



Council of the  
European Union

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**NOTE**

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From: General Secretariat of the Council

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To: Delegations

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No. prev. doc.: 11062/22

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Subject: Public access to documents  
- Confirmatory application No 09/c/01/22

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Delegations will find attached a draft reply to confirmatory application No 09/c/01/22  
(see 11062/22).

**REPLY TO CONFIRMATORY APPLICATION 09/c/01/22,  
made by email on 27 June 2022 and registered on the same day**

The Council has considered the confirmatory application under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) (hereafter referred to as "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 5 May 2022, the Applicant submitted a request for access to documents concerning the following information:

- List of all meetings the Council, Coreper or the Working groups had in connection to the below mentioned Negotiation Rounds on the Modernisation of the Energy Charter Treaty, including but not only preparatory meetings and meetings with other contract parties.

- Minutes and other reports of these meetings.

- All correspondence including attachments (i.e. any emails, correspondence or telephone call notes) as of the below mentioned Negotiation Rounds on the Modernisation of the Energy Charter Treaty.

- All documents prepared for the meetings and exchanged in the course of the meetings between the parties.

List of the Negotiation Rounds on the Modernisation of the Energy Charter Treaty:

- First Negotiation Round on the Modernisation of the Energy Charter Treaty (6 - 9 July 2020)

- Second Negotiation Round on the Modernisation of the Energy Charter Treaty (8 - 11 September 2020)

- Third Negotiation Round on the Modernisation of the Energy Charter Treaty (3 - 6 November 2020)

- Fourth Negotiation Round on the Modernisation of the Energy Charter Treaty (2-5 March 2021)

- Fifth Negotiation Round on the Modernisation of the Energy Charter Treaty (1 - 4 June 2021)
- Sixth Negotiation Round on the Modernisation of the Energy Charter Treaty (6 - 9 July 2021)
- Seventh Negotiation Round on the Modernisation of the Energy Charter Treaty (28 September - 1 October 2021)
- Eighth Negotiation Round on the Modernisation of the Energy Charter Treaty (9 - 11 November 2021)
- Ninth Negotiation Round on the Modernisation of the Energy Charter Treaty (13 December 2021)
- Tenth Negotiation Round on the Modernisation of the Energy Charter Treaty (18 - 21 January 2022)
- Eleventh Negotiation Round on the Modernisation of the Energy Charter Treaty (1 - 4 March 2022)
- Twelfth Negotiation Round on the Modernisation of the Energy Charter Treaty (19 - 22 April 2022)

2. On 31 May 2022, the General Secretariat of the Council (GSC) replied to the Applicant indicating that the negotiations on the Modernisation of the Energy Charter Treaty are conducted by the Commission. In reply to the request, the GSC identified 14 documents which were sent to the Applicant. At the same time, the GSC advised the Applicant to contact directly the Commission to get information about the negotiations, included different links on the results of the abovementioned negotiation rounds from the Commission's website and informed the Applicant that the Energy Charter Secretariat publishes on its website a communication following each round of negotiations and provided the Applicant with a link to the relevant website.
3. On 31 May 2022, the Applicant sent a message to the GSC thanking it for its answer and the compiled documents. He stated that the EU Member States regularly discuss the modernisation of the Energy Charter Treaty in the Working Party on Energy and he reiterated his request for access to documents in connection with these meetings of the Working Party on Energy.

4. On 22 June 2022, the GSC sent an additional reply to the Applicant with a list of the meetings of the Working Party on Energy, in which the negotiation rounds referred by the Applicant in his request were mentioned, as well as the links with the agendas of these meetings. The GSC indicated that, after having consulted the relevant department, it appeared that, with the exception of document WK 55/2022, the GSC did not hold other documents corresponding to his request. The GSC informed the Applicant that an external consultation was on-going regarding that document and that a reply concerning it would be sent to him as soon as possible.
5. On 27 June 2022, without waiting to receive the GSC reply on the abovementioned document WK 55/2022, the Applicant submitted a confirmatory application arguing that the GSC had not provided him with the requested documents. He also put into question the fact that there were no or hardly any preparatory documents and he claimed that there should be minutes of the relevant meetings.
6. On 4 July 2022, the GSC replied to the Applicant regarding document WK 55/2022 (access was granted to the document with the exception of the personal data contained therein). The Applicant therefore submitted this confirmatory application on 27 June 2022, without waiting to receive first the Council's reply regarding the remaining document WK 55/2022, which was sent on 4 July 2022. Given that the Applicant did not subsequently request from the Council to assess his confirmatory application, submitted at an earlier point in time, as covering also this document, nor did he submit another confirmatory application in relation to that document, the Council considers that the GSC decision of 4 July 2022 to grant partial access to document WK 55/2022 is not being challenged in the framework of the present confirmatory application, and therefore does not undertake its review hereinafter in this reply.
7. Following this confirmatory application, further consultations were carried out with the relevant services within the GSC. It has appeared that the modernisation of the Energy Charter Treaty has been discussed in more than one Working Party of the Council.

