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From:	Ms Emily O'Reilly, European Ombudsman
date of receipt:	30 May 2022
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. prev. doc.:	6960/22; 7220/22
Subject:	Complaint 1703/2021/AMF to the European Ombudsman - Decision

Delegations will find in the Annex a copy of the Decision by the European Ombudsman in complaint 1703/2021/AMF.

Personal data have been blanked out.



IM 005513 2022  
30.05.2022

Mr Jeppe Tranholm-Mikkelsen  
Secretary-General  
Council of the European Union  
1048 BRUSSELS  
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DELETED  
CC: DELETED

Strasbourg, 30/05/2022

Complaint 1703/2021/AMF

Decision in the above case on the Council of the EU's refusal to give public access to documents concerning the ongoing negotiations on the taxation of digital services (case 1703/2021/AMF)

Dear Mr Tranholm-Mikkelsen,

Please find enclosed my above decision, which has been sent to the complainant.

On the basis of my inquiry into this complaint, I have decided to close it with the following conclusion:

**There was no maladministration by the Council when it refused access to the ten documents in question, at the time of the adoption of its confirmatory decision, based on the need to protect international relations and the financial, monetary or economic policy of the EU or its Member States.**

**The Ombudsman welcomes however the Council's decision, taken during the course of her inquiry, to grant public access to five of the documents in question, namely the three letters exchanged between the Council and the OECD as well as the two communications on the state of play of the legislative proposal from the Council Presidency.**

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Yours sincerely,



Emily O'Reilly  
European Ombudsman

Enclosure:

- Decision on complaint 1703/2021/AMF



Emily O'Reilly

European Ombudsman

## Decision

on the Council of the EU's refusal to give public access to documents concerning the ongoing negotiations on the taxation of digital services (case 1703/2021/AMF)

*The complainant sought public access to documents concerning the ongoing negotiations by the Council on the legislative proposal concerning the taxation of digital services. The Council identified 53 documents as falling within the scope of the complainant's request. It gave full access to 24 documents, refused access to 10 documents in their entirety and granted partial access to the rest. The Council argued that the refusal to disclose these documents was justified by the need to protect international relations, the financial, monetary and economic policy of the EU or Member States, and its own decision-making process.*

*The complainant was dissatisfied with the Council's decision to refuse access to 10 documents in their entirety and turned to the Ombudsman.*

*After inspecting the documents, and following the additional explanations provided by the Council in reply to her questions, the Ombudsman is of the view that the Council's decision to deny public access to the documents was justified at the time. The Ombudsman, however, welcomes the Council's decision, taken in the course of her inquiry, to grant public access to five of the ten requested documents.*

*The Ombudsman therefore closed the inquiry.*

## Background to the complaint

1. The challenges of taxing digital services have been discussed both in European and international fora, with the objective of improving the fairness and efficiency of EU tax systems.
2. In this context, the negotiations in the Council of the EU (Council) on the legislative proposal for a digital services tax<sup>1</sup> are linked with the international negotiations led by the Organisation for Economic Cooperation and Development (OECD)<sup>2</sup> and the G20<sup>3</sup> on the

<sup>1</sup> Proposal for a Directive on the Common system of a Digital services tax on revenues resulting from the provision of certain digital services. See: <https://www.eum-council.europa.eu/media/146684/main/attachment-data/file/Proposal-for-a-Directive-on-the-common-system-of-a-digital-services-tax-on-revenues-resulting-from-the-provision-of-certain-digital-services.pdf>

<sup>2</sup> See: <https://www.oecd.org/about/>

<sup>3</sup> The G20 or Group of Twenty is an intergovernmental forum comprising 19 countries and the European Union. It works to address major issues related to the global economy, such as international financial stability, climate change mitigation, and sustainable development. See: <https://g20.org/>

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global reform of the rules for corporate taxation, including tax challenges resulting from the digitalisation of the economy.

3. In July 2020, the complainant, a non-profit organisation, asked the Council to grant public access<sup>4</sup> to “all agendas, minutes (and) notes of discussions; position papers; and any other documents relating to Council deliberations, since 1 January 2019, where the EU’s Digital Services Tax proposal, and/or the OECD’s negotiations on a similar tax were discussed.” The complainant made its request under the EU legislation on public access to documents<sup>5</sup>.

