



Brussels, 8 December 2016  
(OR. en)

11735/1/16  
REV 1

INF 148  
API 88

**NOTE**

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From: General Secretariat of the Council  
To: Working Party on Information

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No. prev. doc.: 11734/16

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Subject: Public access to documents  
- Confirmatory application No 19/c/01/16

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Delegations will find enclosed the reply from the Council to confirmatory application No 19/c/01/16 as adopted by the Council on 8 December 2016 with The Netherlands abstaining and Finland and Sweden voting against.

The following statements were made:

**FI, SE:** "Finland and Sweden cannot concur with the reasoning of the draft reply, especially in light of the judgment in the Turco-case (C-39/05 P and C-52/05 P) and the Access Info -case (C-280/11 P) and taking into consideration the importance of openness in legislative procedures emphasized by the Lisbon Treaty."

**NL:** “The Netherlands cannot concur with the reasoning of the draft reply, especially in the light of the judgment in the Turco-case (C-39/05P and C-52/05P) and the Access Info case (C-280/11P) and taking into consideration the importance of openness in legislative procedures emphasized by the Lisbon Treaty. However, The Netherlands has taken notice of the fact that some of the documents relate to certain Member State (s) which cannot agree with granting public access, and that this assessment has been taken into consideration. “

**SI:** ”Slovenia can agree with the outcome proposed in the draft reply. However, Slovenia cannot fully agree with the proposed reasoning. Among other things Slovenia is not convinced that article 4(3) is being applied correctly, particularly as regards the reasoning in paragraph 11. ”

Delegations agreed to publish the result of the vote.

The annex is available in English only

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**REPLY ADOPTED BY THE COUNCIL ON 8 DECEMBER 2016  
TO CONFIRMATORY APPLICATION 19/c/01/16,  
made by email on 17 August 2016,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,  
for public access to documents relating to the Anti-Tax Avoidance Directive (ATAD)**

The Council has considered this 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 of 31.5.2001, p. 43) (hereafter "Regulation No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 6 July 2016 the applicant filed an initial application for access to *"All minutes, memoranda, written remarks, notes, records, transcripts, room documents, letters and other documents as defined in article 3(a) of Regulation 1049/2001, regarding the Council Directive laying down rules against tax avoidance practices (2016/0011 (CNS), COM(2016) 26) or any previous version of that directive, or any meeting between the Council and any Member State with respect to that directive, or any previous version. All room documents of the Working Party on Tax Questions regarding the Anti-Tax Avoidance Directive 2016/0011 (CNS), COM(2016) 26) or any previous version of that directive. All versions, including draft versions, of the Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (2016/0011 (CNS), COM(2016) 26) drafted by the Council or any of the Member States."*
2. On 28 July 2016, the General Secretariat replied to this application, identifying 47 documents, of which it sent 43, informing the applicant that for the remaining 4 documents, necessary consultations were still ongoing.

3. On 17 August 2016, the applicant filed a confirmatory application based on the General Secretariat's failure to reply to the initial application within the legal deadline as regards the four identified documents for which consultations were ongoing and further contending that other documents covered by the initial application had not been identified.

### **Unidentified documents**

4. The applicant contends that the General Secretariat has failed to identify numerous documents that in his opinion must exist. He sets out a detailed reasoning under point 2.2 of his confirmatory application. The Council wishes to reply to this as followed (numbering as in the confirmatory application):
  - (a)-(c) Many discussions in the Council's preparatory bodies are only oral and very informal. Comments from Member States are generally done orally during the meetings. However, some Member States send written comments to be circulated to the other delegations; they are then transformed into room documents. Therefore, the fact that the General Secretariat has identified 19 standard documents and 28 room documents for a negotiating process of less than six months has nothing surprising and certainly cannot be taken as an indication that the General Secretariat has failed to identify documents covered by the initial application and held by the Council. The Council confirms that there are indeed no unidentified (standard or room) documents.
  - (d) The legislative proposal was formally received by the Council on 28 January 2016, and the first discussion took place on 1 February 2016, i.e. on the second working day after reception. This is rather quick, and the Council therefore fails to see how it could be "remarkable" that there were no further documents drafted between those two dates. In any case, the Council confirms that there indeed was no further document after document 5639/16 (which was identified in the General Secretariat's initial reply) and before 1 February 2016.

