about its regulatory treatment *before* it takes a final investment decision. The Derogation is concerned with investors whose regulatory situation changes fundamentally *after* taking a final investment decision and making the investment.

    c. An Article 36 exemption is available to infrastructure that would normally be regulated but seeks an exceptional and more favourable treatment. The Derogation is for infrastructure that was not regulated but becomes regulated due to a change in law.

    It should be uncontested, therefore, that an Article 36 exemption cannot be seen as somehow equivalent to a Derogation under Article 49a.

NSP2AG is an investor which has made an investment in the EU for the purposes of the ECT

19. NSP2AG is a Swiss company headquartered and having substantial business activities in Zug, Switzerland. Switzerland is a contracting party to the ECT. NSP2AG is therefore an investor within the meaning of Article 1(7)(a)(ii) of the ECT.

20. Since 2015, NSP2AG has invested more than €5.8 billion into the planning and construction of Nord Stream 2. NSP2AG has made an investment within the area of the EU within the meaning of Article 1(6) of the ECT.

21. Therefore, the Nord Stream 2 pipeline and the associated project is an investment of an investor for the purposes of the ECT.

Failure to make NSP2AG eligible for the benefit of a Derogation would be a breach of the ECT

22. In the event that the Amending Directive is adopted and implemented, and Nord Stream 2 is not eligible for a Derogation, and if no other steps are taken to put NSP2AG in the same position as if it was eligible for a Derogation, this would be a breach of the EU's obligations under the ECT in relation to NSP2AG as an investor. Among other things, the measure would be discriminatory against NSP2AG as an investor and Nord Stream 2 as its investment.

23. If the basis for Nord Stream 2 not being eligible for a Derogation were that, unlike comparable existing pipelines, Nord Stream 2 had not been fully completed by the time the Amending Directive came into force, such an outcome would clearly be unreasonable, arbitrary and discriminatory. We note in this respect that, when tabling its proposal in November 2017, the Commission explicitly stated that Nord Stream 2 was the only "advanced" pipeline project that would be affected by the amendment.[4] Like for other completed pipelines, very significant investment will have been made

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[3] Questions and Answers on the Commission proposal to amend the Gas Directive (8 November 2017), Question 6.

[4] Questions and Answers on the Commission proposal to amend the Gas Directive (8 November 2017), Question 10 "Which other new pipeline projects would be affected by the proposal". More generally, the Nord Stream 2 pipeline was a prominent part of the factual background to the legislative process. The Commission's Questions and Answers document explicitly discusses the Nord Stream 2 pipeline in 4 of the 11 questions and answers it addresses. On 12 June 2017 the European

in Nord Stream 2 on the basis of an investment decision (and consequent material financial commitments) made and implemented prior to the adoption of the Amending Directive. It would be reasonable for NSP2AG to be entitled to recover that investment. Conversely, it would be unreasonable and discriminatory for the EU to design the Amending Directive and the Derogation in such a way that only Nord Stream 2 is significantly affected. In fact, Nord Stream 2 should be *more* eligible for a derogation than other Import Pipelines, *not less*, because other existing Import Pipelines have already recovered investment in full or in part. Nord Stream 2, by contrast, has not recovered any investment.

24. This may constitute a breach of Articles 10 and 13 of the ECT. NSP2AG is therefore raising this issue now in the hope of receiving clarification from the EU that Nord Stream 2 will be eligible for such a Derogation in order to address such a breach.

Notification to the European Commission under the ECT

25. Given the current uncertainty regarding the operation of the Amending Directive and the availability of a Derogation to Nord Stream 2, NSP2AG requests that the EU confirms that Nord Stream 2 will be treated as "completed" and falling within the Derogation regime like other Import Pipelines in which investments have already been made before adoption of the Amending Directive.
26. NSP2AG is concerned to protect its valuable investment. Accordingly, NSP2AG serves this letter as a notice of dispute to the EU under Article 26 of the ECT and requests that the EU attempt to reach an amicable settlement with NSP2AG in accordance with Article 26(1) of the ECT.

Response requested from the EU

27. We should be grateful for a response to this letter by 13 May 2019.

Yours faithfully

Nord Stream 2 AG

Commission had also tabled a recommendation for a Council Decision authorising the opening of negotiations of an agreement between the EU and Russia on the operation of the Nord Stream 2 pipeline.