



Council of the
European Union

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Brussels, 23 July 2019
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API 94

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 22/c/05/19

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 13 May 2019 and registered the same day (Annex 1);
- reply from the General Secretariat of the Council dated 27 June 2019 (Annex 2);
- confirmatory application dated 18 July 2019 and registered the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 13 May 2019 - 11:16 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:

Any documents held by the Council of the European Union relating to the Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline (ST 10249 2017 INIT).

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, 27 June 2019

DELETED

Email: **DELETED**

Ref. 19/1212-mj/ns

Requests made on: 13.05.2019

Deadline extension: 05.06.2019

Dear **DELETED**,

Thank you for your request for access to *"any documents held by the Council of the European Union relating to the Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline (ST 10249 2017 INIT)"*.¹

The following documents were identified as corresponding to your request :

- 11297/17
- 12590/17
- WK 11382/2017
- WK 11386/2017
- WK 11656/2017

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).

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

Documents 11297/17 and 12590/17 are classified documents, bearing the classification "RESTREINT UE/EU RESTRICTED". This means that the unauthorised disclosure of their content could be disadvantageous to the interests of the European Union or of one or more of its Member States.²

Document 11297/17 **RESTREINT UE/EU RESTRICTED** is a Note of 14 July 2017 from the General Secretariat of the Council to Delegations on the *Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline*. It contains a Steering note for the Working Party on Energy of 25 July 2017.

WK 11386/2017 is a working document of 13 October 2017 from the General Secretariat of the Council to Delegations containing a Commission's presentation on the negotiation mandate for the Nord Stream 2 pipeline.

The requested documents contain information on negotiations which are still under discussion within the Council and at international level.

For the Council to reach a common position on these negotiations, its Member States hold initial consultations and exploratory talks. To reveal the contents of such talks before a common position has been reached would interfere with the negotiations and could jeopardise the conclusion of an agreement within the Council. Disclosure of document 11297/17 **RESTREINT UE/EU RESTRICTED** would therefore seriously undermine the Council's decision-making process. As a consequence, the General Secretariat has to refuse access to this document.³

As abovementioned, the negotiating directives have not yet been agreed by the Council. Release to the public of the information contained in document **WK 11386/2017** at this stage would affect the negotiating process and diminish the chances of the Council reaching an agreement.

As a consequence, the General Secretariat has also to refuse access to this document.⁴

Having examined the context in which both documents were drafted and the current state of play on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in disclosure of the documents in question.

² Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU), OJ L 274, 15.10.2013, p. 1.

³ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

⁴ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

In addition, disclosure of the information contained in these documents would also have a negative impact on the relations of the European Union with the Russian Federation. Should its internal views and negotiation strategy be made public while negotiations have not yet started, the position of the Union in such international negotiations would be seriously weakened. 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 for this reason as well.⁵

We have also looked into the possibility of releasing parts of the documents⁶ However, as the information contained in the documents forms an inseparable whole, the General Secretariat is unable to give partial access at this stage.

Document **12590/17 RESTREINT UE/EU RESTRICTED** comprises an opinion of the Legal Service issued in the context of the Commission recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline. The legal opinion assesses the compatibility of the recommended agreement with EU law, including as regards the distribution of competences between the Union and the Member States. The document consequently contains legal advice.

The decision-making process in question has not been finalised to date. The issues analysed in the opinion form an important part of the basis for the discussions and concern matters that are complex and highly controversial. Disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council and would hence the risk compromising the capacity of the institutions and of the Council to reach an agreement on the dossier. In addition, should the opinion be released, third parties may attempt to influence or exert pressure on the policy choices to be made by the institutions in the specific decision-making process. Thus, disclosure of the requested document would undermine the decision-making process pursuant to Article 4(3) of Regulation (EC) No **1049/2001**.

Moreover, in view of its subject-matter and content, disclosure of the advice and the issues with which it deals would undermine the protection of public security, international relations and the economic policy of the Union under Article 4(1)(a), first, third and fourth indent of Regulation (EC) No **1049/2001**. Indeed, it could undermine the external dimension of the Union's energy policy as well as jeopardize its energy security strategy, as well as that of the Member States.

Finally, the legal advice covered by this opinion deals with issues which are contentious, likely to be subject to litigation before the courts, and, finally, critical elements for the negotiations. The legal advice is therefore particularly sensitive.

⁵ Article 4(1)(a), third indent, of Regulation (EC) No **1049/2001**.

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

Disclosure of such a document would therefore 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 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 of the document.

We have also looked into the possibility of releasing parts of the document.⁷ However, as the exceptions to the right of access apply to its entire content, the General Secretariat is unable to give partial access at this stage.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you access to this document.

WK 11382/2017 is a working document dated 13 October 2017 from the General Secretariat of the Council to Delegations containing a legal opinion from a Member State on Nord Stream 2.

WK 11656/2017 is a working document dated 18 October 2017 from the General Secretariat of the Council to Delegations containing a legal opinion of a Member State on the applicability of the EU Third Energy Package to the Nord Stream 2 Gas Pipeline.

As already mentioned in a reply to one of your requests about 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, Nord Stream 2 consortium recently 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.

⁷ Article 4(6) of Regulation (EC) No 1049/2001.

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 to explain 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 documents WK 11382/2017 and WK 11656/2017 which would reveal a legal opinion of a Member State on this issue would be detrimental to the EU and its Member States in the current context.

