

A legal person and the standing to challenge a directive under EU law – Case C-348/20 P, *Nord Stream 2 AG v European Parliament and Council of the European Union* (Court of Justice (Grand Chamber), Judgment of 12 July 2022)

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1. Introduction

The Nord Stream 2 pipeline project was one of the most controversial and politically loaded projects of our time. While commercial and political risks in such large-scale energy projects are always present, Nord Stream 2 was in a league of its own. Ultimately, the German government withdrew its positive security of energy supply statement within the certification procedure for the pipeline, which under Article 11 of the Gas Market Directive³ is a prerequisite for operating the pipeline. Shortly thereafter, the United States imposed sanctions on the project.⁴ These measures effectively stopped the project, which now remains at the bottom of the Baltic Sea.

Prior to these events, the company had already taken legal action against the changes made in European Union (EU) gas market regulation⁵ at both EU⁶ and international level.⁷ Within the EU, the General Court refused standing to Nord Stream 2 in its attempt to overturn certain amendments to the Gas Market Directive that extended the application of EU energy *acquis* to the pipeline. On appeal, Advocate General Bobek suggested that the Order of the General Court ('GC') should be overturned

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³ 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 [2009] OJ L211/94.

⁴ Nord Stream 2 AG and its CEO Matthias Warnig are sanctioned under the Protecting Europe's Energy Security Act (PEESA), which is implemented pursuant to Executive Order 14039. (E.O. 14039 available at <https://home.treasury.gov/system/files/126/14039.pdf>, last accessed 1 August 2022).

⁵ 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 [2019] OJ L117/1 (hereinafter 'the Amendment' or 'Contested Measure').

⁶ Case C-348/20 P, *Nord Stream 2 AG v European Parliament and Council of the European Union* (12 July 2022), ECLI:EU:C:2022:548.

⁷ A claim under the Energy Charter Treaty is currently pending in the form of *Nord Stream 2 AG v European Union*, PCA Case No. 2020-07.

and the case remitted to the GC for substantive analysis of the claims of discrimination.⁸ With its judgment of 12 July 2022, the Court of Justice of the European Union ('CJEU', here sitting in its Grand Chamber formation) largely agreed with its Advocate General.⁹

The appeal before the CJEU concerned the standing of an individual applicant to bring a direct action for annulment of a legislative act under EU law. Natural and legal persons (known as 'non-privileged applicants') must meet the requirements under Article 263 TFEU in order to establish standing to bring a direct action before the EU courts. For such non-privileged applicants, the threshold for standing has always been both high and ambiguous.

The fourth paragraph of Article 263 TFEU provides as follows:

'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

While it is a long-standing principle of EU law that an individual natural or legal person may in principle initiate an action for annulment of an EU act, the Lisbon Treaty added a new element to what is now Article 263 TFEU and improved the position of private persons in annulment proceedings. The intention behind this was to maintain the previous restrictive approach in relation to actions by individuals against 'legislative acts', but to enable those persons to bring, under less stringent conditions, actions for annulment of acts of general application other than legislative acts.¹⁰ Case C-348/20 P, *Nord Stream 2 AG v European Parliament and Council of the European Union* concerned legislative acts. For this category of acts, a private person needs to show either that the act is addressed to him or her, or that the act is (otherwise) of: (1) direct; and (2) individual concern.

From an EU law perspective, the *Nord Stream 2* case focuses on two important and distinct issues of a procedural nature: (1) can an individual be *directly and individually concerned*, within the meaning

⁸ Opinion of Advocate General Bobek in Case C-348/20 P, *Nord Stream 2 AG v European Parliament and Council of the European Union* (6 October 2021), ECLI:EU:C:2021:831.

⁹ Case C-348/20 P, *Nord Stream 2 AG v European Parliament and Council of the European Union* (12 July 2022), ECLI:EU:C:2022:548.

¹⁰ Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625; Case T-262/10, *Microban (Europe) v Commission*, ECLI:EU:T:2011:623, discussed by S. Peers & M. Costa, 'Judicial Review of EU Acts after the Treaty of Lisbon' (2012) 8(1) *European Constitutional Law Review* 82.

of Article 263 TFEU, by a directive; and (2) 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? This case note focuses on the first of these issues and will not deal with the question of written evidence.

The case note first provides some basic background to the case, followed by a brief discussion of the General Court's ruling and a more extensive analysis of the Opinion Advocate General Bobek, which the CJEU largely followed. It then focuses on the judgment of the CJEU.

2. Nord Stream 2 v Parliament and Council

2.1 Background

On 17 April 2019, the European Parliament and the Council adopted Directive (EU) 2019/692, which amends the 2009 Gas Market Directive¹¹ and extends its geographic scope of application to EU Member States' territorial waters.

The extension of the territorial scope of the Directive was achieved by amending the definition of an 'interconnector' under Article 2(17). The new wording states:

'(17) "interconnector" means a transmission line which crosses or spans a border between Member States for the purpose of connecting the national transmission system of those Member States or 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.'

By modifying the definition of an interconnector, the legislator extended the scope of the Directive. Through this modification, the application of the Gas Market Directive, and all the other instruments of EU energy law that follow, is extended to the territorial sea of the Member State where the first interconnection point is located. Prior to this amendment, all gas volumes transported through import pipelines bringing gas to the EU internal market were subject to EU gas market regulation only at their landing terminal. While the physical structures of the pipelines remain unchanged, the legal, operational and economic impacts on affected operators are considerable. However, in practice the

¹¹ 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 [2019] OJ L117/I.

number of affected pipeline operators is limited to a single pipeline due to the derogation regime ushered in via the 2019 amending Directive.

A derogation from most of the provisions of the Gas Market Directive is now possible under its Article 49a, which is available for pipelines that are ‘completed before 23 May 2019’. Recital 4 of the Amendment Directive explains the reason for the derogation under Article 49a:

‘To take account of the lack of specific Union rules applicable to gas transmission lines to and from third countries before the date of entry into force of this Directive, Member States should be able to grant derogations from certain provisions of Directive 2009/73/EC to such gas transmission lines which are completed before the date of entry into force of this Directive.’

