



Council of the  
European Union

Brussels, 9 September 2022  
(OR. en)

12248/22

INF 147  
API 82

**NOTE**

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From: General Secretariat of the Council  
To: Delegations

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Subject: Public access to documents  
- Confirmatory application No 16/c/01/22

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Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 5 July 2022 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 18 August July 2022 (Annex 2);
- the confirmatory application dated 6 September 2022 and registered on the same day (Annex 3).

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on Tuesday 5 July, 2022 11:55]

From: **DELETED**

Sent: Tuesday 5 July 2022 11:55

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: access to documents request - access to documents request - Tax privileges related to special economic zones

Dear Council of the European Union,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting documents which contain the following information:

the monitoring of the implementation of the 2017 Guidance on tax privileges related to special economic zones, which includes but is not limited to the questionnaire for this monitoring presented at the COCG subgroup on internal issues meeting on 23 October 2020, responses from the Member States which were requested by 31 March 2021 and documents related to clarifications requested on 19 May 2021 from the Member States concerned and those clarifications.

thank you in advance,

Yours faithfully,

**DELETED**



**Council of the European Union**

General Secretariat

*Directorate-General Communication and Information - COMM*

*Directorate Information and Outreach*

*Information Services Unit / Transparency*

*Head of Unit*

Brussels, 18 August 2022

**DELETED**

Email: **DELETED**

Ref. 22/1480-mw/ns

Request made on: 05.07.2022

Deadline extension: 27.07.2022

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.<sup>1</sup>

You request access to documents concerning the monitoring of the implementation of the 2017 Guidance on tax privileges related to special economic zones, which includes but is not limited to the questionnaire for this monitoring presented at the COCG subgroup on internal issues meeting on 23 October 2020, responses from the Member States which were requested by 31 March 2021 and documents related to clarifications requested on 19 May 2021 from the Member States concerned and those clarifications.

We have identified documents **WK 11161/2020**, **WK 12094/2020**, **WK 4706/2021**, **WK 5161/2021** and **WK 5161/2021 ADD 1-10**, **WK 6361/2021** as related to your request.

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

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<sup>1</sup> 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).

Document WK 11161/2020 of 16.10.2020 is a note from the Commission services to the Code of Conduct Group (Business Taxation). It contains a draft questionnaire in order for the Member States to identify their relevant measures (if any) on business tax privileges applicable to special geographic areas.

Document WK 12094/2020 of 30.10.2020 is a note from the Commission services to the Code of Conduct Group (Business Taxation) containing the final version of the questionnaire mentioned above.

Document WK 4706/2021 of 09.04.2021 is a note from the Commission services to the Code of Conduct Group (Business Taxation). It contains a state of play of the replies from the Member States to questionnaire at 8.04.2021.

Document WK 4706/2021 REV1 of 12.05.2021 is a revised version of the previous document containing the replies to questionnaire at 22.04.2021.

Document WK 5161/2021 and ADD1 to 10 of 22.04.2021 are notes from the General Secretariat of the Council to the Code of Conduct Group (Business Taxation).

They consist in a compilation of the Member States' replies to the questionnaire as follows: Bulgaria (ADD 1), Spain (ADD 2), France (ADD 3), Croatia (ADD 4), Hungary (ADD 5), Italy (ADD 6), Latvia (ADD 7), Lithuania (ADD 8), Poland (ADD 9), Portugal (ADD 10).

Document WK 6361/2021 of 12.05.2021 is a note from the Commission services to the Code of Conduct Group (Business Taxation) containing horizontal remarks regarding the completion of the questionnaire.

All of these documents refer to difficult ongoing discussions regarding the field of taxation. Release of these documents would trigger undesirable behaviour by economic operators in order to avoid taxation and thus interfere with the economic and fiscal policy of the European Union and of the Member States. It would therefore undermine the protection of the public interest as regards the financial, monetary or economic policy of the EU and of the Member States.

Moreover, these documents are preparatory working documents outlining certain issues to be considered in the political discussion in the group.

The political workability of that delicate mechanism would be jeopardised if Member States or the EU Institutions had to take into account the possibility that preparatory documents forming the basis for the discussions may be made public, all the more so when the decision-making process has not yet come to an end.

Release of the information included in these documents would affect the negotiating process and diminish the chances of the Council reaching an agreement. Disclosure of these documents would thus seriously undermine the decision making-process concerned.

Having examined the context in which the documents were drafted, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in their disclosure.

As a consequence, the General Secretariat has to refuse access to these documents<sup>2</sup>.

The General Secretariat of the Council has also looked into the possibility of releasing parts of the documents, in the light of the considerations set out above. However, as the exceptions analysed above apply to their entire content, the GSC is unable to give partial access.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.

Yours sincerely,

Fernando FLORINDO

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

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on Tuesday, 6 September, 2022 13:06]

From: **DELETED**

Sent: Tuesday 6 September 2022 13:06

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: Re: Ref. 22/1480-mw/ns

Dear TRANSPARENCY Access to documents (COMM),

I would like to file a confirmatory application for disclosure of all documents in question. In your reply, you state that disclosure of the documents would seriously undermine the decision-making process, while invoking both Article 4(1)(a), fourth indent, and Article 4(3), first subparagraph. As you do not make clear to which of the documents you deny access under which provision, I would like to remind you of Article 4(6) of Regulation 1049/2001, which states that if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

As regards your refusal under Article 4(1)a, fourth indent, I contend that you misapplied the law. As case law has showed, it is necessary to demonstrate that disclosure would undermine the public interest based on the content of the document or documents in question. The mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception (Case T 2/03 Verein für Konsumenteninformation v Commission [2005] ECR II 1121, paragraph 69). In principle, such an application can be justified only if the institution has previously determined, first, that access to the document was likely, specifically and actually, to undermine the protected interest.

As regards your refusal under Article 4(3), first subparagraph, I equally content that you have not sufficiently demonstrated that disclosure of the document would "seriously undermine" the institution's decision-making process, as is required under this exception. In this context, I would like to remind the Council of the findings of the court in the De Capitani ruling (T-540/15). The Court pointed out that "it is precisely openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of EU citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole." [para. 78] The Court drew a link between openness and the strengthening of democracy and noted that the possibility for citizens to find out the considerations underpinning legislative action was a precondition for the effective exercise of democratic rights. It further noted that the Court had never before recognized a presumption of non-disclosure in respect of documents that formed part of the legislative process. It observed that "the effectiveness and integrity of the legislative process cannot undermine the principles of publicity and transparency which underlie that process." [para. 83] The Court accepted that a risk of external pressure could constitute a legitimate ground for restricting access to documents related to the decision-making process, but "the reality of such external pressure must ... be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure". [para. 99]

Furthermore, I would like to contend that there is an overriding public interest in disclosure. The lack of transparency on tax loopholes in the past have led to leaks in the press showing how the wealthiest use and abuse countries' tax systems to reduce their tax bills, sometimes practically to nothing. It was thanks to those leaks and thus transparency and the public scrutiny that followed that measures such as the anti-tax avoidance directive were adopted. The Code of Conduct group has recognized that the opacity around its work is an issue that needs to be addressed. There is little transparency on those special economic zones and the possible loopholes that their tax privileges might open. It would also be interesting to know what type of support to the economic can be considered in those zones as not distorting competition with other countries.

For those reasons, I call on the Council to reconsider its previous decision and grant access to the requested documents.

Many thanks in advance,

Kind regards,

**DELETED**