8. The following documents were further identified as corresponding to the request - the Council regrets that these were not identified at the initial stage:

- WK 2430/2020 INIT – 02.03.2020 – Commission’s document - Energy Charter Treaty Modernisation: Draft EU proposal
- WK 2872/2020 INIT – 13.03.20 – Energy Charter Treaty Modernisation: Draft EU proposal- Comments from France
- WK 2941/2020 – 16.03.20 - PL comments on the Energy Charter Treaty Modernisation: Draft EU proposal
- WK 2953/2020 – 16.03.20 - BE comments on the Energy Charter Treaty Modernisation: Draft EU proposal
- WK 2962/2020 – 16.03.20 - LU comments on the Energy Charter Treaty Modernisation: Draft EU proposal
- WK 2963/2020 – 16.03.20 - LT comments on the Energy Charter Treaty Modernisation: Draft EU proposal
- WK 3937/2020 INIT – 20.04.2020 – Commission’s document - ECT Modernisation: Revised Draft EU proposal
- WK 4251/2020 INIT – 27.04.20 – Draft Commission proposal for the Energy Charter Treaty Modernisation - Comments by Lithuania
- WK 4253/2020 INIT – 27.04.20 - Draft Commission proposal for the Energy Charter Treaty Modernisation - Comments by Poland
- WK 4437/2020 INIT – 29.04.20 - Draft Commission proposal for the Energy Charter Treaty Modernisation - Comments by Belgium
- WK 4539/2020 INIT – 04.05.20 - ECT Modernisation: Revised Draft EU proposal (WK 3937/2020) - Comments by France
- WK 4641/2020 INIT – 05.05.20 - ECT Modernisation: Revised Draft EU proposal - Comments by Cyprus (personal data)
- WK 4663/2020 INIT – 05.05.20 - ECT Modernisation: Revised Draft EU proposal - Comments by Germany
- WK 4680/2020 INIT – 05.05.20 - ECT Modernisation: Revised Draft EU proposal - Comments by the Czech Republic
- WK 4779/2020 INIT – 07.05.20 - ECT Modernisation: Revised Draft EU proposal - Comments by Portugal
- WK 4906/2020 INIT – 11.05.20 – Commission’s document - ECT Modernisation: Revised Draft EU proposal
- WK 4906/2020 REV 1 – 12.05.20 – Commission’s document - ECT Modernisation: Revised Draft EU proposal
- WK 4933/2020 INIT – 12.05.20 – Commission’s document - Energy Charter Treaty Modernisation – Transmission of a draft statement by the EU Delegation on the Modernisation of the Energy Charter Treaty
- WK 4933/2020 REV 1- 20.05.20 – Commission’s document - Energy Charter Treaty Modernisation – Transmission of a draft statement by the EU Delegation on the Modernisation of the Energy Charter Treaty
- WK 5284/2020 INIT – 20.05.20 – Commission’s document - Energy Charter Treaty Modernisation – Transmission of the EU’s Text Proposal on the Modernisation of the Energy Charter Treaty
- WK 6953/2020 INIT – 29.06.20 – Commission’s document - Energy Charter Treaty Modernisation – Thematic fiches for the negotiation round of 6-9 July 2020

