

Finnish Parliament's Committee on Economic and
Financial Affairs
Attn Merja Puska
Secretary of the Parliament's Economic Committee

Submitted via email to: tav@eduskunta.fi

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Subject:

U 30/2018 vp Valtioneuvoston kirjelmä eduskunnalle ehdotuksesta Euroopan parlamentin ja neuvoston direktiiviksi maakaasun sisämarkkinoiden yhteisiä sääntöjä koskevan direktiivin 2009/73/EY muuttamisesta

U 30/2018 vp Government's letter to the Parliament on the proposal for a European Parliament and Council Directive amending Directive 2009/73 / EC on common rules for the internal market in natural gas

Dear ladies and gentlemen,

Proposal to implement the amendment of the Gas Directive

Thank you for inviting Nord Stream AG to comment the Finnish Parliament's Commerce Committee.

1. INTRODUCTION

Nord Stream AG welcomes the opportunity to give feedback on the European Commission proposal to amend the Gas Directive.

Nord Stream AG ("**NSAG**") is a limited liability company with five shareholders (PJSC GAZPROM, Wintershall Oil AG, PEG Infrastruktur AG, Gasunie Infrastruktur AG and ENGIE Energy Management Holding Switzerland AG) based in Zug, Switzerland. The company was established in 2005 for the planning, construction and operation of two parallel natural gas pipelines through the Baltic Sea connecting Russia and Germany ("**Nord Stream**"). The two pipelines have been operational since 2011 and 2012 respectively and have a combined designed transport capacity of approximately 55 bcm per year. A total of 7.4 billion euros has been invested in the pipeline system. In 2006 the Council and the European Parliament granted Nord Stream the highest priority status in the context of the promotion of trans-European energy networks (TEN-E) which aimed to encourage the construction of gas networks contributing to the effective operation of the internal

market and to EU security of supply.¹

The essential aim of the European Commission's new proposal is to extend EU rules concerning transmission networks to import pipelines from countries outside the internal market (non-EEA countries) by extending the scope of the Gas Directive. The documents explain that the underlying objective is to ensure that the Third Energy Package can achieve its full potential for the realisation of the internal market and security of supply. The proposal further explains that it would also provide legal certainty for market participants

Nord Stream AG is surprised by the proposal of the European Commission and the reasons put forward. As a market participant NSAG does not take the view that the current regime lacks legal certainty. On the contrary, the adoption of the proposal would create significant legal uncertainty for NSAG, its shareholders and stakeholders. Furthermore, NSAG is surprised that the European Commission takes the view that the lack of application of the EU rules concerning transmission to import pipelines would undermine the effectiveness of the Third Energy Package. To NSAG's knowledge, the European Commission has not previously expressed such concerns in its policy documents concerning the EU gas market. On the contrary, in the 2006 the EU Institutions encouraged the construction of the Nord Stream pipeline because it would be positive for the internal market and security of supply. Finally, NSAG has great difficulty understanding how the EU rules on transmission networks would in practice be applied to a non-EU import pipeline up to the border of EU Member States' Exclusive Economic Zone.

Nord Stream AG explicitly welcomes and supports not to expand the application of the amended directive to the Exclusive Economic Zones (EEZ) of the various EU member states. NSAG sees, in a similar way as the Finnish government does, the difficulties to comply with the UN law of the sea (UNCLOS). Furthermore this could have significant impact to existing and planned projects.

If NSAG, as an important market participant affected by the proposal, has difficulty understanding its objectives and consequences, it is likely that most others will also find this difficult to understand. It would be very useful, therefore, if the objectives pursued were to be explained in more detail as well as the way in which the proposal would achieve these objectives. This would also enable NSAG to comment more fully, for instance as part of the type of impact assessment that is systematically conducted for the European Commission's legislative proposals.

In the absence of such further detail, NSAG will limit its comments to two points, namely (i) the need to avoid retroactive rules and (ii) the need to conduct an impact assessment.

¹ Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks, OJ 2006, L262/1, recital 8, Article 3, 4 and 8 and Annex I, point NG1 in which Nord Stream is referred to as the "North European gas pipeline"

2. RETROACTIVE EFFECT SHOULD BE AVOIDED

The proposal would introduce a new derogation for existing pipelines (Article 49(9)) and the Nord Stream pipeline is clearly one of the pipelines to which this new derogation could be applied. The European Commission's Fact Sheet published alongside the proposal explains that the derogation is intended *"to take into account the legitimate expectations of existing operators and the previous lack of specific Union rules applicable to gas pipelines to and from third countries."*² While NSAG welcomes the fact that the proposal contains such a derogation, it is evident that the essence of the proposal is that it fundamentally changes the regulatory status of the Nord Stream pipeline, seven years after it was built and started operating. While the Nord Stream pipeline was previously clearly outside the scope of the Gas Directive, it would be within its scope going forward. Furthermore, it would be covered by the rules applicable to transmission networks within the EU, which are stricter than those applying to the pipelines from Norway (which receive more favourable treatment as "upstream pipeline networks" despite the fact that they are within the EEA and, therefore, within the internal market).

The fact that the derogation is included in order to protect legitimate expectations shows that the European Commission agrees that the proposal risks having an unacceptable retroactive effect. It is important to ensure, however, that the derogation effectively achieves its objective of protecting the legitimate expectations of NSAG and other market participants in a similar position. In NSAG's view the derogation as it is currently drafted does not achieve that objective and, therefore, needs to be improved for the following reasons:

- there is no certainty the derogation will be applied, since this is merely a possibility for the Member State in which the offshore pipeline interconnects with the EU transmission network (and provided certain conditions are fulfilled);
- the derogation is limited in time; and
- conditions could be imposed on the pipeline operator at issue.

The Nord Stream pipeline should receive such a derogation since the EU encouraged its construction due to its positive contribution to the internal market and security of supply. Nevertheless, legitimate expectations of operators of existing pipelines can only be properly protected if the derogation from the new rules is automatic, unlimited in time and unconditional. In this respect, NSAG is very concerned that proposals³ have been made in the European Parliament that go in the opposite direction and make application of the derogation of Article 49(9) even more uncertain.

3. A FULL IMPACT ASSESSMENT IS ESSENTIAL

There are many reasons why it is essential to conduct a thorough impact assessment of a proposal that fundamentally changes the territorial scope of EU gas regulation. The reason that

² European Commission - Fact Sheet, Questions and Answers on the Commission proposal to amend the Gas Directive (Directive 2009/73/EC), 8 November 2017, Question 3

³ Draft Report of the Committee on Industry, Research and Energy on the proposal for a directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas ("ITRE Report"), 7 December 2017. See in particular Amendments 4 to 6.

NSAG wants to highlight is the impact it will have on NSAG as an investor and the investment climate in the EU more generally. The proposal, if adopted, will radically change the regulatory environment for a major infrastructure project, the Nord Stream pipeline, several years after it was built with the full support of the EU, and several years after NSAG successfully completed a number of complex and lengthy permitting procedures in multiple EU Member States. This is of course highly unusual and would inevitably raise questions about the investment climate in the EU more generally.

A thorough impact assessment would also be in line with the normal practice of the European Commission and the requirements of the Inter-institutional Agreement on Better Law Making.⁴

Contact:

Marcus Korthals
Compliance Director

Nord Stream AG, Industriestrasse 18, 6302 Zug, Switzerland
Tel.: +41 41 766 91 91 Direct: +41 41 766 91 35 Mobile: +41 79 151 97 43
Marcus.Korthals@nord-stream.com
www.nord-stream.com

⁴ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on better law-making of 13 April 2016, OJ(2016) L 123, p. 1, para 13.