



Council of the
European Union

069910/EU XXVI. GP
Eingelangt am 28/06/19

Brussels, 28 June 2019
(OR. en)

10655/19

INF 207
API 76

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 17/c/02/19

Delegations will find attached the:

- requests 19/1187, 19/1189-19/1200 for access to documents sent to the General Secretariat of the Council on 10 May and registered on 13 May 2019, as well as request 19/1209 sent to the General Secretariat of the Council on 13 May and registered on the same day (Annex 1);
- joint reply from the General Secretariat of the Council dated 5 June 2019 (Annex 2);
- confirmatory application dated 23 June and registered on 24 June 2019 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:09 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 5956/2018 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:17 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 14673/2017 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:20 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 12553/2018 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:25 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 2882/2018 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:28 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 13455/2018 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:32 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 12806/2018 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:47 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 877/2019 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:50 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 11025/2018 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:52 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 843/2019 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:54 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 12730/2018 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 18:58 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 848/2019 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 19:03 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 934/2019 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 10 May 2019 - 19:07 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following document is requested:

WK 12541/2018 INIT

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German

[E-mail message sent to access@consilium.europa.eu on 13 May 2019 - 11:05 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): The following documents are requested:

Any documents held by the Council of the European Union containing comments produced by Member States in relation to COM (2017) 660: 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 (procedure 2017/0294 (COD)).

For the avoidance of doubt, this request only covers documents that have not yet been made available to the general public on one of the EU institutions' websites.

1st preferred linguistic version: EN - English

2nd preferred linguistic version: DE - German



Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 5 June 2019

DELETED

Email: **DELETED**

Ref. 19/1187,1189-1200 & 1209-mj/ns

Requests made on: 10.05.2019

Registered on: 13.05.2019

Dear **DELETED**,

Thank you for your requests for access to documents **WK 14673/2017, WK 2882/2018, WK 5956/2018, WK 11025/2018, WK 12541/2018, WK 12553/2018, WK 12730/2018, WK 12806/2018, WK 13455/2018, WK 843/2019, WK 848/2019, WK 877/2019** and **WK 934/2019** of the Council of the European Union.¹

I regret to inform you that access to these documents cannot be given for the reasons set out below.

These working documents are preparatory documents from the General Secretariat of the Council to the **Working Party on 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*.

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

WK 5956/2018 and WK 11025/2018 contain a Presidency non-paper, WK 13455/2018 contains an option paper from the Presidency and the other documents contain comments from some Member States.

Three of these documents (i.e. WK 11025/2018, WK 12541/2018 and WK 13455/2018) also reflect legal analysis on several legal issues regarding the said proposal.

With the adoption of the Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, the rules governing the EU's internal gas market will in future also apply to pipelines to and from third countries. The new directive aims at closing a legal gap in the EU's regulatory framework and boosting competition in the gas market.

The overall objective of the amendment to the gas directive is to ensure that the rules governing the EU's internal gas market apply to gas transmission lines between a Member State and a third country, up to the border of the Member State's territory and territorial sea.

The amended directive provides for the possibility of derogations for existing pipelines to and from third countries, as well as clear procedures for negotiations with third countries and for exemptions regarding new pipelines.

On 12 April 2019, Nord Stream 2 consortium sent a letter to the Commission in which they refer to the possible breach of the Energy Charter Treaty and to Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

Such a letter from Nord Stream 2 is considered as a first step under the Energy Charter Treaty in the framework of the dispute resolution mechanism. In this letter, Nord Stream 2 gives arguments why the new directive might be in breach of the Energy Charter Treaty. This is the beginning of an official procedure in which Nord Stream 2 will seek a settlement through different options.

Consequently, disclosing any documents related to the preparatory work on the directive and revealing positions of certain Member States would be detrimental to the EU and its Member States in such proceedings.

The requested documents also touch upon current or future Member States international relations, namely the Intergovernmental Agreements. Disclosure of any Member States' opinions on these might prejudice relations between them and some third countries.

Disclosure of the documents would therefore undermine the protection of the public interest as regards international relations. As a consequence, the General Secretariat has to refuse access to the documents.²

In addition, as abovementioned, some parts of documents WK 11025/2018, WK 12541/2018 and WK 13455/2018 also reflect legal analysis on several legal issues regarding the said proposal.

The legal advice pertains to issues touching upon international relations of the Union and of the Member States with economic and political implications. In fact, the issue of natural gas supply chain has various implications to relations with third countries and is the object of various political approaches.

What is more, the legal advice deals with substantial legal issues which are contentious and extremely likely to be subject to litigation in the near future. The legal advice is therefore sensitive. Disclosure of the relevant parts of the requested documents would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001.

As a consequence, the General Secretariat has to refuse access to these documents for this reason as well.

We have also looked into the possibility of releasing parts of the documents.³ However, as the information contained in each of the documents forms an inseparable whole, the General Secretariat is unable to give partial access at this stage.

² Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001.

