



Council of the
European Union

Brussels, 15 February 2017
(OR. en)

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NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 02/c/01/17

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 21 December 2016 and registered the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 9 February 2017 ([Annex 2](#));
- confirmatory application dated 10 February 2017 and registered the same day ([Annex 3](#))

[E-mail message sent to access@consilium.europa.eu on 21 December 2016- 11:43 using the electronic form available in the Register application]

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of: **DELETED**

Address: **DELETED**

Requested document(s): I kindly request you to provide full access to all room documents of the code (sub)group(s) for the year 2016, excluding the docs to which full access has already been granted by you in your letter of 05-10-2016 (Ref. 16/1773-ws/mw). According to the recent code group report of nov 28 2016 various topics have now been closed (inbound profit transfers, rulings policy, Gibraltar tax measure, etc) as a result of which full access to most of the topics must be provided. Thank you very much for processing this information request.



Council of the European Union

General Secretariat

Directorate-General Communication and Information

Knowledge Management

Transparency

Head of Unit

Brussels, 9 February 2017

DELETED

Email: **DELETED**

Ref. 16/2469-mw

Request made on: 21.12.2016

Deadline extension: 19.01.2017

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.¹

Please find attached the following documents:

| | |
|---|--|
| CoC3009_1 2016 INIT | CoC1910_2 2016 "after meeting version" |
| CoC3009_2 2016 INIT | CoC1910_3 2016 INIT |
| CoC3009_2 2016 REV1 | CoC1910_4 2016 INIT |
| CoC3009_2 2016 "after meeting version" | CoC2411_1 2016 INIT |
| CoC1310_1 2016 INIT | CoC2411_2 2016 INIT |
| CoC1310_1 2016 REV1 | WK 919/2016 INIT |
| CoC1310_1 2016 REV1 "after meeting version" | WK 919/2016 REV1 |
| CoC1910_2 2016 INIT | WK 920/2016 INIT |
| CoC1910_2 2016 REV1 | |

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

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

CoC1310_2 2016 INIT
CoC1910_1 2016 INIT
CoC1910_5 2016 INIT
WK 1120/2016 INIT
WK 1171/2016 INIT
WK 1171/2016 ADD1

Document CoC1310_2 2016 INIT is room document # 2 of the Code of Conduct subgroup on third and fourth criteria meeting of 13 October 2016 concerning the *Clarification of the third and fourth criteria of the Code* and originates from the Commission.

Document CoC1910_1 2016 INIT is room document # 1 of the Code of Conduct group meeting of 19 October 2016 concerning the *Work Package 2015 - Taxation of outbound payments* and originates from the Commission.

Document CoC1910_5 2016 INIT is room document # 5 of the Code of Conduct group meeting of 19 October 2016 concerning the *Member States' notifications on rollback regarding existing patent boxes* and originates from the Commission.

Document WK 1120/2016 INIT is working paper of the Code of Conduct group meeting of 24 November 2016 concerning the *Standstill - Croatia, description and comments* and originates from the Commission.

Document WK 1171/2016 INIT is working paper of the Code of Conduct group meeting of 24 November 2016 concerning the *State of Play and Way Forward for IP Regimes* and originates from the Commission.

Document WK 1171/2016 ADD1 is working paper of the Code of Conduct group meeting of 24 November 2016 concerning the *Rollback IP regimes overview* and originates from the Commission.

All of these documents are fairly recent and concern difficult issues that are still debated within the Code of Conduct group. As they reflect the possibility of changes in tax legislation that have not yet been decided, let alone implemented, their (full) release is likely to trigger unwarranted and undesirable behaviour by economic operators which would interfere with Member States' fiscal policy. Release would also affect the decision-making process, since the sensitive issues concerned continue to be discussed and any disclosure would seriously hamper the efforts to find solutions for them; in this regard, the General Secretariat has not identified any overriding public interest in release of these documents.

(Full) access to them must therefore be refused.²

We have also looked into the possibility of releasing parts of the documents.³ However, as the exceptions to the right of access apply to their entire content, the General Secretariat is also unable to give partial access.

Access to the following documents cannot be given for the reasons set out below:

| | | |
|---------------------|---------------------|-------------------|
| CoC1409_1 2016 INIT | CoC1910_6 2016 INIT | WK 1367/2016 INIT |
| CoC1409_2 2016 INIT | CoC1910_7 2016 INIT | WK 1368/2016 INIT |
| CoC0610_1 2016 INIT | WK 865/2016 INIT | WK 1369/2016 INIT |
| CoC0610_2 2016 INIT | WK 868/2016 INIT | WK 1821/2016 INIT |
| CoC1410_1 2016 INIT | WK 1172/2016 INIT | WK 1831/2016 INIT |
| CoC1410_2 2016 INIT | WK 1172/2016 REV1 | WK 2000/2016 INIT |
| CoC1410_3 2016 INIT | WK 1173/2016 INIT | WK 2001/2016 INIT |

Documents CoC1409_1 2016 INIT and CoC1409_2 2016 INIT are room documents 1 and 2 of Code of Conduct group subgroup on third countries meeting of 14.09.2016.

