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OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council

On: 28 January 2016

To: Delegations

Subject: Fiscal Counsellors/Attachés meetings of 13 and 19 January 2016

Fiscal Counsellors/Attachés discussed the issue of ensuring transparency of the documents of the Code of Conduct Group on 13 and 19 January 2016. As a result of their discussion, Fiscal Counsellors/Attachés expressed their support for an approach along the lines set out below.

I. INTRODUCTION

1. In recent months, there has been an increase in the number of requests for access to documents:
 - Delegations have reported requests being addressed to their national parliaments and/or governments.
 - Several requests are being dealt with regularly by the Council Secretariat in the area of taxation. They originate either from citizens or from individual Members of the European Parliament.
 - Similarly, the Commission has also received requests in relation to its internal reports on meetings held in Council premises, and has asked delegations whether they would agree to the disclosure of its internal notes.
2. Given the large number of those requests and the fact that the majority seem to relate to the same documents held by different actors, the matter was discussed by the Fiscal Attachés. Delegations mainly expressed a wish to increase transparency under the legal and political applicable framework, whilst stressing the importance to ensure that result-oriented cooperation within the Code of Conduct Group can continue in a confidential manner, in line with repeated Council conclusions.
3. It was noted that the work of the Code of Conduct Group is of a specific nature, as it aims at assessing measures that remain within the competence of a Member State, but which affect, or may affect, in a significant way the location of business activity in the Union¹. Assessment and peer review of national measures imply discussions on sensitive aspects, and the right balance should be found between transparency requirements and the core task of the Group which is to reach results in relation to potentially harmful tax regimes.

¹ See paragraph A of the Code of Conduct.

4. A coordinated approach when deciding on access to documents was considered to be useful, in order to ensure consistency in the replies. The elements set out below could help to achieve this goal.

II. RELEVANT POLITICAL AND LEGAL FRAMEWORK

a) **Political framework**

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 Conclusions of 8 December 2015, 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, maintain the efficiency of the assessment process and counter related risks of aggressive tax planning*" (paras. 16-17).
- Similarly, the report to Ecofin on 8 December 2015 states that "*the Code of conduct group discussed the issue of requests concerning access to documents of the Code of Conduct Group. While acknowledging that the outcome of the work of the Code of Conduct Group should be given more visibility, notably through its six months report, Member States stressed the need to protect the confidentiality of the discussions, and recalled that it is a key element for the good functioning of the Group.*" (para 54).

b) Legal framework

The legal framework applying to requests for access to documents varies, in particular in function of the identity of the requesting party and of the addressee.

i. Transparency Regulation

Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereinafter 'the Transparency Regulation') confirms the principle of transparency and establishes the exceptions under which an institution can refuse access to documents.

The Transparency Regulation applies to requests submitted to EU Institutions (European Parliament, Council, Commission), whereas Member States might be subject to other domestic rules. Since the Transparency Regulation is applicable to requests originating from the public, i.a. from citizens, individual Members of the European Parliament can submit requests for access.

Exceptions to the disclosure of requested documents (see Annex I of this paper) are based, for example, on the protection of:

- (i) public interests in the area of the financial, monetary or economic policy of the Community or of a Member State (Article 4 (1)(a));
- (ii) the institution's decision making process (Article 4 (3)).

The following provisions of the Transparency Regulation should also be mentioned:

- as regards third-party documents, the institution must consult that third party with a view to assessing whether the exceptions apply, unless it is clear that the documents shall or not shall be disclosed (Article 4 (4));

- a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement (Article 4 (5)). In case the Member State does not agree with disclosure, it needs to provide a motivation as to the existence of a concrete risk for one of the interests protected by the Regulation;
- if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released (Article 4 (6));
- a Member State that receives a request under its national legislation for access to a non-public document originating from an EU-institution, shall consult the EU-institution concerned before taking a decision on possible release of the requested document (Article 5 (1)).

ii. Interinstitutional Agreement between the European Parliament and the Commission

The European Parliament and the Commission have agreed a Framework Agreement, dealing in its Annex II with the issue of handling confidential information to the European Parliament (see Annex II of this paper).

Under the Interinstitutional Agreement, based on the principle of sincere cooperation, the Commission undertakes to inform the European Parliament about confidential information, required for the exercise of Parliament's prerogatives and competences, under specific conditions and provided that some guarantees are in place. The Agreement adopts a broad notion of confidential information, which includes, both formal EU classified information (e.g. information classified with the EU or equivalent national or international classification markings) and any other confidential information, including information covered by the obligation of professional secrecy.