Nord Stream 2 challenged this amendment before the General Court and asked the Court to annul the Contested Directive in its entirety. In support of the action, Nord Stream 2 presented a number of pleas, of which the most important appears to be infringement of the general EU law principle of equal treatment. The applicant argued that the amending Directive denies it the possibility of derogation from the application of the Gas Market Directive, notwithstanding the sheer magnitude of investment that had already been incurred as at the date of adoption of the amending Directive and even before it was first proposed, whereas all other existing offshore import pipelines are eligible for a derogation.

In addition, the challenge was based, *inter alia*, on violation of the principle of proportionality (the Directive is incapable of achieving its stated objectives), the principle of legal certainty (the Directive fails to incorporate appropriate adaptations with respect to the applicant’s particular situation but, on the contrary, is specifically designed to have a negative impact upon it), misuse of powers and breaches of essential procedural requirements.

2.2 *The order of the General Court*

On 20 May 2020, the General Court made an order dismissing the claim.¹² In essence, the General Court refused to hear the case and held that the applicant did not meet the criteria for standing. It

¹² Order of the General Court in Case T-526/19, *Nord Stream 2 v Parliament and Council*, ECLI:EU:T:2020:210. For an assessment of the case, see K. Talus, ‘Direct Challenges Against EU Acts and Standing Requirements for Private Persons

appears that the main reason for this conclusion stems from the fact that the EU act under challenge is a Directive that requires implementation at national level and this in turn, according to the General Court, implies that there is no ‘direct concern’.

In referring to the established case-law, the General Court noted, first, that the fact that the legal instrument in question is a directive is not *per se* a sufficient ground for declaring an action by an individual to be inadmissible. It observed that the EU institutions cannot, merely by means of their choice of legal instrument, deprive natural or legal persons of the judicial protection which they are afforded by the Treaty.¹³ It also noted that in certain circumstances, even a legislative act which applies to economic operators generally may be of direct and individual concern to some of them for the purposes of that provision.¹⁴ However, with regard to directives, the Court of First Instance in *Salamander* made clear that an applicant could only meet the direct concern requirement where the directive’s effects were automatic or where the directive expressly authorises a Member State to act in a particular way.¹⁵

The applicant had argued that in this case the contested Directive does not confer upon the Federal Republic of Germany, the Member State in whose territorial sea the section of the Nord Stream 2 pipeline concerned is located, any genuine discretion in implementing that Directive, because the rules on unbundling, third-party access and tariff regulation are to be applied to the applicant without any possibility for it to obtain a derogation from the corresponding provisions of Directive 2009/73 under Article 49a thereof.¹⁶ It also maintained that each of the unbundling options provided by the contested Directive would have a significant impact on the applicant’s situation by fundamentally affecting its ownership and business structure. Thus, since Germany would be required to demand that the applicant complies with at least one of these three options, Germany is not “free to act or not to act”, according to the wording used by the General Court in *Sahlstedt and Others v Commission*.¹⁷ Therefore, ‘the prejudice to the legal situation of the applicant is due to the requirement to attain that

- Order of the General Court on 20 May 2020 in Case T-526/19, *Nord Stream 2 v Parliament and Council*, OGEL (pre-publication, April 2021, OGEL, ISSN 1875-418X), www.ogel.org.

¹³ *Ibid.*, para 78.

¹⁴ *Ibid.*, para 84, with references to Case 11/82, *Piraiki-Patraiki and Others v Commission*, EU:C:1985:18, paras 11 to 32, and Joined Cases T-172/98 and T-175/98 to T-177/98, *Salamander and Others v Parliament and Council*, EU:T:2000:168, para 30. See also Case C-309/89, *Codorniu v. Council*, ECLI:EU:C:1994:197.

¹⁵ *Salamander*, para. 54. See Peers & Costa, n 9 (above), 84-85.

¹⁶ *Ibid.*, para 98.

¹⁷ Case T-150/05, *Sahlstedt and Others v Commission*, EU:T:2006:172, para 53.

result' prescribed by the Directive, according to the wording used in *Commission v Infront WM*¹⁸ by the CJEU.¹⁹

This argument was not accepted by the Court, which held that regarding:

- the specific obligations to which the part of the gas transmission lines of certain operators, such as the applicant, will now be subject under the Gas Market Directive, as amended; and
- the way in which those obligations will specifically be defined,

these are dependent on the national transposing measures which the Member State in whose territorial sea that part of the line is located will adopt or has adopted under Article 2 of the contested Directive, read in conjunction with Article 288(3) TFEU, by 24 February 2020 at the latest.²⁰

The Court stated that 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.²¹ Accordingly, 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 applicant and liable, on that basis, to affect its legal situation directly for the purposes of Article 263(4) TFEU. In particular, the German regulatory authority cannot, if the Federal Republic of Germany has not adopted measures transposing the contested Directive, require the applicant to comply with the obligations which are newly applicable in its case, as laid down by that Directive.²²

The Court concluded that the correct forum for the applicant was the national court, as it may have its case heard by the CJEU via the preliminary ruling procedure.²³ It noted that in the applicant's case, it is open to it to request, from the German regulatory authority, a derogation under Article 49a of the

¹⁸ Case C-125/06 P, *Commission v Infront WM*, EU:C:2008:159, para 63.

¹⁹ Order, para 99.

²⁰ *Ibid.*, para 105.

²¹ *Ibid.*, para 106.

²² *Ibid.*, para 107. Where provisions of a directive are sufficiently clear and precise, they could grant rights to a private party as *against the state* (such as Germany) – i.e. vertically upwards, but *not* downwards as against an individual at the behest of the state –, but that was not in issue here.

²³ As the EU Courts have regularly advised in earlier cases: see, e.g., Case T-99/94 *Asocarne v Council*, ECLI:EU:T:1994:252 and Case C-209/94 P, *Buralux v Council*, ECLI:EU:C:1996:54, paras 35-36.