- WK 7264/2020 INIT – 03.07.20 – Commission’s document - Energy Charter Treaty Modernisation – Thematic fiches for the negotiation round of 6-9 July 2020
- WK 8742/2020 REV 1 – 1.09.20 - EU text proposal for the modernisation of the Energy Charter Treaty - Revised - Joint Statement of Lithuania, Austria, Greece and Cyprus on sustainable development
- WK 8872/2020 INIT – 03.09.20 - ECT modernisation negotiation round (8-11 September 2020) – Hymn sheets on Frivolous Claims, Transparency, Third Party Funding, Security for Costs, Valuation of Damages
- WK 9084/2020 INIT – 07.09.20 – Commission’s document - Energy Charter Treaty
- WK 11786/2020– 26.10.20 – Commission’s document - EU text proposal for the modernisation of the Energy Charter Treaty
- WK 11903/2020 – 28.10.20 – Commission’s document – ECT: Termination and phase out of investment protection in fossil fuels – PPT Presentation – Informal VT of the WP on Energy – 29 October 2020
- WK 12908/2020 – 16.11.20 - ES comments on the Energy Charter Treaty definitions on economic sector activity
- WK 13178/2020 – 19.11.20 - AT comments on the definition of economic activity in the energy sector in the context of the modernisation of the Energy Charter Treaty
- WK 13194/2020 – 19.11.20 - LU proposal on the economic sectors of the Energy Charter Treaty
- WK 13776/2020 – 27.11.20 - LT comments on EU text proposal for the modernisation of the Energy Charter Treaty - Definition of the economic activity in the energy sector (WK 11786/2020 INIT).
- WK 13882/2020 – 30.11.20 - SK comments on EU text proposal for the modernisation of the Energy Charter Treaty - Definition of the economic activity in the energy sector
- WK 13946/2020 – 1.12.20 - NL questions on the definition of economic activity under the ECT
- WK 14042/2020 – 02.12.20 - SE questions on the definition of economic activity under the ECT
- WK 14178/2020 – 04.12.20 - PT comments on the proposal of the Definition of economic activity under the ECT
- WK 14385/2020 – 09.12.20 - FI comments on the proposal on Economic Activity in Energy Sector under the ECT
- WK 14937/2020 – 21.12.20 - FR comments on the definition of economic activity in the Charter Treaty
- WK 633 2021 INIT- 15/01/2021 – Cion document - Definition of economic activity in the energy sector
- WK 1016 2021 INIT - 22/01/2021 - DE comments on the definition of "economic activity in the energy sector" (ECT Modernisation)
- WK 1027 2021 INIT- 25/01/2021- BE comments on the Commission's proposal on the definition of economic activity within the ECT
- WK 1558 2021 INIT- 03/02/2021 - LU contributions on Energy Charter Treaty modernization process: economic sectors
- WK 1768 2021 INIT - 08/02/2021- CY comments on the definition of economic activity in the energy sector in the ECT
- WK 2116 2021 INIT - 15/02/2021- EL comments on the definition of economic activity in the energy sector in the ECT
- WK 2126 2021 INIT - 15/02/2021- LV comments on the definition of economic activity in the energy sector in the ECT
- WK 2132 2021 INIT - 15/02/2021- PL comments on the definition of economic activity in the energy sector in the ECT

- WK 2140 2021 INIT -15/02/2021- CY comments on the definition of economic activity in the energy sector in the ECT
- WK 2280 2021 INIT- 17/02/2021 MT comments on the definition of economic activity in the energy sector in the ECT
- WK 2816 2021 INIT - 26/02/2021- Commission's document - Energy Charter modernisation - Thematic fiche: Economic activity in the energy sector
- WK 7915 2021 INIT - 15/06/2021 – Commission's document - Energy Charter Treaty modernization – Presentation
- WK 3298/2022 INIT – 04/03/2022 – Commission's document - ECT Modernisation round 11 - comments proposed by the Commission on the draft public communication

## THE GENERAL CONTEXT OF THE REQUEST

9. The Energy Charter Treaty (ECT) is a plurilateral trade and investment agreement applicable to the energy sector. It was signed in December 1994 and entered into force in April 1998. It provides a multilateral framework for energy cooperation that is unique under international law. It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. Currently there are fifty-six Signatories and Contracting Parties to the Treaty.
10. The Energy Charter Treaty was in need of revision to face the challenges of the 21<sup>st</sup> century. On 15 July 2019, the Council gave a mandate to the European Commission to start negotiations on the modernisation of the Energy Charter Treaty.
11. The aim of the negotiations was to modernise the provisions of the Energy Charter Treaty so that it takes account of sustainable development and climate goals, as well as modern standards of investment protection and investor-to-state dispute settlement. The objective of the modernised Energy Charter Treaty was to facilitate investment in the energy sector in a sustainable way, provide for legal certainty and ensure a high level of investment protection.
12. The negotiations started in July 2020 and 12 rounds of negotiations were held from July 2020 until April 2022. As already mentioned in the first reply sent to the Applicant, these negotiations are conducted by the European Commission.

