



Council of the
European Union

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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	12601/24
Subject:	Public access to documents - Confirmatory application No 21/c/02/24

Delegations will find attached a draft reply to confirmatory application No 21/c/02/24
(see 12601/24).

REPLY TO CONFIRMATORY APPLICATION 21/c/02/24
made by email on 24 July 2024 and registered on the same day

The Council has considered this confirmatory application in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001¹ (“Regulation (EC) No 1049/2001”) and Annex II to the Council’s Rules of Procedure², and has come to the following conclusion:

1. On 24 May 2024, the Applicant introduced a request for access to the working papers, standard documents, non-papers and emails in the possession of the Council regarding the proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU (the “Unshell Directive”).
2. The General Secretariat of the Council (“GSC”) identified 40 documents which fall under the scope of the request (hereinafter the “requested documents”), namely 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, 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.
3. On 5 July 2024, the GSC replied to this application.

¹ OJ L 145, 31.5.2001, p. 43.

² Council Decision 2009/937/EU (OJ L 325, 11.12.2009, p. 35).

4. Access was given to the 7 ST documents and denied to the 33 WK documents. All these WK documents are working documents originating from the General Secretariat of the Council and the Commission services. Access to these documents has been refused pursuant to the exceptions laid down in Article 4(1)(a), fourth indent (protection of the financial, monetary or economic policy of the Community or of a Member State) and – in the absence of any indication of an overriding public interest in release – Article 4(3), first subparagraph (protection of the institution's decision-making process), of Regulation (EC) No 1049/2001.
5. On 24 July 2024, the Applicant introduced a confirmatory application against the GSC's refusal of access as mentioned above, alleging that the GSC did not or did not sufficiently explain the reasons why the invoked exceptions under Regulation (EC) No 1049/2001 apply nor did it indicate in respect of which of the documents, and which part of the documents, it considered which of the exceptions provided for in Regulation (EC) No 1049/2001 to apply.
6. The Applicant claims that the GSC has misapplied the exceptions under Article 4(1)(a), fourth indent and Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001. He also argued that disclosure of the documents would ensure a better informed – open – public debate, which would contribute to the adoption of the directive.
7. The Council has reassessed this application in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and in the light of the applicant's arguments.
8. The Council has thus decided to grant full access to documents **WK 118/2022, WK 3594/2022, WK 4685/2022, WK 6530/2022, WK 6535/2022, WK 7193/2022, WK 8282/2022, WK 9716/2022, WK 9777/2022, WK 10877/2023.**
9. Considering the context and the state of play on the matter, the Council has reached different conclusions as regards the remaining requested documents.

Context of the requested documents

10. Following the adoption on 18 May 2021 of a Communication on Business Taxation for the 21st century, the Commission issued, on 22 December 2021, a proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU.
11. The proposal constitutes an important step in the fight against tax avoidance and evasion in the EU. The proposed Directive aims to tackle the misuse of shell entities for tax purposes within the EU. It should ensure that entities in the EU that perform no actual economic activity are unable to benefit from any tax advantages and also protect the level playing field for the businesses and ensure that taxpayers do not suffer additional financial burden due to those that try to avoid paying their fair share.
12. The proposal introduces new monitoring and tax reporting obligations for shell companies that will make it harder for them to enjoy unfair tax advantages and easier for national authorities to track any abuse arising from shell companies.
13. Since 2022, this proposal has been under discussion at working party level at the Council. The requested documents were produced for discussions within the Working Party on Tax Questions. No agreement has been reached until now within the Council.
14. Technical, practical and legal aspects are still under discussion, such as the identification of the entities concerned or the possible conflicts with other existing anti-avoidance and anti-abuse rules, which could lead to distortions in the single market, or the relation between double taxation treaties and EU law. A wide variety of issues remains therefore unresolved and further important practical and legal work will be necessary before an agreement could be feasible.
15. Considering the complexity of the proposal, its impact on the single market as well as its interrelation with other instruments of EU law, further work is required before the Council can reach a decision on the Commission proposal.