4. The Council identified 53 documents as falling within the scope of the complainant’s request. It granted full access to 18 documents, partial access to two documents and refused access to 33 documents in their entirety. In refusing access, the Council relied on a number of exceptions provided for under the EU legislation on public access to documents, including the need to protect the public interest as regards international relations<sup>6</sup>, the financial, monetary or economic policy of the EU<sup>7</sup> and the protection of the decision making-process of the Council<sup>8</sup>.

5. In November 2020, the complainant asked the Council to review its decision to refuse access (by making a ‘confirmatory application’).

6. In January 2021, the Council reviewed its original decision<sup>9</sup>. It gave full public access, “taking account of the state of play on the matter” to eight of the previously non-disclosed documents and to one of the previously partially released documents. In addition, the Council gave partial public access, after erasure of personal data, to two of the previously non-disclosed documents. Overall, the Council provided partial access to 14 documents and refused access to 10 documents in their entirety, confirming that the non-disclosure was justified by the need to protect the public interest as regards international relations<sup>10</sup>, the financial, monetary or economic policy of the EU<sup>11</sup> and the protection of the decision making-process of the Council<sup>12</sup>.

7. Dissatisfied with the reply, the complainant turned to the Ombudsman regarding the refusal to grant access to 10 documents in their entirety<sup>13</sup>.

<sup>4</sup> All the exchanges related to this request are published on: [https://www.piktheu.org/en/request/digital\\_services\\_tax](https://www.piktheu.org/en/request/digital_services_tax)

<sup>5</sup> Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049>

<sup>6</sup> In accordance with Article (4)(1)(a), third indent of Regulation 1049/2001

<sup>7</sup> In accordance with Article (4)(1)(a), fourth indent of Regulation 1049/2001

<sup>8</sup> In accordance with Article (4)(3), first paragraph of Regulation 1049/2001

<sup>9</sup> It appears that the complainant did not receive the correct attachments to the Council’s reply to its confirmatory application due to an administrative error. The complainant raised this issue in July 2021, and the Council provided it with the correct attachments in September 2021. The Council’s reply to the confirmatory application with the correct attachments had been published in the Council’s public register since January 2021.

<sup>10</sup> In accordance with Article (4)(1)(a), third indent of Regulation 1049/2001

<sup>11</sup> In accordance with Article (4)(1)(a), fourth indent of Regulation 1049/2001

<sup>12</sup> In accordance with Article (4)(3), first paragraph of Regulation 1049/2001

<sup>13</sup> Identified by the Council as:

WK 260 2019 INIT “Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services - Digital Advertising Tax – possible circumvention risks”;  
WK 8515 2019 INIT “Methodology for the economic analysis of the proposals on international corporate tax reform”

WK 8650 2019 INIT “Economic Analysis of Corporate Tax Reform Options (for the EU) - Presentation”



## The inquiry

8. The Ombudsman opened an inquiry into the complaint that the Council was wrong to refuse public access to ten documents.

9. In the course of the inquiry, the Ombudsman inquiry team inspected the ten documents in question and subsequently met with staff of the General Secretariat of the Council with a view to obtaining clarifications on the Council's reasons for refusing access. The Ombudsman then provided the complainant with a report on this meeting and, subsequently, received the complainant's comments on that report.

10. After the meeting, the Ombudsman inquiry team inspected additional documents, namely the Council's consultations with the Commission, Hungary and the OECD on the potential disclosure of the documents originating from them. The inspection of these documents led the Ombudsman to ask for further explanations regarding the Council's arguments justifying its decision to refuse public access to three of the requested documents. The Council provided the Ombudsman with the requested explanations in May 2022.

## Arguments presented to the Ombudsman

### *By the complainant*

11. The complainant is of the view that the Council has not explained how international relations and the financial, monetary or economic policy of Member States would be harmed by the disclosure of the documents.

12. The complainant stated that, in the context of negotiations between Member States, the fact that there have been consultations with the OECD and the G20 is not sufficient to argue that international relations are at stake: *"The mere fact that there has been some consultation with or input from the OECD and G20, which are inter-governmental bodies/processes, is not sufficient to consider that international relations are at stake."*

13. The complainant also argued that it was not demonstrated that disclosure of the documents would cause a reasonably foreseeable and non-hypothetical harm to the Council's decision-making process. In its opinion, the public interest in the publication of the documents prevails over the protection of the Council's decision making.

14. The complainant is of the view that the Council has not complied with the Ombudsman's previous recommendations on the transparency of its legislative process<sup>14</sup>.