Gas Market Directive, as amended, or an exemption under Article 36 thereof and, as the case may be, to challenge that authority's decision before a German court by claiming that the contested Directive is invalid and causing that court to put questions to the Court of Justice by way of questions referred for a preliminary ruling regarding the validity of the contested directive on the basis of Article 267 TFEU.²⁴

In the end, the General Court ruled that the applicant did not have standing to bring an action for annulment of the contested Directive. This was based only on the lack of direct concern and the Court did not engage in any discussion of the other relevant criterion under Article 263(4) TFEU (individual concern).

While this case note does not examine this issue in detail, it is worth noting that the General Court appears to have excluded from consideration certain material (documents and academic articles with references to these documents) contained in the applicant's application due to its confidential nature.²⁵ The fact that this material was excluded seems to suggest that the amendment of the Directive targeted Nord Stream 2 specifically and would have assisted in showing individual concern, the second requirement under Article 263(4) TFEU. These leaked documents have been used widely in academic comments concerning the case and suggest that the amendment was indeed designed to target the Nord Stream 2 project. This, according to the Opinion of AG Bobek, is common knowledge that the Court must consider in any event.²⁶ With respect to the documents in question, the CJEU decided to set aside certain parts of the Order from the General Court.²⁷

3. The Opinion of Advocate General Bobek

The Opinion of Advocate General Bobek in Case C-348/20 P, *Nord Stream 2 AG v European Parliament and Council of the European Union* was delivered on 6 October 2021.²⁸ The Opinion is structured around various questions raised by the case and by the General Court's judgment. These can be summarized as follows:

²⁴ Ibid., para 122.

²⁵ Ibid., paras 44, 55, 65, 69-70 and 125-135.

²⁶ Opinion, para. 198.

²⁷ Judgment, paras 135-137 and 148-149.

²⁸ Opinion of Advocate General Bobek in Case C-348/20 P, *Nord Stream 2 AG v European Parliament and Council of the European Union* (6 October 2021), ECLI:EU:C:2021:831.

(1) First ground of appeal: direct concern

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

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

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

(2) Second ground of appeal: contested documents

(3) Consequences of the assessment: how the present case should be disposed of

(a) Individual concern

(b) Merits of the action

This section of the case note is structured around these questions, covering first (1) in section 3.1 and then (3) in section 3.2. It does not discuss the second ground of appeal relating to contested documents (see (2) above).

3.1 First ground of appeal: direct concern

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

Advocate General Bobek's first criticism focuses on the basic premise of the General Court's decision: the contested measure cannot be of direct concern to the appellant because it is a directive. This premise is not only contrary to the established case-law of the CJEU but also excludes the standing of individual applicants in all cases concerning a directive. He underlined the difference between *direct concern* and *direct effect*. Although the two concepts have certain similarities, they are nonetheless ontologically different and serve different purposes. Article 263(4) TFEU does not require that the challenged act has direct effect, let alone be capable of being invoked by the authorities against individuals. It merely requires that the challenged act 'produce legal effects *vis-à-vis* third parties'.²⁹

It is established case-law that the 'direct concern' criterion requires that the contested measure must:

(1) directly affect the legal situation of the individual; and

²⁹ Opinion, para 40.

(2) leave no discretion to the addressees of the measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting solely from the contested rules without the application of other intermediate rules.³⁰

In the case at hand, Advocate General Bobek found that the amendment is capable of producing legal effects by extending the scope of the rules of the Gas Market Directive to situations and addressees not previously caught by those rules. It is equally clear that, as a result of this, the appellant's legal position 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.³¹

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 EU or by 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, that is capable of breaking that link.³²

Significantly, that assessment cannot be made in the abstract, by relying only on the type of act being challenged. It requires an examination of the purpose, content, scope and substance of the specific measure challenged and the legal and factual context in which that measure was adopted.³³

The Opinion emphasized that a provision of a directive will only very rarely meet the requirement of direct concern in respect of an individual. However, this is very different from being systematically excluded, as the reasoning of the General Court would imply.³⁴ The Opinion went on to challenge the

³⁰ Opinion, para 41; and Cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori v Commission*, ECLI:EU:C:2018:873, para 42. The test for 'direct concern' appears to be the same for legislative acts and regulatory acts. Case T-262/10 *Microban International and Microban (Europe) v Commission*, ECLI:EU:T:2011:623, paras 26-27; and Case C-666/16, *Lysoform Dr. Hans Rosemann and Ecolab Deutschland v ECHA*, ECLI:EU:C:2017:569, paras 41-42.

³¹ Opinion, para 42.

³² Opinion, para 43.

³³ Opinion, para 44.

³⁴ Opinion, para 47.

General Court's reasoning, ultimately concluding that the appellant company's grounds of appeal are well founded.

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

The second set of reasons given by the General Court for the exclusion of direct concern is linked to the specific position of the appellant and the content of the legal provisions invoked. 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.³⁵

The Opinion underlined that the criterion relating to the absence of implementing measures does not mean that any act of implementation whatsoever immediately and necessarily excludes direct concern. In particular, 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.³⁶ As Advocate General Wathelet has stated elsewhere, 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.'³⁷ There is no shortage of case-law to confirm this point. It is also 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

The arguments for excluding direct concern by the General Court revolved around the theoretical possibility of applying an exemption under Article 36 of the Gas Market Directive³⁹ or taking advantage of the possibility of derogation under its Article 49a.⁴⁰ The General Court suggested that

³⁵ Opinion, para 59.

³⁶ Opinion, para 61. Also Opinion in Case C-352/19 P, *Région de Bruxelles-Capitale v Commission*, ECLI:EU:C:2020:588, para 50 and Case C-519/07 P, *Commission v Koninklijke Friesland Campina*, ECLI:EU:C:2009:556, para 49.

³⁷ Opinion in Case C-133/12 P, *Stichting Woonlinie and Others v Commission*, ECLI:EU:C:2013:336, para 41.

³⁸ Case T-119/02, *Royal Philips Electronics v Commission*, ECLI:EU:T:2003:101, paras 277 to 281.

³⁹ Under Article 36 major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from unbundling, third-party access and certain other rules of the Gas Market Directive. The exemption is available where the final investment decision has not been taken.

