

(The Continental Shelf)

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*This present document is a translation. The Danish version is the valid document, e.g. regarding interpretation; the English version alone is included as a provided service.*

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J.nr.: 1111-1

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**COMPLAINT**      The Estonian Naturalists' Society  
**FROM**  
**DECISION**      The Danish Energy Authority dated October 20<sup>th</sup> 2009  
**FROM**  
**ON**                Permit for laying of North Stream AG's natural gas pipe-  
                         line in Danish waters

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**COMPOSTION**    Board President, Justice Poul K. Egan  
**OF THE BOARD**   Board Vice President, Professor dr.polit Chr. Hjorth-  
**IN THE**             Andersen  
**CASE**                Professor, cand.jur & Ph.D. Bent Ole Gram Mortensen  
                         Attorney Håkun Djurhuus  
                         Associate Professor, cand.scient & Ph.D Michael Olesen

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**DECISION OF**      The decision of the DEA of 20 October 2009 is upheld.  
**THE BOARD**

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By letter dated 16 November 2009, The Estonian Naturalists' Society (the complainant) brought the Danish Energy Authority (hereinafter the DEA) decision of 20 October 2009 before the Energy Board of Appeal. By the decision DEA granted Nord Stream AG permission to lay two parallel gas pipelines in Danish waters. During the hearing of the case before the Energy Board of Appeal Nord Stream AG was represented by Attorney Søren Stenderup, the law firm of Plesner (hereinafter called Nord Stream).

#### **Background of the case**

The permit of 20 October 2009 was granted on the basis of Nord Stream's application of 3 March 2009. The permit comprises two parallel natural gas pipes in Danish waters in the Baltic east and south of Bornholm.

In 2000 the European Commission approved a northern natural gas pipeline through the Baltic Sea as part of the Trans-European Gas Network. DEA's permit covering two pipelines in Danish waters constitutes part of a major pipeline project. The pipelines cover 137.1 kilometres on the Danish continental shelf and territorial waters out of a total length of approx. 1200 km.

The pipelines are to start from Portovaya Bay north of St. Petersburg in Russia and proceed across Russian, Finnish, Swedish, Danish and German waters and go ashore at the German Baltic coast at Lubmin in the Griefswald area.

The complainant is an association of approx. 800 voting natural scientists and environmentalists with a broad academic background and approx. 600 trustees. The association was formed in 1853. According to the association's by-laws the purpose of the association is interdisciplinary communication and to bind scientific knowledge with practical environmental problem issues such as development plans, construction projects etc. The association also has as its purpose nature conservation and education in environmental matters and to contribute to the exploration and protection of Estonian nature. In support of the complaint the complainant has stated among other things that the DEA decision of 20 October 2009 was taken on an inadequate basis as, among other things, the EIAs on which the decision is based are deficient.

The case before the Energy Board of Appeal deals firstly with the issue whether the Energy Board of Appeal can process the complaint, i.e. if the complainant fulfils the requirements to appeal the decision of 20 October 2009 to the Board. If the complainant is entitled to complain, the case focuses on whether the decision covering the installation of the natural gas pipelines in Danish waters is valid and can be upheld.

#### **Stay of execution**

By decision of 2 March 2010 the Energy Board of Appeal dismissed the complainant's request to attribute stay of execution to the complaint of 16 November 2009 (case no. 1111-1). The decision is published in a Danish and an English version on the Board's website: [www.ekn.dk](http://www.ekn.dk).

#### **Other information**

In connection with the application for permit of project, Nord Stream has prepared an environmental impact assessment in accordance with Executive Order No. 884 of 21 September 2000 on environmental impact assessment (EIA) of projects for extraction of hydrocarbons and for the construction of pipelines in Danish waters and the continental shelf area (hereinafter Order No. 884) as regards the part of the project to be laid in Danish waters. Nord Stream has

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also prepared an environmental impact assessment in accordance with the Espoo Convention, as regards the whole project.

During the information collection of the case the Energy Board of Appeal has via a newspaper article in Politiken of 6 February 2010 been made aware that on 3 February 2010 the Swedish TV sent a documentary called "Scrutinization" which allegedly claimed that the Soviet defence in the early 1990s dumped unknown quantities of chemical weapons and radioactive waste in the waters east of Gotland.

Those materials may have been dumped in the area where the pipelines are to be laid on the seabed. It is argued that the Swedish government has long had suspected this, but that the Swedish government considers the information to be a state secret. The Energy Board of Appeal has obtained DEA's, Nord Stream's and the complainant's comments to this issue. The comments from the parties to the case and DEA have been incorporated below.

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### **The appealed decision**

The DEA decision of 20 October 2009 is attached to this decision as **appendix 1**, to which reference is made. The DEA decision is taken in light of an environmental impact assessment as regards the partial section of the project to be laid in Danish waters and an environmental impact assessment in accordance with the Espoo Convention as regards the whole project. DEA has found that the environmental assessment of the part of the pipeline to be laid in Danish waters has been completed with satisfactory results. On the basis of this DEA has granted Nord Stream permit to lay the natural gas pipelines in Danish waters as requested, subject to further conditions, however.

### **The complainant's views and comments**

The complainant finds that the decision of 20 October 2009 permitting laying of natural gas pipelines in Danish waters should be set aside until an assessment of the project's environmental impacts and an analysis of the risks of the project has been made at such a level that there is a guarantee that there will be no major environmental impacts on the Baltic Sea with border-crossing consequences. As regards the decision basis of the decision of 20 October 2009 and the project in itself, the complainant has stated the following in particular:

- There should be a thorough assessment of the project's environmental impact before permit is granted for implementation of the project. If the approval phase has been too short, or no opposing arguments have been made, the approving authority will be inclined to accept the applicant's position.

