



**Brussels, 28 June 2019**  
**(OR. en)**

**10802/19**

**INF 213**  
**API 82**

**NOTE**

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 19/c/04/19

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Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 13 May 2019 and registered on the same day (Annex 1);
- 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](mailto:access@consilium.europa.eu) on 13 May 2019 - 11:08 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 relating to meetings by the Working Party on Energy where 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)) was discussed, including minutes and/or transcripts of said meetings and other documents distributed and/or discussed in the context of said meetings.

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. 19/1210-mj/ns

Requests made on: 13.05.2019

Dear **DELETED**,

Thank you for your requests for access to documents "*relating to meetings by the Working Party on Energy where 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)) was discussed, including minutes and/or transcripts of said meetings and other documents distributed and/or discussed in the context of said meetings*".<sup>1</sup>

Please note that the General Secretariat of the Council does not hold minutes of the abovementioned meetings.

In addition to the documents which are already available in the public register of Council documents<sup>2</sup> and to the documents which were already covered by some of your other requests (see our replies ref. 19/1188 and ref. 19/1187, 1189 to 1200 and 1209), documents 6738/18 and 7502/18 (+ COR 1) were identified.

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<sup>1</sup> 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).

<sup>2</sup> See <http://register.consilium.europa.eu>

Document **6738/18**, dated 1 March 2018, contains an opinion of the Council Legal Service examining the compatibility with the United Nation Convention on the Law of the Sea (UNCLOS) of the Commission's proposal amending Directive **2009/73/EC** concerning common rules for the internal market in natural gas.

Document **7502/18**, dated 26 March 2018, contains an opinion of the Council Legal service 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. The opinion examines the legal basis of the Proposal, the derogations provided therein as well as the allocation of competences between Member States and the Union following the adoption of the Proposal.

The requested documents reflect legal analysis on several legal issues regarding the Commission's proposal amending common rules for the internal market in natural gas and repealing Directive **2003/55/EC** (gas directive).

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. In view of its subject-matter, disclosure of the advice and the issues with which it deals would undermine the protection of international relations under Article 4(1)(a) third indent of Regulation (EC) No. **1049/2001**.

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. More precisely, prelitigation has already started under the Energy Charter Treaty and the risk of litigation before the European Courts is real. The legal advice is therefore particularly sensitive. Disclosure of the relevant parts of the requested documents would undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No **1049/2001**. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences.

As regards the existence of an overriding public interest in disclosure in relation to the interest in having a frank, objective and comprehensive legal advice under Regulation (EC) No 1049/2001, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interests so as to justify disclosure.

In view of the foregoing, the General Secretariat of the Council is unable to grant you full access to documents 6738/18 and 7502/18. However, in accordance with Article 4 (6) of the Regulation (EC) No 1049/2001, you may have access to paragraphs 1 to 4 of document 6738/18 (already public) and to paragraphs 1 to 5 of document 7502/18 (already public).

Please note that access to document 7502/18 COR 1 cannot be granted as this corrigendum relates to parts of document 7502/18 which cannot be disclosed for the abovementioned reasons.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).<sup>3</sup>

Yours sincerely,

Paulo VIDAL

Enclosures

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<sup>3</sup> 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 1:12 PM

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

**Subject:** AW: Ref. 19/1210-mj/ns

**Confirmatory application in accordance with Regulation 1049/2001 - Ref. 19/1210-mj/ns**

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

- Document 6738/18, dated 1 March 2018: The Council states that this document contains an opinion of the Council Legal Service examining the compatibility with the United Nation Convention on the Law of the Sea (UNCLOS) of the Commission's proposal amending Directive 2009/73/EC concerning common rules for the internal market in natural gas.
- Document 7502/18, dated 26 March 2018: The Council states that this document contains an opinion of the Council Legal service 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. According to the Council, the opinion examines the legal basis of the Proposal, the derogations provided therein as well as the allocation of competences between Member States and the Union following the adoption of the Proposal.

The Council provides partial disclosure of these documents, in particular it gives access to the introductory texts of these provisions but not the legal analysis contained in the opinions. Access to the remainder of the documents is denied on the basis that their disclosure would risk undermining the public interest as regards international relations, and also legal advice. In this regard, the Council states that:

- The requested documents reflect legal analysis on several legal issues regarding the Commission's proposal amending common rules for the internal market in natural gas and repealing Directive 2003/55/EC (gas directive).

- 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.
- The legal advice deals with substantial legal issues which are contentious and extremely likely to be subject to litigation in the near future.

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.

First, as regards the risk of undermining international relations, the reasons given are vague and do not meet the standard of specifically establishing that there are risks that could specifically and actually undermine international relations – or risks that are reasonably foreseeable and not hypothetical. The mere fact that an opinion of the EU Council Legal Service on an adopted piece of legislation "touches upon" matters related to third countries cannot be sufficient to invoke the international relations exception. Indeed, the UNCLOS opinion presumably relates to the proposal by the Commission to extend the Gas Directive as far as the EEZ. It is well known that this proposal was not accepted and that the Directive adopted pursuant to the Commission proposal (Directive 2019/692) did not follow the approach. In this context, it is unclear how there could be any real risk, specific or otherwise, in relation to the public interest as regards international relations.

Second, as regards the risk of undermining the protection of legal advice, it is well-established that there is usually an overriding public interest in the disclosure of opinions of the Council Legal Service that relate to adopted EU legislation. Notwithstanding this general presumption, the Council refers to possible litigation as a reason for not disclosing the legal opinions. While the EU Court has recognised that potential litigation can be a reason for non-disclosure in certain circumstances, this is only to the extent that the legal opinion has a reasonable relationship to litigation. Given that, as mentioned above, Directive 2019/692 does not extend to the EEZ, it is unclear how any Council opinion on UNCLOS could interact with potential litigation. As regards the second opinion, the Council should explain why it considers that topics covered could be subject to litigation – for example, issues related to allocation of competences.

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

Sincerely,

**DELETED**

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