



Council of the
European Union

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Brussels, 28 November 2017
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API 143

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 29/c/02/17

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 8 November 2017 and registered on the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 23 November 2017 ([Annex 2](#));
- confirmatory application dated 23 November 2017 and registered the same day ([Annex 3](#)).

[E-mail message sent to access@consilium.europa.eu on 8 November 2017 - 15:52]

From: **DELETED**

Sent: Wednesday, November 08, 2017 3:52 PM

To: SECRETARIAT DGF Access

Subject: RE: Ref. 17/1662 and 17/1778-mw

On 25 August you provided me with several documents on the issue of ‘outbound profit transfers’ and ‘outbound payments’. These documents – to which full access was provided – were originated from the Council, Chair of the Code Group and individual Member States. I would kindly ask you to also provide me with the documents on this topic related to the period 2016-2017 with origin “European Commission” (to the extend not attached above). Please be informed that the Commission in the past – most of the times – provided full access to these documents. For your information I have attached various documents on this topic to which full access was provided in the past. I would kindly ask you to take this into account when assessing my information request regarding the remaining documents on this topic to which full access is not yet provided.

Thank you very much for your assistance.

Kind regards,

DELETED



Council of the European Union

General Secretariat

Directorate-General Communication and Information

Knowledge Management

Transparency

Head of Unit

Brussels, 23 November 2017

DELETED

Ref. 17/2315-mw

Request made on: 08.11.2017

Dear **DELETED**,

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

We have identified the following documents concerning the issue of 'outbound profit transfers' and 'outbound payments' related to the period 2016-2017 with origin "European Commission" and held by the Council:

- Room document # 1 of 12.04.2016
- Room document # 5 of 20.07.2016
- Room document # 4 of 21.09.2016
- Room document # 1 of 19.10.2016

Please note that we have not found any other room document originated from the Commission concerning this issue for 2016-2017.

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).

It appears from the documents that you sent in attachment to your application that you have already received room document # 1 of 12.04.2016 and room document # 5 of 20.07.2016.

On the other hand, partial access has been granted to room document # 4 of 21.09.2016 and room document # 1 of 19.10.2016 (see our letter dated 26.09.2016, ref. 17/1777).

We have reassessed, in full consideration of the principle of transparency underlying Regulation No 1049/2001 and in the light of your comments, whether wider access can be granted to the two documents.

In particular we have consulted the Commission on these documents emanating from its services.

The documents outline possible solutions to tax avoidance issues arising through outbound payments.

The discussions are still ongoing and, in that context, (full) release of the requested documents would be premature, preventing proper discussion of the issues at stake.

The General Secretariat considers that (full) release of these documents are likely to trigger unwarranted and undesirable behaviour by economic operators which would interfere with Member States' fiscal policy.

(Full) Release would also affect the decision-making process, since the sensitive issues concerned continue to be discussed and any (full) disclosure would seriously hamper the efforts to find solutions for it. In this regard, we have not identified any overriding public interest in (full) release of these documents.

Therefore, the General Secretariat must refuse (full) access to these documents.²

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).³

Yours sincerely,

Ramón CHISMOL IBÁÑEZ

Enclosures

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

³ 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 23 November 2017 - 13:27]

From: **DELETED**

Sent: Thursday, November 23, 2017 1:27 PM

To: SECRETARIAT DGF Access

Subject: confirmatory application

Please find attached my confirmatory application.

Kind regards,

DELETED

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Council of the European Union
Ramón CHISMOL IBÁÑEZ
Transparency
Rue de la Loi/Wetstraat 175
1048 Bruxelles/Brussel
Belgium

Subject: Confirmatory application No 17/2315

Dear Mr Chismol Ibáñez,

I hereby submit a confirmatory application concerning the incorrect compliance with my initial application of 8 November 2017 (no 17/2315).

The grounds for my confirmatory application are as follows:

Introduction and summary

1. As you know, I am attached to **DELETED**.
Accordingly, I have submitted applications under the Transparency Regulation requesting access to documents held by the Council concerning the Code of Conduct Group and related matters.
2. On 8 November 2017, I submitted a request for access to documents held by the Council concerning the Code of Conduct Group in relation to 'outbound payments' and 'outbound profit transfers' for the period from 2016 to 2017. That request was registered by the Council under number 17/2315.
3. In a letter dated 23 November 2017 (ref. 17/2315-mw), the Council sent me its decision on my initial application, together with a number of (identified) documents.
4. Regrettably, it is clear to me that the Council handled my initial application incorrectly by failing to provide sufficient justification for its refusal to grant full access to documents.