- (e) The following remarks can be made as regards the list in annex 3 to the confirmatory application (numbering as in that annex):
- (1) Delegations shared their views orally at the Fiscal Attachés meeting concerned, and no concrete proposal was tabled by the Presidency. As to the Coreper meeting, the only record of that meeting held by the Council is document 8924/16; this is a public document.<sup>1</sup>
  - (3) Council deliberations on legislative proposals are public and the applicant can consult the video of the relevant part of the meeting on the Council's website<sup>2</sup>. The legislative parts of the minutes were published in document 9518/16 ADD 1, but this contains no substantial information on the questions raised by the applicant. Documents 9431/16 and 9432/16 which were submitted to ministers, as well as document 9520/16 which is a compilation of additional room documents #1 to #3 submitted to them, were duly identified and sent to the applicant in the initial phase.
  - (4) Room documents from individual delegations such as the one from Austria, which had been identified, are rather exceptional and requests and suggestions are made orally. No other room documents than the one identified exist on the matter.
- (12) This document was identified in the General Secretariat's reply as "WPTQ2504\_5 2016 INIT" (see below).
- (14)-(17) These discussions were oral and no room documents were tabled.

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<sup>1</sup> The parts concerning legislative matters were circulated as public in document 8924/16 ADD 1, but the complete document 8924/16 had also been made public already before the applicant's initial application.

<sup>2</sup> At the following address: <http://video.consilium.europa.eu/en/webcast/de6daeb5-2654-44bf-bc27-56addb13d6ad>

- (20) The room documents containing the draft Council statements were published in document 9520/16, already mentioned above. The Commission chose to not formally submit its prepared statement, which was, however contained in the last room document (#4) of the ECOFIN meeting, to which the applicant may have access as well. There are no documents on bilateral contacts, which were oral.
- (23) The questionnaire was the basis for structuring the debate at the meeting; it did not require written answers, and no such written answers were received.
- (24) This reference concerns the documents identified as WPTQ2504\_3 2016 REV1, WPTQ2504\_4 2016 INIT, WPTQ2504\_5 2016 INIT, WPTQ0405\_2 2016 INIT and WPTQ0405\_4 2016 INIT; in addition it concerns the initial version of the document identified as WPTQ2504\_3 2016 REV1 which was effectively subject to the ongoing consultations but the mention of which had been omitted from the General Secretariat's reply by clerical error.
- (27)-(29) Not all national parliaments have submitted subsidiarity and proportionality opinions. The ones from Sweden, Portugal and Malta were circulated via standard document at the Council and easily identified. However, upon verification it appears that the Council has also received such parliamentary opinions from the Czech Republic, Germany, Romania and France. The applicant will find these public documents enclosed.
- (31) No reports have been made for these meetings (cf. explanations above under "(a)-(c)"); the results are simply reflected in following draft texts, which have been identified. No notes have been established or are held by the Council.
- (39) Likewise, the Council neither has established nor holds notes on the Coreper meetings of 24 May and 15 June 2016; summary records are contained in documents 9833/16 and 10491/16, which are public.

- (f) It should be noted that the reply referred to by the applicant here was not sent by the Council, as erroneously contended, but by the Commission who obviously holds other documents not necessarily held by the Council.
  - (g) As mentioned, the Commission holds other documents than the Council in regard of ATAD.
  - (h) All documents that were shared with all delegations were in the form of either standard or room documents. It should be noted that many emails sent or received during a legislative procedure are of an ephemeral nature and do not necessarily require conservation. Accordingly, there have been emails exchanged in the course of the legislative process concerned, that were not kept on file and therefore are not held by the Council (especially emails sent from or received in individual mailboxes of staff members and not from or in the relevant functional mailbox). The Council has nevertheless thoroughly verified whether it holds any emails that can be considered covered by the confirmatory application. It has identified 27 such emails (see below).
5. In addition, as concerns room documents, these have in principle been identified in the initial phase. However, after careful verification, it appears that the General Secretariat has omitted to mention two further room documents (identified as WPTQ1803\_1 2016 INIT and WPTQ2504\_1 2016 INIT).