Documents CoC0610_1 2016 INIT and CoC0610_2 2016 INIT are room documents 1 and 2 of Code of Conduct group subgroup on third countries meeting of 06.10.2016.

Documents CoC1410_1 2016 INIT, CoC1410_2 2016 INIT and CoC1410_3 2016 INIT are room documents 1, 2 and 3 of Code of Conduct group subgroup on third countries meeting of 14.10.2016.

Documents CoC1910_6 2016 INIT and CoC1910_7 2016 INIT are room documents 6 and 7 of Code of Conduct group subgroup on third countries meeting of 19.10.2016.

Documents WK 865/2016 INIT and WK 868/2016 INIT are working papers of Code of Conduct group subgroup on third countries meeting of 17.11.2016.

Documents WK 1172/2016 INIT, WK 1172/2016 REV1 (revised version of that document) and WK 1173/2016 INIT are working papers of Code of Conduct group meeting of 24.11.2016.

Documents WK 1367/2016 INIT, WK 1368/2016 INIT and WK 1369/2016 INIT are working papers of Code of Conduct group subgroup on third countries meeting of 30.11.2016.

Documents WK 1821/2016 INIT, WK 1831/2016 INIT, WK 2000/2016 INIT and WK 2001/2016 INIT are working papers of Code of Conduct group subgroup on third countries meeting of 16.12.2016.

² Article 4(1)(a), fourth indent, and Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

³ Article 4(6) of Regulation (EC) No 1049/2001.

These documents discuss issues concerning ways to draft a list of non-cooperative jurisdictions for tax purposes. Delegations are only at the beginning of these discussions which are thought to continue at the least until the end of 2017. This is a very delicate issue touching on relations with third countries, and release of the information contained in the documents would both severely affect the EU's position on the international level and considerably undermine internal discussions, putting in jeopardy a successful outcome.

Full disclosure of the documents would therefore seriously undermine the protection of the public interest as regards international relations as well as the decision-making process. As a consequence, the General Secretariat has to refuse full access to these documents.⁴

We have also looked into the possibility of releasing parts of the documents.⁵ However, as the exceptions to the right of access apply to their entire content, the General Secretariat is also unable to give partial access.

Finally, the following documents were identified, but could not be fully assessed within the required timeframe:

CoC2109_1 2016 INIT, CoC2109_2 2016 INIT, CoC2109_3 2016 INIT, CoC2109_4 2016 INIT, CoC2109_5 2016 INIT and CoC2109_6 2016 INIT of Code of Conduct group meeting of 21.09.2016 and also document WK 1078/2016 of Code of Conduct group meeting of 24.11.2016.

It should be noted that the present decision does not preclude you from introducing initial request for these documents.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).⁶

Yours sincerely,

Fernando PAULINO PEREIRA

Enclosures

⁴ Article 4(1)(a), third indent, and – in the absence of any evidence of an overriding public interest in release – Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

⁵ Article 4(6) of Regulation (EC) No 1049/2001.

⁶ Article 7(2) of Regulation (EC) No 1049/2001.

Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

[E-mail message sent to access@consilium.europa.eu on 10 February 2017 - 10:58]

From: **DELETED**

Sent: Friday, February 10, 2017 10:58 AM

To: SECRETARIAT DGF Access

Subject: RE: Ref. 16/2469-ws/mw

Please find attached my confirmatory application.

Kind regards,

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Council of the European Union
Jakob Thomsen
Transparency
Rue de la Loi/Wetstraat 175
1048 Bruxelles/Brussel
Belgium

Re: Confirmatory application No 16/2469-mw

Dear Mr Thomsen,

1. In taking its decisions the Council invoked the various material grounds for exception laid down in Article 4(1) to (3) of the Transparency Regulation.
2. A general objection to the way in which the Council has used those material grounds for exception is that in respect of a large number of documents it refers to such grounds without clearly stating that each document has been subject to a specific examination, although it is required to do so under established case-law.
3. Furthermore, the Council has in essence applied the material grounds for exception, two in particular, incorrectly. The exceptions in question are the fourth indent of Article 4(1)(a) and the first subparagraph of Article 4(3) of the Transparency Regulation on (i) protecting the public interest in relation to financial, monetary or economic policy and (ii) avoiding undermining the institution's decision-making process in relation to decisions that have yet to be taken.

'Protection of the public interest as regards financial, monetary or economic policy'

4. In taking its decisions the Council appears to invoke the material grounds for exception concerning the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State, as referred to in Article 4(1)(a), fourth indent, of the Transparency Regulation. As regards the way in which it did that, I have the following objection.

5. The Council did not properly assess the applicability of the material ground for exception and in any case did not provide appropriate justification. With the documents in question, it is not clear, at least not immediately, how disclosure would damage the public interest as regards financial, monetary or economic policy. Hence the ground for refusal cited here cannot be invoked without justification which is, however, lacking.
6. The material grounds for exception must be strictly interpreted and applied. As regards the material ground for exclusion here, the significance of this principle under established case-law is that it applies only if the risk of the interest in question being undermined is reasonably foreseeable. In other words, the risk should be real and not purely hypothetical. The fact that a document concerns an interest protected by an exception is therefore not enough in itself to apply this ground for exception.
7. While the room documents which I requested do touch on the financial, and possibly also the monetary, policy of the European Union and the Member States, it is unclear how disclosure of the documents in question might do real damage to that interest. I am therefore of the opinion that the Council has applied the material ground for exception too generally and thus wrongly. In any event I find the justification given completely inadequate.