- If the application documents, including the Danish environmental impact assessment and the assessment made according to the Espoo Convention are incomplete, inadequate, unclear or misleading with respect to the evaluation of the project's environmental impacts associated with the processing of the case, the DEA has been misled. A review of the Nord Stream material to the relevant countries' authorities indicates that DEA has been misled since the material contains misleading, selected and insufficient information which provides a false impression of the most relevant environmental impacts of the project and the risks involved. The main problem in this context is the completion of EIA assessment prepared in relation to the Espoo Convention without providing an answer to the most critical issues.
- The EIA assessment is of poor quality, and it is necessary to conduct further scientific studies on environmental impacts.
- It follows the recommendations of the EIA Directive and the provisions of the Espoo EIA estimated that all statements about environmental conditions must be supported by evidence and that evidence must be shown in the EIA assessment. On 9 March 2009, the Espoo EIA was sent to affected parties. It appears from the resulting responses from stakeholders that both the Espoo and the national EIAs were deficient and that the information in the statements were insufficient as regards many items. Despite some improvements, the Espoo EIA assessment and its underlying material is still insufficient.
- Nord Stream has not dealt with incoming data in a scientifically correct manner. Studies conducted in the Finnish and Russian areas show that the results in scientific terms are not substantiated and are misleading. Neither has Nord Stream seen the scientific basis on which the Estonian scientists have prepared for their response concerning the project's environmental impacts.
- On 8 and 13 January 2010 respectively Nord Stream presented two reports regarding the presence of barrels of toxic substance within the Finnish EEZ. Out of 560 barrels more than 80 have a poisonous content. Nord Stream's risk analysis is based on a guess of the exact contents of the barrels. The Espoo EIA is therefore deficient. There are more than a hundred half open barrels, which could be tested, but this has not taken place. The barrels may also be damaged or begin to leak in connection with the removal of munitions. The applications for permits to remove the munitions were thus made and permits issued on the basis of partial information. Actions that may have environ-

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mental consequences were thus launched before there was the chance to make a full risk assessment. As a result of geography, the result of activities to move barrels will have a border-crossing impact on Estonia. The information has not been communicated to the Estonian authorities, and neither has the information been submitted in connection with proceedings before the Energy Board of Appeal. Since Nord Stream has been aware of the data since January 2010, the company has misled both the DEA and Energy Board of Appeal, and the Board has not had all relevant information when assessing the project.

- On 12 March 2010 Nord Stream requested permission to access to Estonia's exclusive economic zone in order to negotiate monitoring (surveillance) in the zone. The inquiry was however made too late and on the basis of insufficient information in EIA. In the plans for the original project Nord Stream promised that all interested parties would have an impact on monitoring. The discussions on monitoring did not succeed at the meeting for stakeholders in Hamburg on 16 and 17 September 2009 as Nord Stream could not meet the time schedule. It was then decided that Nord Stream should provide the monitoring program, which was then to be discussed by all stakeholders. The final Espoo EIA assessment was, however, almost identical to the original version.

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As for the conditions in relation to information about chemical and conventional munitions, the complainant has stated the following in particular:

- DEA has not investigated the risk of chemical munitions sufficient. The completed EIA studies of chemical munitions and possible radioactive material, for example, are not sufficient. The Danish authorities have apparently only considered the documents of the case, but have not availed themselves of the opportunity to make independent surveys of the conditions regarding chemical munitions at Bornholm. Experience from the Finnish gulf shows that the number of chemical munitions have risen significantly during the application and permit phase. Sea currents can bring radioactive material up to the surface of the ocean and led in the direction of Estonia's territorial waters. However, it is unlikely that it would affect the Danish area.
- There is no correct and published documentation with a sufficient assessment of the cross-border effects on Estonia. There is not a correct and published monitoring program discussed with the states concerned, and neither is there adequate preparedness discussed with the

affected states. In addition there is no satisfactory insurance in relation to the project.

- Experts hired by Nord Stream have said that it will be dangerous to lay pipeline No. 2 after the first pipeline has been commissioned.
- The risk analyses show lower risks than that assessed by independent experts. Analyses made by Norske Veritas (DVN) can not be considered reliable since DVN's results differ materially from the independent experts' results. Furthermore, recently the competence of DVN's has been brought into question, for example, on climate change. If DVN's certificates are wrong, there is a risk that the pipeline is wrecked which may cost hundreds of human lives.

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#### **Nord Streams views and comments**

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Nord Stream finds that the decision of 20 October 2009 should be upheld. As to the decision basis of the decision of 20 October 2009 and the project itself, Nord Stream has stated the following in particular:

- It appears from the continental shelf act and executive order no. 361 of 25 April 2006 on certain pipeline facilities for transportation of hydrocarbons in the territorial sea and continental shelf (hereinafter order no. 361) that the DEA is accorded a wide discretion. Neither the act nor the order sets a framework for DEA's discretionary assessment of whether to grant a permit. There are no requirements for determining the specific conditions in the permit either. There is no basis for overruling DEA's assessment.
- EIAs have been completed in each of the five countries of origin, and consultation have been conducted both according to national rules and regulations of the Espoo Convention. The Estonian Naturalist Society has come up with a statement about the potential impact of conventional and chemical munitions. This statement is taken into account in the DEA permit. The fact that all permits to construct and/or operate the pipeline have been given in all five jurisdictions proves that Nord Stream has complied with the applicable standards.
- The decision relates to the Danish part of the pipeline, and the Danish EIA as well as the Espoo report show that the identifiable environmental impacts are insignificant, of limited extension and duration limited to the laying of the pipeline. There are no lasting effects on the environment. The rules for the EIA for a project such as the present appear from executive order no. 884. They are as

with other regulations on EIAs rules of procedure. The procedural rules do not require that the assessment should show a particular result, or that certain conditions are to apply to a permit in order to remedy any expedient conditions. It is in full compliance with executive order no. 884 that Nord Stream has prepared the EIA with involvement of the Danish authorities' requirements, see section 3 (1) and (3). The order does not contain powers for DEA performing the relevant studies themselves.

