



Council of the
European Union

Brussels, 10 September 2021
(OR. en)

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API 141

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 36/c/04/21

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 10 May 2021 and registered on 11 May 2021 (Annex 1);
- reply from the General Secretariat of the Council dated 19 August 2021 (Annex 2);
- confirmatory application dated 9 September 2021 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 10 May 2021 - 11:07]

From: **DELETED**

Sent: Monday, May 10, 2021 11:07 PM

To: TRANSPARENCY Access to dAcuments (COMM) Access@consilium.europa.eu

Subject: WP - Doc request

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 about 30 working documents on the EU list of non-cooperative jurisdictions for tax purposes.

I look forward to your reply.

Thank you in advance and have a nice day.

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

Utrecht, May 10, 2021

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

My name is **DELETED** and I am a PhD candidate in International and European Tax Law at Leiden University. 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 pdf file. It contains working papers (WK-documents) from January-June 2020.

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, 12713/20 and ADDs, 10791/19);

- 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 and its Annex III, 8374/20);
- 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);
- endorsement of FHTP outcomes on 2.1 jurisdictions (see docs. 9639/4/18 REV 4, 8603/1/20 REV 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 positively consider my document request.

I look forward to hearing from you.

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, 19 August 2021

DELETED

Email: **DELETED**

Ref. 21/1021-ADD 1-mw/jl

Request made on: 10.05.2021

Registered on: 11.05.2021

Dear **DELETED**,

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

Following the letter sent to you on 17.05.2021, please find attached the documents listed

below. **WK 7081/2020**: Steering note for the informal videoconference on 8 July 2020

WK 4644/2020: Technical aspects of the monitoring process - Report #42 on day-to-day interactions with jurisdictions = Bahamas

WK 2186/2020: Technical aspects of the monitoring process - Report #40 on day-to-day interactions with jurisdictions = the British Virgin Islands

WK 2187/2020: Technical aspects of the monitoring process - Report #40 on day-to-day interactions with jurisdictions = Cayman Islands

WK 2847/2020: Technical aspects of the monitoring process - Report #41 on day-to-day interactions with jurisdictions = Crown Dependencies

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).

WK 1036/2020: Overview of standstill and rollback notifications for the year ending on 31/12/2019

WK 1036/2020 REV 1: Overview of standstill and rollback notifications for the year ending on 31/12/2019

WK 1036/2020 REV 2: Overview of standstill and rollback notifications for the year ending on 31/12/2019

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

WK 4649/2020: Technical aspects of the monitoring process - Report #42 on day-to-day interactions with jurisdictions = Switzerland

WK 4645/2020: Technical aspects of the monitoring process - Report #42 on day-to-day interactions with jurisdictions = Barbados

WK 4579/2020: Procedural/political aspects of the monitoring process: - Report #35 on interactions with jurisdictions = Trinidad and Tobago

WK 4578/2020: Procedural/political aspects of the monitoring process: - Report #35 on interactions with jurisdictions = Seychelles

WK 4575/2020: Procedural/political aspects of the monitoring process: - Report #35 on interactions with jurisdictions = Panama

WK 4572/2020: Procedural/political aspects of the monitoring process: - Report #35 on interactions with jurisdictions = Namibia

WK 4570/2020: Procedural/political aspects of the monitoring process: - Report #35 on interactions with jurisdictions = Cayman Islands

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

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.

As a consequence, the General Secretariat has to refuse access to these documents².

Please note that the necessary consultations are still ongoing concerning the remaining documents.

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.³

Yours sincerely,

Fernando FLORINDO

Enclosures: 8

² Article 4(1)(a), third, of Regulation (EC) No 1049/2001

³ 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 9 September 2021 - 12:59]

From: **DELETED**

Sent: Thursday, September 9, 2021, 12:59

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

Subject: RE: Ref. 21/1021-ADD 1-mw/jl

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

Please find attached my confirmatory application to Council decision Ref. 21/1021-ADD 1-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

Utrecht, 9 September 2021

Subject: Confirmatory application – Ref. 21/1021-ADD 1-mw/jl

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

My name is Federica Casano and I am a PhD candidate in international and European tax law at Leiden University. My PhD dissertation discusses and evaluates the design and effectiveness of the EU list of non-cooperative jurisdictions for tax purposes (hereinafter, the EU list).

This letter refers to the decision issued by the Council of the European Union (hereinafter, the Council) on August 19, 2021 and registered under Ref. 21/1021-ADD 1-mw/jl. With this decision, the Council refuses me access to the following documents:

- WK 4649/2020: Technical aspects of the monitoring process - Report #42 on day-to-day interactions with jurisdictions = Switzerland
- WK 4645/2020: Technical aspects of the monitoring process - Report #42 on day-to-day interactions with jurisdictions = Barbados
- WK 4579/2020: Procedural/political aspects of the monitoring process: - Report #35 on interactions with jurisdictions = Trinidad and Tobago
- WK 4578/2020: Procedural/political aspects of the monitoring process: - Report #35 on interactions with jurisdictions = Seychelles
- WK 4575/2020: Procedural/political aspects of the monitoring process: - Report #35 on interactions with jurisdictions = Panama
- WK 4572/2020: Procedural/political aspects of the monitoring process: - Report #35 on interactions with jurisdictions = Namibia

- WK 4570/2020: Procedural/political aspects of the monitoring process: - Report #35 on interactions with jurisdictions = Cayman Islands

The documents are all in relation to the EU list.

As motivations for the denial, the Council reported that “[t]hese 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.”.

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 one exception of Regulation 1049/2001: the protection of the public interest as regards international relations.

However, only generic explanations are granted by the Council. There is no sufficient motivation on the applicability of the exception to the documents required. Additionally, even supposing that the applicability of the exception 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. In particular, the Council does not precisely explain why the disclosure of mere technical and/or procedural issues 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 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.

Finally, I would like to kindly bring the following points to your attention.

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 institutions¹. Meanwhile, it is also known that the work on the EU list is currently involved in relevant discussions at the European Parliament. 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 could be appreciated. It could 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

¹ It could be useful to recall the critical discussion started since the LuxLeaks scandal in 2014.

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.

Therefore, I would kindly ask the Council to reconsider its position.

Thank you very much for processing this confirmatory application.

Your faithfully

