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Policy & Regulation

All eyes on the ECT as Nord Stream 2 lawsuit looms

The Switzerland-based Nord Stream 2 holding company is expected to take legal action against the EU over its revised Gas Directive, which will be a big test for the Energy Charter Treaty and its interpretation

By **Andreas Walstad**

1 HOUR AGO

Europe & Russia / Policy & Regulation



Offshore work being carried out for Nord Stream 2. (Gazprom)

Nord Stream 2's Switzerland-based holding company is considering taking legal action under the [Energy Charter Treaty](#) (ECT) unless it secures derogations from the [revised EU Gas Directive](#), a letter sent by the pipeline developer to European Commission President Jean-Claude Juncker has revealed. This would be the first legal action taken against the EU under the treaty.

The letter – dated 12 April but leaked to the press this week – specifically mentions articles 10 and 13 of the ECT, which refer to investor protection and “fair and equitable treatment” for foreign investors. It calls on the commission to clarify whether the pipeline will secure exemptions from EU market rules such as third-party access, ownership unbundling and tariff setting.

The revised directive is open for possible exemptions under article 49a, but only for pipelines that are completed before the rules enter into force this summer. To this end, the Nord Stream 2 company says the German-section of the pipeline – to which the directive will apply – will be “substantially” completed by the summer [but not yet operational](#).

Discriminatory?

Enforcing market rules on Nord Stream 2 on the condition that the pipeline is not yet completed while at the same time exempting existing pipelines would be “unreasonable, arbitrary and discriminatory” and a breach of the EU's obligations under the ECT, the letter says. It was signed by company Chief Executive Matthias Warnig.

Warnig's call for an “amicable settlement” – in other words a derogation from the directive – seem likely to fall on deaf ears in Brussels as the revised directive was specifically designed to capture Nord Stream 2, a point to which the letter also alludes. The commission's spokespeople said during a [daily press briefing on Thursday](#) that the letter would be replied to in due course. However, they highlighted that the revised directive has backing from the 28 member states and the European Parliament and that it will be formally adopted by the Council of the EU before the summer.

“You should not expect any change in our position with regards to Nord Stream, especially since the legislation has been approved by all member states,” a spokeswoman said.

The commission will likely argue that the directive was not designed to discriminate against Nord Stream 2 but rather that it wants the Gazprom-led pipeline to be operated according to EU market rules. This does not sound

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unreasonable, but it is worth noting the commission has exempted key infrastructure pipelines from third-party access rules in the past, including the Trans-Adriatic Pipeline. Russia has previously challenged these exemptions under General Agreement on Tariffs and Trade rules, but [most of its claims were rejected](#) by a World Trade Organization panel in August last year.

The fact Gazprom and its investment partners are now turning to the ECT – using the Swiss holding company in the process – is not without peculiarities. Switzerland is a signatory to the treaty, as is the EU on behalf of its 28 member states. Russia, meanwhile, has a long and bumpy relationship with the ECT. It signed the treaty in 1994 but never ratified it. It then withdrew from the treaty in 2009. In 2004, an ECT tribunal awarded shareholders in oil company Yukos more than \$50 billion in damages over Russia's alleged breaches of ECT rules, but the case has never reached a final settlement.

The commission's relationship with the ECT is not entirely unproblematic either. For example, the commission has used the so-called [Achmea judgement](#) to argue arbitration tribunals established under the treaty could not be used for intra-EU investment disputes – which means disputes between EU-based investors and EU countries.

"If Nord Stream 2 AG decides to take legal action, then using the ECT is probably the right mechanism. A major strength here is that the both the EU and Switzerland are contracting parties to the treaty," Graham Coop, a partner with law firm Volterra Fietta and former general counsel at the Energy Charter Secretariat, told *Interfax*.

However, Coop noted that Nord Stream 2 will likely face an objection from the EU based on article 17 of the ECT, which allows contracting parties to deny the advantages of investment protection to a company owned or controlled from a third state with no substantial business activities in the jurisdiction where it is organised – in this case Switzerland.

The Brussels-based Energy Charter Secretariat has previously called for the ECT to play a bigger role in the EU's foreign energy policy, and in this context it seems to be getting what it wants. On the other hand, legal action could delay the operation of Nord Stream 2 and further worsen already fraught energy relations between Brussels and Moscow.

The letter from Nord Stream 2 asked for a reply by 13 May.

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