Namely, the Interinstitutional Agreement states that "*confidential information from a State, an institution or ... shall be forwarded only with its consent*" (Annex II, 2.1). Furthermore, it provides that specific arrangements to ensure the confidentiality of the information can be put in place before granting access to information. Section 3 describes different possibilities, among which the possibility to hold in camera meetings where no notes or photocopies of documents are being taken, and where security measures are put in place to ensure confidentiality.

It will be eventually up to the Commission, that is the addressee of Parliament's requests, to make the assessment of the relevance of the requested information for the exercise of the Parliament's prerogatives and competences.

It is also to be noted that no such Interinstitutional Agreement exists between the European Parliament and the Council.

III. APPLICATION OF THE POLITICAL AND LEGAL FRAMEWORK TO CODE OF CONDUCT GROUP DOCUMENTS

Different documents are drawn up in the framework of the Code of Conduct Group. Those documents vary in nature, and their content ranges from very sensitive issues to less sensitive ones.

When applying the political and legal framework set out above to individual requests for disclosure of the Code of Conduct documents, the following principles could be applied.

a) Assessment under the Transparency Regulation

i. Principles

1. As a general principle, transparency should be ensured where possible.
2. Assessments should always be made on a case by case basis, in cooperation with the requesting party.

3. Consultation of the originator of the document: the holder of a document to which a request for access has been submitted is obliged under the Regulation to consult with the originator of the document in order to carry out the assessment of the risks linked to disclosure. Consultation is also required under the principle of sincere cooperation if the requested document does not originate but nonetheless relates to an important degree to that Member State or works carried out within another institution.
4. When an actor intends to deny access to a document, he should inform others.
5. When applying the exemptions in the transparency regulation (e.g. undermining of the financial, monetary or economic policy), reasoned explanations why this is the case should be given. The assessments by Member States of the risks linked to disclosure of a joint document, or of more documents having similar content, should be coherent in order to secure the soundness of the reasoning.
6. Assessments of requests for documents should take into account the need to ensure efficient and result-oriented discussion and of an effective decision making within the Code of Conduct WP as a Council preparatory body.
7. Partial release should always be considered when the full document cannot be disclosed.

ii. Concrete cases, types of documents

Keeping in mind the principles set out above, the following lines could be applied when assessing whether to disclose documents.

1. Identification of documents that may be disclosed in principle under reservation of individual assessment to the contrary²:

Housekeeping documents: invitations to meetings, agendas etc.
Presidency Work Programmes: setting out issues to be discussed and the number of planned meetings.
Work Packages: multiannual work programmes of the Group (last examples: 2008, 2011, 2015)
Reports to Ecofin, once agreed: they contain the progress made during the last six months.
General guidance, once agreed
More generally, documents relating to issues on which agreement has been reached ³
Factual documents containing already public information, such as "agreed descriptions" of national measures

2. Reversely, documents relating to pending issues that are still under discussion should not be disclosed in principle.
3. As regards this second category of documents, the possibility could be explored for the existence of a general presumption against disclosure, along the way the Court has already done in other fields (e.g.: State aid investigation, merger investigations, infringement procedures).

² Paragraph 1 identifies categories of documents that can be release in principle. This does not prevent the institution or the Member State(s) concerned to make an individual assessment of those documents under the principles developed under III a) i).

³ In order to ensure a consistent approach, the Code of Conduct Group may wish to draw a list of issues on which agreement has been reached.

b) Assessment under the Interinstitutional Agreement (IIA) between the European Parliament and the Commission

Documents that can be disclosed under the Transparency Regulation should also be considered as releasable in principle to the European Parliament under the IIA.

It belongs to the Commission, as an Institution bound by the Interinstitutional Agreement, to take the final decision on whether to disclose confidential documents. However, as regards confidential information relating to Member States, the latter may refuse to consent to the disclosure when the disclosure would harm their financial, monetary or economic policy.

When assessing whether to give their consent to the disclosure, Member States should also consider the fact that:

- documents can be consulted in the format of an in camera meeting, with appropriate confidentiality agreements and security arrangements being put in place by the European Parliament and the Commission;
- the content of a document can be made available partially.