- The alignment which the project ended up with has been recommended by all authorities, including the Danish Maritime Authority and the Ministry of the Environment. The Danish part of the pipeline and the various studied line alignments in Denmark have been the subject of international consultations at four stages during the project development. Observations from other countries around the Baltic Sea have been assessed as well as comments from the Danish authorities. Nord Stream agrees with the Danish authorities that the project, which has been approved, represents a solution which fulfils the ALARP principle<sup>1</sup>, and which at the same time makes allowance for the interests of all involved parties.
- Risks to humans and the environment in the construction and operation phases are by independent organisations assessed to be very limited and therefore considered by national authorities as being acceptable. None of the studies and evaluations have found evidence of cross-border influences from Denmark to Estonia. The conclusion of all EIAs conducted by Nord Stream and independent organisations confirm that the project's impacts will be limited to laying of pipeline and the surrounding areas. Nord Stream has implemented a comprehensive risk assessment for both construction and operational phases that have been verified by DNV. All risks are evaluated and assessed to be under the acceptance criteria.
- In the risk analysis of the EIA assessment and the permit it is presupposed that the second pipeline is to be laid while the first is in operation. A possible delay of the second pipeline will therefore not change the risk level.
- According to the EIA and the non-technical summary it is very unlikely that there will be gas leaks during the lifetime of the pipeline. In the event of a leak, it will only have minor or moderate consequences. The cross-border consequences will primarily be

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emission of methane into the atmosphere. In the event of a complete break in the pipeline, about 148,000 tons of methane will be released. This corresponds to 3.7 million tons of CO<sub>2</sub>, which is equivalent to approx. 7 percent of Denmark's or Sweden's annual emissions in 2004 figures. In comparison, the total amount of carbon dioxide from maritime traffic in the Baltic Sea is estimated to be about 25.5 tons annually. Natural gas exhibits a negligible water dissolution, and a gas leak will therefore have a limited impact on the marine environment. Impacts on fish, marine mammals and birds are considered to be limited in time or place.

- DEA has made perfectly adequate conditions for monitoring of both environmental and safety conditions before laying of pipeline starts and later is put into operation. Conditions for a permit are made where appropriate in consideration of prevention and mitigation of pollution from pipelines, see continental shelf act section 4 (2). The conditions which the DEA has determined fully suffice to ensure prevention and mitigation of pollution. An emergency system is presupposed in the permit and there will be made a separate condition to this effect in connection with the subsequent operating permit. An automatic shot-down system will be established. The system is well known and tested in the offshore industry. In the permit DEA has also demanded that Nord Stream must take out insurance for coverage of damage caused by the activities conducted in conformity with the permit even if the damage is accidental. There is no legal basis for requiring preparation of monitoring programs, emergency systems and taking out insurance after discussion with all stakeholders.

As for the conditions regarding the information on chemical and conventional munitions, Nord Stream has stated the following in particular:

- According to the EIA there will be no impact from the chemical and conventional munitions as regards contact with chemical munitions during the construction phase, contact between pipelines and munitions during the operation, spreading of chemical munitions or contact/impact from the conventional ammunition. The pipeline will not commence until there has been new studies determining if the munitions have moved into installation corridors.
- Nord Stream has ongoing discussions with the Admiral Danish Fleet about handling of laying of pipeline in the area east of Bornholm, and the Admiral Danish Fleet possesses expertise in chemical munitions. These issues can be therefore be treated during the

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construction phase without any harmful effects on the environment. There have been extensive studies of the entire Bornholm area, and none of these studies have shown evidence of any radioactive waste in the area. Nord Stream is also not aware that there has ever been reported radioactive waste to the Admiral Danish Fleet. Nord Stream has also conducted extensive research to find the optimal alignment in collaboration with the relevant Danish authorities in order to avoid to come into contact with the dumped ammunition. The alignment is solely located in the danger zone (zone 3) which deals with the whole Bornholm and which only requires that fishermen have personal protection gear on board in case of contact with chemical munitions.

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- The results of the geophysical munitions screening studies have not identified any ammunition in the installation corridors. The results of sediment and pore water samples show that only from very few sample stations there has been found evidence of substances from chemical munitions and the content of these substances is small. No content of mustard gas has been measured in any of the samples. Outside these corridors there have been three finds of chemical munitions. The Admiral Danish Fleet has estimated that these will pose no risk to the pipeline or the environment. If there should be interaction between the finds of munitions and construction equipment or similar, it will correspond to the contact between chemicals and fishing gear which many fishermen have experienced over the years. In the event of contact, the equipment is to be rinsed thoroughly so that human contact with the chemicals is prevented. The amount of chemical substance will be so small that it would have no environmental impact on the marine environment.

#### **DEA's statement in the case**

DEA finds that the decision of 20 October 2009 be upheld. As regards decision-making basis for the decision of 20 October 2009 and the project the DEA has stated in particular:

- The Danish authorities which have been consulted in connection with proceedings before the DEA, including the Urban and Landscape Protection Agency, the Environmental Protection Agency and the Admiral Danish Fleet, has found Nord Stream's application material to be sufficient in quantity and quality. This implies that the authorities have found that there is sufficient scientific certainty to assess risks that may stem from the laying and operation of Nord Stream's pipeline in the Danish marine area. No permit is

granted on the basis of an incomplete and unsatisfactory application material. The authorities have not been misled. Several of the factors which the claimant apply fall outside what can be regulated by a permit for natural gas pipelines in the Danish waters. The decision relates to matters which may be governed by Danish law. Before the pipeline can be used, a commissioning permit must be granted.