### Existing documents not yet released

6. Apart from the public documents mentioned in paragraph 4 above (8924/16, 9518/16 ADD 1 and the subsidiarity and proportionality opinions by the Czech, German, Romanian and French parliaments) which the applicant can obviously receive, it follows from the reply to the initial application and the explanations above, that the following documents effectively held by the Council are covered by the confirmatory application:

- WPTQ0604\_3 2016 INIT
- WPTQ2504\_3 2016 INIT
- WPTQ2504\_3 2016 REV1
- WPTQ0405\_4 2016 INIT
- WPTQ2504\_5 2016 INIT
- WPTQ1803\_1 2016 INIT
- WPTQ2504\_1 2016 INIT
- ECOFIN room doc. # 4 of 25 May 2016
- the following 27 emails:

	origin	destination	date	description
1.	IT	Presidency + DGG	19.04.16	drafting suggestions
2.	SI	DG G	11.07.16	agreed on the cor 1 version
3.	DE	DG G	19.04.16	more precise on lit. a) of Art. 8.2
4.	BE	Presidency + DGG	19.02.16	written BE comments
5.	DE	Presidency + DGG	15.06.16	Art. 8.2.a
6.	EE	Presidency + DGG	02.05.16	concern for article 5
7.	LU	Presidency + DGG	02.02.16	written comments
8.	MT	Presidency + DGG	19.02.16	analysis
9.	HU	Presidency + DGG	19.02.16	Questions and recommendations
10.	BE	DGG	15.06.16	BE proposal



11.	DE	DGG	22.02.16	DE suggestions
12.	HU	Presidency - DG G	19.04.16	HU suggestions
13.	SK	DG G	20.02.16	written comments
14.	IE	Presidency + DGG	19.02.16	comments
15.	PT	Presidency + DGG	19.02.16	PT technical comments
16.	FR	DG G	20.04.16	Draft room document #3 - 25.4.16
17.	GSC official	Presidency	24.05.16	Open Issues
18.	GSC official	Presidency	07.06.16	Next steps
19.	Presidency	DE + DGG	15.06.16	Draft definition of “substantive economic activity
20.	IE	DGG	20.04.16	UK suggestions ATAD Hybrids
21.	Presidency	SE+DGG	22.04.16	room doc SE
22.	MT	DGG	19.04.16	comments on the 4th compromise text
23.	ES	DGG	19.02.16	Comments
24.	UK	Presidency + DGG	19.02.16	Preliminary comments
25.	SE	Presidency + DGG	19.02.16	written comments
26.	FI	Presidency + DGG	19.02.16	written comments
27.	EE	Presidency + DGG	20.02.16	written comments

## **Documents that can be fully released**

7. The applicant may have access to ECOFIN room document # 4 of 25 May 2016 and to those identified above as WPTQ2504\_3 2016 INIT, WPTQ2504\_3 2016 REV1, WPTQ1803\_1 2016 INIT, and WPTQ2504\_1 2016 INIT.

## **Documents that can be partially released**

### *Data protection*

8. The applicant may also have access to 21 of the 27 emails mentioned above (i.e. excluding those numbered 1, 4, 10, 13, 14 and 24), with the exception of personal data contained therein. This personal data is necessary for the organisation of the work of the Council.
9. Data protection rules at EU level<sup>3</sup> provide that when the personal data collected is to be used for a different purpose, including disclosure to the public, a balance needs to be established between the public interest in having access to such data and the legitimate right of individuals to protect their personal data. In this regard, it should be noted that the identity of the individuals concerned – who are all staff members either of the institutions or national delegations acting under instructions from their hierarchy – are irrelevant to the public interest in being informed about legislative proceedings.
10. After carefully considering all the principles related to this application, on balance the Council has concluded that disclosure of the personal data contained in the emails would undermine the protection of privacy and the integrity of the identified individuals. As a consequence, it has to refuse access to the relevant parts of the emails pursuant to Article 4(1)(b) of Regulation No 1049/2001.

