



Council of the
European Union

Brussels, 17 May 2023
(OR. en)

9422/23

INF 110
API 79

NOTE

From: General Secretariat of the Council
To: Delegations

Subject: Public access to documents
- Confirmatory application No 13/c/01/23

Delegations will find attached:

- the requests for access to documents sent to the General Secretariat of the Council on 14 April 2023 and registered on 17 April 2023 (Annex 1);
- the reply from the General Secretariat of the Council dated 10 May 2023 (Annex 2);
- the confirmatory application dated 14 May 2023 and registered on 15 May 2023 (Annex 3).

[E-mail messages sent to GSC on Friday 14 April, 2023 and received by access@consilium.europa.eu on Monday 17 April, 2023]

Sent via email

[REDACTED]
Head of Unit (ECOFIN 2.B – Tax Policy)
General Secretariat
European Council

[REDACTED]
Head of Unit (DG JUST C: Fundamental rights and Rule of Law)
Directorate-General Justice and Consumers (DG JUST)
European Commission

[REDACTED]
Head of Unit (FISMA.B.3 – Retail Financial Services)
Directorate-General for Financial Stability, Financial Services and
Capital Markets Union
European Commission

Cc: PETI / EDPB / Council of Europe (T-PD) / EU Petitioners

Dear [REDACTED]

First Information Access Request

You are aware of our correspondence on FATCA and the CRS, which is available [online](#).

1. Background

I understand that the Working party on Tax Questions (Direct Taxation) met on 30 March 2023 (following an invitation dated 8 March 2023 from the Council dated 8 March 2023 (to attend the delivery of a presentation concerning the ongoing work in the OECD on international automatic exchange of information in the area of taxation and its interaction with the framework for data protection ([ECOFIN 2.B, Ref. 7180/23](#))).

2. Access request

I am writing to ask you to give me and the [EU Petitioners](#) (copied in) public access to:

2.1	any preparatory documents, agenda and meeting notes relating to the 30 March 2023 meeting of the Working Party on Tax Questions (Direct Taxation)
2.2	the presentation delivered at such meeting.
2.3	This included exchanges between EU institutions and the OECD, Member States and data protection authorities.

3. Discussion

Over the past few years, our requests to the Commission have been [met with obstruction](#). Before considering rejecting this request, I would invite you please to consider the recent [mismanagement decision](#) issued against the EDPB as well as the previous decisions issued by the EU Ombudsman against the Commission in the long-running saga concerning FATCA¹, the ["culture of secrecy"](#) described by Sophie in 't Veld MEP, as well as the [criticism](#) levelled by the Chair of the European Parliament's Petitions Committee to the Commission for the lack of progress.

¹ e.g. cases [1102/2021/VB](#), [2177/2017/STL](#) and [1398/2013/ANA](#)

doc. 75710247.1
Switchboard: +44 (0)20 3321 [REDACTED]
Main Fax: +44 (0)20 7404 [REDACTED]



There is an overwhelming public interest in the disclosure of the requested material. Recent judgments by the CJEU in the "Schrems II" and "Sovim" cases (C-311/18 and C-601/20) reaffirmed the importance of safeguards for international data transfers and the principle of necessity when seeking to limit the fundamental rights to privacy and data protection. As our [chronology](#) shows, the Commission itself harboured worrying concerns about the data protection implications of systems of automatic exchange of information.

As regards the OECD, additional concerns stem from the [OECD's Secretary-General decision](#) (following our [complaint](#) under the OECD rules) according to which the OECD does not owe any data protection obligations to the millions of citizens whose data is subject to automatic exchange, which is inconsistent with the core values of the EU.

As our research shows, there are also [concerns about the safety of the CTS² / IDES³](#), which act as a single gateway for potential hacking activities.

The inclusion, at a high-level meeting of the EU, of an international organisation that does not believe in the application of data protection to automatic exchange of information, and giving the role of delivering a presentation on data protection to EU institutions merits a high degree of influence.

We first raised data protection concerns with the OECD [in 2016](#) (duly ignored) and it is a matter of public record that the OECD [ignored the "strong concerns"](#) raised by the Chair of the EU's Article in relation to the compliance of the OECD's framework with EU data protection rules in the weeks preceding the entry into effect of the CRS at the beginning of 2017.

In the circumstances, it is worrying that the EU might now be relying on data protection advice proffered by the OECD, and therefore the circumstances of the OECD's presentation to the Working Party on Tax Questions merits a high degree of scrutiny by EU petitioners, as well as civil society.

4. Timetable

Given the EU's proved track-record of obstructionism in this area, I would expect a substantive response to this access request within 10 working days, i.e. by 4pm on 28 April 2023, failing which we will file an additional complaint to the EU Ombudsman.

