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**'I/A' ITEM NOTE**

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
No. prev. doc.:	11366/19, 11368/19
Subject:	Public access to documents - Confirmatory application No 22/c/05/19

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Delegations will find enclosed a draft reply from the Council to confirmatory application No 22/c/01/19, approved by the Working Party on Information by written consultation which ended on 21 November 2019 with the Netherlands, Poland and Romania voting against and the United Kingdom abstaining.

The following statements were made:

NL: *"The Netherlands cannot concur with the draft reply regarding document 12590/17 containing an opinion of the Council's Legal Service and believes that full public access should be granted to this document According to the Netherlands, the need to ensure transparency and public participation in the legislative process should take priority over the protection of legal advice and court proceedings and the protection of the decision-making process in this specific case. In addition the Netherlands does not believe that full disclosure of the requested documents would specifically and actually undermine the public interest as regards international relations and the financial and economic policy."*

RO: *"We agree to the draft reply as far as it concerns the refusal of public access to documents 12590/17 RESTREINT UE/EU RESTRICTED, WK 11382/2017 and WK 11656/2017. However, we do not agree to the proposed solution concerning WK 11386/2017 and 11297/17, as we consider that access to these two last documents should be denied, as well."*

Delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- approve the draft reply annexed to this document, as an "A" item
- decide to make public the result of the vote.

The annex is available in English only.

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**DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx**

**TO CONFIRMATORY APPLICATION 22/c/05/19,**

**made by email on 18 July 2019**

**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**

**for public access to documents 11297/17, 12590/17, WK 11382/2017, WK 11386/2017  
and WK 11656/2017**

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) 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 13 May 2019, the applicant requested 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)".<sup>1</sup>
2. On 27 June 2019, the General Secretariat of the Council replied to the applicant informing him that the following documents had been identified as corresponding to his request : 11297/17, 12590/17, WK 11382/2017, WK 11386/2017 and WK 11656/2017.

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<sup>1</sup> It has to be noted that the applicant had already introduced a separate request for access to documents 10249/17 and 10249/17 ADD 1 which contain 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*, to which the Council has already replied.

3. 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.

Document **12590/17 RESTREINT UE/EU RESTRICTED**, dated 27 September 2017, contains an opinion of the Council's Legal Service 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.

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

**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.

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

4. On 27 June 2019, the General Secretariat of the Council refused public access to documents 11297/17 and WK 11386/2017 pursuant to Article 4(1)(a), third indent (protection of the public interest as regards international relations), and Article 4 (3), first subparagraph (protection of the decision-making process), of Regulation (EC) No 1049/2001.

Access was denied to documents WK 11382/2017 and WK 11656/2017 pursuant to Article 4(1)(a), third indent (protection of the public interest as regards international relations) and Article 4 (2) second indent (protection of court proceedings and legal advice) of Regulation (EC) No 1049/2001.

Access to document 12590/17 was refused pursuant to Article 4(1)(a), first, third and fourth indent, (protection of the public interest as regards public security, international relations and the economic policy of the Union), Article 4 (3), first subparagraph (protection of the decision-making process), and Article 4 (2) second indent (protection of court proceedings and legal advice) of Regulation (EC) No 1049/2001.

5. On 18 July 2019, the applicant submitted a confirmatory application asking the Council to reconsider the GSC's position.
6. According to the applicant, since the main part of the Commission recommendation for the negotiating mandate has leaked and is available to the public on the internet, it is unlikely that disclosure of document WK 11386/2017 could seriously undermine any decision-making process (or international relations). The applicant also considers that further information is needed to substantiate that disclosure of document 11297/17 could potentially undermine any decision-making procedure in a "serious" way (or international relations). In addition, he claims that since the Council's legal service opinion has also leaked, it is unclear how disclosure of document 12590/17 could specifically and actually undermine the interests invoked. As regards this document, the applicant argues that the Council should at least consider partial disclosure. The applicant also alleges that the reply is not sufficient to demonstrate that any disclosure of documents WK 11382/2017 and WK 11656/2017 risks specifically and actually undermining the interests invoked.
7. The Council has carefully considered the confirmatory application in the light of the applicant's arguments. Having thoroughly examined the documents concerned by the request and carried out further consultations, it has re-assessed the request for access in full consideration of the principles of openness and transparency enshrined in EU primary law and Regulation (EC) No 1049/2001.

**I. THE CONTEXT OF THE REQUESTED DOCUMENTS**

8. The Commission submitted 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 on 12 June 2017. With this recommendation, the Commission seeks to ensure that Nord Stream 2 operates in line with key principles of EU energy law such as : transparency in pipeline operation, non-discriminatory tariff-setting, an appropriate level of non-discriminatory third party access and a degree of separation between activities of supply and transmission.