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<sup>3</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

*More restricted partial access*

11. More restricted partial access is possible for the emails numbered 1, 4, 10, 13, 14 and 24 above. The considerations concerning data protection set out in points 8 to 10 also apply to them, but some further parts need to be withheld as well.
12. The email of 20 February 2016 from the Slovak delegation to the GSC and the Presidency (numbered 13 above) contains, among other things, comments on hybrid mismatches and the switch-over clause.
13. These comments need to be withheld; they concern issues that still need to be discussed within the Council and its preparatory bodies.
14. Hybrid mismatches involving third countries have been excluded from ATAD. The Council has made a statement (annexed to document 10672/16) inviting the Commission to submit a new legislative proposal and this has now been submitted (interinstitutional file 2016/0339(CNS)). Likewise, there is a new proposal touching on the switch-over clause (interinstitutional file 2016/0337(CNS)). The comments by Slovakia on these difficult issues therefore remain highly relevant for these new legislative procedures, and the difficulty of the issues – as underlined by the fact that they have not been settled by ATAD – combined with the necessity of unanimity and the particular content of the document lead the Council to the conclusion that release would seriously undermine these decision-making processes.
15. On balance, the Council has not been able to identify an overriding public interest justifying full release of this document in spite of the considerations set out above, even when taking into account the legislative nature of the discussions.

16. At the same time, discussions on the transposition of ATAD are underway in Slovakia, and the directive leaves considerable margins for Member States to adopt stricter domestic rules than the ones imposed by the directive itself, so that the issues discussed by the Slovak delegation are being discussed again on the domestic level. The views and reflections in the attachment are neither exhaustive nor final and do not necessarily reflect the final position of the Slovak authorities. The disclosure of the comments is likely to put into question the final choices made by Slovakia and would create unnecessary uncertainty on the intentions of Slovak authorities. This would inevitably have an impact on the expectations, behaviours and decisions of private undertakings as well as other economic operators and due to this also more generally on Slovak financial and economic policies. Disclosure of the attachment would thus undermine the protection of the financial, monetary or economic policy of a Member State.
17. Therefore the Council has to refuse access to the relevant parts of this document pursuant to Article 4(1)(a), fourth indent, and to Article 4(3), second subparagraph, of Regulation No 1049/2001.
18. The email of 19 April 2016 from the Italian delegation to the Presidency and the GSC (numbered 1 above), the email of 19 February 2016 from the Belgian delegation to the GSC and the Presidency (numbered 4 above), the email of 15 June 2016 from the Belgian delegation to the GSC (numbered 10 above), the email of 19 February 2016 from the Irish delegation to the GSC and the Presidency (numbered 14 above) and the email of 19 February 2016 from the UK delegation to the Presidency and the GSC (numbered 24 above), which contain attachments with comments from those delegations,. The emails as such can be released, with the exception of personal data (for the reasons set out in points 8 to 10), but access to the attachments needs to be refused.

19. Indeed, discussions on the transposition of ATAD are underway in those countries, and the directive leaves considerable margins for Member States to adopt stricter domestic rules than the ones imposed by the directive itself. In this context, the issues discussed in the attachment concerned are being discussed again on the domestic level. The views and reflections in the attachment are neither exhaustive nor final and do not necessarily reflect the final position of the national authorities concerned. Therefore, disclosure of the attachment is likely to put into question the choices that these countries will eventually make in terms of transposing ATAD. The disclosure of the attachment would create unnecessary uncertainty on the intentions of national authorities. This would inevitably have an impact on the expectations, behaviours and decisions of private undertakings as well as other economic operators and due to this also more generally on financial and economic policies of the countries concerned. Disclosure of the attachment would thus undermine the protection of the financial, monetary or economic policy of Member States, as provided for in Article 4(1)(a), fourth indent, of Regulation No 1049/2001. Furthermore, it cannot be ignored that delegations always act with a double hat, both as members of the Council and as national authorities, making it difficult to disconnect the decision-making process until the adoption of a directive on the one hand, and after that – in the framework of transposition – on the other hand. Therefore, problems at this stage also have an important bearing on the Council's decision-making process, as contemplated by Article 4(3), second subparagraph, of the same Regulation, and on balance, the Council has not been able to identify an overriding public interest justifying full release of these documents in spite of the considerations set out above, even when taking into account the legislative nature of the discussions.
20. Each of the attached documents being an inseparable whole, it is not possible either to give access to certain parts of them.

