

Report of the European Ombudsman's inspection of documents on The Council of the European Union's handling of a request for access to documents concerning a 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

Correspondence - 08/11/2019

Case 1611/2019/KR - **Opened on** 04/09/2019 - **Decision on** 27/03/2020 - **Institution concerned** Council of the European Union (No maladministration found) |

COMPLAINT : 1611/2019/KR

Case title : The Council of the European Union's handling of a request for access to documents concerning a 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

Date : Monday, 14 October 2019

Physical location

Justus Lipsius Building

10 FL 14

Rue de la Loi/Wetstraat 175 - 1048 Bruxelles/Brussel - Belgique/België

Present

From the General Secretariat of the Council of the EU
(GSC):



Head of the Transparency Service

Transparency officer

Energy policy administrator

Legal advisor

Legal advisor

European Ombudsman:

Head of Inquiries Unit 2

Case handler, Strategic Inquiries Unit

Purpose of the inspection of documents / meeting

To conduct an inspection of documents, as well as to clarify issues concerning this complaint.

Introduction and procedural information

The Ombudsman's inquiry team reviewed the documents provided and asked questions as regards the context of the complaint.

Information exchanged / documents inspected

The representatives of the GSC explained the general context of the requested documents.

They recalled that the confirmatory reply adopted by the Council presents a detailed statement of reasons on the basis of which the Council has refused access to the requested documents and briefly recalled the arguments for invoking the three applicable exceptions under Regulation 1049/2001 (namely protection of international relations, the decision-making process and the interest in court proceedings).

The representatives of the GSC stressed that the documents under inspection relate to a mandate that has not yet been adopted. Should the requested documents be made public, this could be detrimental to the position of the EU in the upcoming negotiations with Russia that



concern the area of energy supply, which is particularly relevant in the international context.

The representatives of the GSC underlined that certain of the risks invoked in the contested decision have already materialised. In that regard, they pointed out that arbitration proceedings were brought by the Nord Stream 2 consortium against the European Union under the Energy Charter Treaty (ECT) against the amended EU Gas Directive [1] and the EU actions in connection with that Directive. Litigation has also already been brought against the Council before the General Court of the European Union seeking the annulment of the Gas Directive. [Note: the Council supplied the Ombudsman with further detail on this matter, which it said is of a confidential nature. This information is included in the annex, which is marked confidential.]

The press statement issued by the European Commission on 9 June 2017 (*“ The Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2 ”*) was described as being of a general nature. The fact that this statement was issued, could not justify a (partial) release of the documents under inspection. Representatives of the GSC also said that the existence of a press release does not palliate the risk that the requested documents would be used against the interests of the Council in court proceedings.

As regards the pro-active disclosure of negotiation positions as regards some other international negotiations to which the Council and Commission have proceeded in the past, the GSC representatives stated that this is always subject to a case-by-case assessment. Such disclosure concerned notably trade negotiations and not the area of energy. The documents under inspection were assessed to be of a sensitive nature and could not be made directly accessible. Indeed, proactive disclosure may only be pursued if it is without prejudice to the exceptions provided by Article 4 of Regulation (EC) 1049/2001.

During the meeting, the Ombudsman's inquiry team reviewed copies 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’ (Ref.: 10249/17) and its Annex (Ref.: 10249/17 ADD1).

Both documents are classified and bear the security classification marking ‘RESTREINT UE/EU RESTRICTED’.

Brussels, 8/11/2019

Head of Inquiries Unit 2 Case handler, SIU



[1] [\[Link\]](#) 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.)