



Council of the
European Union

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Eingelangt am 20/04/18

Brussels, 20 April 2018
(OR. en)

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INF 51
API 37

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 08/c/01/18

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 12 February 2018 and registered on 13 February ([Annex 1](#));
- reply from the General Secretariat of the Council dated 21 March 2018 ([Annex 2](#));
- confirmatory application dated 16 April 2018 and registered on 17 April 2018 ([Annex 3](#)).

[E-mail message sent to access@consilium.europa.eu on 12 February 2018 - 19:22 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of: **DELETED**

Address: **DELETED**

Telephone:

Mobile: **DELETED**

Fax:

Requested document(s):

The documents are the pleadings of the parties and interveners in case C-209/13¹.

List of documents requested:

- pleadings of the Council of the European Union as defendant
- pleadings of the United Kingdom of Great Britain and Northern Ireland
- pleadings of the Kingdom of Belgium as intervener supporting the Council of the European Union
- pleadings of the Federal Republic of Germany as intervener supporting the Council of the European Union
- pleadings of the French Republic as intervener supporting the Council of the European Union
- pleadings of the Portuguese Republic as intervener supporting the Council of the European Union
- pleadings of the European Parliament as intervener supporting the Council of the European Union
- pleadings of the European Commission as intervener supporting the Council of the European Union

¹ The applicant has later clarified that the case reference should read "C-209/13".

In the event that the documents contain personal data of the individuals concerned (particularly signatures), I waive my right to access such information and am willing for it to be removed in the interests of a rapid response.

Reasons

The request is based on Art. 15(3) TFEU and the specifying provision in Art. 2 of Reg. (EC) No 1049/2001. The requested pleadings are indeed 'documents' within the meaning of these provisions (Art. 3(a) of Reg. (EC) No 1049/2001 and concern a matter relating to the area of activity of the Union; some of them were drawn up by the Council itself (Council's pleadings as defendant). Moreover, insofar as the documents originated in the Member States or other Union institutions, and were addressed to the European Court of Justice and only transmitted in copy to the Council, they have however been "received by it" within the meaning of Art. 2(3) of Reg. (EC) No 1049/2001, and are thus subject to the right of access (see in this regard ECJ (Breyer), Case C-213/15 P, ECLI:EU:C:2017:563, paragraphs 44 and 46).

Furthermore, these pleadings concern a case that has been settled by judgment of 30 April 2014 and they are therefore no longer capable of affecting the judicial activity of the Court (see ECJ (API), C-514/0 P and others, ECLI:EU:C:2010:541, paragraph 131).

Please preferably provide the documents in an electronic format, pursuant to the third alternative of Art. 10(1) of Reg. (EC) No 1049/2001.

1st preferred linguistic version:

2nd preferred linguistic version:



Council of the European Union
General Secretariat

Directorate-General Communication and Information
Knowledge Management
Transparency
Head of Unit

Brussels, 21 March 2018

DELETED
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Ref. 18/0284-em/ns

Request made on: 12.02.2018
Registered on: 13.02.2018
Deadline extension: 06.03.2018

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.²

Please find attached the documents requested, but omitting the signatures in the case of the Commission (as per your application) and with the exception of the Council's statement of defence and rejoinder in the case in question (C-209/13 United Kingdom of Great Britain and Northern Ireland v Council of the European Union).

You will also find attached a partially accessible version of the Council's statement of defence.³ However, I regret to have to inform you that, for the reasons set out below, full access to this document as well as access to the Council's rejoinder in the same case cannot be granted.

² The General Secretariat of the Council has examined your request on the basis of 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).

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

These two documents comprise the Council's legal argument against the pleas brought by the applicant. The case to which the pleadings relate has been decided by the Court with its judgment of 30 April 2014 which is final. Consequently, proceedings are no longer pending, but the legal information contained in the documents in question relates to a decision-making process that is still ongoing. The issues covered by the documents in question are of a particularly sensitive nature, since the question of enhanced cooperation on a financial transaction tax is controversial. The mere fact that Decision 2013/52/EU of 22 January 2013 authorising such cooperation has been contested before the Union courts highlights the sensitivity of the questions and represents a risk of litigation which is foreseeable and by no means purely hypothetical.

Disclosure of these documents would therefore undermine the protection of legal advice. Disclosure of the legal information could affect the ability of the Legal Service to effectively defend the Council before the Union courts, notably by undermining the equal footing between the parties by revealing details of the legal advice concerning the proceedings which was utilised by the Council. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences.

Having examined the context in which the documents were drafted and the current state of play on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest that would justify their full disclosure.

As a consequence, the General Secretariat has to refuse access to these documents at this stage.⁴

We have also looked into the possibility of releasing parts of the documents.⁵ As stated above, such partial disclosure is possible for the statement of defence. However, as the information contained in the rejoinder forms an inseparable whole, the General Secretariat is unable to give partial access to that document.

⁴ Article 4(2), second indent, of Regulation (EC) No 1049/2001.

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

As requested, you will find attached an English version of the documents released. You will see that some of these documents are marked as being translations. These translations into the language of the proceedings were prepared by the Court, and consequently the parties to the proceedings can take no responsibility for them.

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

Yours sincerely,

Sally BLISS

⁶ Article 7(2) of Regulation (EC) No 1049/2001.
Council documents on confirmatory applications are made available to the public. According 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 16 April 2018 - 18:56]

From: **DELETED**

Sent: Monday, April 16, 2018 18:56

To: SECRETARIAT DGF Access <Access@consilium.europa.eu>

Subject: Ref. 18/0284-ws/mf - RE: Electronic Request for Access

Confirmatory application for access to documents

Dear Sir/Madam,

Further to my application for access to documents held by the Council of the European Union (most recent correspondence ref. 18/0284-em/ns), I hereby make a **confirmatory application** in accordance with Article 7(2) ATD Regulation.

This application relates to all the documents to which access was not granted, or granted only in part, by correspondence dated 21 March 2018. These are pleadings of the different parties in Case C-209/13, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*.

- The Council's statement of defence in the case
- The Council's rejoinder in the case

As correctly set out in the letter to me dated 21 March 2018, these documents relate to legal proceedings which concluded nearly four years ago with the final judgement of 30 April 2014. Furthermore, since then there have been no further disputes in connection with the subject matter of the case (financial transaction tax).

In joined cases C-514/07 P, C-528/07 P and C-532/07 P, *API* (in particular paragraphs 72 et seq and 130 et seq), the Court of Justice of the European Union set out strict criteria for refusing applications for access to documents in the case of pleadings by parties in legal disputes which are already closed. In the case in question, it was a matter of the risk of undermining other proceedings which were connected to the original proceedings and were *still pending*.

The criteria must therefore be even stricter when, as in this case, no further proceedings are pending. The argument that it is a question of 'sensitive issues' could be used in almost any area of law and therefore does not stand up. In any case, it is ultimately a matter of the risk of undermining *hypothetical* proceedings. The need to protect such proceedings cannot outweigh the public – and, in this case, scientific – interest in access to the documents in question.

In addition, there have been no reliable indications recently that the probability of further proceedings on the matter is higher than average. Not only was the case for which the requested documents were drawn up closed nearly four years ago, but the implementation of the contested enhanced cooperation on a financial transaction tax in the coming years is highly unlikely, given the opposition of the French president (see, for example, <https://www.euractiv.de/section/finanzdienstleistungen/news/finanztransaktionssteuer-auf-eis-gelegt-2/>). This reduces the likelihood of a dispute on the matter even further.

In these circumstances, I hope that a positive decision on my application will be taken swiftly.

(Complimentary close)

DELETED