- The EIA of the Danish part of the project contains a description of the cross-border impact. It appears from this that there will be no impacts from the Danish in relation to other countries, except for the local impacts that are in the areas of Swedish and German waters, where the Danish part of the project is progressing further on to the waters of these countries. The assessment of each environmental aspect does not have such an extent that they affect Estonian waters. In general, the EIA shows that the environmental impacts that may come from the Danish part of the project are insignificant and of short extension and duration limited to the laying of pipelines. They have no lasting impact on the environment. They Danish authorities consulted agree with this assessment.
- The risk analysis in the application material is made according to internationally recognized standards in accordance with DEA's requirements and is therefore exhaustive. There has been risk assessments for both the construction phase and the operational phase. Both risk assessments have been verified by DNV, an internationally recognised classification society. All risks are assessed to be below the acceptance criteria. Description and assessment of the risks posed by the toxins which exist in the area where the pipeline is to be laid are sufficient in both quantity and quality.
- It appears from the continental shelf act, section 4 f, that the owner of a pipeline facility is liable for the damage caused by the facility even if the damage is incidental. In the permit's section 4, condition 2, Nord Stream was required to obtain insurance to cover the company's liability in accordance with legislation.
- The pipes will be fitted with an automatic shut-down system where the pipeline goes ashore in Russia and Germany. The system is well known and tested in the offshore industry.
- There is an obligation to conduct hearings in connection with processing an application for permit to lay pipelines and to take

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consultation responses into account. That does not mean that the content of consultation responses must necessarily be met.

- The complainant has not at any point provided concrete evidence that there has been a case processing which is not in conformity with statutory requirements, and the complainant has only made unsubstantiated allegations. DEA has since early 2006 had ongoing access to and made demands in relation to Nord Stream's documentation.

As to the conditions in relation to information regarding chemical and conventional munitions, DEA has stated in particular:

- It is well known that there are dumped both chemical and conventional munitions in the Baltic Sea, and one of the dumping sites is east of Bornholm. This has been the subject of extensive studies, and information in the media does not give rise to DEA's revision of its assessments. DEA has no knowledge of radioactive waste having been dumped in the Danish marine area. DEA states that the Swedish documentary shows that the permitted alignment of the pipelines is located outside the dumping areas and is not impacted by them. The surveys have been conducted with sophisticated equipment. Within the pipeline alignment surveys resulted in discovery of three pieces of chemical munitions. The presence of conventional munitions was not ascertained. The Danish authorities have extensive knowledge of the presence of dumped munitions and Nord Stream has examined the available knowledge. Nord Stream's treatment of the subject dumped chemical and conventional munitions and the release of toxins in the Danish EIA meets the requirements of size and quality.
- The Admiral Danish Fleet has stated that the sites for dumping of munitions found in the Baltic Sea east of Bornholm and near Gotland in Sweden are not covered by the classifications.
- In the design of the pipeline it has been taken into account that the pipeline must be able to move. The risk and the likelihood that the pipeline will cause movement of chemical munitions is very small. Nord Stream is obliged to monitor the marine environment after laying of the pipeline and during operation, and any changes in the marine environment will be registered. The EIA conducted according to the Espoo Convention highlights the environment throughout the extent of the alignment of the pipeline. The report was prepared by Nord Stream and has been discussed by a working group of civil servants from all Baltic Sea states and has been in public consultation in all Baltic Sea

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states. DEA also sent both the specific EIA of the Danish part of the project and the Espoo report for consultation with the Estonian authorities.

### **Legal Basis**

Laying of pipelines for transport of hydrocarbons in the Danish continental shelf area requires permission from the Minister of Climate and Energy according to the continental shelf act section 4 (1) and section 2 of executive order no. 361. The Minister has delegated his power grant permits according to the continental shelf act to DEA, see section 3(2) second sentence of executive order no. 1224 of 12 October 2009 about DEA's duties and powers. DEA's decision of 20 October 2009 was made in conformity with section 4 of the continental shelf act and based on an assessment of the environmental impact (EIA), as defined under section 4 a of the act. The following appears from the act:

"[...]

**Section 1.** The natural resources of the Danish continental shelf belong to the Danish state and can only be explored and exploited by other according to concession or permit.

...

[...]

**Section 4.** Laying of power cables and pipelines for transporting hydrocarbons in the Danish continental shelf area requires a permit issued by Minister of Transport and Energy before the laying starts.

*Subsection 2.* Conditions may be determined for permits according to subsection 1. The conditions are to be made taking into account the exploration of the shelf, exploitation of its natural resources, prevention and limitation of pollution from pipelines, the ability to repair existing cables and pipelines, and to avoid deterioration of natural habitats and habitats of species in designated international nature conservation areas and disturbance of the species for which the areas are designated.

**Section 4 a.** Permission to lay pipelines covered by section 4 (1) likely to affect the environment significantly, can only be granted based on an assessment of the environmental impacts and after public and concerned authorities and organisations have had the opportunity to comment on this. If the pipeline is likely to affect international designated nature conservation areas significantly, a permit may only be granted based on the basis of an assessment of the impact on the locality in terms of conservation objectives. If the Minister of Transport and Energy considers it necessary, the public must be consulted on the assessment of

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impacts on the locality before the permit is granted.

*Subsection 2.* Permission may be granted only if:

- 1) The project does not harm the integrity of an international nature conservation area or
- 2) significant public interests, including of a social and economic nature, makes it imperative to implement the project because there is no alternative solution, see subsection 3, however.

*Subsection 3.* In the case of an international nature conservation area of a priority natural habitat type or a priority species, a permit may only be granted for a project covered by subsection 2, item 2 if

- 1) it is necessary for human health, public safety or to achieve significant beneficial effects on the environment or
- 2) other essential public interests make the implementation indispensably necessary.