13. On 24 June 2022, the Contracting Parties of the Energy Charter Treaty reached an agreement in principle thus concluding the negotiations for a modernised Energy Charter Treaty. However, the text has still to be adopted by the Energy Charter Conference which should occur, in principle, on 22 November 2022. The agreement in principle is without prejudice to its final assessment by the Contracting Parties.

## **THE ASSESSMENT OF THE IDENTIFIED DOCUMENTS**

14. As a preliminary remark, it is to be noted that both the Treaty on European Union (Article 16(8)) and the Treaty on the Functioning of the European Union (Article 15(2)) make a distinction between legislative and non-legislative activities as regards the application of transparency rules, with a high standard of transparency in the legislative domain. The requested documents were not drawn up in the context of legislative activities, i.e. for the adoption of acts which are legally binding in or for the Member States<sup>1</sup>, therefore the wider access which is referred to in recital 6 of Regulation (EC) No 1049/2001 does not apply in the present circumstances.
15. After a careful assessment of the abovementioned documents and based on the result of the consultations of the different authors thereof, the Council came to the following conclusion.
16. Access is granted to the following documents:

WK 2953/2020, WK 2962/2020, WK 4253/2020, WK 4437/2020, WK 4641/2020, WK 4663/2020, WK 4680/2020, WK 4779/2020, WK 11786/2020, WK 12908/2020, WK 13178/2020, WK 13194/2020, WK 13946/2020, WK 14178/2020, WK 14385/2020, WK 1016/2021, WK 1027/2021, WK 1558/2021, WK 1768/2021, WK 2116/2021, WK 2126/2021, WK 2132/2021, WK 2140/2021 and WK 2280/2021.

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<sup>1</sup> Article 12(2) of Regulation (EC) No 1049/2001.

17. A partial access may be granted to documents WK 5284/2020 INIT and WK 14042/2020 INIT.

The Commission, author of document WK 5284/2020 INIT, was consulted on its possible release and agreed to partially disclose it as follows:

Document **WK 5284/2020 INIT** contains in annex the published version of the EU's Text Proposal on the Modernisation of the Energy Charter Treaty.

Access can therefore be granted to this document except for the parts which contain personal data about individuals. Disclosure of this information would undermine the protection of privacy and the integrity of the individuals in question, in particular in accordance with European legislation regarding the protection of personal data.<sup>2</sup> Accordingly, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual), access cannot be granted to these parts of the document.

However, as mentioned above, pursuant to Article 4(6) of the Regulation, access is granted to the rest of the document which is not covered by this exception.

18. Sweden was consulted on the possible disclosure of document WK 14042/2020 INIT, which contains a contribution from Sweden on the definition of economic activity under the ECT, and agreed to a partial release of this document as follows:

Document **WK 14042/2020 INIT** contains comments concerning ongoing negotiations with third parties and disclosure of these comments would damage the relations between the European Union and the third parties involved in the negotiations.

Disclosure of the comments would therefore undermine the protection of the public interest as regards international relations. As a consequence, access to these comments has to be refused pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001.

However, pursuant to Article 4(6) of Regulation (EC) No 1049/2001, access can be granted to those parts of document WK 14042/2020 INIT which are not covered by this exception.

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<sup>2</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295, 21.11.2018, p. 39).