³ Article 4(6) of Regulation (EC) No 1049/2001.

The abovementioned reply also applies to your request for access to "*Any documents held by the Council of the European Union containing comments produced by Member States in relation to COM (2017) 660: 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 (procedure 2017/0294 (COD))*".

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).⁴

Yours sincerely,

Paulo VIDAL

⁴ Article 7(2) of Regulation (EC) No 1049/2001.
Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EU) No 2018/1725, if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

From: **DELETED**

Sent: Sunday, June 23, 2019 1:05 PM

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: AW: Ref. 19/1187,1189-1200 & 1209-mj/ns

Confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 – Ref. 19/1187, 1189-1200 & 1209-mj/ns

To Whom It May Concern:

By letter dated 5 June 2019, the Council refused access to the following documents in their entirety:

WK 14673/2017, WK 2882/2018, WK 5956/2018, WK 11025/2018, WK 12541/2018, WK 12553/2018, WK 12730/2018, WK 12806/2018, WK 13455/2018, WK 843/2019, WK 848/2019, WK 877/2019 and WK 934/2019

The Council also refused access to any documents covered by the following request:

"Any documents held by the Council of the European Union containing comments produced by Member States in relation to COM (2017) 660: 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 (procedure 2017/0294 (COD))".

This email constitutes a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001. The Council is requested to reconsider its decision, taking into account the points below.

As a preliminary point, the 5 June 2019 reply of the Council is inadequate, since it fails to provide a meaningful description of most documents which, in many instances, makes it difficult to ascertain whether the documents are actually covered by the interests invoked and, if so, to what extent. In this regard:

- The reply generally refers to the fact that certain specific documents requested contain some comments from Member States. This is not an adequate description of the documents. At a minimum, where a document contains comments from Member States, the Council should identify which Member State comments are associated with which document and give an indication of the nature of the comments (e.g. as commenting on international agreement matters or other matters concerned by the legislative discussion);
- The Council's position that its reply also applies to the more general request for disclosure of documents containing the comments of Member States is also insufficient. The Council should identify whether documents other than those specifically requested by number exist and give certain basic information about them (e.g. document number, Member State giving comments, and general nature of the comments); and
- The reply states that documents WK 5956/2018 and WK 11025/2018 contain Presidency non-papers, and document WK 13455/2018 contains an opinion paper from the Presidency. However, there is no real indication of what is concerned by the papers; rather, the reply only contains vague statements that certain papers reflect legal analysis, relate to the legislative procedure, and "touch-upon" current or future international relations. Without more information about the full content of each document, it is impossible to tell whether the entirety of the documents can legitimately be viewed as relating to the international relations and/or legal advice issues.

Further, the reply fails in any event to sufficiently explain why there is risk that disclosure of the documents (even partially) would specifically and actually undermine protected interests, as required by the case law of the Court of Justice.

For all documents except WK 11025/2018, WK12541/2018 and WK 13455/2018, the only interest invoked is the public interest as regards international relations.

- First, reference is made to proceedings brought by Nord Stream 2 under the Energy Charter Treaty. Those proceedings are not state-to-state but are rather brought by a private party. In this context, it is difficult to see how the exception related to international relations is relevant. Further, even if it were, the reply is certainly not sufficient to demonstrate that there is a risk that any disclosure of documents risks specifically and actually undermining any relevant interest that could be invoked.
- Second, the reply also states that the requested documents "touch upon" current or future Member State international relations. The international relations exception cannot be relied on in relation to risks that are not reasonably foreseeable or purely hypothetical. In the absence of further explanation, it appears that the 5 June 2019 reply does just that. Moreover, the reply is overly general in any event and does not meet the standard of showing how disclosure of information in the documents could specifically and actually undermine the public interest as regards international relations.

For documents WK 11025/2018, WK12541/2018 and WK 13455/2018, the Council also relies on the legal advice exception. To the extent that information in those documents is viewed as covered by the international relations exception, the comments above apply. To the extent that the Council invokes the legal advice exception, the following comments are made:

- The Council has only stated that they "relate" to legal advice. It has not shown in any concrete way why disclosing the information could specifically and actually undermine the protection of legal advice.
- While the Council refers to substantial legal issues which are contentious and likely to be subject to litigation in the near future, this is a general argument and also does not meet the standard of showing that disclosure risks specifically and actually undermining the protection of legal advice.

- The Council should also take into account the overriding public interest in the disclosure of the documents related to the legislative procedure. To the extent that the documents only "relate" to legal advice, it must be concluded that there is an overriding public interest in disclosure. Any other conclusion would allow the Council to systematically preclude disclosure of legislative procedure documents, contrary to the purpose of Regulation 1049/2001.

The Council's rejection of any partial disclosure on the basis that each of the documents forms "an inseparable whole" is insufficient. It is highly unlikely that no aspect of the 13 specific documents covered by the response can be disclosed, even partially.

The Council's prompt reply to this confirmatory application is appreciated.

Sincerely,

DELETED
