



Council of the
European Union

Brussels, 21 June 2021
(OR. en)

9998/21

INF 196
API 105

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 28/c/02/21

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 25 February 2021 and registered on 26 February 2021 as well as an email limiting the scope of the request sent on 20 April 2021 (Annex 1);
- the reply from the General Secretariat of the Council dated 2 June 2021 (Annex 2);
- the confirmatory application dated 16 June 2021 and registered on 17 June 2021 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 25 February 2021 - 17:55]

Dear representative of the General Secretariat of the Council of the European Union,

Please find attached my information request to ST documents on the EU list of non-cooperative jurisdictions for tax purposes.

I look forward to your reply.

Thank you in advance.

Kind regards,

DELETED

General Secretariat of the Council of the European Union

DG F - Transparency

Rue de la Loi/Wetstraat 175

B-1048 Bruxelles/Brussel

Subject: Document request EU Code of Conduct Group and EU tax haven blacklist

February 25, 2021

Dear representative of the General Secretariat of the Council of the European Union,

My name is [REDACTED] and I am a PhD candidate in [REDACTED] at [REDACTED]. My PhD-dissertation discusses and evaluates the design and effectiveness of the EU tax haven blacklist. For this purpose, I would like to submit a targeted information request on the basis of Regulation 1049/2001 for documents in the possession of the Council about the work of the EU Code of Conduct Group, and its Subgroups, concerning the EU list of non-cooperative jurisdictions for tax purposes (EU tax haven blacklist).

This information request covers Council documents that are listed in the enclosed excel file. This file contains two tabs, which can be opened by clicking on the tabs in the bottom. The first page contains a list of non-public ST-documents. The second page contains a list of ST-documents which are partially publicly available.

Please note that this information request covers a few documents which were also covered in my previous request which I submitted in 2020. However, due to the missed deadline for the confirmatory application, I was not able to appeal against the Council's decision of that time denying my request.

I would like to point out that this additional targeted information request covers documents that are comparable to other documents that the Council has recently made public in its document register. For example, the Council has published the following types and categories of documents:

- commitment letters and other responses from third jurisdictions (see docs. 6097/19 and related ADDs, docs. 6972/18 and related ADDs);
- letters seeking commitments (see docs. 5981/19, 6671/18);
- countries' progress and monitoring reports (see docs. 5361/20 DCL 1, 6886/19 DCL 1, 6810/19 DCL 1, 5669/19 DCL 1, 5625/19 DCL 1, 5623/1/19 REV 1 DCL 1, 5618/19 DCL 1, 5443/19 DCL 1, 10791/19 DCL 1);
- guidelines and scoping papers on the interpretation of listing criteria (see docs. 14784/17 Annex I, 9637/18 Annex I and IV, 14114/19 Annex III, 9652/19 Annex IV, 14364/18 Annex III);
- coordination on defensive measures (see docs. 13888/19 DCL 1, 7232/18, 14114/19 Annex IV);
- information papers (see docs. 13015/17 DCL 1, 14451/17 DCL 1);
- note of the CoCG (13949/17 DCL 1, 10901/17 DCL 1);
- reports of the CoCG (see docs. 14784/17, 9637/18, 8828/1/19 REV 1, 14114/19).

Given the fact that my request concerns similar documents, I would kindly ask you to provide me with the requested documents.

Please be informed that a second – targeted – information request will follow soon, by which access to working papers in the possession of the Council of the European Union will be asked.

I look forward to hearing from you.

Yours faithfully,

DELETED

[E-mail message sent to access@consilium.europa.eu on 20 April 2021 - 11:15]

Dear representative of the General Secretariat of the Council of the European Union,

Following your kind suggestion on making a more targeted document request (see your letter Ref. 21/0506 and 21/0519-mw/vk), please find attached my information request to 17 ST documents on the EU list of non-cooperative jurisdictions for tax purposes.

I look forward to your reply.

Thank you in advance.

Kind regards,

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, 2 June 2021

DELETED

Email: **DELETED**

Ref. 21/0506-mw/jl

Request made on: 25.02.2021

Registered on: 26.02.2021

Dear **DELETED**,

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

Please find attached documents ST 8603/20, ST 9807/18 DCL1, which is a declassified version of document ST 9807/18 and ST 10900/19 EXT1, which is a partially declassified version of document ST 10900/19.

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

Document ST 9627/19 concerns the "Technical aspects of the monitoring process - Report #24 on day-to-day interactions with jurisdictions."

Document ST 9920/19 concerns the "Technical aspects of the monitoring process - Report #25 on day-to-day interactions to jurisdictions."

Document ST 10094/19 concerns the "Procedural/political aspects of the monitoring process: Report #25 on interactions with jurisdictions."

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).