Incorrect application of the grounds for exception

5. 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.
6. A general objection to the way in which the Council has used those material grounds for exception is that it has failed to indicate which exception it considers to be applicable to which document. In its letter, the Council refers to a number of documents and invokes two distinct material grounds for exception without making it sufficiently clear which exception it considers to be applicable to which document, and (accordingly) without stating in its justification that each document has been subject to a specific examination, despite the fact that it is required to do so under established case-law. See Judgment of the Court of First Instance, 13 April 2005, Verein für Konsumenteninformation v Commission, T-2/03, paragraphs 69-70; Judgment of the Court, 18 December 2007, Sweden v Commission, C-64/05 P, paragraph 66 and Judgment of the Court, 1 July 2008, Turco v Council, C-39/05 P and C-52/05 P, paragraphs 34-36.
7. Another objection is that the denial of full access to the documents (here I am referring to redacting) means refusing access to comparable information which has already been made public by the Council, under active or passive transparency provisions, through previous decisions concerning requests for information. I would refer in that connection to the documents which I attached to my initial application submitted to the Council on 8 November 2017. It is clear from the documents attached to my application that comparable documents concerning the same document - including documents originating from the Commission - have in fact been released in full by the EU institutions in the past.
8. A further objection is that the denial of full access to the documents means refusing access to (by which I mean redacting) comparable information which has already been made public by the Council, under active transparency provisions, through recent progress reports published by the Group. As you may know, the EU Member States have recently agreed that the Code of Conduct Group should draw up more detailed progress reports. The recent progress report dated 12 June 2017 is a good example of this (see Annex 1). It provides a comprehensive update on the subject of 'outbound payments' and 'outbound profit transfers' - comparable information which has now been redacted by the Council in the documents identified. The Council has hitherto failed to take account of those new working arrangements in its decisions, despite the need, under passive transparency rules, also to take account, when assessing whether to grant access to specific information, of information that has already been made public by EU institutions and EU Member States on their own initiative.
9. Furthermore, the Council has in essence applied the material grounds for exception incorrectly. The two exceptions in question are those provided for in Article 4(1)(a), fourth indent, and the first subparagraph of Article 4(3) of the Transparency Regulation on protecting the public interest in relation to financial, monetary or economic policy and 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'

10. In taking its decision the Council has invoked 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. I have the following objection as regards the way in which it has done so.
11. Firstly, the Council did not properly assess the applicability of the material ground for exception and in any event 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.
12. The material grounds for exception must be strictly interpreted and applied (see Judgment of the Court of Justice of the European Union, 18 December 2007, *Sweden v Commission*, C-64/05 P, paragraph 66 and Judgment of the Court of Justice of the European Union, 1 July 2008, *Turco v Council*, C-39/05 P and C-52/05 P, paragraphs 34-36). 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. See, for instance, Judgment of the Court of First Instance of 13 April 2005, *Verein für Konsumenteninformation v Commission*, T-2/03, paragraph 69, and Judgment of the Court of First Instance of 6 December 2012, *Evropaiki Dynamiki v Commission*, T-167/10, paragraph 69).
13. While the documents which I requested do touch on the financial, and possibly also the economic policy of the European Union and the Member States, it is unclear how disclosure of the documents in question might do real damage to those interests. 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'

14. In its decision the Council has also invoked 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 the first paragraph of Article 4(3) of the Transparency Regulation. (The second paragraph of this article has not been invoked by the Council). I have two objections to the way in which the Council deals with this material ground for exception.

15. 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 contain statements by the participants in the discussions, who rely on their position not being made public and who in exercising their right to make their position clear, would otherwise feel inhibited if this were not the case. This is not an argument that can be used to justify the existence of a serious obstacle, but is rather a categorical exclusion of all the documents and parts of documents in which personal views are expressed. The Transparency Regulation makes no provision for this, nor can it be regarded as containing one.
16. 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 various decisions of the Code of Conduct Group's 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 in the field of 'outbound payments' and 'outbound profit transfers' is a topic that has for some time occupied a prominent place in public debate. On this subject I believe I need only refer to the LuxLeaks scandal, the Panama Papers and Paradise Papers cases, and the brouhaha surrounding the tax rulings concerning Starbucks and Amazon, to name but two.

Confirmatory application

17. I hereby submit a confirmatory application in respect of my initial application. Please allow me to add that I am, as ever, open to discussion. The course of events has left me with no alternative but to avail myself of the legal means of redress offered by the 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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