⁴⁰ Article 49a provides that a Member State may decide on a derogation from unbundling, third-party access and certain other rules of the Gas Market Directive for an interconnector between that Member State and a third country if the interconnector was completed before 23 May 2019.

the fact that the applicant may apply for these options, even in a situation where it is clear that it does not meet the legal requirements under Articles 36 or 49a⁴¹ of the Directive, excludes direct concern.

The Opinion discussed the impacts of exemption under Article 36 and derogation under Article 49a of the Gas Market Directive at great length. It correctly emphasized that the existence of *genuine* discretion on the part of the national authorities is required in order for these options to have any bearing on the question of direct concern.⁴² The fact that an individual may theoretically take advantage of either option does not mean that direct concern is excluded.

AG Bobek noted that it would be unreasonable (as well as 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.⁴³ The ‘complete system of legal remedies and procedures’ to which the General Court refers⁴⁴ 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, as the Opinion has it, it is the ‘paternity’ of the measure actually affecting the applicant that determines the court to which he or she must apply to challenge that measure.⁴⁵ In the present case, as far as Articles 36 and 49a of the Gas Market 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: (1) the derogation is only applicable to gas transmission lines between a Member State and a third country ‘completed before 23 May 2019’; and (2) the exemption is only available to major infrastructure projects in respect of which no final investment decision has been taken. 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, but was not going to be physically completed, let alone operational, before 23 May 2019.⁴⁶

Therefore, while those provisions do give some leeway to national authorities to grant an exemption or a derogation to certain operators in the future, that leeway does not exist in respect of the appellant. In that regard, the (in)applicability of those provisions is entirely pre-determined by the EU rules,

⁴¹ Nord Stream 2 AG applied for the derogation under Article 49a from the German Regulatory Authority and the application was denied as the pipeline was not physically completed by the required date. See https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK7-GZ/2020/BK7-20-0004/BK7-20-0004_Beschluss_Internet.html?nn=269738 (last accessed 1 August 2022).

⁴² Opinion, para 72.

⁴³ Opinion, para 73.

⁴⁴ Order, para 120.

⁴⁵ Opinion, para 73.

⁴⁶ Opinion, para 74.

since the national authorities lack any room for manoeuvre and must thus act as a *longa manus* of the EU. The Opinion therefore concluded that the mere existence, in the abstract, of derogations or exemptions from the rules laid down in an EU act cannot have any bearing on the position of an applicant that manifestly cannot avail itself of those exceptions or derogations in practice.⁴⁷

One of the relevant changes to the Gas Market Directive made by the Amendment concerns the extension of the unbundling obligations under Article 9. In principle, the General Court did not dispute this. However, it found that the extension did not follow from the Amendment, since Member States were allowed to provide two *alternatives* to full ownership unbundling: the ‘independent system operator’ (ISO) model and the ‘independent transmission operator’ (ITO) model provided for in the Gas Market Directive.⁴⁸

However, the Opinion correctly noted that the fact that three options are available for unbundling is irrelevant.⁴⁹ The point is that, regardless of the option ultimately chosen by the national authorities, the appellant’s legal position will inevitably be altered, as it will have to: (1) sell the entire Nord Stream 2 pipeline; or (2) sell the part of the pipeline that falls under German jurisdiction; or (3) 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 alter its corporate structure.⁵⁰

The Advocate General concluded that, in this quite unique situation, it is the Amendment 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 Directive. 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 predetermined forms of the *how*.⁵¹

⁴⁷ Opinion, para 75.

⁴⁸ Opinion, para 77.

⁴⁹ Opinion, para 78.

⁵⁰ Opinion, para 80.

⁵¹ Opinion, para 81.

Against this backdrop, Advocate General Bobek found that the General Court's ruling that the appellant was not directly concerned by the contested measure, because the provision on unbundling required national measures of implementation⁵², was vitiated by an error of law.⁵³

In the light of the above, the Advocate General advised the CJEU that, since neither of the two sets of reasons for the exclusion of direct concern given by the General Court in the order under appeal (the contested measure is a directive, and the provision on unbundling does not immediately affect the appellant's legal position) could be accepted, the General Court erred in law when it held that the appellant was not directly concerned.⁵⁴

(c) The failure to address further arguments put forward by the appellant

In addition to unbundling, the Amendment also creates other changes to the legal position of Nord Stream 2.⁵⁵ The Opinion specifically noted that the General Court failed to discuss the rules concerning third-party access and tariff regulation. It appears that throughout its submissions before the General Court, the appellant consistently referred to the (allegedly prejudicial) effects resulting from the application of those three provisions to its situation.⁵⁶ The General Court acknowledged this but 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 appellant's legal position could be affected by the provisions on third-party access and/or on tariff regulation.⁵⁷

Far from being ancillary considerations that could be ignored or impliedly dismissed by the General Court, the AG Bobek noted that 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

⁵² Order, para 118.

⁵³ Opinion, para 84.

⁵⁴ Opinion, para 85.

⁵⁵ It is worth noting that the Opinion also rejects the argument put forward by the Government of Poland that the Gas Market Directive applied, in some manner, to the pipeline prior to the Amendment. This had already been excluded by numerous commentators. See K Talus, 'Application of EU Energy and Certain National Laws of Baltic Sea Countries to the Nord Stream 2 Pipeline Project' (2017) 10(1) *Journal of World Energy Law & Business* 30; A Goldthau, *Assessing Nord Stream 2: Regulation, Geopolitics & Energy Security in the EU, Central Eastern Europe & the UK* (EUCERS Report 2016), S Pirani and K Yafimava, *Russian Gas Transit Across Ukraine Post-2019: Pipeline Scenarios, Gas Flow Consequences, and Regulatory Constraints* (OIES paper NG 105, February 2016); and L Hancher, K Talus and M Wustenberg, 'Retrospective application of legal rules in the European Union: recent practise in the energy sector' (2021) 39(1) *Journal of Energy and Natural Resources Law* 65-81.

⁵⁶ Opinion, para 87.