Document ST 10094/19 ADD2 concerns the "Procedural/political aspects of the monitoring process:- Report #25 on interactions with jurisdictions = Cayman Islands - letter to the COCG Chair."

Document ST 10596/19 concerns the "Technical aspects of the monitoring process - Report #26 on day-to-day interactions with jurisdictions."

Document ST 10692/19 contains a "Progress report-Switzerland."

Document ST 10736/19 contains a "Preliminary report Mexico."

Document ST 10790/19 contains a "Progress report Bermuda."

Document ST 10808/19 concerns the "Procedural/political aspects of the monitoring process: Report #26 on interactions with jurisdictions."

Document ST 10808/19 ADD1 concerns the "Procedural/political aspects of the monitoring process: Report #26 on interactions with jurisdictions - Bermuda."

Document ST 10813/19 concerns the "Further coordination of defensive measures in the tax area."

Document ST 10900/19 contains a "Note by the Chair of the Code of Conduct group on issues requiring procedural and political decisions in the context of the EU listing process."

Document ST 10931/19 contains a "Progress report UAE."

Document ST 11742/19 contains a "Progress report-United Arab Emirates."

Document ST 11777/19 contains a "Progress report-The Cayman Island."

These documents concern the process leading to the establishment of a list of non-cooperative jurisdictions for tax purposes.

They are classified documents, bearing the classification "RESTREINT UE/EU RESTRICTED". This means that the unauthorised disclosure of their content could be disadvantageous to the interests of the European Union or of one or more of its Member States.²

These documents reflect very delicate issues pertaining to fiscal policies which may affect in a significant way the location of business activity between the Union and jurisdictions outside the Union. Their release would severely affect the Union's policy efforts in this regard and weaken its position vis-à-vis those jurisdictions.

Disclosure of these documents would therefore seriously undermine the protection of the public interest as regards international relations.

Moreover, release of the information contained in these document would considerably undermine internal discussions, which are still ongoing, putting in jeopardy a successful outcome.

The General Secretariat of the Council points out that these documents are preparatory working documents outlining certain issues to be considered in the political discussion in the group.

² Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU), OJ L 274, 15.10.2013, p. 1.

As a consequence, the General Secretariat has to refuse access to these documents.³

However, as regards document ST 10813/19, release of the information included in the document would seriously undermine the decision-making process of the Council, even after the formal decision has been taken.⁴

Documents ST 9627/19, ST 9920/19, ST 10094/19, ST 10596/19, ST 10808/19 also contain personal data.

The personal data contained in these documents are necessary for the organisation of the work of the Council. The data protection rules at EU level⁵ provide that when the personal data collected is to be used for a different purpose, including disclosure to the public, a balance needs to be established between the public interest in having access to such data and the legitimate right of individuals to protect their personal data.

After carefully considering all the principles related to this request, on balance the General Secretariat has concluded that disclosure of the personal data contained in the documents would undermine the protection of privacy and the integrity of the identified individuals.⁶

We have also looked into the possibility of releasing parts of the documents.⁷ However, as the information contained in each of the documents forms an inseparable whole, the General Secretariat is unable to give partial access, excepted for document ST 10900/19.

The General Secretariat considers that access can be given to the part of document ST 10900/19 which is already public and therefore not covered by the exceptions of Regulation No 1049/2001.

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.⁸

Yours sincerely,

Fernando FLORINDO

Enclosures: 3

³ Article 4(1)(a), third, 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.

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

⁵ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295, 21.11.2018, p. 39).

⁶ Article 4(1)(b) of Regulation (EC) No 1049/2001.

⁷ Article 4(6) of Regulation (EC) No 1049/2001.

⁸ Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EU) No 2018/1725, 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 June 2021 - 17:50]

Dear representative of the General Secretariat of the Council of the European Union,

Please find attached my confirmatory application to Council decision Ref. 21/0506-mw/jl.

Thank you in advance for processing my application.

I look forward to your reply.

Have a nice day.

Kind regards,

DELETED

Council of the European Union
General Secretariat
DG COMM
Directorate Information and Outreach
Information Services Unit / Transparency

16 June 2021

Subject: Confirmatory application – Ref. 21/0506-mw/jl

Dear representative of the Secretariat-General of the Council of the European Union,

My name is [REDACTED] and I am a PhD candidate in [REDACTED] at [REDACTED]. My PhD dissertation discusses and evaluates the design and effectiveness of the EU tax haven blacklist.

