Delegations will find enclosed a draft reply from the Council to confirmatory application made by Mr Peter HARRIS (No 12/c/01/11), as it stands after examination by the Working Party on Information at its meeting on 20 May 2011.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting, record its agreement to the draft reply annexed to this document as an "A" item.

The Annex is available in English only.
DRAFT

REPLY ADOPTED BY THE COUNCIL ON .................

TO CONFIRMATORY APPLICATION No 12/c/01/11,
made by Mr Peter Harris by e-mail on 29 April 2011,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents


1. The applicant refers to three documents prepared by the Commission services for the Code of Conduct Group (Business taxation) regarding the discussions within that Group on the zero/ten tax regime of Jersey: "Considerations concerning the Jersey zero/ten regime", "Standstill Description" as well as "UK: Jersey - Zero-Ten Corporate Tax Regime". In his confirmatory application, the applicant underlines that he also requests "any other 'Room' documentation issued by the Commission within the Council which would meet the description given" by a specific, named person, an alleged lobbyist.

2. In its reply dated 8 April 2011, the General Secretariat refused public access to the above-mentioned documents pursuant to Article 4(1)(a), fourth indent (protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State) as well as the first subparagraph of Article 4(3) (protection of the Council's decision-making process) of Regulation (EC) No 1049/2001.
3. In his confirmatory application dated 29 April 2011, the applicant refers to articles written by the person referred to above as well as to that person's blog, the content of which, according to the applicant, indicates that that person has received unauthorized access to documents concerning the zero/ten tax regime of Jersey. According to the applicant, this means that the requested documents are in the public domain and that he should thus be granted public access to these documents.

4. The Council has examined the above-mentioned document in the light of the applicant’s arguments and has come to the following conclusion:

5. On 1 December 1997, the Council and the Representatives of the Governments of the Member States meeting within the Council agreed the Code of Conduct for business taxation\(^1\), which entails a political commitment not to introduce new tax measures which are harmful within the meaning of the Code and to re-examine existing laws and established practices, having regard to the principles underlying the code and to the review process outlined therein. By its conclusions of 9 March 1998 \(^2\) the Council established the Code of Conduct Group (Business Taxation) to assess the tax measures that may fall within the scope of the Code and to oversee the provision of information on those measures.

The Code of Conduct Group - a preparatory body of the Council composed of a high-level representative of each Member State and the Commission - reports regularly on the measures assessed. These reports are forwarded to the Council for deliberation. The reports and the Council conclusions in connection with them are published following respective meetings of the Council, as appropriate.

6. Three documents issued by the Commission have been identified as corresponding to the applicant's request. These documents are working papers prepared by the Commission's services to serve as some basis of discussions in the Code of Conduct Group on the zero/ten tax regime of Jersey. Two of these documents, "Considerations concerning the Jersey zero/ten regime" and "Standstill Description", were prepared for the meeting of the Code of Conduct Group on 23 September 2010. The third one, "UK: Jersey - Zero-Ten Corporate Tax Regime",

was prepared for the meeting of the Code of Conduct Group on 19 November 2010. These documents contain an outlining of the relevant issues that the Code of Conduct Group could consider in its deliberations when assessing the zero/ten regime against the criteria of the code of conduct. All three documents are hereafter referred to as "the requested documents".

7. The Code of Conduct Group will meet again on 26 May 2011 to discuss its biannual report to the Council, to be submitted to the Council session of 20 June 2011 (Economical and Financial Affairs). In this report, the Group is likely to cover inter alia the progress of the ongoing work on the issue of the zero/ten regime of Jersey in accordance with the provisions of the Code of Conduct.

8. Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001 obliges the Council to refuse public access to documents when there is a risk that public access to those documents would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State. In the present case, this mandatory exception to the principle of public access applies for the following reasons:

First, in order to allow for a political peer review between Member States in a sensitive area of taxation, it is of particular importance to ensure workable preparatory discussions of the Code of Conduct Group. The Group's reports and the Council conclusions must be agreed between Member States by consensus after sensitive discussions. The requested 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 jeopardized if Member States or the Commission had to take into account the possibility that preparatory documents forming the basis for the discussions may be made public, be it before or after the decision-making process comes to an end.

Second, the requested documents address certain tax provisions. If discussions on such matters were made public before the Council adopts its final conclusions on them, that may give raise to concerns about certain aspects of those tax provisions that may later, in the light of what the Group or the Council decide, turn out to have been unfounded. Such premature concerns could, in turn, even influence the decisions of the taxpayers and thereby trigger negative budgetary consequences.
9. The applicant claims that the requested documents must be released because the person referred to above had invoked them in the public sphere. The Council underlines that its General Secretariat has circulated the requested documents exclusively to the participants of the Code of Conduct Group. Furthermore, the Council is bound by virtue of Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001 not to make the requested documents accessible to the public. That provision would be deprived of its effet utile if the Council's transparency policy was to be determined by an (alleged) occurrence of an unauthorized disclosure or usage of a legally protected document rather than by the rule of law.

10. In the light of the preceding, the Council concludes that full public access to documents by the Commission services with the titles "Considerations concerning the Jersey zero/ten regime", "Standstill Description", "UK: Jersey - Zero-Ten Corporate Tax Regime" and "Jersey Zero/Ten regime - additional input" must be refused pursuant to Article 4(1)(a), fourth indent, of Regulation 1049/2001 (protection of the public interest with regard to the financial, monetary or economic policy of the Union or a Member State).

11. The Council also carefully examined, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to the documents under scrutiny. However, the above reasons justifying the refusal of access apply to all parts of the requested documents. There was therefore no room to grant partial access.

12. As regards the alleged existence of an overriding public interest in releasing the requested documents, the legislator balanced the principle of the transparency of the institutions’ decision-making when it laid down the general principles and limits on the right of public access to documents in Regulation (EC) No 1049/2001. The exceptions provided for in Article 4(1)(a) of that Regulation, including the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State, are mandatory and do not comprise an “overriding public interest” clause. In consequence, once it is established that the requested documents fall within the protected sphere of public interest as regards the financial, monetary or economic policy of the Union or a Member State and that the protection of the invoked interest would be undermined if the documents were to be disclosed, the institution is obliged to refuse public access.