16. Against this background, the Council confirms the **denial** of access to documents **WK 8066/2022, WK 12691/2022 and WK 15836/2022**.
17. The Council has furthermore considered the possibility of giving **partial access** to some of the requested documents pursuant to Article 4(6) of Regulation (EC) No 1049/2001. It has come to the conclusion that partial access can be granted to documents **WK 7331/2022 (from page 1 to page 20), WK 8064/2022 (first page and the three first paragraphs on page 2), WK 10041/2022 (first page), WK 12148/2022 (first page), WK 12150/2022 (first page, first, second and fourth paragraphs on page 2, first three paragraphs on page 3), WK 15576/2022 (first page), WK 15753/2022 (first page), WK 528/2023 (first page), WK 1907/2023 (first page), WK 2144/2023 (first page), WK 3554/2023 (first page), WK 3582/2023 (first page), WK 3716/2023 (first page), WK 4309/2023 (first page, paragraphs 1 to 6 on pages 2, 3 and 4, paragraphs 7 and 8 on pages 8 and 9), WK 4310/2023 (first page), WK 8265/2023 (pages 1 and 2, first three paragraphs on page 3), WK 10232/2023 (first page), WK 10876/2023 (first page), WK 12052/2023 (pages 1 to 3 and first paragraph on page 4), WK 14870/2023 (pages 1 to 3 and first and second paragraphs on page 4)**.
18. The requested documents and their content are listed below for the sake of completeness:
- 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 on the proposal prepared 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 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 on the proposal by the Presidency.
- 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 2023²⁰²² 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.
- 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 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 from the General Secretariat of the Council to the Working Party on Tax Questions. It contains a Commission explanatory note on regulated financial entities.
- Document **WK 12052/2023** of 28 September 2023 from the Presidency to Delegations. It contains a Presidency steering note.

- Document **WK 14870/2023** of 16 November 2023 from the Presidency to Delegations. It contains a Presidency steering note.

**ASSESSMENT OF THE REMAINING REQUESTED DOCUMENTS UNDER
REGULATION (EC) No 1049/2001**

19. The Council considers that, in view of their content and the state of play on the matter, the documents indicated above fall fully or partly within the remit of the exception to the right of access set out in Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001 (protection of the public interest as regards the financial, monetary or economic policy of the Union or of a Member State).
20. Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001 provides that “*the institutions shall refuse access to a document where disclosure would undermine the protection of (...) the financial, monetary or economic policy of the [Union] or a Member State*”.
21. At the outset, the Council recalls that, according to the established case law of the Court of Justice and the General Court, the public interest exceptions laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4.
22. On the one hand, the Council enjoys a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest.³
23. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interests in these areas, it has no choice but to refuse access, because “*it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the*

³ Judgments of the General Court of 11 July 2018 in case T-644/16, *ClientEarth v Commission*, EU:T:2018:429, paragraphs 23-25, and of 27 November 2019 in case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX)*, EU:T:2019:815, paragraphs 63-65.

*interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests”.*⁴

24. Therefore, while the Council enjoys a wide discretion in assessing the probable impact of the release of a document in its possession on the financial, monetary or economic policy of the Union or a Member State, it is barred from considering other legitimate interests that might override the conclusion that giving access to a document would harm the protected interest and from granting access nonetheless.⁵
25. The General Court has recognised specifically in the case of Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001 that the EU judicature’s review of the legality of such an assessment must “*be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers*”.⁶ Furthermore, brevity in the institution’s explanation of its refusal to grant access is justified, in particular, by the need not to undermine the sensitive interests in question through disclosure of the very information which the exceptions are designed to protect.⁷
26. In addition, the General Court has already found that, if the release of documents would open the door to speculation by relevant stakeholders and this might generate unwarranted pressure causing a negative impact on the financial, monetary or economic policy of the Union or of a Member State, the use of that exception under Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001 is justified.⁸

⁴ Judgment of the Court of Justice of 1 February 2007 in case C-266/05, *Sison v Council*, EU:C:2007:75, paragraph 46.