WK 10986 2019 INT "Tax challenges arising from digitalisation"

WK 11055 2019 INT "Presentation by the Commission"

WK 11769 2019 INT "Preliminary results pillar 2 - Presentation by the Commission"

WK 13225 2019 INT "Hungary's Position Paper on the compatibility of the Pillar 2 Proposals with EU law"

WK 2260 2020 INT "Digital taxation: economic impact analysis - Letter from OECD"

WK 5870 2020 INT "Economic impact assessment - Digital taxation"

WK 7902 2020 INT13 "Letter to OECD - digital taxation"

<sup>14</sup> See European Ombudsman's strategic inquiry OI/220217/TE

<https://www.ombudsman.europa.eu/en/decision/en/94896>

The complainant argues that the disclosure of the requested documents would allow the public to assess the impact of external lobbying on the legislative process.

*By the Council*

**15.** In its confirmatory decision, the Council recalled its wide discretion when determining whether the disclosure of documents would undermine the public interest as regards international relations and the financial, monetary or economic policy of the EU and its Member States<sup>15</sup>.

**16.** According to the Council, the disclosure of the documents would have a *“negative impact on the relations of the European Union with its counterparts in the OECD and G20. Should the European Union internal views and negotiation strategy be made public while negotiations to find a consensus-based solution to tax challenges linked to the digitalisation of the economy are still ongoing, the position of the Union in such multilateral negotiations would be seriously weakened. Such disclosure could seriously undermine the mutual trust essential to the effectiveness of the international negotiations and risks upsetting those discussions that are taking place in a sensitive context”*.

**17.** The Council added that the disclosure of the documents *“might trigger negative tendencies, both in communication and impact on work of democratically elected governments, and possible arrangements businesses might be deciding to take, which then would consequently undermine the protection of the public interest as regards the financial or economic policy of the EU or any Member State concerned”*.

**18.** The Council also stated that a premature disclosure of the documents *“would not stimulate debates in the Council or between the Institutions, but more likely dissuade Member States from sharing such details in the future in a climate of mutual trust”*. It therefore added that *“the legitimate public interest in release of the information does not outweigh in this particular case the equally legitimate need to protect the decision-making process”*.

**19.** In the meeting with the Ombudsman inquiry team, the staff of the Council General Secretariat stressed that the negotiations around the legislative proposal on the taxation of digital services are particularly sensitive. An international tax system can function only if there is broad support for international rules (unanimity or, at least, a large consensus). Therefore, a global debate is necessary. That is also one of the main reasons why the Council publicly announced<sup>16</sup> that the discussions on the legislative proposal for a Digital Services Tax should be put on hold, until there is a timely agreement in the relevant global fora.

**20.** The staff of the Council General Secretariat also noted that most of the documents related to the ongoing legislative procedure had been released, and that the ten documents in question mostly concerned the ongoing global negotiations on international taxation. The Council thus considered these documents not to be part of a legislative process.

<sup>15</sup> Judgment of the Court of Justice of 1 February 2007 in case C-268/05 P, *Sison v Council*, para 34. Available at: <https://curia.europa.eu/juris/document/document.jspx?text=&docid=66056&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=17781820>

<sup>16</sup> <https://data.consilium.europa.eu/doc/document/ST-13350-2020-INIT/en/pdf>

21. During the meeting, the staff of the Council General Secretariat gave further explanations regarding the documents in question:

- Three of the non-disclosed documents are letters between the OECD and the Presidency of the Council, which were not meant to be public. It explained that even partial disclosure of the contents of the interactions reflected in the letters would have undermined reciprocal trust between the EU and the OECD. The staff of the Council General Secretariat confirmed that the OECD had been consulted before refusing access to the letters<sup>17</sup>.
- Four of the non-disclosed documents are presentations and papers originating from the European Commission. The staff of the Council General Secretariat confirmed that the Commission had been consulted before refusing access to the documents that originated from it<sup>18</sup>.
- One of the non-disclosed documents is the opinion of a Member State (Hungary) on the compatibility of the legislative proposal with EU law. The Council had consulted Hungary on the potential disclosure of the document<sup>19</sup>.
- Two of the non-disclosed documents are communications issued by the Council's Presidency on the state of play of the legislative proposal.

## The Ombudsman's assessment

22. The EU institutions enjoy a wide margin of discretion when determining whether disclosing a document would undermine any of the public interests protected under Article 4(1)(a) of Regulation 1049/2001, such as international relations and the financial, economic or monetary interest of the EU and its Member States<sup>20</sup>. The public interests protected under this provision cannot be superseded by another public interest that is deemed more important. This means that, if an institution considers that any of these interests could be undermined by disclosure, it must refuse access.