Disclosure of the documents would therefore undermine the protection of court proceedings and legal advice as well as the public interest as regards international relations. As a consequence, the General Secretariat has to refuse access to the documents.⁸

We have also looked into the possibility of releasing parts of the documents.⁹ However, as the exceptions to the right of access apply to their entire content, the General Secretariat is unable to give partial access at this stage.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).¹⁰

Yours sincerely,

Paulo VIDAL

⁸ Article 4 (2) second indent and Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001.

⁹ Article 4(6) of Regulation (EC) No 1049/2001.

¹⁰ 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.

[E-mail message sent to access@consilium.europa.eu on 18 July 2019 - 12:52]

From: **DELETED**

Sent: Thursday, July 18, 2019 12:52 PM

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

Subject: AW: Ref. 19/1212-mj/ns

Confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 – Ref. 19/1212-mj/ns

To Whom It May Concern:

By letter dated 27 June 2019, the Council refused access to the following documents in their entirety:

- 11297/17
- 12590/17
- WK 11382/2017
- WK 11386/2017
- WK 11656/2017

The Council also refused partial access to any of the documents above.

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.

Documents 11297/17 and 12590/17

The Council describes the two documents as follows:

· Document 11297/17 RESTREINT UE/EU RESTRICTED is a Note of 14 July 2017 from the General Secretariat of the Council to Delegations on the Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline. It contains a Steering note for the Working Party on Energy of 25 July 2017.

· WK 11386/2017 is a working document of 13 October 2017 from the General Secretariat of the Council to Delegations containing a Commission's presentation on the negotiation mandate for the Nord Stream 2 pipeline.

The Council refuses disclosure of these documents on the basis that their disclosure "*would seriously undermine the institution's decision-making process*" within the meaning of the first paragraph of Article 4(3) of Regulation 1049/2001. The Council describes the documents as containing information on negotiations which are still under negotiation within the Council and at international level. The Council also claims that disclosure of the documents would undermine the protection of international relations. Further, the Council notes that the documents bear the classification "RESTREINT UE/EU RESTRICTED" which means that the unauthorised disclosure of their content could be disadvantageous to the interests of the European Union or of one or more of its Member States.

The Council should reconsider its position, taking into account the points below:

- First, the fact that the documents are classified as "RESTREINT UE/EU RESTRICTED" is not relevant. Indeed, they are not even the types of documents that fall within the scope of Article 9 of Regulation 1049/2001 (which must be handled according to certain procedures but whose non-disclosure must still be justified by exceptions in any event).
- Second, the exception requires that documents not be disclosed if they would "seriously" undermine internal discussions. The two documents specifically relate to the Commission recommendation for a negotiating mandate, the main part of which is already available to the public on the internet. In view of this fact, it seems highly unlikely that disclosure of the Commission presentation in Document WK 11386/2017 (which appears to provide an overview of that recommendation) could *seriously* undermine any decision-making process (or international relations). As regards Document 11297/17, the Council has only described it in vague terms as containing a "Steering note". At a minimum, further information is needed to substantiate that disclosure of the document could potentially undermine any decision-making procedure in a "serious" way (or international relations).

Document 12590/17 RESTREINT UE/EU RESTRICTED

According to the Council:

- Document 12590/17 RESTREINT UE/EU RESTRICTED comprises an opinion of the Legal Service issued in the context of the Commission recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline. The legal opinion assesses the compatibility of the recommended agreement with EU law, including as regards the distribution of competences between the Union and the Member States. The document consequently contains legal advice.

The Council claims that disclosure of the document would undermine the internal decision-making process, legal advice and protection of public security, international relations and the economic policy of the EU.

The Council should reconsider its position, taking into account the points below:

- First, as above, the fact that the Council Legal Opinion is classified as "RESTREINT UE/EU RESTRICTED" is not relevant.
- Second, it is noted that the Council Legal Opinion is already in the public domain and has been discussed by numerous scholars in legal articles – in many cases citing the provisions verbatim. In this context, it is unclear how the disclosure could specifically and actually undermine the interests invoked. Further, the reasons put forth by the Council do not in any event justify the complete lack of even partial disclosure.

Documents WK 11382/2017 and WK 11656/2017

The Council describes these two documents as follows:

- WK 11382/2017 is a working document dated 13 October 2017 from the General Secretariat of the Council to Delegations containing a legal opinion from a Member State on Nord Stream 2.
- WK 11656/2017 is a working document dated 18 October 2017 from the General Secretariat of the Council to Delegations containing a legal opinion of a Member State on the applicability of the EU Third Energy Package to the Nord Stream 2 Gas Pipeline.

For these documents, the Council refers to Nord Stream 2's action under the Energy Charter Treaty and relies on the exceptions related to (i) international relations and (ii) court proceedings and legal advice.

The Council should reconsider its position, taking into account the points below:

- First, the Energy Charter proceedings are not state-to-state but are rather brought by a private party. In this context, it is highly questionable whether at least the international relations exception could be relevant.
- Second, even if the exceptions could be relevant, the reply is not sufficient to demonstrate that there is a risk that any disclosure of documents risks specifically and actually undermining the interests invoked. As the Council states, the Energy Charter Treaty action relates to an amendment to the Gas Directive. However, both opinions pre-date even the Commission proposal to amend the Gas Directive. The Council has failed to explain in any concrete way why these opinions would be relevant to any litigation under the Energy Charter Treaty.

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

Sincerely,

DELETED