'Protection of the decision-making process'

8. In its decision the Council appears to invoke the material ground for exception regarding the protection of the decision-making process in respect of documents relating to decisions not yet taken, as referred to in Article 4(3), first paragraph, of the Transparency Regulation. (The second paragraph of this article does not seem to have been invoked by the Council.) I have two objections to the way in which the Council deals with this material ground for exception.
9. Firstly, the Council uses the wrong criterion. Pursuant to the first paragraph of Article 4(3) of the Transparency Regulation, the disclosure of documents is to be refused if it would seriously undermine the decision-making process in respect of decisions not yet taken. However, according to the reasons it gave, instead of checking whether (how) this was the case, the Council simply applied the material ground for exception. To summarise the Council's argument, the documents in question concern thorny tax issues and contain statements by the participants in the discussions as well as evaluations of tax measures. This is not an argument that can be used to justify the existence of a serious obstacle, but is rather a categorical exclusion of documents. The Transparency Regulation makes no provision for this, nor can it be regarded as containing one.

10. Secondly, the Council has not given a single reason to underpin the existence of a serious obstacle to the decision-making process. The general argument that the participants in the discussions must be able to count on confidentiality falls short, if only because the question of whether the obstacle to the decision-making process can be described as serious cannot be seen as separate from the question of whether a public interest calls for transparency and to what extent. In this regard, the fact that the decisions of the Code of Conduct Group are 'soft law' (which will or may also culminate in 'hard law' in relation to a number of issues) cannot be overlooked. Furthermore, the Code of Conduct Group's area of activity - the prevention of harmful tax competition between EU Member States - is a topic that has for some time occupied a prominent place in public debate. On this subject I believe I need merely to refer to the so-called LuxLeaks scandal and the brouhaha surrounding the tax rulings concerning Starbucks and Amazon, to name but two.

Comments concerning individual documents

11. Access is refused to '*Document CoC1310_2 2016 INIT [which] is room document # 2 of the Code of Conduct subgroup on third and fourth criteria meeting of 13 October 2016 concerning the Clarification of the third and fourth criteria of the Code and originates from the Commission.*' This concerns clarification of two criteria of the Code of Conduct. Similar documents on the same subject were released by the Council in its decision. No explanation is given for this unequal treatment, however.
12. Access is refused to '*Document CoC1910_1 2016 INIT [which] is room document # 1 of the Code of Conduct group meeting of 19 October 2016 concerning the Work Package 2015 - Taxation of outbound payments and originates from the Commission.*' This concerns the issue of outgoing interest and royalty payments. Similar documents on the same subject were released by the Council in previous decisions. Those documents were drawn up in 2009 and 2010.

13. Access is refused to 'Documents CoC1409_1 2016 INIT and CoC1409_2 2016 INIT [which] are room documents 1 and 2 of Code of Conduct group subgroup on third countries meeting of 14.09.2016. Documents CoC0610_1 2016 INIT and CoC0610_2 2016 INIT [which] are room documents 1 and 2 of Code of Conduct group subgroup on third countries meeting of 06.10.2016. Documents CoC1410_1 2016 INIT, CoC1410_2 2016 INIT and CoC1410_3 2016 INIT [which] are room documents 1, 2 and 3 of Code of Conduct group subgroup on third countries meeting of 14.10.2016. Documents CoC1910_6 2016 INIT and CoC1910_7 2016 INIT [which] are room documents 6 and 7 of Code of Conduct group subgroup on third countries meeting of 19.10.2016. Documents WK 865/2016 INIT and WK 868/2016 INIT [which] are working papers of Code of Conduct group subgroup on third countries meeting of 17.11.2016. Documents WK 1172/2016 INIT, WK 1172/2016 REV1 (revised version of that document) and WK 1173/2016 INIT [which] are working papers of Code of Conduct group meeting of 24.11.2016. Documents WK 1367/2016 INIT, WK 1368/2016 INIT and WK 1369/2016 INIT [which] are working papers of Code of Conduct group subgroup on third countries meeting of 30.11.2016. Documents WK 1821/2016 INIT, WK 1831/2016 INIT, WK 2000/2016 INIT and WK 2001/2016 INIT [which] are working papers of Code of Conduct group subgroup on third countries meeting of 16.12.2016.' These concern the establishment of a European blacklist of tax havens and agreement on countermeasures against those third countries. It is unclear why access to these documents must be completely refused given that the European Commission has since already provided the general public with exhaustive information on that subject in press releases and media coverage. As stated above, the categorical refusal of access to documents contravenes the EU's Transparency Regulation.

I would be grateful if you could send me confirmation that this confirmatory application has been registered.

(Complimentary close).

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