19. Access has to be refused to the following documents:

- WK 2430/2020 INIT – 02.03.2020 – Commission’s document - Energy Charter Treaty Modernisation: Draft EU proposal
- WK 2872/2020 INIT – 13.03.20 – Energy Charter Treaty Modernisation: Draft EU proposal- Comments from France
- WK 2941/2020 – 16.03.20 - PL comments on the Energy Charter Treaty Modernisation: Draft EU proposal
- WK 2963/2020 – 16.03.20 - LT comments on the Energy Charter Treaty Modernisation: Draft EU proposal
- WK 3937/2020 INIT – 20.04.2020 – Commission’s document - ECT Modernisation: Revised Draft EU proposal
- WK 4251/2020 INIT – 27.04.20 – Draft Commission proposal for the Energy Charter Treaty Modernisation - Comments by Lithuania
- WK 4539/2020 INIT – 04.05.20 - ECT Modernisation: Revised Draft EU proposal (WK 3937/2020) - Comments by France
- WK 4906/2020 INIT – 11.05.20 – Commission’s document - ECT Modernisation: Revised Draft EU proposal
- WK 4906/2020 REV 1 – 12.05.20 – Commission’s document - ECT Modernisation: Revised Draft EU proposal
- WK 4933/2020 INIT – 12.05.20 – Commission’s document - Energy Charter Treaty Modernisation – Transmission of a draft statement by the EU Delegation on the Modernisation of the Energy Charter Treaty
- WK 4933/2020 REV 1- 20.05.20 – Commission’s document - Energy Charter Treaty Modernisation – Transmission of a draft statement by the EU Delegation on the Modernisation of the Energy Charter Treaty
- WK 6953/2020 INIT – 29.06.20 – Commission’s document - Energy Charter Treaty Modernisation – Thematic fiches for the negotiation round of 6-9 July 2020
- WK 7264/2020 INIT – 03.07.20 – Commission’s document - Energy Charter Treaty Modernisation – Thematic fiches for the negotiation round of 6-9 July 2020
- WK 8742/2020 REV 1 – 1.09.20 - EU text proposal for the modernisation of the Energy Charter Treaty - Revised Joint Statement of Lithuania, Austria, Greece and Cyprus on sustainable development
- WK 8872/2020 INIT – 03.09.20 - ECT modernisation negotiation round (8-11 September 2020) – Hymn sheets on Frivolous Claims, Transparency, Third Party Funding, Security for Costs, Valuation of Damages
- WK 9084/2020 INIT – 07.09.20 – Commission’s document - Energy Charter Treaty
- WK 11903/2020 – 28.10.20 – Commission’s document – ECT: Termination and phase out of investment protection in fossil fuels – PPT Presentation – Informal VT of the WP on Energy – 29 October 2020
- WK 13776/2020 – 27.11.20 - LT comments on EU text proposal for the modernisation of the Energy Charter Treaty - Definition of the economic activity in the energy sector (WK 11786/2020 INIT).
- WK 13882/2020 – 30.11.20 - SK comments on EU text proposal for the modernisation of the Energy Charter Treaty - Definition of the economic activity in the energy sector
- WK 14937/2020 – 21.12.20 - FR comments on the definition of economic activity in the Charter Treaty
- WK 633 2021 INIT- 15/01/2021 – Commission’s document - Definition of economic activity in the energy sector

- WK 2816 2021 INIT - 26/02/2021- Commission's document - Energy Charter modernisation - Thematic fiche: Economic activity in the energy sector
- WK 7915 2021 INIT - 15/06/2021 – Commission's document - Energy Charter Treaty modernization – Presentation
- WK 3298/2022 INIT – 04/03/2022 – Commission's document - ECT Modernisation round 11 - comments proposed by the Commission on the draft public communication

20. The Commission, author of the following documents WK 2430/2020 INIT, WK 3937/2020 INIT, WK 4906/2020 INIT, WK 4906/2020 REV 1, WK 4933/2020 INIT, WK 4933/2020 REV 1, WK 6953/2020 INIT, WK 7264/2020 INIT, WK 8872/2020 INIT, WK 9084/2020 INIT, WK 11903/2020 INIT, WK 633/2021 INIT, WK 2816/2021, WK 7915/2021 INIT and WK 3298/2022 INIT, was consulted on their possible release and has opposed their disclosure for the following reasons:
21. The documents in question are preparatory documents drawn up by the Commission which served to establish the Union's negotiating position (the EU's text proposal for a modernised Energy Charter Treaty (ECT)). Document WK 2941/2020 INIT<sup>3</sup> contains comments from Poland on document WK 2430/2020 INIT which it reproduces entirely.
22. The negotiations on the modernised ECT are still ongoing among the Contracting Parties to the ECT and they will not be completed until the Energy Charter Conference officially adopts the amendments in line with Article 42 of the ECT.
23. Release of the information contained in these documents would have a negative impact on the relations between the European Union and the other contracting Parties. Should the Union's internal views and negotiation strategy be made public while negotiations are not concluded, the position of the EU in such multilateral negotiations would be seriously weakened. Disclosure of these documents would therefore undermine the public interest as regards international relations pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001.

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<sup>3</sup> In spite of the fact that Poland agreed with the disclosure of document WK 2941/2020 INIT (which contains their comments), since this document reproduces entirely document WK 2430/2020 INIT (a Commission's document that the Commission considers should not be disclosed), the Council decided to refuse access to document WK 2941/2020 INIT as well.