*Subsection 4.* Permit under subsection 3, item 2 can be given only after obtaining an opinion from the European Commission.

*Subsection 5.* When permits are granted under subsection 2, item 2, or subsection 3, the Minister of Transport and Energy shall determine appropriate compensatory measures necessary, including the terms of the permit. The costs of any compensatory measures are to be covered by the project applicant. The Minister shall inform the European Commission of which compensatory measures are to be made.

**Section 4 b.** The Minister of Transport and Energy Minister shall take appropriate measures, including by determination of conditions or issue of directions or bans, to prevent deterioration of the nature types and the habitats of the species in the international nature protection areas as well as disturbance of the species for which the areas were designated these disturbances have significant impacts on the objectives in Council directive 92/43/EØF of 21 May 1992 on conservation of nature types and wild animals and plants (the habitat directive).

**Section 4 c.** The Minister of Transport and Energy Minister may require owners of installations as mentioned in section 4. 1, provide all information necessary for the processing of applications and reviews comprised by sections 4 and 4a, and for the monitoring of the installation. The Minister may require the owner of the installation to conduct further investigations of specified conditions.

[...]

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**Section 4 e.** Inspection of the facilities mentioned in section 4(1) is to be conducted by the Minister of Transport and Energy. The Minister may lay down rules for conduction of the inspection.

**Section 4 f.** The owner of a facility as mentioned in Section 4(1) is liable for damage caused by the facility, although the damage is accidental. The Minister of Transport and Energy can determine detailed rules on liability and insurance.  
[...].

Access to appeal the DEA decision of 20 October 2009 to the Energy Board of appeal is based on section 6a of the Act on the continental shelf:

"[...]

**Section 6 a.** Anyone with a substantial and individual interest in decisions can complain to the Energy Board of Appeal of environmental issues of decisions under sections 4 and 4 b. Subsection 2. Local and national associations and organisations whose main purpose is protection of nature and environment may complain of the decisions made under subsection 1. A given decision. The same applies to local and national associations and organisations which according to their purpose cater for essential recreational interests when a decision affects those interests.

*Subsection 3.* Local and national associations and organisations shall no later than at the time of submitting the complaint forward their articles of association to the Energy Board of Appeal as evidence that they are local or national and that their purpose falls within the requirements of subsection 2.

[...].

The DEA decision of 20 October 2009 was also taken pursuant to Executive Order no. 361. The Order is issued under section 4(2) and section 5(3) of the Act on the continental shelf and determines the following for permits for the establishment of pipeline facilities:

"[...]

**Section 1.** This Executive Order shall apply to pipeline installations in Danish territorial waters and the Danish continental shelf for transport of hydrocarbons extracted outside Danish territory.

*Subsection 2.* The Order does not apply to pipe installations for activities covered by the Act on use of the Danish underground.

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**Section 2** Establishment and operation of the pipeline facilities mentioned in section 1(1), shall take place only after receiving permit from the Minister of Transport and Energy.

**Section 3.** The permit under section 2 may specify certain conditions regarding exploration of the continental shelf, exploitation of its natural resources, prevention and mitigation of pollution from pipelines and the possibility to repair existing pipelines and cables, including inter alia,

- 1) that the pipeline does not obstruct the exploration and utilisation of the natural resources of the Danish continental shelf and the Danish territorial waters,
- 2) that the is pipeline buried into the seabed so that its presence does not result in unjustified interference, disturbing impacts on shipping and fishing,
- 3) that the pipeline is laid outside Danish territorial waters,
- 4) that the permit holder, if the pipeline must cross existing pipes or cables, makes agreement with the owners of these to ensure the owners' indemnity as a result of the crossing,
- 5) that the specified security requirements for construction, establishment and operation of the pipeline are observed,
- 6) that the pipeline system during the construction phase and during operation is subject to supervision by the Danish authorities,
- 7) that the permit holder shall establish an emergency service to counteract consequences of spills of hydrocarbons and
- 8) that the pipeline system is maintained and inspected in accordance with the guidelines set by the supervisory authorities.

*Subsection 2.* The Minister of Transport and Energy Minister may, in a permit under section 2, decide what is to be done with a pipeline facility after cessation of use.

[...]

**Section 5.** The owner of a pipeline facility is liable for any damage caused by it pursuant to the in relation to activities carried out pursuant to the permit although the damage may be accidental.

*Subsection 2.* If the injured party has contributed to the damage with intent or gross negligence, the compensation may be reduced or waived.

*Subsection 3.* This permit may impose upon its holder to take out insurance for full or partial coverage of the liability under subsection 1.

[...]" .

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Executive Order no. 884 of 21 September 2000 on environmental impact assessment (EIA) of projects for the extraction of oil and for the construction of pipelines in the Danish territorial sea and continental shelf area is based in particular on section 4 a of the Act on the continental shelf. The Order contains provisions that implement Council Directive on the assessment of the effect of certain public and private projects on the environment (the EIA Directive) and Council Directive 97/11/EC of 3 March 1997 amending the EIA Directive. The following issues, among others, appear in particular from the order in relation to preparation of an environmental impact assessment:

[...]

**Section 1.** These regulations shall apply to the establishment of the projects mentioned in section 2 above regarding projects on exploration, extraction and transport of hydrocarbons in the Danish territorial sea and continental shelf area. Permits for an approval of these projects pursuant to sections 10, 17 and 28 of the Underground Act and section 4a of the Act on the continental shelf may be granted only on the basis of an assessment of the environmental consequences

**Section 2.** There must be an environmental impact assessment (EIA report) before the granting of permits and approval of the following projects:

...

2) establishment of pipelines with a diameter exceeding 800 mm and a length of over 40 km for the transportation of gas, oil or chemicals

...