⁵⁷ Opinion, para 88.

affected by the contested measure. Each of those three elements could, individually, be sufficient to justify a finding of direct concern. In particular, irrespective of the form of unbundling ultimately chosen by the national authorities, the obligations as to third-party access and tariff regulation imposed on the appellant remain unaffected.⁵⁸ According to the Opinion, 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.⁵⁹

It is true that both Articles 32 (non-discriminatory third-party access) and 41 (tariffs) of the Gas Market Directive require the Member States to ‘ensure’ their implementation.⁶⁰ 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.⁶¹

By virtue of those provisions, the appellant will, to the extent envisaged by them, be legally precluded from acting as a 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 work in respect of the infrastructure began, and the time when the appellant entered into contracts for its financing and future operation, did not provide for mandatory third-party access and tariff approval by the national regulator.⁶²

On the basis of these considerations, the Opinion found that the second part of the appellant’s first ground of appeal was also well-founded, and that appellant must thus be regarded as being directly concerned by the contested measure.

3.2 Consequences of the assessment: how the present case should be disposed of

Advocate General Bobek considered that the state of proceedings permitted the CJEU to take a final position on the question of the appellant’s standing in this case. The Opinion therefore examined the second criterion concerning the standing of private parties under EU law.

⁵⁸ Opinion, para 89.

⁵⁹ Opinion, para 92.

⁶⁰ Opinion, para 93.

⁶¹ Opinion, para 94.

⁶² Opinion, para 96.

The second criterion that a private litigant that is not an addressee of the act in question needs to fulfil in order to have the right to bring proceedings against an act of the EU institutions is that it is individually concerned by that act. The leading case in this area to date is *Plaumann*,⁶³ in which the Court explained:

‘[P]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision 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 these factors distinguishes them individually just as in the case of the person addressed.’

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 in itself prevent it being of individual concern to some of them.⁶⁴ The test requires that the applicant be part of a restricted group of persons affected by the act in order to be able to show individual concern. The Court’s case-law confirms that where the act 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 traders.⁶⁵ To put it another way, 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 identities were clearly discernible – would be specifically affected by the measure.⁶⁶

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.⁶⁷ That was found to be the case, in particular, when the contested

⁶³ Case C-25/62, *Plaumann v Commission*, ECLI:EU:C:1963:17.

⁶⁴ Opinion, para 188. See also: Case C-519/07 P, *Commission v Koninklijke Friesland Campina*, ECLI:EU:C:2009:556, para 51 and the case-law cited; and Case C-309/89, *Codorniu v. Council*, ECLI:EU:C:1994:197.

⁶⁵ Case 11/82, *Piraiki-Patraiki and Others v Commission*, ECLI:EU:C:1985:18, para 31; and Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, ECLI:EU:C:2006:416, para 60.

⁶⁶ Opinion, para 189. Similarly, Opinion in Case 11/82, *Piraiki-Patraiki and Others v Commission*, ECLI:EU:C:1982:356, p. 218.

⁶⁷ Opinion in Case C-309/89, *Codorniu v Council*, ECLI:EU:C:1992:406, para 38. Joined Cases 106 and 107/63, *Töpfer v Commission*, ECLI:EU:C:1965:65 (see [1965] ECR 405, at 411-412).

measure altered the rights acquired by the applicant prior to its adoption.⁶⁸ 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.⁶⁹

However, other circumstances may 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.⁷⁰ For example, in order to determine whether applicants were sufficiently individualized by a challenged measure, the Court has taken into account – alone or in combination with other elements – (1) whether the applicants had participated in the procedure which led to the adoption of the measure;⁷¹ (2) whether their market position was ‘substantially affected’ by a targeted measure;⁷² and/or (3) whether the author of the contested measure was required to take into account the specific situation of the applicants.⁷³

Against this background, the Opinion found that the appellant was individually concerned by the contested measure. This is so because:

- (1) 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 Market Directive: Nord Stream 2 and the Trans-Adriatic Pipeline. Nevertheless, since an exemption had already been obtained for the latter, 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.⁷⁴

⁶⁸ Case C-125/06 P, *Commission v Infront WM*, ECLI:EU:C:2008:159, para 72); and C-132/12 P, *Stichting Woonpunt and Others v Commission*, ECLI:EU:C:2014:100, para 59.

⁶⁹ Case 100/74, *CAM v EEC*, ECLI:EU:C:1975:152, para 18; and Cases 41/70 to 44/70, *International Fruit Company and Others v Commission*, ECLI:EU:C:1971:53, paras 17 and 18.

⁷⁰ Opinion, para 191.

⁷¹ Case 169/84, *Cofaz and Others v Commission*, ECLI:EU:C:1986:42, paras 24 and 25; Case 26/76, *Metro v Commission*, ECLI:EU:C:1977:167.

⁷² Case C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:757, paras 50 to 57. Similarly, Case T-95/03, *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio v Commission*, ECLI:EU:T:2006:385, paras 52 to 55.

⁷³ Case 11/82 *Piraiki-Patraiki*, paras 24-31; Case C-142/00 P, *Commission v Nederlandse Antillen*, ECLI:EU:C:2003:217, paras 71 to 76 and the case-law cited; Case T-139/01, *Comafrika and Dole Fresh Fruit Europe v Commission*, ECLI:EU:T:2005:32, para 110; Case C-354/87, *Weddel v Commission*, ECLI:EU:C:1990:371, paras 20 to 22); and Case C-213/91, *Abertal and Others v Commission*, ECLI:EU:C:1993:238, para 23.

⁷⁴ Opinion, para 194. With references to 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).

- (2) 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 physically completed before the deadline set out in Article 49a of the Gas Market Directive. Consequently, the new regime would immediately apply to the appellant, which was caught between a rock and a hard place: neither the derogation nor the exemption set out in the Gas Market Directive was applicable.⁷⁵ In fact, the Opinion noted that 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.⁷⁶
- (3) 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.⁷⁷ In addition, the appellant provided, at first instance, several documents, other than those excluded by the General Court, which suggest that the extension of the EU gas market 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.⁷⁸ The Opinion emphasized that this fact 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 order to establish the relevant facts, the Court may also rely on matters of common knowledge. Advocate General Bobek commented that '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'.⁷⁹

⁷⁵ Opinion, para 195.