24. In line with the judgment of the General Court of 12 September 2013 in Case T-331/11, *Besselink v Council*, the preparatory nature and detailed content of negotiating documents can - and should in the present case - justify a refusal:

*“72. .... In the context of international negotiations, the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union (In 't Veld v Commission, paragraph 70 above, paragraph 125).”*

25. As a consequence, access to these documents has to be refused.
26. France has been consulted on the possible release of documents WK 2872/2020 INIT, WK 4539/2020 INIT and WK 14937/2020 and has opposed their disclosure on the following basis: documents WK 2872/2020 INIT and WK 4539/2020 INIT contain comments from France on the draft EU proposal and the revised draft EU proposal for the Energy Charter Treaty Modernisation. Document WK 14937/2020 contains comments from France on the definition of economic activity in the Charter Treaty. These documents contain opinions for internal use in the context of ongoing discussions on the modernisation of the Energy Charter Treaty. For the same reasons as explained in points 20-25 above, disclosure of these documents would undermine the protection of the public interest as regards international relations. As a consequence, access to these documents has to be refused pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001.

27. Lithuania has been consulted on the possible release of documents WK 2963/2020 INIT, WK 4251/2020 INIT, WK 13776/2020 INIT and WK 8472/2020 REV 1 and has expressed its opposition to their disclosure for the following reasons: documents WK 2963/2020 INIT, WK 4251/2020 INIT and WK 13776/2020 INIT contain Lithuanian comments on the draft EU proposal for the modernisation of the Energy Charter Treaty. Document WK 8742/2020 REV 1 contains a revised Joint Statement of Lithuania, Austria, Greece and Cyprus on sustainable development in the context of the EU text proposal for the modernisation of the Energy Charter Treaty.
28. These documents contain sensitive information which was intended for internal use of a particular community. Although proposals in these documents are tailored towards the specific context of modernisation of the Energy Charter Treaty, they form part of a broader strategy of the Lithuanian delegation, primarily in the sphere of nuclear energy security. Moreover, some of these proposals cover not only substantive provisions of the documents being negotiated but also handling of negotiations. The proposals contained in these documents retain relevance and significance not only in the context of the modernisation of the Energy Charter Treaty, which is not yet over, but also in a broader context and their disclosure at this stage would impair future negotiations at various levels.
29. In addition, in the context of the current geopolitical situation, some third countries are increasingly and openly exploiting energy security as a means of hybrid warfare. Therefore, energy security is directly linked to defence and military interests of EU Member States and disclosure of negotiating positions in this area would undermine the protection of the public interest as regards defence and military matters as well as international relations, pursuant to Article 4(1)(a), second and third indent, of Regulation (EC) No 1049/2001. As a consequence, access to these documents has to be refused.
30. Slovakia was consulted on the possible disclosure of document WK 13882/2020 INIT and has expressed its opposition to its disclosure for the following reason: document WK 13882/2020 INIT contains Slovak comments on the EU text proposal for the modernisation of the Energy Charter Treaty as regards the definition of the economic activity in the energy sector. This document contains some information the disclosure of which would undermine the protection of the economic policy of Slovakia.

31. As a consequence, access to this document has to be refused pursuant to the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, which provides that “*The institutions shall refuse access to a document where disclosure would undermine the protection of the financial, monetary or economic policy of the Community or a Member State*”.

***As for the nature of the exceptions pursuant to Article 4(1)(a) of Regulation (EC) No 1049/2001***

32. The Council wishes to recall that, according to established case-law, the public interest exceptions laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 are subject to a different regime than the other exceptions included in Article 4.

33. As stated by the General Court, “*Against that background, the criteria set out in Article 4(1)(a) of Regulation No 1049/2001 are very general, since access must be refused, as is clear from the wording of that provision, if disclosure of the document concerned would ‘undermine’ the protection of the ‘public interest’ as regards, inter alia, ‘international relations’ (see judgment of 12 September 2013, Besselink v Council, T 331/11, not published, EU:T:2013:419, paragraph 33 and the case-law cited).*”

34. *Thus, the principle of strict interpretation of the exceptions set out in Article 4 of Regulation No 1049/2001 does not, in respect of the public interest exceptions provided for in Article 4(1)(a) of that regulation, preclude the institution concerned from enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision”<sup>4</sup>.*

35. It follows that, concerning the protection of the public interest as regards international relations in particular, on the one hand, the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of a document to the public would undermine that interest protected by the provision of Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001.

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<sup>4</sup> Judgment of 11 July 2018, *ClientEarth v Commission*, [T-644/16](#), EU:T:2018:429, paragraphs 24 and 25. See also judgment of 27 November 2019, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX)*, [T-31/18](#), EU:T:2019:815, paragraph 65.

36. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest in this area, it has no choice but to refuse access, because “*it is clear from the wording of Article 4(1)(a) of Regulation (EC) No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests*”.<sup>5</sup>
37. Therefore, the Council enjoys a wide discretion in assessing the impact of the release of documents on international relations but is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document would harm the protected interest and granting access nonetheless.<sup>6</sup> It also follows from the above that the Council has no choice but to refuse access to a document that falls within the scope of the exception concerning international relations and whose disclosure would undermine the public interest protected by it.
38. In view of the above, the Council considers that access to the documents mentioned in paragraph 19 has to be refused.

***Partial access pursuant to Article 4(6) of Regulation (EC) No 1049/2001***

39. The Council has also examined the possibility of granting partial access to the documents referred to in paragraph 19 above, as provided for in Article 4(6) of the Regulation. However, as the information contained in each of the documents forms an inseparable whole, it came to the conclusion that a partial access is not possible at this stage.

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<sup>5</sup> Judgment of 1 February 2007, *Sison v. Council*, [C-266/05 P](#), paragraph 46, and similarly judgment of 12 September 2013, *Besselink v Council*, [T-331/11](#), EU:T:2013:419, paragraph 44.

<sup>6</sup> See judgments of 7 February 2018, *Access Info Europe v Commission*, [T- 851/16](#), EU:T:2018:69, paragraph 38 and the case-law cited, and of 7 February 2018, *Access Info Europe v Commission*, [T- 852/16](#), EU:T:2018:71, paragraph 38 and the case-law cited.

40. The Applicant is also informed that the Working Party on Energy did not produce minutes or reports of the meetings in question. In that regard, the Council would like to recall that there is no legal obligation to establish minutes for all meetings held by the Council's preparatory bodies.
41. It is recalled that the right of access to documents held by the institutions within the meaning of Article 2(3) of Regulation (EC) No 1049/2001 applies only to existing documents in the possession of the institution concerned. The Regulation does not oblige an institution to create a document for which it has been asked to grant access but which does not exist.<sup>7</sup>

## CONCLUSION

42. In light of the above, the Council confirms that:

- access is granted to the following documents: WK 2953/2020, WK 2962/2020, WK 4253/2020, WK 4437/2020, WK 4641/2020, WK 4663/2020, WK 4680/2020, WK 4779/2020, WK 11786/2020, WK 12908/2020, WK 13178/2020, WK 13194/2020, WK 13946/2020, WK 14178/2020, WK 14385/2020, WK 1016/2021, WK 1027/2021, WK 1558/2021, WK 1768/2021, WK 2116/2021, WK 2126/2021, WK 2132/2021, WK 2140/2021 and WK 2280/2021;

- a partial access is granted to documents WK 5284/2020 INIT and WK 14042/2020 INIT<sup>8</sup>;

- access is refused to the following documents: WK 2430/2020 INIT, WK 2872/2020 INIT, WK 2941/2020, WK 2963/2020, WK 3937/2020 INIT, WK 4251/2020 INIT, WK 4539/2020 INIT, WK 4906/2020 INIT, WK 4906/2020 REV 1, WK 4933/2020 INIT, WK 4933/2020 REV 1, WK 6953/2020 INIT, WK 7264/2020 INIT, WK 8742/2020 REV 1, WK 8872/2020 INIT, WK 9084/2020 INIT, WK 11903/2020 INIT, WK 13776/2020, WK 13882/2020 INIT, WK 14937/2020 INIT, WK 633 2021 INIT, WK 2816 2021 INIT, WK 7915 2021 INIT and WK 3298/2022 INIT<sup>9</sup>.

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<sup>7</sup> Judgment of 2 October 2014, *Strack v Commission*, [C-127/13](#) P, EU:C:2014:2250, paragraphs 38 and 46.

<sup>8</sup> See points 17 and 18 above.

<sup>9</sup> See points 20-38 above.