IV. WAY FORWARD

A way forward on the release of Code of Conduct documents (both under the IIA and the Transparency regulation) could be found along the following lines:

1. Release in principle of all documents identified under III a) ii) 1 under reservation of individual assessment to the contrary;
2. All other documents that do not fall under the release as described above under 1 are to be individually assessed under the principles developed under III a) i);

3. The Member States concerned by the release of a document should have the possibility to indicate which part of the paper would harm their economic policy or the decision-making process and why;
 4. When the assessment is negative, disclosure to the public shall not be granted; when the assessment is partially negative, partial access may be granted. In case of a negative assessment, other actors/institutions should be informed so as to ensure consistency;
 5. Requests from EP/MEPS should be dealt with at least as favourably as for citizens; further transparency should be envisaged under certain conditions (e.g. confidentiality);
 6. As regards the particular request regarding the Commission's internal notes of the Code of Conduct meeting, disclosure in camera to the European Parliament could be considered provided that confidentiality is ensured, and Member States can request that parts of the documents that they identify as not disclosable are blacked out. Any disclosure by the Commission under the Transparency Regulation could be assessed under the principles developed under points 1 to 4.
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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

Article 4

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the *protection of*:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Article 5

Documents in the Member States

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.

Framework Agreement on relations between the European Parliament and the European Commission⁴

ANNEX II

Forwarding of confidential information to Parliament

1. Scope

1.1. This Annex shall govern the forwarding to Parliament and the handling of confidential information, as defined in point 1.2, from the Commission in connection with the exercise of Parliament's prerogatives and competences. The two Institutions shall act in accordance with their mutual duties of sincere cooperation, in a spirit of complete mutual trust and in the strictest conformity with the relevant Treaty provisions.

1.2. 'Information' shall mean any written or oral information, whatever the medium and whoever the author may be.

1.2.1. 'Confidential information' shall mean 'EU classified information' (EUCI) and non-classified 'other confidential information'.

1.2.2. 'EU classified information' (EUCI) shall mean any information and material, classified as 'TRÈS SECRET UE/EU TOP SECRET', 'SECRET UE', 'CONFIDENTIEL UE' or 'RESTREINT UE' or bearing equivalent national or international classification markings, an unauthorised disclosure of which could cause varying degrees of prejudice to Union interests, or to one or more Member States, whether such information originates within the Union or is received from Member States, third States or international organisations.

(a) TRÈS SECRET UE/EU TOP SECRET: this classification shall be applied only to information and material the unauthorised disclosure of which could cause exceptionally grave prejudice to the essential interests of the Union or of one or more of its Member States.

⁴ OJ L 304, 20.11.2010, p. 47–62

(b) SECRET UE: this classification shall be applied only to information and material the unauthorised disclosure of which could seriously harm the essential interests of the Union or of one or more of its Member States.

(c) CONFIDENTIEL UE: this classification shall be applied to information and material the unauthorised disclosure of which could harm the essential interests of the Union or of one or more of its Member States.

(d) RESTREINT UE: this classification shall be applied to information and material the unauthorised disclosure of which could be disadvantageous to the interests of the Union or of one or more of its Member States.

1.2.3. 'Other confidential information' shall mean any other confidential information, including information covered by the obligation of professional secrecy, requested by Parliament and/or forwarded by the Commission.

1.3. The Commission shall ensure that Parliament is given access to confidential information, in accordance with the provisions of this Annex, whenever it receives from one of the parliamentary bodies or office-holders mentioned in point 1.4 a request relating to the forwarding of confidential information. Moreover, the Commission may forward any confidential information on its own initiative to Parliament in accordance with the provisions of this Annex.

1.4. In the context of this Annex, the following may request confidential information from the Commission:

- the President of Parliament,
- the chairs of the parliamentary committees concerned,
- the Bureau and the Conference of Presidents, and
- the head of Parliament's delegation included in the Union delegation at an international conference.

1.5. Information on infringement procedures and procedures relating to competition, in so far as they are not covered by a final Commission decision or by a judgment of the Court of Justice of the European Union on the date when the request from one of the parliamentary bodies/office-holders mentioned in point 1.4 is received, and information relating to the protection of the Union's financial interests, shall be excluded from the scope of this Annex. This is without prejudice to point 44 of the Framework Agreement and to the budgetary control rights of Parliament.

1.6. These provisions shall apply without prejudice to Decision 95/167/EC, Euratom, ECSC of the European Parliament, of the Council and of the Commission of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry ⁽¹⁾ and the relevant provisions of Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF) ⁽²⁾.

