



Council of the  
European Union

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## NOTE

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From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 21/c/02/24

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Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 24 May 2024 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 5 July 2024 (Annex 2);
- the confirmatory application dated 24 July 2024 and registered on the same day (Annex 3).

From: **DELETED**  
Sent: Friday, May 24, 2024 4:58 PM  
To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>  
Subject: Document request on the basis of regulation 1049/2001

Dear representative of the council,

I would kindly request acces to the working papers, st-documents, non-papers, and emails in the possession of the council regarding the unshell directive (amending directive 2011/16/eu, as proposed by the commission on 22 december 2021) Kind regards **DELETED** vanaf mijn iPhone



**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, 5 July 2024

**DELETED**

E-mail: **DELETED**

Ref. 24/1597

Request made on: 24.05.2024

Deadline extension: 14.06.2024

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 the working papers, st-documents, non-papers, and emails in the possession of the Council regarding the Draft Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU (Unshell).

We have identified the following documents as related to your request:

ST documents

ST 15296/21, ST 15296/21 ADD1, ST 15296/21 ADD2, ST 15296/21 ADD3, ST 15296/21 ADD4, ST 6220/22, ST 8007/22.

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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).

### Working papers

WK 118/2022, WK 3594/2022, WK 4685/2022, WK 6530/2022, WK 6535/2022, WK 7193/2022, WK 7331/2022, WK 8064/2022, WK 8066/2022, WK 8282/2022, WK 9716/2022, WK 9777/2022, WK 10041/2022, WK 12148/2022, WK 12150/2022, WK 12691/2022, WK 15576/2022, WK 15753/2022, WK 15836/2022, WK 528/2023, WK 1907/2023, WK 2144/2023, WK 3554/2023, WK 3582/2023, WK 3716/2023, WK 4309/2023, WK 4310/2023, WK 8265/2023, WK 10232/2023, WK 10876/2023, WK 10877/2023, WK 12052/2023, WK 14870/2023.

Please note that documents ST 15296/21, ST 15296/21 ADD1, ST 15296/21 ADD2, ST 15296/21 ADD3, ST 15296/21 ADD4, ST 6220/22, ST 8007/22 are freely available on the [Council's public register](#)

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

Document WK 118/2022 of 7 January 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a presentation on the proposal by the Commission.

Document WK 3594/2022 of 11 March 2022 is a note from the General Secretariat of the Council to delegations. It contains a presentation on the proposal by the Commission.

Document WK 4685/2022 of 30 March 2022 is a note from the General Secretariat of the Council to delegations. It contains a presentation article by article of the proposal by the Commission.

Document WK 6530/2022 of 5 May 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a note by the Commission Services on the interaction with CFC rules.

Document WK 6535/2022 of 5 May 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a presentation article by article of the proposal by the Commission.

Document WK 7193/2022 of 18 May 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a note from the Presidency on technical, practical and legal issues.

Document WK 7331/2022 of 19 May 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a presentation article by article of the proposal by the Commission.

Document WK 8064/2022 of 3 June 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a note from the Presidency on technical, practical and legal issues.

Document WK 8066/2022 of 3 June 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains suggestions for modifications of the proposal by the Commission.

Document WK 8282/2022 of 8 June 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a presentation by the Commission with comparisons before and after Unshell.

Document WK 9716/2022 of 5 July 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a note from the Commission with examples and other matters concerning tax consequences of the proposal.

Document WK 9777/2022 of 5 July 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains an information note from the Commission on the tax consequences of the proposal.

Document WK 10041/2022 of 8 July 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains an information from the Spanish delegation about tax consequences of the proposal.

Document WK 12148/2022 of 16 September 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a Presidency compromise proposal on Chapter II of the proposal.

Document WK 12150/2022 of 16 September 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a Presidency note on tax consequences of the proposal.

Document WK 12691/2022 of 27 September 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a presentation by the Commission on tax consequences of the proposal.

Document WK 15576/2022 of 16 November 2022 is a note from the Presidency to the Working Party on Tax Questions. It contains a Presidency compromise text on Chapter IV and Article 15 of the proposal.

Document WK 15753/2022 of 16 November 2022 is a note from the Presidency to the Working Party on Tax Questions. It contains a Presidency compromise text on Chapter II of the proposal.