⁵ See judgments of 7 February 2018, *Access Info Europe v Commission*, T- 851/16, EU:T:2018:69, paragraph 38 and the case-law cited, and of 7 February 2018, *Access Info Europe v Commission*, T- 852/16, EU:T:2018:71, paragraph 38 and the case-law cited.

⁶ Judgment of the General Court of 13 January 2011 in case T-362-/08, *IFAW Internationaler Tierschutz-Fonds v Commission*, ECLI:EU:T:2011:6, paragraphs 106-07.

⁷ Judgment of the Court of 1 February 2007, *Sison v Council*, C-266/05 P, ECLI:EU:C:2007:75, paragraph 82.

⁸ Judgment of the General Court of 26 April 2018 in case T-251/15, *Espírito Santo Financial v European Central Bank*, ECLI:EU:T:2018:234, paragraphs 92-97.

27. The requested documents indicated above contain analysis, notes and presentations from the Presidency, the Commission and the delegations relating to the negotiations of the “Unshell Directive”.
28. The documents address issues which the Council deems as being particularly sensitive. The aim of the proposal is to combat tax avoidance and tax evasion practices, such as hiding revenues in shell entities. The contents of the documents indicated above show various individual negotiation steps and preliminary compromises between the decision-makers on the substance of the proposal. By its very nature, this subject-matter has an important impact on the conduct on an extremely large number of economic operators within the EU.
29. Specifically, public information on the specific rules under intense negotiations as well as preliminary compromise risks economic operators adapting their practices to circumvent the proposal’s aims before its entry into force. The disclosure of the content of the requested documents therefore entails a risk of creating a bigger scale tax avoidance in the EU.
30. Indeed, disclosure would reveal preliminary reflections and compromises on sensitive issues pertaining, for instance, to the impact of the envisaged measures on tax revenues and businesses, their macroeconomic impact, the methodology for the economic analysis of the tax reform options, constraints and key issues of such analysis, the possible tax evasions schemes, the data regarding specific Members States or exploratory views on the compatibility with the EU framework and the internal market.
31. Public access to the documents would therefore reasonably foreseeably and not purely hypothetically affect, in a negative manner, economic operators’ practices relating to tax avoidance and tax evasion. A perpetuation of such practices, in turn, would be detrimental to tax revenue and thus undermine the Member States’s, and therefore the Union’s, financial, monetary and economic policy.
32. Disclosure of the documents in question also entails the risk that undue conclusions are drawn regarding the assessment of the impact of the proposed new rules on national revenue and on national fiscal and economic policy in general. The Member States would be discouraged to share national impact assessments in the future, while an increased coordination of national impact assessments is endeavoured in order to achieve progress on a common tax base.

33. For the above-mentioned reasons, release of the information contained in the requested documents at this stage, before the adoption of the proposal, would entail the specific and actual, reasonably foreseeable and non-hypothetical risk of undermining the protection of the public interest as regards the financial, monetary or economic policy of the EU or of a Member State. As a consequence, the Council has to refuse full or partial access to these documents pursuant to Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001.

CONCLUSION

34. The Council concludes that:

- full public access is granted to documents **WK 118/2022, WK 3594/2022, WK 4685/2022, WK 6530/2022, WK 6535/2022, WK 7193/2022, WK 8282/2022, WK 9716/2022, WK 9777/2022, WK 10877/2023.**
- partial access is granted to documents **WK 7331/2022, WK 8064/2022, WK 10041/2022, WK 12148/2022, WK 12150/2022, WK 15576/2022, WK 15753/2022, WK 528/2023, WK 1907/2023, WK 2144/2023, WK 3554/2023, WK 3582/2024, WK 3716/2023, WK 4309/2023, WK 4310/2023, WK 8265/2023, WK 10232/2023, WK 10876/2023, WK 12052/2023, WK 14870/2023.**
- access is refused to documents **WK 8066/2022, WK 12691/2022 and WK 15836/2022.**