*Subsection 2.* The rules subsection 1 shall also apply to the following projects when they are likely to have a significant impact on the environment:

1) construction of oil and gas pipelines that are not covered by subsection 1, item 2,

2) modifications or extensions of projects covered by this provision already approved, have been executed or are being executed if they may be detrimental to the environment.

[...]

**Section 3.** The applicants shall prepare the report and forward it to DEA if the rules in section 2 require an EIA report.

*Subsection 2.* The report must contain at least information and reviews required in Annex 1. Applicants must also prepare a non-technical summary of the EIA report.

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*Subsection 3.* DEA may require preparation of additional material for assessment of environmental impacts.

[...]

Annex 1 of the order lists the information and assessments which the EIA assessment should contain as a minimum. Annex 1 states the following:

Annex 1

Information to be provided in accordance with section 3

1) A description of the project, and in particular:

- the entire project's physical characteristics and land use requirements during the construction and operation phases,
- the main characteristics of the production processes, for instance type and quantity of the substances and materials used,
- an estimate by type and quantity of expected residues and materials and emissions (pollution of water, air, seabed and soil, noise, vibration, light, heat, radiation, etc.) in connection with the operation of the proposed project,
- How the facility can be disposed of.

2)

- A description of the main alternatives studied by the builder.
- A description of the consequences of the extraction not being implemented (0-alternative).
- The reasons for the choice of extension solution and developing strategy and explanation of the criteria for the choice made in consideration of the environmental impact.
- A description of any subsequent development steps, connection to other fields and shore based installations and possible coordination of extraction activities.

3) A description of the environment both within and outside the Danish area which could be significantly be affected by the proposed project, and in particular:

- population
- fauna
- flora
- soil
- seabed
- water
- air
- climatic conditions
- tangible assets, including the archaeological heritage and cultural heritage
- landscape

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- the interrelation between the above factors.  
A description of the state of the environment before deployment for evaluation of foreseeable changes in the state of the environment.

4) A description of the significant environmental impacts resulting from the proposed project as a result of:

- the existence of the project as a whole
- the use of natural resources
- emission of pollutants
- creation of nuisances
- waste disposal
- and the builders statement of the methods used to assess environmental impact.

This description should cover the direct effects of the project, and if relevant, its indirect, secondary, cumulative, short- and long-term, permanent and temporary, positive and negative effects.

5) A description of measures envisaged with a view to avoiding, reducing and where possible offset any significant adverse impacts on the environment.

6) An assessment of the environmental consequences of the technical solutions chosen and an explanation of how environmental criteria and implications have formed part of the choice of these solutions.

7) An overview of any difficulties (technical deficiencies or lack of knowledge) which the builder may have encountered in relation to gathering the necessary information.

8) A description of technical measures for environmental preparedness.

9) An assessment of how the company's control of the impact on the environment in the area can be implemented.

10) A description of which parties that may have been involved in preparation of the EIA report and planning of projects.

11) A non-technical summary of the information supplied on the basis of the above.

[...]"

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Espoo Convention sets out rules on the assessment of environmental impact across national borders. According to the Ministerial Resolution of 25 February 1997, Denmark has approved and ratified the Convention. Denmark has not ratified the first and second supplement to the convention or the protocol on strategic environmental assessment. The Convention is ratified by Denmark, Finland, Sweden and the European Community, among others. The Convention provides requirements for environmental assessments to be carried out prior to implementation of major activities that are likely to have a

cross-border environmental impacts. According to Convention, Germany, Denmark, Sweden and Finland and, according to agreement, are to be regarded as "parties of origin" in relation to the Nord Stream project, see Article 1 of the Convention, i.e., states under whose jurisdiction project is to be conducted. All nine states of the Baltic Sea, including Estonia, are to be considered "interested party" under Article 1, i.e. states which may be affected by the cross-border project. The following appears, among other things from the Convention of 25 February 1991, see Executive Order No. 71 of 4 November 1999:

"[...]

*Article 1*  
*Definitions*

For the purposes of this Convention,

[i] "Parties" means, unless the text otherwise indicates, the Contracting Parties to this Convention;

[ii] "Party of origin" means the Contracting Party or Parties to this Convention under whose jurisdiction a proposed activity is envisaged to take place;

[iii] "Affected Party" means the Contracting Party or Parties to this Convention likely to be affected by the transboundary impact of a proposed activity;

[iv] "Concerned Parties" means the Party of origin and the affected Party of an environmental impact assessment pursuant to this Convention;

[v] "Proposed activity" means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure;

[vi] "Environmental impact assessment" means a national procedure for evaluating the likely impact of a proposed activity on the environment;

[vii] "Impact" means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors;

[viii] "Transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party;

[ix] "Competent authority" means the national authority or authorities designated by a Party as responsible for performing the

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tasks covered by this Convention and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity;

[x] "The Public" means one or more natural or legal persons.

*Article 2*

*General provisions*

....

3. The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

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6. The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

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[...]

*Article 4*

*Preparation of environmental impact assessment documentation*

1. The environmental impact assessment documentation to be submitted to the competent authority of the Party of origin shall contain, as a minimum, the information described in Appendix II.

...

*Article 5*

*Consultations on the basis of the environmental impact assessment documentation*

The Party of origin shall, after completion of the environmental impact assessment documentation, without undue delay enter into consultations with the affected Party concerning, inter alia, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact. Consultations may relate to:

(a) Possible alternatives to the proposed activity, including the no-action alternative and possible measures to mitigate significant

adverse transboundary impact and to monitor the effects of such measures at the expense of the Party of origin;

(b) Other forms of possible mutual assistance in reducing any significant adverse transboundary impact of the proposed activity; and

(c) Any other appropriate matters relating to the proposed activity. The Parties shall agree, at the commencement of such consultations, on a reasonable timeframe for the duration of the consultation period. Any such consultations may be conducted through an appropriate joint body, where one exists.  
[...]