⁷⁶ Opinion, para 196.

⁷⁷ See, amongst other freely accessible documents: (1) 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); (2) European Parliament Questions, Answer given by Mr Arias Cañete on behalf of the European Commission (E-004084/2018(ASW)), 24 September 2018 (https://www.europarl.europa.eu/doceo/document/E-8-2018-004084-ASW_EN.html, last accessed 1 August 2022); and (3) European Parliament Research Service Briefing, EU Legislation in Progress, 'Common rules for gas pipelines entering the EU internal market', 27 May 2019, p. 2.

⁷⁸ European Parliament Questions, Answer given by Mr Arias Cañete, 24 September 2018, n 77 above.

⁷⁹ Opinion, paras 197 and 198.

(4) 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 of its adoption. It is thus rather clear that the contested measure not only has the capacity, but was also intended, significantly to affect 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 into which it had previously entered, thereby affecting an already established legal position.⁸⁰

In the light of the above, the AG Bobek concluded that, being both directly and individually concerned, the appellant has standing to challenge the contested measure under Article 263(4) TFEU. As to the merits of the action, the Opinion suggests that the case must be referred back to the General Court for assessment and judgment. The next section will now focus on the judgment of the CJEU, which followed the Opinion of the Advocate General.

4. The Judgment of the CJEU

As the CJEU followed the Opinion of the Advocate General Bobek and, as is customary, provided less detailed arguments and more restricted analysis, this case note will examine the judgment in less detail than the Opinion. It is restricted to the core questions of direct and individual concern, as required by the fourth paragraph of Article 263 TFEU.

4.1 The requirement of direct concern

On the question of direct concern, the CJEU largely concurred with the assessment of its Advocate General. The Court held that the mere fact that the act being challenged must be the subject of implementing measures, including, as regards a directive, transposing measures, for the purposes of its implementation does not necessarily mean that there is a discretion as regards the addressees of

⁸⁰ Opinion, para 199.

that act.⁸¹ Indeed, the CJEU specifically criticized the General Court for its formalistic approach to the question of the possible direct concern of directives in general.⁸²

In its analysis of Articles 36 and 49a of the Gas Market Directive, the Court noted that, based on the wording of the Amending Directive and the EU's intention, it was not possible to apply any of the exemptions or derogations to the appellant's situation. This was because:

(1) the investments for the Nord Stream 2 gas pipeline had already been decided at the date of the adoption of the directive at issue, which excluded that pipeline from the benefit of an exemption under Article 36 of Gas Market Directive, which applies to major new gas infrastructures or to significant increases of capacity in existing infrastructure; and

(2) it was clear that that pipeline could not be physically completed by 23 May 2019, thus preventing the grant of a derogation under Article 49a of that Directive.⁸³

It therefore held that while it is true that the Member States enjoy a margin of discretion in relation to the grant of such exemptions and derogations to gas undertakings that meet the conditions laid down in Articles 36 and 49a of Gas Market Directive respectively, they do not, however, have any discretion as regards the possibility of granting those exemptions or derogations to the appellant, which does not and could never satisfy those conditions. Therefore, there is a direct link between the entry into force of the Gas Market Directive and the imposition upon the appellant of the obligations laid down by that Directive, such that direct concern had been established.⁸⁴ This was in stark contrast to the more artificial approach taken by the General Court.

The CJEU also concurred with the Advocate General and found that, as the exemption under Article 36 and the derogation under Article 49a were not available to Nord Stream 2, the rules on unbundling, third party access and regulated tariffs would apply. Regardless of the possibility to make a choice between three unbundling alternatives at the national level, the legal situation of the appellant will inevitably be changed, as Article 9 of the Gas Market Directive on unbundling only offers Member States the choice of means by which the clearly defined result – namely that of the effective separation

⁸¹ Judgment, para 96.

⁸² Judgment paras 65-70.

⁸³ Judgment, para 104.

⁸⁴ Judgment, para 105.

of the structures of transmission and those of supply and production – must be achieved. Thus, even though the Member States are not deprived of all room for manoeuvre in implementing Article 9, they do not have any discretion as regards the unbundling obligation laid down in that provision, such that the appellant cannot avoid it, irrespective of which one of the three methods provided for by Article 9 is chosen.⁸⁵

The same applies as regards the obligations flowing from Article 32 of Gas Market Directive, read together with Article 41(6), (8) and (10) thereof. Those obligations require the transmission system operators subject to that directive, *inter alia*, to grant third parties access to their system on the basis of a regime that is applied objectively and without discrimination, and based on published tariffs that are proportionate and approved by the competent regulatory authority. That authority must, in the context of approving those tariffs, *inter alia*, provide for appropriate incentive measures to encourage operators to improve their performance.⁸⁶ For some reason,⁸⁷ the General Court had failed to consider the impact of these rules on third party access and regulated tariff structures.

4.2 *The requirement of individual concern*

The CJEU followed the approach of the Advocate General and also considered the question of individual concern. Again, the CJEU agreed with the Advocate General in finding the existence of individual concern in the present case. It observed that amongst both existing interconnectors and interconnectors which are yet to be constructed, the Nord Stream 2 gas pipeline is the only pipeline which is, or which could be, affected by the Directive in the specific ways discussed above. The operators of all the other interconnectors covered by the Gas Market Directive have had or will have had the possibility of being granted an exemption or derogation under one of the provisions of the Gas Market Directive.⁸⁸

It follows that after the entry into force of the Amending Directive, the relationship between, on the one hand, the extension of the scope of the Gas Market Directive to interconnectors between Member States and third countries provided for in Article 2(17) of that Directive and, on the other hand, the

⁸⁵ Judgment, para 110.

⁸⁶ Judgment, para 111.

⁸⁷ Presumably as a result of its conclusion that directives would be incapable of being of direct concern due to their very nature, so that such rules would also only have an impact upon the applicant once implemented by Germany at national level? One can only speculate.