9. The Working Party on Energy started the examination of this recommendation on 20 June 2017. It was also presented by the Commission at the (Energy) Council on 26 June 2017. The file was on the agenda of three other meetings of the Working Party on Energy. In Autumn 2017, it was decided to put this file on hold until the end of the negotiations 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*<sup>2</sup> (the "Gas Directive") since the two files were interconnected.
10. The abovementioned directive was adopted on 17 April 2019. The examination of 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 is therefore expected to resume.
11. The Council notes that documents 11297/17 and 12590/17 are classified documents bearing the security classification marking "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.<sup>3</sup>
12. In that context, the Council would like to inform the applicant that contrary to what he states, it is not because this type of documents does not fall within the scope of Article 9 of Regulation (EC) No 1049/2001 that their classification is irrelevant.
13. The Council also wishes to draw the applicant's attention to the fact that, contrary to what he appears to contend, the General Secretariat of the Council has not denied access to these documents on the basis of the fact that the documents were classified documents but, as abovementioned, on the basis of the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001.

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<sup>2</sup> Document 14204/17 (ref. 2017/0294 (COD))

<sup>3</sup> 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.

## **II. ASSESSMENT OF THE REQUEST UNDER REGULATION (EC) NO 1049/2001**

### **A. Document WK 11386/2017**

14. Document **WK 11386/2017** contains a presentation of the Commission on the negotiation mandate for the Nord Stream 2 pipeline given at the Energy Working Party meeting held on 12 October 2017. This presentation notably concerned the necessity of the mandate, the applicable procedure pursuant to Article 218 TFUE as well as the voting majority required.
15. Having thoroughly examined the content of the document and taking into account the state of play on the matter, the Council considers that full public access can be given to document WK 11386/2017.

### **B. Document 11297/17 RESTREINT UE/EU RESTRICTED**

16. Document **11297/17** 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 which contains a Steering note for the Working Party on Energy of 25 July 2017.
17. Having thoroughly examined the content of the document and taking into account the state of play on the matter, the Council considers that document 11297/17 can be declassified and made public.

**C. Documents covered by the exceptions provided by Article 4 of Regulation (EC) No 1049/2001**

- **Preliminary remarks**

18. At the outset, the Council notes that both the Treaty on European Union (Article 16(8)) and the Treaty on the Functioning of the European Union (Article 15(2) and (3)) make a distinction between legislative and non-legislative activities as regards the application of transparency rules, with particular emphasis on transparency in the context of legislative activities.
19. The requested documents were not drawn up in the context of legislative activities. Therefore the wider access which is also referred to in recital 6 of Regulation (EC) No 1049/2001 is not relevant as regards the request under examination.

- **Individual assessment of the requested documents**

**Document 12590/2017 RESTREINT UE/EU RESTRICTED**

20. As a general remark, the Council wishes to state that, according to the established case-law of the Court of Justice, 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.
21. On the one hand, *"the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest"*.<sup>4</sup>

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<sup>4</sup> Judgment of the Court of Justice of 1 February 2007, *Sison v. Council*, C-266/05 P paragraph 34, , *Besselink v. Council*, T-331/1, paragraph 32, *Jurašinović v. Council*, T-63/10, paragraph 32



22. 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>
23. Therefore, the Council enjoys a wide discretion in assessing the probable impact of the release of documents on international relations and on the economic and financial policy of the Union, 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 interests and granting access nonetheless.
24. 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 exceptions concerning international relations and the economic and financial policy of the Union, whose publication would undermine the public interest protected by them.
25. As stated above, document 12590/17 RESTREINT UE/EU RESTRICTED comprises an opinion of the Council's Legal Service 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.

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<sup>5</sup> Judgment of the Court of Justice of 1 February 2007, *Sison v. Council*, C-266/05 P, paragraph 46, *Besselink v. Council*, T-331/11, paragraph 44