23. As such, the Ombudsman's inquiry aimed to assess if there was a **manifest error** in the Council's assessment that the ten documents could not be disclosed.

24. Having inspected the documents, the Ombudsman found no manifest error in the Council's assessment leading to its decision to deny public access to seven of the documents in question, at the time of the adoption of the confirmatory decision. The seven documents include the four presentations and papers originating from the European Commission, Hungary's opinion on the compatibility of the legislative proposal with EU law and the two communications issued by the Council's Presidency on the state of play of the legislative proposal (both of which have now been released, see point 28 below).

<sup>17</sup> In accordance with article 4(4) of Regulation 1049/2001 (footnote 6).

<sup>18</sup> See footnote 18.

<sup>19</sup> See footnote 18 and article 4(5) of Regulation 1049/2001.

<sup>20</sup> See, for example, judgment of the General Court of 11 July 2018, *ClientEarth v Commission*, T-644/16: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=203913&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=46943>.



25. As regards the remaining three documents, that is, the letters exchanged between the OECD and the Presidency of the Council, the Ombudsman notes that the OECD, when consulted by the Council, expressed "no objection" to giving public access to its letters. Given the diplomatic tone and content of the letters, the Ombudsman asked the Council to explain precisely how the reciprocal trust between the EU and the OECD would have been undermined by the (partial) disclosure of these letters.

26. In its reply to the Ombudsman, the Council confirmed its position that the mutual trust between the Council and the OECD would have been undermined by the disclosure of the documents at the time of the adoption of the confirmatory decision. It explained that the OECD had postponed the deadline to find a consensus to address the tax challenges arising from the digitalisation of the economy to mid-2021, and that the Council had put on hold the discussions on the legislative proposal for a Digital Services Tax in order to facilitate the work of the OECD. In that context, the parties involved agreed that the Commission papers presenting a methodology to estimate the revenue impacts of the OECD-led negotiations were strictly confidential. The three letters contained an exchange between the Council and the OECD regarding those Commission papers.

27. The Council also noted that the release of a document involving two parties does not necessarily have the same consequences for both of them, and that the consultation process under Article 4 of Regulation 1049/2001 is not binding on the institution's final assessment. Therefore, even if the OECD expressed no objection to the release of the letters, the Council had considered it essential to build trust in its ability to maintain the confidential nature of the talks with its international counterparts by refusing to disclose the letters.

28. Having said that, the Council noted that, in October 2021, the OECD negotiations led to an agreement on a global solution on the general framework of the reform of the rules on international corporate taxation. This political agreement was divided into two pillars. While the work on Pillar I is still ongoing, the Pillar II rules are expected to be transposed into EU law through a Directive on ensuring a global minimum level of taxation for multinational groups in the Union. Therefore, given these recent events, the Council has now decided to grant access to the three letters exchanged with the OECD, as well as to two further documents requested by the complainant, namely the two communications issued by the Council Presidency on the state of play of the legislative proposal<sup>21</sup>.

29. The Ombudsman accepts the additional explanations provided by the Council. She welcomes however the Council's decision, taken during the course of her inquiry, to grant the complainant access to five of the documents in question, namely the three letters exchanged between the Council and the OECD as well as the two communications on the state of play of the legislative proposal from the Council Presidency.

<sup>21</sup> The Council has now granted public access to:  
WK 2260 2020 INIT "Digital taxation: economic impact analysis - Letter from OECD"  
WK 5870 2020 INIT "Economic impact assessment - Digital taxation"  
WK 7902 2020 INIT21 "Letter to OECD - digital taxation"  
WK 260 2019 INIT "Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services - Digital Advertising Tax – possible circumvention risks"  
and  
WK 10988 2019 INIT "Tax challenges arising from digitalisation"

## Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

**There was no maladministration by the Council when it refused access to the ten documents in question, at the time of the adoption of its confirmatory decision, based on the need to protect international relations and the financial, monetary or economic policy of the EU or its Member States.**

The Ombudsman welcomes however the Council's decision, taken during the course of her inquiry, to grant public access to five of the documents in question, namely the three letters exchanged between the Council and the OECD as well as the two communications on the state of play of the legislative proposal from the Council Presidency.

The complainant and the Council will be informed of this decision.



Emily O'Reilly  
European Ombudsman

Strasbourg, 30/05/2022