Document WK 15836/2022 of 16 November 2022 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a note prepared by the Commission services on the reporting for the purposes of establishing minimum substance requirements.

Document WK 528/2023 of 17 January 2023 is a note from the Presidency to the Working Party on Tax Questions. It contains a Presidency compromise text on Chapters I and II of the proposal.

Document WK 1907/2023 of 13 February 2023 is a note from the Presidency to the Working Party on Tax Questions. It contains a Presidency compromise text on Chapters I, III, V and VI of the proposal.

Document WK 2144/2023 of 14 February 2023 is a note from the Presidency to the Working Party on Tax Questions. It contains a Presidency steering note on reporting obligations and threshold amounts.

Document WK 3554/2023 of 14 March 2023 is a note from the Presidency to the Working Party on Tax Questions. It contains a Presidency compromise text of the proposal.

Document WK 3582/2023 of 14 March 2023 is a note from the Presidency to the Working Party on Tax Questions. It contains a Presidency steering note on DAC reporting.

Document WK 3716/2023 of 16 March 2023 is a note from the Presidency to the Working Party on Tax Questions. It contains an illustration by the Presidency on timeline.

Document WK 4309/2023 of 17 April 2023 is a note from the Presidency to delegations. It contains a Presidency steering note with a state of play and questions for discussion.

Document WK 4310/2023 of 17 April 2023 is a note from the Presidency to delegations. It contains a Presidency compromise text (clean version) of the proposal.

Document WK 8265/2023 of 28 June 2023 is a note from the Presidency to the Working Party on Tax Questions. It contains a Presidency steering note mapping the main outstanding issues which need further discussion in the WPTQ and suggesting a possible way forward on these issues.

Document WK 10232/2023 of 29 August 2023 is a note from the Presidency to the Working Party on Tax Questions. It contains a Presidency compromise text.

Document WK 10876/2023 of 4 September 2023 is a note from the Presidency to the Working Party on Tax Questions. It contains a Presidency paper on the rebuttal of the presumption.

Document WK 10877/2023 of 5 September 2023 is a note from the General Secretariat of the Council to the Working Party on Tax Questions. It contains an explanatory note from the Commission on Regulated Financial Entities.

Document WK 12052/2023 of 28 September 2023 is a note from the Presidency to Delegations. It contains a Presidency steering note with a state of play and questions for discussion.

Document WK 14870/2023 of 16 November 2023 is a note from the Presidency to Delegations. It contains a Presidency steering note with a state of play of the discussions and considering the possibility of exploring the a new approach of the proposal.

We have consulted the Commission, as author of their documents. The Commission is opposed to the release of documentation linked to the unshell proposal, as this is an initiative on which negotiations are ongoing in the Council and are in a critical phase currently. The Commission is currently working to relaunch the technical discussions after months of stagnation in this dossier.

The General Secretariat, having also consulted internally the service in charge of the matter, considers that access cannot be given to these documents at this stage.

The decision-making process to which the documents are related is still ongoing. The negotiations on the proposal are complex and require unanimity within the Council.

Disclosure of the documents would adversely affect the negotiations by impeding internal discussions of the Council on the proposal and would risk compromising the capacity of the Council to reach an agreement on the file. Moreover, the release of the documents to the public would affect the negotiating process since delegations may come under additional pressure from stakeholders.

Disclosure of the documents would thus seriously undermine the decision-making process of the Council.

In addition, 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.

The General Secretariat considers that disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the EU and of the Member States.

We have looked into the possibility of releasing parts of the documents.<sup>2</sup> However, as the exceptions to the right of access apply to their entire content, the General Secretariat is unable to give partial access.

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 the documents.<sup>3</sup>

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(6) of Regulation (EC) No 1049/2001.

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

**From:** DELETED

**Sent:** Wednesday, July 24, 2024 11:20 AM

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

**Subject:** Confirmatory application (Ref. 24/1597)

Dear Sir or Madam,

With this email I file a confirmatory application concerning your decision of 5 July 2024 (see below) to refuse access to all the working papers in possession of the Council regarding the Unshell Directive, to which I requested access via my initial application of 24 May 2024.