2. General rules

2.1. At the request of one of the parliamentary bodies/office-holders referred to in point 1.4, the Commission shall forward to that parliamentary body/office-holder with all due despatch any confidential information required for the exercise of Parliament's prerogatives and competences. In accordance with their respective powers and responsibilities, the two Institutions shall respect:

- fundamental human rights, including the right to a fair trial and the right to protection of privacy,
- provisions governing judicial and disciplinary procedures,
- protection of business secrecy and commercial relations,
- protection of the interests of the Union, in particular those relating to public safety, defence, international relations, monetary stability and financial interests.

In the event of a disagreement, the matter shall be referred to the Presidents of the two Institutions so that they may resolve the dispute.

Confidential information from a State, an institution or an international organisation shall be forwarded only with its consent.

2.2. EUCI shall be forwarded to, and handled and protected by, Parliament in compliance with the common minimum standards of security applied by other Union Institutions, in particular the Commission.

When classifying information for which it is the originator, the Commission will ensure that it applies appropriate levels of classification in line with the international standards and definitions and its internal rules, whilst taking due account of the need for Parliament to be able to access classified documents for the effective exercise of its competences and prerogatives.

- 2.3. In the event of any doubt as to the confidential nature of an item of information or its appropriate level of classification, or where it is necessary to lay down the appropriate arrangements for it to be forwarded in accordance with one of the options set out in point 3.2, the two Institutions shall consult each other without delay and before transmission of the document. In these consultations, Parliament shall be represented by the chair of the parliamentary body concerned, accompanied, where necessary, by the rapporteur, or the office-holder who submitted the request. The Commission shall be represented by the Member of the Commission with responsibility for that area, after consultation of the Member of the Commission responsible for security matters. In the event of a disagreement, the matter shall be referred to the Presidents of the two Institutions so that they may resolve the dispute.
- 2.4. If, at the end of the procedure referred to in point 2.3, no agreement has been reached, the President of Parliament, in response to a reasoned request from the parliamentary body/office-holder who submitted the request, shall call on the Commission to forward, within the appropriate deadline duly indicated, the confidential information in question, selecting the arrangements from among the options laid down in point 3.2 of this Annex. Before the expiry of that deadline, the Commission shall inform Parliament in writing of its final position, in respect of which Parliament reserves the right, if appropriate, to exercise its right to seek redress.

2.5. Access to EUCI shall be granted in accordance with applicable rules for personal security clearance.

2.5.1. Access to information classified as ‘TRÈS SECRET UE /EU TOP SECRET’, ‘SECRET UE’ and ‘CONFIDENTIEL UE’ may only be granted to Parliament officials and those employees of Parliament working for political groups to whom it is strictly necessary, who have been designated in advance by the parliamentary body/office-holder as having a need to know and who have been given an appropriate security clearance.

2.5.2. In light of Parliament’s prerogatives and competences, those Members who have not been given a personal security clearance shall be granted access to ‘CONFIDENTIEL UE’ documents under practical arrangements defined by common accord, including signature of a solemn declaration that they will not disclose the contents of those documents to any third person.

Access to ‘SECRET UE’ documents shall be granted to Members who have been given an appropriate personal security clearance.

2.5.3. Arrangements shall be made with the support of the Commission to ensure that the necessary contribution of national authorities within the framework of the clearance procedure can be obtained by Parliament as quickly as possible.

Details of the category or categories of persons who are to have access to the confidential information shall be communicated simultaneously with the request.

Prior to being granted access to such information each person shall be briefed on its confidentiality level and the resulting security obligations.

In the context of the review of this Annex and future security arrangements, as referred to in points 4.1 and 4.2, the issue of security clearances will be re-examined.

3. Arrangements for access to and the handling of confidential information

3.1. Confidential information forwarded in accordance with the procedures set out in point 2.3 and, where appropriate, point 2.4 shall be made available, on the responsibility of the President or of a Member of the Commission, to the parliamentary body/office-holder who submitted the request, in accordance with the following conditions:

Parliament and the Commission will ensure the registration and the traceability of confidential information.

More specifically, EUCI classified as ‘CONFIDENTIEL UE’ and ‘SECRET UE’ shall be forwarded from the Commission’s Secretariat General central registry to the equivalent competent Parliament service who will be responsible for making it available under the agreed arrangements to the parliamentary body/office-holder who submitted the request.