This letter refers to the decision issued by the Council of the European Union (hereinafter, the Council) on June 2, 2021 and registered under Ref. 21/0506-mw/jl. With this decision, the Council grants me access to documents ST 8603/20, ST 9807/18 DCL1 and ST 10900/19 EXT1 (a partially declassified version of document ST 10900/19). However, the decision refuses me access to the following documents:

- Document ST 9627/19 ("Technical aspects of the monitoring process - Report #24 on day-to-day interactions with jurisdictions");
- Document ST 9920/19 ("Technical aspects of the monitoring process - Report #25 on day-to-day interactions to jurisdictions");
- Document ST 10094/19 ("Procedural/political aspects of the monitoring process: Report #25 on interactions with jurisdictions");
- Document ST 10094/19 ADD2 ("Procedural/political aspects of the monitoring process:- Report #25 on interactions with jurisdictions = Cayman Islands - letter to the COCG Chair");
- Document ST 10596/19 ("Technical aspects of the monitoring process - Report #26 on day-to-day interactions with jurisdictions");
- Document ST 10692/19 ("Progress report-Switzerland");

- Document ST 10736/19 ("Preliminary report Mexico");
- Document ST 10790/19 ("Progress report Bermuda");
- Document ST 10808/19 ("Procedural/political aspects of the monitoring process: Report #26 on interactions with jurisdictions");
- Document ST 10808/19 ADD1 ("Procedural/political aspects of the monitoring process: Report #26 on interactions with jurisdictions - Bermuda");
- Document ST 10813/19 ("Further coordination of defensive measures in the tax area");
- Document ST 10900/19 ("Note by the Chair of the Code of Conduct group on issues requiring procedural and political decisions in the context of the EU listing process");
- Document ST 10931/19 ("Progress report UAE");
- Document ST 11742/19 ("Progress report-United Arab Emirates");
- Document ST 11777/19 ("Progress report-The Cayman Island").

The documents are in relation to the EU list of non-cooperative jurisdictions for tax purposes.

As motivations for the denial, the Council reported that disclosure of the information contained in the documents “*would [...] seriously undermine the protection of the public interest as regards international relations*”; that disclosure “*could be disadvantageous to the interests of the European Union or of one or more of its Member States*” and that “*it would seriously undermine the decision-making process of the Council*”. Therefore, the Council rejected access on the basis of Article 4(1)(a) 3rd indent and Article 4(3) first and second subparagraphs of Regulation 1049/2001.

Based on Article 7(2) of Regulation (EC) No 1049/2001, with this letter I would like to express objections to the opinion that forms the above-mentioned decision.

Reasoning of the confirmatory application:

- Lack of clarification/motivation in invoking the exceptions

The Council justified the denial of disclosure on the basis of three exceptions of Regulation 1049/2001: i) ongoing discussions (Article 4(3)); and ii) protection of the public interest as regards international relations (Article 4, (1)(a) 3rd indent).

However, only generic explanations are granted by the Council. There is no sufficient motivation on the applicability of the three exceptions to the documents required. Additionally, even supposing that the applicability of the exceptions is justified, sufficient and appropriate argumentation is provided neither on the reason why this damage would happen, nor on the specific and actual damage that the Member States (or the Union) would suffer from full disclosure of the documents. As a non-exhaustive list of examples, the Council does not precisely explain: why disclosing third countries assessment¹ carried out three or two years ago—and whose analysis has (or may have) already reached final conclusions—and related interactions with jurisdictions² would create undue damage; why and which precise aspects of discussions on defensive measures³ deserve to be omitted due to alleged ongoing discussions or public interest; why the disclosure of mere technical and/or procedural issues⁴ would hurt international relations or ongoing discussions.

It is kindly stressed that Member States and the Council have no veto right according to Regulation 1049/2001. Their denial of access should be justified and motivated on the basis of specific exceptions, and the actual link of applicability of such exceptions to the documents requested should be explained specifically for each document. Also, concrete arguments should be given, explaining how the public interest as regards international relations and the Code of Conduct Group's (or in general, the Council's) decision-making process would be damaged by the disclosure of the documents.

As stated by the European Court of Justice (hereinafter, the Court) in the case *Access Info Europe v Council of the European Union*, paragraph 31: “if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying. Moreover, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (*Sweden v MyTravel and Commission*, paragraph 76 and the case-law cited)”. The same line of reasoning by which

¹ See, among the documents object of denial, documents ST 10692/19, ST 10736/19, ST 10790/19, ST 10931/19, ST 11742/19, ST 11777/19.

² See, among the documents object of denial, documents ST 10094/19, ST 10094/19 ADD2, ST 10808/19, ST 10808/19 ADD1.

³ See, among the documents object of denial, document ST 10813/19.

⁴ See, among the documents object of denial, document ST 9627/19, ST 9920/19, ST 10596/19, ST 10900/19.

exceptions to Regulation 1049/2001 must be interpreted and applied strictly has been expressed by the Court in other cases (e.g. *Sison v Council*, paragraph 63; *Sweden and Turco v Council*, paragraph 36; *Sweden and Others v API and Commission*, paragraph 73; and *Sweden v MyTravel and Commission*, paragraph 75).