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*APPENDIX I*  
*List of activities*

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...

8. Oil and gas pipelines with large diameters.

...

[...]

*APPENDIX II*

*Content of the environmental impact assessment documentation*

Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with Article 4:

- (a) A description of the proposed activity and its purpose;
- (b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;
- (c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;
- (d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;
- (e) A description of mitigation measures to keep adverse environmental impact to a minimum;
- (f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
- (g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;
- (h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

[...]

### **The Energy Board of Appeal's reasons for decision**

#### *As to right of appeal*

Access to appeal against the DEA decision of 20 October 2009 is regulated in section 6a of the Act on the Continental Shelf. The provision was introduced into the Act by Act No. 447 of 31 May 2000 amending certain environmental acts which implemented the Convention on access to information, public participation in decision-making processes and access to complain and court decisions in environmental matters of 25 June 1998 (Aarhus Convention).

It follows from section 6A (2) of the Act on the continental shelf that the local and national associations and organisations whose main purpose is protection of nature and environment may complain about the environmental conditions in decisions under section 4 and 4 b of the Act. In the legislative history of section 6a is the indicated that access to the review of decisions covered by the scope of the Convention was for anyone who has a sufficient interest and non-governmental organisations working to promote environmental protection and meeting any requirements under national law for having a sufficient interest. It is moreover stated that there is a need to ensure that associations that have rights to complain possess a certain degree of seriousness and permanency in the organization/are firmly established. It is also stated that nationwide associations and organisations are those which are not only catering for interests part of the country and that they are open to members from the entire country. Local associations must be locally focused.

The claimant resides in Estonia. After a literal interpretation of the complaint provisions of section 6a of the Act on the continental shelf, the Energy Board finds in principle that the provisions do not cover a right to complain for associations and organisations not based in Denmark. The provision must, however, be interpreted in the light of the Aarhus Convention. The Convention serves, among other things, the purpose to guarantee public participation in decision making and access to administrative and judicial review in accordance with the provisions of the Convention, see Article 1 of the Convention. It also appears from Article 3.9 that within the scope of the relevant provisions of the Convention the public has access to information, opportunity to participate in decision-making processes and access to complain and court review in environmental matters without discrimination as to citizenship, nationality or residence and in case of a legal person, without discrimination as to the place where it has its registered office or a factual base for its activities. After an interpretation of section 6a(2) of the Act on the continental shelf and seen in the context of the Aarhus Convention, the Energy Board of Appeal

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finds that, according to a concrete assessment, foreign associations may be justified in complaining to the Board.

After a concrete assessment of the complainant and his statutes and purposes, the Energy Board of Appeal finds that complainant is entitled to complain according to section 6a of the Act on the continental shelf. In this context the Energy Board of Appeal has attached importance to that the complainant, according to its statutes, has as one of its main objectives to contribute to the protection of Estonian nature, and the information about the organisation's focus in recent years on interdisciplinary scientific communication, nature conservation and education within the environmental field. The Energy Board of Appeal has also emphasized that, according to the information received, the organisation has been firmly established for many years that it has about 800 voting members and 600 trustees, that the organisation can be regarded as an Estonian nationwide organisation, and that organisation, according to the assessment of the Energy Board of Appeal, meets the requirements as regards being firmly established and possesses seriousness. The Energy Board of Appeal has finally attached importance to the fact that Estonia, in relation to the project, is regarded as "affected party" under the Espoo Convention, and that the complaint relates to possible impact on the environment in the Baltic Sea from the natural gas pipeline.

The Energy Board of Appeal may then consider the complaint of 16 November 2009.

*Re) Complaint regarding the DEA decision of 20 October 2009*

The DEA decision of 20 October 2009 for a permit under certain conditions, to Nord Stream to lay two parallel gas pipelines in the Danish territorial waters east and south of Bornholm was granted on the basis of Section 4 of the Act on the continental shelf and section 2 of Order no. 361 of 25 April 2006 on certain pipelines systems for the transport of hydrocarbons in the territorial sea and continental shelf. The permit was granted on the basis of an assessment of the environmental consequence of the project, including an environmental impact assessment, see section 4a(1) and 4c(3) of the Act on the continental shelf and section 2 of the former Executive Order No. 884 of 21 September 2000 on environmental impact assessment (EIA) of projects for recovery of hydrocarbons and for the construction of pipelines in the Danish territorial sea and continental shelf area, and a report prepared on the basis of the Espoo Convention on the pipeline project's cross-border impact. Prior to the hearings of the EIA assessment and Espoo report there has since April 2006 been collaboration under Article 5 of the Espoo Convention, among all countries around the Baltic Sea and the Nord Stream where the environmental impacts of the pipeline project were discussed. Section 4(2) of the Act on the continental shelf allows for setting the conditions of a permit under section

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4(1). The terms are to be decided with regard to prevention and mitigation of pollution from pipelines.

The wording of section 4(1) of the Act on the continental shelf act and the legislative history of the provision contain no standardisation of when and under what conditions a permit for laying of pipelines on the Danish continental shelf accounts may be granted.

It follows, however, from the section 4a(2) of the continental shelf Act that a permit can be granted only in the following two cases: 1) If the project does not harm the integrity of an international protection area (section 4a(2) items 1) or 2). 2) If substantial public interests, including those of a social or economic nature, make it imperative to implement the project because there are no alternative solutions (Section 4 a(2) item 2).

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Energy Board of Appeal finds that there is no information in the case which show that the project affects the integrity of an international protection area. The Energy Board of Appeal has here attached importance to the fact that the relevant Danish authorities (including the Environmental Protection Agency, The Danish Maritime Authority and Admiral Danish Fleet) in connection with the DEA information of the case have had no comments to Nord Stream's assessment of the pipeline project's impact on Natura 2000, Ramsar areas and the Baltic Sea Protected Areas. The Energy Board of Appeal also finds that the complainant has not put forward information that identifies or makes probable that the project would harm the integrity of an international protection area. The terms of section 4a(2) item 1 for granting a permit therefore apply.