In its decision the Council refused access to all working papers (meeting documents) drafted and used as basis for deliberation in Council to pay the way for compromise and agreement on the (adoption of the) Unshell Directive. In a footnote of the decision, the Council referred to the following two exceptions (contained in Regulation 1049/2001):

- Article 4(1)(a) fourth indent, which relates to the undermining of the public interest as regards the financial, monetary or economic policy of the EU or a Member State; and
- Article 4(3) first subparagraph, which relates to seriously undermining of the decision-making process.

My objection is that the Council in its decision, does not, or at least not sufficiently, explain why these exceptions apply to all the working papers identified by the Council. The following reasons are mentioned by the Council:

- The documents contain “internal discussions” related to a legislative file that is still on-going.
- Unanimity is required for the adoption of the proposed legal act;
- This area is subject of very difficult negotiations.
- Release of the documents would trigger tax avoidance by many economic operators.

My objection is that these reasons do not justify the claim that disclosure of the documents (1) would seriously undermine the decision-making process and (2) undermine the public interest as regards the financial, monetary or economic policy of the EU or a Member State.

A first general objection to the way in which the Council applied these two exceptions is that it has not indicated in respect of which working paper, or passages in the working papers, it considers which of the two exceptions to apply. The Council basically invokes two different exceptions without specifying in respect of which identified working paper, or which passage, it considers which exception is applicable and (as follows) without stating in the grounds that a concrete examination has been carried out in respect of each document. This is, however, required by established case law of the European Court of Justice.

Furthermore, the Council fundamentally misapplied the abovementioned grounds for exception. I will clarify this below.



## 'Protecting the decision-making process'

First, the Council uses an incorrect benchmark. It is true that disclosure of documents can be refused if it would seriously undermine the decision-making process regarding decisions not yet taken. However, according to its reasoning, the Council has not assessed whether (how) this would be the case, but simply applies the exception. In summary, the argumentation used by the Council is that the documents in question contain “internal discussions of the Council” (including statements, suggestions, alternative policy options, compromise proposals, etc. related to the ongoing legislative file of the Unshell directive). That is not an argument that can substantiate a serious impediment but is a categorical exclusion of all working papers about the Unshell directive. This is not provided for in the Regulation 1049/2001, nor can it be presumed to be contained therein.

On the contrary, it can be argued that disclosure of the documents, as a result of which a better informed public societal debate can be conducted about internal discussions, statements, suggestions, alternative policy options, compromise proposals, etc. related to the ongoing legislative procedure of the Unshell directive (that is still going on), can actually benefit the decision-making process. Anyway, the fact that the documents contain “internal discussions of the Council” is simply not a reason to fully refuse access to all working papers regarding the Unshell directive.

Besides, the Council has also not explained why there would be no overriding public interest in the disclosure of the requested documents. This public interest means that disclosure of the documents will enable a better-informed public debate on the Unshell Directive and restore public confidence in the tackling tax avoidance by companies by using shell companies (holding companies with barely any substance) and creating fairness in the corporate tax system. Furthermore, the disclosure of the documents is essential to promote fair tax competition within the European Union. Various tax scandals, like the Panama Papers and Pandora Papers, have underlined the importance of tax avoidance via shell companies and the need for a coordinated EU action in this area. This also calls for a high degree of openness and transparency from policymakers at the Council (and the European Commission) when it comes to tackling tax avoidance through letterbox companies, especially when it comes to the creation of European laws, as in the present matter.

## 'Protecting the financial, monetary or economic policy of the EU or a Member State'

In addition, it is hard to see why the disclosure of documents relating to discussions and negotiations on the Unshell directive, would undermine the public interest as regards the financial, monetary or economic policy of the EU or a Member State. On the contrary, currently, various Member States – especially the ones which are often blamed to be European tax havens because they facilitate tax avoidance by letterbox companies – are currently blocking and frustrating the legislative process of the Unshell directive. Disclosure of the documents would ensure a better informed – open – public debate, also about the new policy options and compromise proposals currently on the table in the Council, which would create pressure on blocking Member States to lift their reservations, and which would pay the way for adoption of the directive. Therefore, providing access to the working papers would contribute to tackling tax avoidance by shell companies. This

would protect the financial, monetary and economic policy of the EU and all Member States, rather than undermining it.

I hope that the Council - based on this confirmatory application - will review its position.

Kind regards,

**DELETED**

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