26. The Council notes that the applicant does not contest in the confirmatory application the harm for the protected interests invoked by the General Secretariat in its reply refusing to disclose this document. Instead, the applicant only contends that disclosure could not be further detrimental because the content of the document, discussed in several articles, is already widely known. The Council points out that this consideration does not constitute a sufficient ground to conclude that this document was officially released by the Council. In fact, this document has not been released to the public in application of Regulation (EC) No 1049/2001 and any leak of its content was unlawful. Accordingly, the Council considers that such an unauthorised leak does not prevent the institution from processing applications for public access to documents, as provided for in Articles 7 and following of Regulation (EC) No 1049/2001 and in Annex II to the Council's Rules of Procedure, and should not prejudice this procedure.
27. The requested 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. It comments in detail on the context and content of the suggested agreement and reflects the content of the directives for the negotiations with the Russian Federation in that regard.
28. The Council considers that several parts of the requested document, if released, would reveal the EU's orientations and strategic objectives to be achieved in the future negotiations with the Russian Federation. Public access to the requested document would make known to everyone, including to the EU's negotiating partners, information regarding aims which the EU seeks to attain in the negotiations. Releasing this information to the public would weaken the EU's negotiating position and would impede the proper conduct of the negotiations. Such disclosure is also likely to damage the climate of trust necessary for the negotiations. In addition, the requested opinion examines several complex legal issues and disclosure of the relevant parts could negatively affect the conduct of the negotiations and the possibility to reach an agreement.
29. The Council would also like to stress that the negotiations in question are especially sensitive. They concern the particularly relevant area of energy supply with various implications for relations with third countries and will take place in a delicate political context. It is to be noted that several parts of the opinion contain considerations on the impact on transfer of energy sources required for the operation of the Union's economy.

30. In this context, the Council considers, in exercise of its wide discretion in the matter, that there is a reasonably foreseeable risk that full disclosure of the requested document could undermine the Union's international position in relation to third parties as well as its financial and economic policy. As a consequence, access to the requested document must be refused pursuant to the third and fourth indents of Article 4(1), (a) of Regulation (EC) No 1049/2001.
31. In addition, as mentioned above, the Council has not yet taken any decision concerning the recommendation suggested by the Commission. To reveal the content of the requested document at this stage would negatively affect the discussions within the Council and diminish the chances to reach an agreement with regard to the Commission's recommendation. Disclosure could also lead to undue external pressure on Council members affecting progress on this file. It must also be stressed that the decision-making process at stake is a complex one which has already caused significant controversy and has already been subject to intense external and media attention.
32. Disclosure of the document would therefore seriously undermine the Council's decision-making process. As a consequence, pursuant to Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001, access to the documents shall be refused for this reason as well.
33. As regards the interest protected under the second indent of Article 4(2) of Regulation (EC) No 1049/2001, the Council notes that the legal advice contained in the requested opinion touches upon issues (such as the allocation of competences between the Member States and the Union) that have a systematic nature and are of a broad scope, which go beyond the context of the decision-making process in question. As developed above, the legal advice also pertains to matters that are sensitive in the international context and which are crucial for the Council's decision-making role.

34. Moreover, the requested opinion is relevant for ongoing legal proceedings. In that regard, it is important to underline that arbitration proceedings brought by the Nord Stream 2 consortium against the European Union under the Energy Charter Treaty (ECT) are currently ongoing. More specifically, by a notice of arbitration of 26 September 2019, Nord Stream 2 AG alleges that the amended EU Gas Directive<sup>6</sup> and the EU actions in connection with that Directive breach EU obligations under the ECT. Disclosure of the content of the requested document could be detrimental to the Union's interests in those proceedings.
35. Litigation has also already been brought against the Council before the General Court of the European Union seeking the annulment of the Gas Directive (Cases T-526/19 and T - 530/2019). Several issues addressed in the Legal Service's opinion are relevant to the court proceedings. Disclosure of legal advice may therefore negatively affect the ability of the Council to defend the Directive on an equal footing with the other parties to the proceedings. It could in fact limit the margin of manoeuvre of the Legal Service in preparing the defence of the Council and therefore put it in a disadvantageous position as regards the other litigants, who would be aware of its internal thinking in the issues at stake. Full disclosure of the requested opinion would therefore manifestly run counter to the principle of equality of arms and of the right of defence.
36. In that regard, the Council also wishes to recall that case law has established a general presumption of non-disclosure of documents which have a relevant link with a specific ongoing judicial dispute in the light of the need to ensure that, throughout the court proceedings, the exchange of arguments by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity.<sup>7</sup> The Council considers that the general presumption of confidentiality applies to the legal advice contained in the requested opinion of its Legal Service.

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<sup>6</sup> Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (Text with EEA relevance.)

<sup>7</sup> See notably judgment of 21 September 2010, Sweden and Others v API and Commission, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 92-95 and judgment of 15 September 2016, Philip Morris Ltd v Commission, T-796/14, EU:T:2016:483, paragraphs 84-98.

37. In addition, the Council considers that disclosure of the requested opinion would compromise the interest of the institution in seeking legal advice and receiving frank, objective and comprehensive advice. 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 it could expose to external pressure the Legal Service, which in turn, could affect the way in which legal advice is drafted and hence prejudice the possibility to express views free from external influences.
38. The Council notes that its statement of reasons does not prevent the understanding of its decision and that it could not, in any case, further reveal the content of the document concerned, as this would negate the purpose of the exception relied on.
39. Under these circumstances, the Council concludes that full disclosure of the requested document would undermine the protection of legal advice and court proceedings pursuant to Article 4(2), second indent, of Regulation No 1049/2001.