The forwarding of EUCI classified as ‘TRÈS SECRET UE/EU TOP SECRET’ shall be subject to further arrangements, agreed between the Commission and the parliamentary body/office-holder who submitted the request, aimed at ensuring a level of protection commensurate with that classification.

- 3.2. Without prejudice to the provisions of points 2.2 and 2.4 and the future security arrangements referred to in point 4.1, access and the arrangements designed to preserve the confidentiality of the information shall be laid down by common accord before the information is forwarded. That accord between the Member of the Commission with responsibility for the policy area involved and the parliamentary body (represented by its chair)/office-holder who submitted the request, shall provide for the selection of one of the options set out in points 3.2.1 and 3.2.2 in order to ensure the appropriate level of confidentiality.

3.2.1. Regarding the addressees of confidential information, provision should be made for one of the following options:

- information intended for the President of Parliament alone, in instances justified on absolutely exceptional grounds,
- the Bureau and/or the Conference of Presidents,
- the chair and rapporteur of the relevant parliamentary committee,
- all members (full and substitute) of the relevant parliamentary committee,
- all Members of the European Parliament.

The confidential information in question may not be published or forwarded to any other addressee without the consent of the Commission.

3.2.2. Regarding the arrangements for the handling of confidential information, provision should be made for the following options:

- (a) examination of documents in a secure reading room if the information is classified as ‘CONFIDENTIEL UE’ and above;

- (b) holding the meeting in camera, attended only by the members of the Bureau, the members of the Conference of Presidents or full members and substitute members of the competent parliamentary committee as well as by Parliament officials and those Parliament employees working for political groups who have been designated in advance by the chair as having a need to know and whose presence is strictly necessary, provided they have been given the required level of security clearance, taking into account the following conditions:
- any documents may be numbered, distributed at the beginning of the meeting and collected again at the end. No notes of those documents and no photocopies thereof may be taken,
 - the minutes of the meeting shall make no mention of the discussion of the item taken under the confidential procedure.

Before transmission, all personal data may be expunged from the documents.

Confidential information provided orally to recipients in Parliament shall be subject to the equivalent level of protection as that accorded to confidential information provided in written form. This may include a solemn declaration by recipients of that information not to divulge its contents to any third person.

3.2.3. When written information is to be examined in a secure reading room, Parliament shall ensure that the following arrangements are in place:

- a secure storage system for confidential information,
- a secure reading room without photocopying machines, telephones, fax facilities, scanners or any other technical equipment for the reproduction and transmission of documents etc.,
- security provisions governing access to the reading room, including the requirements of signature in an access register and a solemn declaration not to disseminate the confidential information examined.

3.2.4. The above does not preclude other equivalent arrangements agreed between the Institutions.

3.3. In the event of non-compliance with these arrangements, the provisions relating to sanctions of Members set out in Annex VIII to Parliament's Rules of Procedure and, in respect of Parliament officials and other employees, the applicable provisions of Article 86 of the Staff Regulations ⁽³⁾ or Article 49 of the Conditions of employment of other servants of the European Communities shall apply.

4. Final provisions

4.1. The Commission and Parliament shall take all the measures required for the implementation of the provisions of this Annex.

To that end, the competent services of the Commission and of Parliament shall closely coordinate the implementation of this Annex. This shall include the verification of traceability of confidential information and periodic joint monitoring of security arrangements and standards applied.

Parliament undertakes to adapt, where necessary, its internal provisions so as to implement the security rules for confidential information laid down in this Annex.

Parliament undertakes to adopt as soon as possible its future security arrangements and to verify those arrangements by common accord with the Commission, with a view to establishing equivalence of security standards. This will give effect to this Annex with regard to:

- technical security provisions and standards regarding the handling and storage of confidential information, including security measures in the field of physical, personnel, document and IT security,
- the establishment of a specially established oversight committee, composed of appropriately cleared Members for the handling of EUCI classified as ‘TRÈS SECRET UE/EU TOP SECRET’.

4.2. Parliament and the Commission will review this Annex and, where necessary, adapt it, no later than at the time of the review referred to in point 54 of the Framework Agreement, in light of developments concerning:

- future security arrangements involving Parliament and the Commission,
- other agreements or legal acts relevant for the forwarding of information between the Institutions.

⁽¹⁾ OJ L 113, 19.5.1995, p. 1.

⁽²⁾ OJ L 136, 31.5.1999, p. 20.

⁽³⁾ Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of employment of other servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission.