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NOTE

From: General Secretariat of the Council
To: Working Party on Information

No. prev. doc.: 11763/16

Subject: Public access to documents
- Confirmatory application No 20/c/06/16

Delegations will find enclosed a draft reply from the Council to confirmatory application No 20/c/06/16, as adopted by the Council by written procedure on 13 October 2016 with Austria abstaining.

The majority of the delegations agreed to publish the result of the vote.

The following statement was made:

SE: *“Sweden can agree with the outcome proposed in the draft reply. However, Sweden cannot fully agree with the proposed reasoning, in particular paragraph 20.”*

The annex is available in English only.

DRAFT

REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION 20/c/06/16,
made by email on 24 August 2016,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to several documents of the Code of Conduct group

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 8 July 2016 the applicant introduced an initial application for access to "with all the room documents of the Code Group (including origin Commission, etc) which have been drawn up during the Dutch Presidency (first half 2016) and are in the possession of the General Secretariat of the Council".
2. On 23 August 2016, the General Secretariat replied to this application, fully releasing 9 documents, partially releasing 4 and refusing access to 27 other documents. Furthermore, the applicant was informed that 10 more documents identified could not be assessed within the legal deadlines and that he was welcome to submit a new initial request for access to them.¹

¹ Which he did on 24 August 2016 (application registered under number 16/1773).

3. On 24 August 2016, the applicant introduced a confirmatory application against the General Secretariat's refusals of access as mentioned above. In substance, the applicant contends therein that the General Secretariat has not given sufficient explanations for the application of the exceptions to the right of access as regards protection of the financial, monetary or economic policy of the Union or a Member State (Article 4(1)(a), fourth indent, of Regulation 1049/2001) and as regards protection of the decision-making process (Article 4(3), first subparagraph, of Regulation 1049/2001).
4. The Council has reassessed, in full consideration of the principle of transparency underlying Regulation No 1049/2001 and in the light of the applicant's comment, whether public access can be provided to the documents fully or partially withheld in the General Secretariat's reply. It has in particular consulted the Commission on documents emanating from its services. The Council has come to the conclusions set out below.

THE CONTEXT

5. In the absence of Union legislation, business taxation, that is direct taxation, falls within the competence of Member States. The Union has competence in this field only with regard to measures that directly affect the establishment or functioning of the internal market². However, the number of Union measures has been limited to date due to the unanimity requirement for the adoption thereof.

² Article 115 TFEU.

6. Nevertheless, since 1997, the Member States have recognised the importance to promote at the European level a coordinated action against unfair tax practices, without prejudice to the respective spheres of competence of the Member States and the Community. To that end, on 1 December 1997, the Council and the Representatives of the Governments of the Member States meeting within the Council adopted a Resolution containing a Code of Conduct for business taxation³, which entails a political commitment not to introduce new tax measures and to roll back existing ones which provide for a significantly lower effective level of taxation than those levels which generally apply in a Member State and, as a consequence, affect or may affect in a significant way the location of business activity of the Union. Clearly, the scope of the Code of Conduct is much broader than the potential Union competence provided for in the Treaties.
7. The same Resolution has provided for a peer review mechanism based on exchange of information among the Member States and on the assessment of existing or proposed tax measures by a dedicated group composed by representatives of the Member States. By its conclusions of 9 March 1998⁴ the Council established the Code of Conduct group (Business Taxation), which is composed of a high-level representative of each Member State, to assess the tax measures that may fall within the scope of the Code and to oversee the provision of information on those measures.
8. The members of the group evaluate carefully the effects that tax measures (current and planned) may have on other Member States, *inter alia* in view of how the activities concerned are effectively taxed throughout the Union. The reviews of the group may result in recommendations to the Council. During the review process, Member States are called on to cooperate loyally in the framework of the Code of Conduct and provide relevant information about laws and administrative practices in the business taxation area.

³ OJ C 2, 6.1.1998, p. 1.

⁴ OJ C 99, 1.4.1998, p. 1.

9. The Council has taken significant steps to make the public at large more acquainted with the work of the Code of Conduct group and it is fully committed to continue increasing transparency in the group's activities. In particular, in line with paragraph H of the Resolution, the group reports regularly on the measures assessed with the assistance of the Commission. 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.
10. However, it has to be pointed out that from its very conception, it has been essential to the functioning of the Code of Conduct group that it could serve as a forum in which Member States would be able to freely exchange views on each other's tax measures and their conformity with the Code of Conduct on Business Taxation. When engaging in discussions of this kind, Member States have always assumed that they would be conducted in a spirit of confidentiality and mutual trust and have reasonably continued to rely on such an assumption ever since.
11. More specifically, since the establishment of the Code of Conduct group in 1998, the Council has repeatedly indicated that it was essential that discussions held within the group remain confidential, while increasing its visibility:
- the Council conclusions of 9 March 1998 establishing the Code of Conduct indicate that the Council "*agrees that the work of the group shall be confidential*";
 - this principle was recalled by the Council conclusions of 8 December 2015⁵, where the Council "expresses the wish to improve the visibility of the work of the Code of Conduct group and agrees therefore that its results, in particular its 6-monthly reports, are systematically made available to the public" but "insists however on the confidentiality of the group's deliberations with a view to protect the public interest as regards the economic policy of Member States".

⁵ Council document 15148/15

12. Moreover, the exchange of information within the Code of Conduct group has been regulated in detail in the Resolution of the Council and the representatives of the governments of the Member States, meeting within the Council, annexed to the Council Conclusions of 1 December 1997. Hence, a specific framework is in place which provides for the exchange of information within the Code of Conduct group between the Member States and the Commission and between Member States themselves. The Resolution does not lay down a right of access for third parties to documents that are discussed within the group. This is inherent to the nature of the Code of Conduct that is an instrument of coordination among Member States which remain the subjects and the addressees of that coordination.⁶ Its activities do not concern the Union as such but are essentially of an intergovernmental nature. A generalised access of the public to the documents would jeopardise the balance which Member States have sought to ensure when they agreed to establish the Code of Conduct group.
13. These remarks concerning the nature of the Code of Conduct group and the legal framework in which it was set up have to be duly taken into account when interpreting the relevant provisions of Regulation 1049/2001 and assessing whether access to the requested documents can be given.

THE APPLICABLE EXCEPTIONS

14. The requested documents come within the remit of the exception of protection of the public interest as regards financial, monetary or economic policy of the Union or a Member State (Article 4(1), (a) fourth indent of Regulation No 1049/2001) and the protection of the Council's decision making process (Article 4(3), first subparagraph, of Regulation No 1049/2001). Three of them are also covered by the exception of protection of the public interest as regards international relations (Article 4(1)(a), third indent, of Regulation No 1049/2001).

⁶ See seventh recital of the Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997.

15. At the outset, the Council recalls that, according to the established case law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of Regulation No 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4.
16. On the one hand, "*the Council must be recognised as enjoying 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*"⁷.
17. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest in this area, 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 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*"⁸.
18. Therefore, the Council enjoys a wide discretion in assessing the probable impact of the release of a document on the financial, monetary or economic policy of the Union or a Member State – and, where applicable, on international relations – and it is barred from taking into account other legitimate interests in order to override the conclusion that giving access to a document would harm the protected interest.

⁷ Judgment of the Court of Justice of 1 February 2007 in case C-266/05 P, Sison v Council, para 34.

⁸ Judgment of the Court of Justice of 1 February 2007 in case C-266/05 P, Sison v Council, para 46.

19. As regard the exception provided for in Article 4(3), first subparagraph, the Council points out that in order to allow for an effective 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. In that regard, it should be stressed that the group's reports and the Council conclusions must be agreed between Member States by consensus. 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 jeopardised if Member States or the EU Institutions had to take into account the possibility that preparatory documents forming the basis for the discussions may be made public, all the more so when the decision-making process has not yet come to an end.
20. Under the circumstances described in paragraphs 5 to 13 above, the Council considers that it can be presumed that Code of Conduct documents on issues that are still debated are indeed covered by at least one of the exceptions mentioned, and in particular the specific exception applying to protection of the public interest as regards financial, monetary or economic policy of the Union or a Member State (Article 4(1)(a), fourth indent, of Regulation No 1049/2001).

INDIVIDUAL ASSESSMENT OF THE REQUESTED DOCUMENTS

21. The Council has nevertheless proceeded to a more specific assessment of the requested documents.
22. Room documents # 6, # 6 REV 1 and # 6 annex of 12 April 2016, # 1 and # 1 REV 1 of 2 June 2016 originate from Commission services and concern Member States' notifications on standstill and rollback on various issues.
23. Room documents # 3 of 2 February 2016, # 4, # 5, # 7 and # 7 REV 1 of 12 April 2016, # 2, # 2 REV 1, # 3, and # 3 REV 1 of 2 June 2016 and # 2 of 20 July 2016 originate from Commission services and concern standstill and rollback regarding patent boxes.