⁸⁸ Judgment, para 161.

arrangements for the conditions for exemption and derogation laid down in Articles 36 and 49a of the Gas Market Directive, produced effects for the appellant's legal situation in such a way as to distinguish it individually in a manner analogous to that of the addressee of a decision.⁸⁹

The Court concluded that, in such circumstances, it must be held that the appellant was individually concerned by the conditions for exemption and derogation under Articles 36 and 49a of Gas Market Directive, as amended and inserted, respectively, by the Directive at issue.⁹⁰

In finding that Nord Stream 2 was directly and individually concerned by the Amending Directive, the CJEU referred the case back to the General Court for a decision on the merits of the action for annulment.

4.3 Comments on the CJEU judgment

With this judgment, the CJEU finally found that, in the specific circumstances of this case, an individual appellant may have standing to challenge a directive. The Court has consistently held that it is *possible* for an individual to bring an action for annulment against a directive, yet it has been hesitant to accept this in practice. Clearly, what is required in order to meet the high threshold set by the CJEU is that the facts of the case must be highly unusual. *Nord Stream 2 AG v European Parliament and Council of the European Union* offers just that: a highly unusual case. The actions of the EU legislature in this case have been extraordinary.

As AG Bobek's Opinion suggested, the Court should (obviously) not ignore the legal and factual reality. Significantly for this case, it must consider that the real scope for discretion at national level is extremely limited and the impact on the appellant flows directly from the Gas Market Directive itself without the national decision-making having any possibility to change this impact. The fact that the legal instrument in question is a directive means that it will be subject to national implementation, but, as the Court found, that does not exclude direct concern in the circumstances of this specific case.

The Member States have no discretion as regards the implementation of the Gas Market Directive in terms of its effects on the appellant. The only margin theoretically available at national level concerns whether or not to grant an exemption under Article 36 of the Directive or to provide a derogation

⁸⁹ Judgment, para 162.

⁹⁰ Judgment, para 163.

under its Article 49a. While these options are available for other pipelines, they have been specifically and intentionally excluded in relation to Nord Stream 2 through the precise wording and design of the Directive. The General Court's approach suggests that the fact that Nord Stream 2 may apply for these options in a situation where it seems clear that it does not meet the legal requirements under Articles 36 or 49a⁹¹ of the Directive excludes direct concern. This of course constitutes a highly artificial and formalistic approach. The CJEU did not accept this.

As to the existence of the preliminary rulings procedure argued by the General Court, it would have been artificial to require the making of an application to a national court in a situation where the end result is clear.⁹² A possible application under Articles 36 or 49a of the Gas Market Directive would not (and did not) have any effect on the causal link between the Directive and the impact on the company, as Nord Stream 2 does not meet the legal requirements laid down in these provisions. In the specific case of Nord Stream 2, the national regulator has already found that it has no genuine discretion in exercising its powers to apply Article 49a of the amended Directive.⁹³

In this case, it is the clear and automatic result of the Gas Market Directive (now extended to pipelines in the territorial waters of a Member State) that Nord Stream 2 would have been subject to unbundling, to the Directive's third-party access rules and to a regulated tariff regime, among other things, had Russia not invaded Ukraine and the project been successfully completed. This stands in contrast to the Directive's impact on all other operators of comparable import pipelines which may take advantage of provisions that allow them to escape such obligations.

The General Court suggested that the proper recourse for Nord Stream 2 would have been the national route and a preliminary rulings procedure. Consideration of the significance of possible applications for exemptions and derogation without possibility of success, the requirement of a costly and time-consuming application before the national courts in order to obtain access to justice (which is

⁹¹ Nord Stream 2 AG applied for the derogation under Article 49a from the German Regulatory Authority and the application was denied as the pipeline was not physically completed by the required date. See https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK7-GZ/2020/BK7-20-0004/BK7-20-0004_Beschluss_Internet.html?nn=269738 (last accessed 1 August 2022).

⁹² A certain similarity can be seen to the artificial requirement to apply for state aid where the applicant is not eligible for the aid in C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori* and *Commission v Ferracci*, ECLI:EU:C:2018:873, para 66.

⁹³ This was specifically emphasized in the German regulator's decision concerning derogation in respect of Nord Stream 2. This decision excluded the possibility of derogation following analysis of the provision, its purpose and objective, and specifically noted that it could not interpret the provision more expansively than the meaning contained in the Gas Market Directive. See https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK7-GZ/2020/BK7-20-0004/BK7-20-0004_Beschluss_Internet.html?nn=269738 (last accessed 1 August 2022).

furthermore uncertain, as the appellant does not have the right to request a preliminary ruling)⁹⁴ and the emphasis on the implementation of the Directive at national level in a situation where there is no margin of appreciation when it comes to the impact flowing from the directive are all elements of the General Court's approach that seem overly formalistic and blind to the practical reality.

The General Court referred to the mantra of the 'complete system of remedies' under EU law and the possibility, in principle but not necessarily in practice, to have the case heard before the Court of Justice through the preliminary ruling procedure. As advocates general,⁹⁵ academic commentators⁹⁶ and even another international organisation⁹⁷ have previously noted, the need to make an application to a national court and reliance on the preliminary ruling procedure is problematic. The uncertainty, the inevitability of long delays, additional costs, procedural disadvantages and the competence limitations to which national courts are subject all create tensions, both with private litigants' limited rights and with the principles of effective judicial protection and legal certainty. Be that as it may, in a case like this, where the appellant *does* meet the restrictive conditions to obtain access to the Court, refusing standing would not only be wrong but also unacceptable from a perspective of effective judicial protection and the rule of law.

⁹⁴ Although one should note that, as a result of Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452, where the relief sought is the annulment of an EU act, then – unless the national court were to consider that all the substantive arguments on validity were thoroughly without merit – there is a strong requirement for the national court to make a reference for a preliminary ruling in such cases.

⁹⁵ In addition to the Opinion in the present case, see for example, the Opinion of Advocate General Jacobs in Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:197 and the Opinion of Advocate General Bobek in Case C-352/19 P, *Région de Bruxelles-Capitale v Commission*, ECLI:EU:C:2020:588.

⁹⁶ For example, P Craig, *EU Administrative Law* (OUP, 3rd edn, 2018)), 346-347.

⁹⁷ Under the Århus Convention. See UN Economic Commission for Europe, Reports of the Compliance Committee: 'Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union' (ECE/MP.PP/C.1/2011/4/Add.1, 14 April 2011) (https://unece.org/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1_as_submitted.pdf, last accessed, 1 August 2022), esp paras 89-90; now addressed by the reform of the 'Aarhus Regulation' 1367/2006/EU [2006] O.J. L264/13 by Regulation 2021/1767/EU [2021] O.J. L356/1. Problems concerning State aid have also been identified under the Århus Convention: 'Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union' (ECE/MP.PP/C.1/2021/21, 13 March 2021) (https://unece.org/sites/default/files/2021-10/ECE_MP.PP_C.1_2021_21_E.pdf, last accessed 1 August 2022), esp paras 122-124. To its credit, the Commission has accepted these findings on state aid and is now consulting on how to address the access to justice problems identified under the Århus Convention. See: 'Plan of action for MOP request ACCC/M/2021/4 (European Union)' (<https://ec.europa.eu/environment/aarhus/pdf/Request%20M4%20-%20EU%20plan%20of%20action.pdf>, last accessed 1 August 2022); and Commission Communication on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards State aid: Analysing the implications of the findings and assessing the options available https://ec.europa.eu/eusurvey/runner/OPC_on_ACCC_Findings_?surveylanguage=EN (requires EU login, last accessed 1 August 2022).

On a more abstract level, the Court's main concern in allowing direct access for individuals is the impact this would have upon its caseload.⁹⁸ Cases where the impact of an EU law measure is the direct consequence of the EU measure itself, without the national implementation being able to affect the causal link between the measure and the impact on the private individual, and where all other requirements for standing are met, are rare. The extension of the Court's guarded approach to such rare cases seems unfounded and should in any case be measured against the right to effective judicial protection under Article 47 of the EU Charter of Fundamental Rights.⁹⁹ The rights of private litigants should have significant weight. This case shows that the CJEU is willing to open the door for private litigants, in the right circumstances. At a time when Russia is being roundly, and rightly, criticised for its disrespect of international law, the Court's judgment sends a strong signal that the EU will uphold its own legal order and the fundamental principles thereof, even in a politically and diplomatically sensitive situation such as that raised by the *Nord Stream 2* case. This stance is vital in maintaining the EU's credibility¹⁰⁰ in upholding the rule of law and access to justice, even for those with whom one might currently have little sympathy. In that sense, justice should indeed be blind.

The Court has now sent the case back to the General Court for substantive analysis of the legal framework and the underlying facts, the underlying reality of the Amendment, its objective and its practical effect. In this assessment, the discriminatory nature of the Amendment, now established by the CJEU, will play a key role, as will whether the amendment as such and the changes it created are reasonable and justifiable on strong public policy grounds.

5. Conclusions

In *Nord Stream 2*, the Grand Chamber of the CJEU has, for the first time, found a directive to be of direct and individual concern to a private applicant under Article 263(4) TFEU. It took a strange and rare set of circumstances for this to happen, as explained in this case note. The CJEU's judgment is a

⁹⁸ Opinion in Case C-352/19 P, *Région de Bruxelles-Capitale v Commission*, ECLI:EU:C:2020:588, para 142; and P Craig, *EU Administrative Law* (OUP, 3rd edn, 2018), 342.

⁹⁹ The fundamental rights issues involved were strongly emphasised by AG Jacobs in his Opinion in *UPA* (n 91, above, paras 39, 84, 86) and by the Court of First Instance in Case T-177/01, *Jégo-Quéré v Commission*, ECLI:EU:T:2002:112, paras 41-47.

¹⁰⁰ The UK government's recent statements in the fields of international law and human rights law seem to be causing it problems in this regard, see e.g.: A. Spisak, 'Four Reasons Why the UK's Northern Ireland Protocol Bill Is A Mistake' (Centre for European Reform Blog, 27 June 2022) (<https://www.cer.eu/insights/four-reasons-why-uk-nireland-protocol-bill-mistake>, last accessed 1 August 2022); and H. Siddique, 'Consequences "dire" if Human Rights Act ditched, more than 50 groups warn' (*The Guardian*, 9 May 2022) (<https://www.theguardian.com/law/2022/may/09/consequences-dire-human-rights-act-ditched-northern-ireland-boris-johnson>, last accessed, 1 August 2022).

welcome example of the EU upholding its own stated constitutional values, even in the face of a very difficult diplomatic situation. It seems unlikely that the *Nord Stream 2* judgment will herald a more wide-ranging relaxation of the strict standing rules under Article 263 TFEU. Indeed, the post-Treaty of Lisbon direction of travel concerning access to the EU courts for private applicants in annulment actions would appear to have been heading rather towards a tightening of the already restrictive standing rules.¹⁰¹ Nevertheless, the CJEU's approach to direct and individual concern in *Nord Stream 2* shows a welcome acknowledgment of the need to look beyond form to substance and to engage with the practical realities of the application of the detailed rules increasingly found in EU directives and their impact upon private applicants.

¹⁰¹ See, e.g., the judgments in: *Inuit* (n. 9, above, concerning the definition of 'legislative acts' as a formal category not capable of being in substance a 'regulatory act' thereby limiting the potential impact of the Lisbon Treaty's reform of Article 263(4) TFEU); and Case C-274/12 P, *Telefonica v Commission*, EU:C:2013:852 and Case C-456/13 P, *T&L Sugars and Sidul Açúcares v Commission*, EU:C:2015:284 (which give a broad interpretation to the notion of 'implementing measures' for 'regulatory acts' under Article 263(4) TFEU, thus reducing still further the liberalising impact of the Lisbon reforms). And these cases were decided thus despite the repeated calls from many commentators for a more liberal and creative approach to using the new wording of Article 263(4): see, e.g., S. Balthasar, 'Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU' (2010) 35 *European Law Review* 542; A. Albers-Llorens, 'Remedies against the EU Institutions after Lisbon: An Era of Opportunity?' (2012) 71 *Cambridge Law Journal* 507; and A. Arnall, 'Judicial Review in the European Union' in A. Arnall & D. Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP, 2014), 376.