- **Assessment of the public interest in disclosure**

40. As abovementioned, Article 4(1) of Regulation (EC) No 1049/2001 does not provide for a test of balancing the harm to the protected interest against the public's interest in disclosure. On the contrary, once the Council has come to the conclusion that release would indeed undermine the public interests protected pursuant to the third and fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, this conclusion is not conditioned by any obligation – or even possibility – to take into account "*an overriding public interest in disclosure*" as is the case for Article 4(2) and (3) of the Regulation.
41. As for the latter two grounds justifying its refusal to grant access to the requested document (protection of the decision-making procedure and protection of the interest in court proceedings) the Council reiterates that the requested document relates to a decision-making procedure that falls within the domain of non-legislative activities. In this particular domain, the principle of transparency which characterises the legislative activity of the institutions does not apply with the same intensity. In addition, the Council notes that the applicant has not set out considerations that could provide an appropriate basis for establishing that, in the present case, the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying the refusal to grant access, as developed in paragraphs 20 to 39 above.

42. In light of the above considerations, the Council has carefully balanced the need to ensure transparency against the need to protect the interests invoked. It has concluded, on account of the need of preserving the effectiveness of its decision-making process and protecting the Union's interests in the context of court proceedings as well as its interest in seeking and receiving legal advice, that no overriding public interest exists in the present case, which would outweigh the need to preserve the interests protected under Article 4(3) first subparagraph and Article 4(2), second indent of Regulation No 1049/2001.

**Documents WK 11382/2017 and WK 11656/2017**

43. Pursuant to Article 4 (5) of Regulation (EC) No 1049/2001, the Council has carried out further consultations on the possible disclosure of documents WK 11382/2017 and WK 11656/2017 which contain two Polish legal opinions on Nord Stream 2 and more specifically on the applicability of the EU Third Energy Package to the Nord Stream 2 Gas Pipeline.
44. The Polish authorities have asked the Council not to disclose these two documents as they consider that their disclosure would undermine the protection of court proceedings and legal advice pursuant to Article 4 (2) second indent of Regulation (EC) No 1049/2001.
45. In that regard the Polish authorities recalled that the Nord Stream 2 consortium has brought arbitration proceedings against the European Union under the Energy Charter Treaty challenging the EU gas link rules. Disclosure of the information contained in the requested documents could cause prejudice to the EU interest in these proceedings and would be detrimental to the EU and its Member States in the current context.
46. In addition, litigation has already been brought against the Council before the General Court of the European Union seeking the annulment of the Gas Directive (Cases T-526/19 and T-530/2019) by Nord Stream 2 AG and Nord Stream AG. Consequently, access to documents WK 11382/2017 and WK 11656/2017 has to be denied since their disclosure would undermine the protection of the pending court proceedings as it would reveal the legal opinion of a Member State on this issue.

47. The Council considers that the justification evoked by the Polish authorities is indeed valid. The Council reiterates in that regard its reasoning in paragraphs 34-36 of this reply that apply also as regards documents WK 11382/2017 and WK 11656/2017. As regards the existence of an overriding public interest that would justify disclosure, despite the risk that this would entail for the protection of court proceedings and legal advice, the Council refers to its reasoning in paragraphs 41 and 42 above.

48. The Council concludes that access to these two documents should consequently be refused on the ground of Article 4(2) second indent of Regulation (EC) No 1049/2001 (protection of court proceedings and legal advice).

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

49. The Council has thoroughly re-examined the requested documents in accordance with the provision on partial access laid down in Article 4(6) of Regulation (EC) No 1049/2001.

50. Following this examination, the Council confirms that no partial access to documents 12590/17, WK 11382/2017 and WK 11656/2017 is possible.

### **III. CONCLUSION**

51. In the light of the above considerations, the Council confirms that public access to documents 12590/17 RESTREINT UE/EU RESTRICTED, WK 11382/2017 and WK 11656/2017 is refused.

52. The Council has decided that documents WK 11386/2017 and 11297/17 can be made public. Document 11297/17 RESTREINT UE/EU RESTRICTED has consequently been declassified.

53. The Council notes that the positive decision regarding these documents is based on an individual analysis of their content and the specific circumstances of the present case. Under no circumstances does it constitute a precedent for the future, since each application shall be assessed and judged on its own merits, pursuant to the established practice of the Council.