24. Room documents # 2 of 2 February 2016 and # 10 of 12 April 2016 originate from Commission services and concern the treatment of asset holding companies under Gibraltar's Income Tax Act 2010.
25. Room documents # 8 of 12 April 2016, # 5 of 2 June 2016 and # 8 of 20 July 2016 (guidelines on the issuing of tax rulings), # 3 of 20 July 2016, # 2 and # 3 of 12 April 2016 (provision of information to the group), # 4 (monitoring guidance on inbound profit) and 4 annex 2 (switchover rule) of 2 February 2016, # 5 of 20 July 2016 and # 1 of 12 April 2016 (taxation of outbound payments/profit distributions) originate from Commission services and concern the work package 2015.
26. Room documents # 6 and # 6 annex 3 of 2 June 2016 originate from Commission services and concern relations with Liechtenstein.
27. Room document # 8 of 2 June 2016 originates from Commission services and concerns the external strategy as regards a common EU approach to listing third countries (scoreboard of indicators).
28. Room document # 9 of 12 April 2016 originates from the Chair and contains remarks and a questionnaire concerning the "Model Instruction".
29. All of these documents are fairly recent and concern difficult issues that are still debated within the Code of Conduct group. As they reflect the possibility of changes in tax legislation that have not yet been decided, let alone implemented, their (full) release is likely to trigger unwarranted and undesirable behaviour by economic operators which would interfere with Member States' fiscal policy.
30. Release would also affect the decision-making process, as explained in paragraph 19, since the sensitive issues concerned continue to be discussed and any disclosure would seriously hamper the efforts to find solutions for them. In this regard, the Council has not identified any overriding public interest in release of these documents.

31. As regards more specifically the documents mentioned in paragraphs 22 and 23 above (*rollback and standstill*), it should be noted that this peer-review mechanism, which is one of the core tasks of the Code of Conduct group, is a very sensitive issue. Early public disclosure of the details of these discussions – were Member States are judging each other's tax regimes – would severely impede the search for solutions for what has been identified as harmful tax regimes, increasing instead of reducing distortions in the single market and often resulting in excessive losses of tax revenue or negatively impact on the way business activity is located within the Union.
32. The documents mentioned in paragraph 24 above (*Gibraltar*) concern Gibraltar's tax regime which is a delicate open issue, while the documents concern sensitive comments and their release at this stage would in particular seriously prejudice the prospect of finding an acceptable solution to the problems.
33. The documents referred to in paragraph 25 above concern various issues which are part of the *work package 2015*. These are sensitive issues on which the Code of Conduct group is concentrating efforts in order to make progress. However, discussions are still at an early stage to the point that even questions concerning the timetable for treatment are still debated. Under these conditions, release of the requested documents would be very premature, preventing proper discussion of the issues at stake.
34. Finally, the document mentioned in paragraph 28 above (*Model Instruction*) concerns guidance to Member States when judging the compatibility of a rulings regime with the criteria of the Code of Conduct. The Code of Conduct group currently tries to make sure that this instruction is applied correctly, also discussing different types of "rulings". It is of special importance to come to a common approach on these questions, as "rulings" regimes have a considerable potential of distortion. At the same time, important economic interests are at stake, which in turn also makes discussions very difficult. As just an example to show the complex and protracted nature of the discussions, the questionnaire of 12 April 2016 contained in the document simply is a revised version of a questionnaire that had already been tabled on 9 April 2015, i.e. one year earlier.

35. The Council therefore must confirm the refusal of access to these documents, pursuant to Article 4(1)(a), fourth indent, and 4(3), first subparagraph, of Regulation 1029/2001.
36. In the case of the documents referred to in paragraphs 26 and 27, which concern relations with third countries, their release would also weaken the EU's position vis-à-vis the countries concerned. Room document # 6 (including annexes 1 and 2) contains details on several sensitive tax issues concerning Liechtenstein, on which discussions with that country are ongoing. Liechtenstein has a particularly sensitive position, on the one hand being a member of the European Economic Area (EEA) and on the other hand often having been accused of creating a tax haven for letterbox companies. In that situation, improving relations requires a high degree of diplomatic tact and mutual trust; public release of the information contained in the document would go against these interests. This is also true for annex 3 to the document (listed apart) which concerns exchange of information with Liechtenstein on the work of the Code of Conduct group, which is of great interest to that EEA country, but to which it is not associated. Room document # 8 sets out detailed proposals on a strategy concerning the assessment of third countries as regards recognised standards of good governance in the area of taxation. These proposals envisage a process continuing until the end of 2017, and release of that information at the current point in time would affect that process, weakening the EU position in it.
37. Release of these documents must therefore also be refused pursuant to Article 4(1)(a), third indent, of Regulation 1049/2001 (protection of the public interest as regards international relations).
38. The Council has furthermore considered the possibility of giving partial access to all or some of the requested documents. It has come to the conclusion that no further partial access than the one granted in the initial phase can be given, as the exceptions referred to above apply to all parts withheld.