### **Documents that still need to be fully withheld**

21. Room document # 3 of the meeting of 6 April 2016 of the Working Party on Tax Questions – Direct Taxation (identified above as WPTQ0604\_3 2016 INIT) contains comments from the Spanish delegation on Article 4(2) of the draft ATAD text.

22. These comments are related to Article 14 of the Spanish Act 27/2014 on Corporation Tax concerning provisions and other expenses, and the interaction between that national text and the draft ATAD text is analysed. This interaction raises difficult issues regarding the constitutional principle of equality before the law. These issues are currently the subject of 30 judicial proceedings before the Spanish Central Economic Administrative Court (Tribunal Económico-Administrativo Central) which has jurisdiction over this subject matter, as well as 135 appeals to the Supreme Court (Audiencia Nacional y Tribunal Supremo). Public release of the Spanish government's considerations voiced during the ATAD negotiations at this stage could affect the serenity of the ongoing judicial proceedings and undermine the equality of arms of the litigants in those proceedings.
23. On balance, the Council has not been able to identify an overriding public interest justifying release of this document in spite of the considerations set out above, even when taking into account the legislative nature of the discussions.
24. Therefore the Council has to refuse access to this document pursuant to Article 4(2), second indent, of Regulation No 1049/2001.
25. Room document # 4 of the meeting of 4 May 2016 of the Working Party on Tax Questions – Direct Taxation (identified above as WPTQ0405\_4 2016 INIT) contains comments by the UK delegation concerning controlled foreign companies (CFCs).
26. These comments are linked to the existing legal rules on CFCs in the UK. They concern a sensitive and legally complex issue and their release would considerably complicate the ongoing transposition of the directive, as the latter leaves the Member States considerable margins of choice. The views and reflections in this room document are neither exhaustive nor final and do not necessarily reflect the final position of UK authorities. The disclosure of the comments is likely to put into question the final choices made by the UK and would create unnecessary uncertainty on the intentions of British authorities. This would inevitably have an impact on the expectations, behaviours and decisions of private undertakings as well as other economic operators and due to this also more generally on the UK's financial and economic policies. Disclosure of the document would thus undermine the protection of the financial, monetary or economic policy of a Member State. Given the complexity of the legislation concerned, disclosure would even affect application of the national legal framework after transposition of ATAD, resulting in an important impact on the UK's economic and financial policy.

27. Therefore the Council has refused access to this document pursuant to Article 4(1)(a), fourth indent, of Regulation No 1049/2001 as well as – for the reasons set out above in point 19 – to Article 4(3), second subparagraph, of the same Regulation.
  28. Room document # 5 of the meeting of 25 April 2016 of the Working Party on Tax Questions – Direct Taxation (identified above as WPTQ2504\_5 2016 INIT) contains comments by the UK delegation concerning hybrid mismatches.
  29. The reasons given above in points 13 to 15 as regards interinstitutional file 2016/0339(CNS) apply to the comments made by the UK in this document.
  30. Therefore the Council has to confirm the refusal of access to this document pursuant to Article 4(3), second subparagraph, of Regulation No 1049/2001.
  31. The exceptions set out above apply to all parts of these room documents, and no partial access, as provided for in Article 4(6) of Regulation No 1049/2001 therefore can be given either.
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