Energy Board also finds that the complainant has not put forward information demonstrating, indicating or making probable that the considerations involved by the DEA when assessing the project were illegal and arbitrary, including, i.a., the results of the EIA and responses received from relevant authorities and organisations. Energy Board of Appeal also finds that there are no indications or probabilities that DEA has involved illegal or arbitrary considerations in the assessment of the project. Consequently there is also a basis in section 4(1) of the Act on the continental shelf for the permit granted.

In connection with the permit DEA has under section 4(2) of the Act of the continental shelf, and Order No. 361, Section 3, set conditions for the permit. These include among other things that Nord Stream must establish monitoring programs for the construction and operation phases, that environmentally hazardous chemicals as a rule must not be discharged in the Danish part of the Baltic Sea and that pipelines during the construction phase as well as during operation shall undergo supervision by the Danish authorities, etc. It appears from section 4(2) of the Act on the continental shelf and section 3 of

Executive Order No. 361 that conditions are set for, i. a., prevention and mitigation of pollution from pipelines. It is the assessment of the Energy Board of Appeal that the conditions provided by the DEA to a sufficient extent will contribute to preventing and reducing possible pollution and that the conditions set by DEA are reasonable.

With regard to the factual basis on which DEA has made the decision in complaint, the Energy Board of Appeal has noted the following: Section 4 a(1) of the Act on the continental shelf determines that permits to lay pipelines covered by section 4(1) that are likely to affect the environment to a significant extent may only be granted on the basis of an assessment of the environmental consequences and after the public and concerned authorities and organisations have had the opportunity to comment on this.

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DEA has in connection with these proceedings of the case assessed that an EIA of the project had to be made, see section 4a(1) of the Act on the continental shelf since the project is likely to affect the environment significantly.

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The Energy Board of Appeal agrees with DEA that the project is likely to affect the environment significantly, and the conditions of section 4 a(1) of the Act on the continental shelf therefore, must be met. The permit may therefore be granted only on the basis of a) an environmental impact assessment for the laying of pipelines on the continental shelf, 2) and after the public and the affected authorities and organisations have had the opportunity to comment on this.

If in addition, the pipeline is assessed to affect designated internal nature protection areas substantially, the permit may only be granted after an assessment of the project's impact on the site with regard to certain issues, see section 4a(1) item 2 of the Act on the continental shelf.

As mentioned, the Energy Board of Appeal finds that there is no evidence nor probability that the project will harm the integrity of an international protection area. After a concrete assessment the Energy Board of Appeal also finds that the project will not affect the designated international nature protection areas significantly. In its assessment, the Energy Board of Appeal has also put emphasis on the fact that the relevant Danish authorities, in connection with the DEA information about the case, have had no comments to Nord Stream's assessment of pipeline project's impact on Natura 2000, Ramsar areas and Baltic Sea Protected Areas. Therefore no assessment has to be made according to section section 4a(1) item 2.

Order no. 884 establishes requirements for the detailed contents of the EIA for the portion of the project to be laid in Danish territorial waters. The Order

is a continuation and deepening of the EIA Directive. The Espoo Convention sets the requirements for the detailed content of reports on assessments of environmental impact across national boundaries.

Energy Board of Appeal finds that the EIA satisfies the substantive requirements of Order no. 884 and the requirements of the latest present Order nr. 359 of March 25<sup>th</sup> 2010. The Energy Board of Appeal also finds that the EIA assessment made pursuant to the Espoo Convention complies with the substantive requirements of this Convention. The Energy Board of Appeal has in this context attached importance to the contents of the assessments and the fact that the existing regulations do not contain a standardisation of the circumstances and conditions under which a permit for the construction of pipelines on the Danish continental shelf can be granted. The provisions therefore only make requirements for the content of the decision-making basis. The Energy Board of Appeal therefore finds that in all aspects the case was clarified sufficiently when DEA made the decision on 20 October 2009.

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DEA has sent the EIA assessment in consultation with the public and the concerned authorities and organisations under section 4a(1) of the Act on the continental shelf. The consultation period was 8 weeks. For details of the case is seen in particular that the Agency for Spatial and Environmental Planning has estimated that the studies conducted of the requested layout shows that the pipeline can be laid without damage to the Baltic Sea marine environment. This also applies with respect to chemical munitions. As indicated, also the Environmental Protection Agency, The Danish Maritime Authority and Admiral Danish Fleet have made comments to the project. In connection with DEA's public hearing the complainant submitted one response.

Energy Board finds in this context that the public and the concerned authorities and organizations have had proper opportunity to comment on the case.

Altogether, the Energy Board of Appeal finds that the DEA decision of 20 October 2009 was taken on a fully sufficient information basis and that no procedural errors or other case-handling deficiencies were committed in connection with issue of the decision.

On this background the Energy Board of Appeal upholds the DEA decision of 20 October 2009.

#### **Decision of the Energy Board of Appeal**

The DEA decision of 20 October 2009 is upheld.

The case was heard at the meeting of the Energy Board of Appeal on 3 May 2010, and subsequently there was written consideration.

The decision was made in conformity with section 6a of the Act on the continental shelf.

The decision may not be brought before any other administrative authority.

The decision will be published in a Danish and an English version on the homepage of the Energy Board of Appeal at: [www.ekn.dk](http://www.ekn.dk). In the event of deviations between the two versions, the Danish version shall apply.

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On behalf of the Board

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Poul K. Egan  
President

/ Signe Sara Hildebrandt  
Head of Section