In contrast, it seems that in the decision here discussed the Council merely relied on vague and hypothetical considerations, without substantiating, in a comprehensive way, a specific and actual causal-link between the release of the documents and the undermining of contra-interests.

- The topics assumed to be under ongoing discussion have already been disclosed

By referring to Article 4 (3) of Regulation 1049/2001, the Council stresses that some work on the EU list of non-cooperative jurisdictions are still under ongoing discussion. Thus, their disclosure could be detrimental.

However, it seems that other documents have already been published on the same or similar matters by the Council⁵. In particular, the non-exhaustive list in footnotes shows that correspondence and interactions with third countries, as well as procedural guidelines and decisions have already been published. Also, preliminary and/or final assessments and progress reports of the third countries relevant to this confirmatory application (e.g. Bermuda, Cayman Islands, Switzerland) are already publicly available.

Therefore, the above-mentioned decision seems contradictory. It should explain why the documentation reported in footnote (as a non-exhaustive list of examples) could have been

⁵ Please, see the following documents as examples: ST 13015/17 DCL1, ST 13182/17 DCL 1, ST 14451/17 DCL 1, ST 9639/4/18 REV 4, ST 6671/18, ST 15913/17, ST 9637/18 (especially Annex I and IV); ST 14364/18 (especially Annex II and III), ST 9652/19, ST 14114/19 (Annex IV), ST 10809/18 DCL 1, ST 6213/18, ST 6603/18, ST 15429/17 (Annex III and IV), ST 6972/18 ADD 43 and 13206/19 and 13205/19 and 13203/19 and 13202/19 and 13196/19 (assessment Switzerland), ST 13015/17 (assessments of Cayman Islands and Bermuda), ST 7222/19 (assessments of Cayman Islands), ST 10791/19 (assessments of Cayman Islands), ST 8603/20. These are documents of the COCG giving information on the assessment of the third countries relevant to this confirmatory application, correspondence with the (same) third countries, COCG procedural and technical guidelines, defensive measures. This information is available to the public via the Online Register of the Council. This seems to contradict the Council's opinion mentioned above, by which the disclosure of information on items linked to ongoing discussion would be detrimental for the work of the COCG and for Member States' policy.

fully disclosed without provoking any damage, while the documents on the same topics and which are the object of this request should not be disclosed.

Additionally, regarding the case of Mexico and the United Arab Emirates (UAE), the following two points are not clear:

- why old-dated assessments (concluded in 2019) of Mexico and the UAE cannot be published, while similar and old-dated reports of other countries (e.g. Cayman Islands, Bermuda, Bahamas, Turkey, British Virgin Islands, Panama, Grenada, Switzerland) have been published; and
- how could such old-dated screenings, concluded three years ago (2019) or earlier, still influence the current discussion. This is especially doubtful for the case of the UAE, considering that the jurisdiction has already been listed many times, thus suggesting that final conclusions based on previous assessments have been already made by the Council.

In other words, similarly to the point previously explained, in the motivation of the Council there seems to be a lack of explanation on the actual, specific and reasonably foreseeable risk of undermining the effectiveness of the COCG's and Council's decision-making process or the international position of Member States (or the Union), especially considering that other documents on the same matters have already been published by the Council.

- “Unless there is an overriding public interest in disclosure”

Article 4(3) of Regulation 1049/2001 admits that an overriding public interest in disclosure should prevail. It could be argued that such overriding interest exists in the case at hand, considering the relevance and essentiality of research for the benefit of society and its institutions.

As it is commonly known, tax avoidance is a matter becoming more and more delicate, difficult and at the core of heated debates. It is evidently attracting attention, social tension and criticism towards governments and public institutions⁶. Meanwhile, it is also known that the work on the EU list is currently involved in relevant discussions and criticism at the European Parliament.

⁶ It could be useful to recall the critical discussion started since the LuxLeaks scandal in 2014.

Therefore, the ambition of purely academic and expert research to provide well-informed and rational analysis on the topics linked to the EU list of non-cooperative jurisdictions should be appreciated. It should be supported via a transparent approach that is aware of the social, political and academic interests at stake. Together with the hard work that the European Union is doing at fighting against aggressive tax planning and tax fraud, such an open approach (especially with academia) would help at recovering clarity and adding solutions to the matter.

As explained in my first letter to the Council, the request of access to documents was made in a full spirit of collaboration and reciprocal support, believing in the potentiality of academic research at constructively driving the European institutions to progressively improve their useful work. For this reason, among others, and in the interest of the European community I am part of as an European citizen, the transparency of the Union is essential: it allows society to work at the service of institutions, so that institutions can work at the service of society.

For all the reasons explained above, I would kindly ask the Council to reconsider its position.

Thank you very much for processing this confirmatory application.

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