Best regards,


Partner

² The Common Transmission System (CTS) is used to transfer CRS data amongst 100+ jurisdictions.

³ International Data Exchange System (IDES) is used to transfer FATCA data to the US.

Sent via email

[REDACTED]
Head of Unit (ECOFIN 2.B – Tax Policy)
General Secretariat
European Council

[REDACTED]
Head of Unit (DG JUST C: Fundamental rights and Rule of Law)
Directorate-General Justice and Consumers (DG JUST)
European Commission

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Head of Unit (FISMA.B.3 – Retail Financial Services)
Directorate-General for Financial Stability, Financial Services and
Capital Markets Union
European Commission

Cc. PETI / EDPB / Council of Europe (T-PD) / EU Petitioners

[REDACTED]
[REDACTED]
[REDACTED]
14 April 2023

Dear [REDACTED]

Second Information Access Request

You are aware of our correspondence on FATCA and the CRS, which is available [online](#).

1. Background

According to an article published today in [Tax Notes](#) ("EU Seeks to Ensure Info Exchange Complies With Data Protection Reg"), a comparative table prepared by the Swedish presidency of the EU Council shows that not all the provisions of the EDPB guidelines have a CRS equivalent.

We had already reached the same conclusion in [our letter dated 6 March 2020](#), comparing an IGA with those guidelines.

2. Access request

I am writing to ask you to give me and the [EU Petitioners](#) (copied in) public access to:

2.1	The comparative table prepared by the Swedish Presidency, including any draft version
2.2	Any exchanges between the European Council, the Commission, Member States and data protection authorities concerning the same.

3. Discussion

Over the past few years, our requests to the Commission have been [met with obstruction](#). Before considering rejecting this request, I would invite you please to consider the recent [mismanagement decision](#) issued against the EDPB as well as the previous decisions issued by the EU Ombudsman against the Commission in the long-running saga concerning FATCA¹, the "[culture of secrecy](#)", described by Sophie in 't Veld MEP, as well as the [criticism](#) levelled by the Chair of the European Parliament's Petitions Committee to the Commission for the lack of progress.

¹ e.g. cases [1102/2021/VB](#), [2177/2017/STI](#), and [1398/2013/ANA](#)

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Switchboard: +44 (0)20 3321 [REDACTED]
Main Fax: +44 (0)20 7404 [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]



There is an overwhelming public interest in the disclosure of the requested material. Recent judgments by the CJEU in the "Schrems II" and "Sovim" cases (C-311/18 and C-601/20) reaffirmed the importance of safeguards for international data transfers and the principle of necessity when seeking to limit the fundamental rights to privacy and data protection. As our [chronology](#) shows, the Commission itself harboured worrying concerns about the data protection implications of systems of automatic exchange of information.

As regards the OECD (which we understand has taken part to a [recent EU meeting](#) on this subject) additional concerns stem from the [OECD's Secretary-General decision](#) according to which the OECD does not owe any data protection obligations to the millions of citizens whose data is subject to automatic exchange, which is inconsistent with the core values of the EU.

As our research shows, there are also [concerns about the safety of the CTS² / IDES³](#), which act as a single gateway for potential hacking activities.

4. Timetable

Given the EU's proved track-record of obstructionism in this area, I would expect a substantive response to this access request within 10 working days, i.e. by 4pm on 28 April 2023, failing which we will file an additional complaint to the EU Ombudsman.

Best regards,


Partner

² The Common Transmission System (CTS) is used to transfer CRS data amongst 100+ jurisdictions.
³ International Data Exchange System (IDES) is used to transfer FATCA data to the US.



Council of the European Union

General Secretariat

Directorate-General Communication and Information - COMM

Directorate Information and Outreach

Information Services Unit / Transparency

Head of Unit

Brussels, 10 May 2023

DELETED

E-mail: **DELETED**

Ref. 23/1165 and 23/1166-mw/sr

Request made on: 14.04.2023

Registered on: 17.04.2023

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.

Please note that with this letter, we are responding to your two requests for access to documents, registered under the references 23/1165 and 23/1166.

Your first request concerns the preparatory documents, agenda and meeting notes relating to the 30 March 2023 meeting of the Working Party on Tax Questions (Direct Taxation); the presentation delivered at such meeting and exchanges between EU institutions and the OECD, Member States and data protection authorities.

Your second request concern the comparative table prepared by the Swedish Presidency, including any draft version and exchanges between the European Council, the Commission, Member States and data protection authorities concerning the same.

We have identified the following documents as related to your requests.

CM 2129/2023

ST 7180/23

WK 4084/2023

WK 4085/2023

WK 4378/2023.

Please find attached documents CM 2129/23 and ST 7180/23.

I regret to inform you that full access to documents WK 4084/2023, WK 4085/2023 and WK 4378/2023 cannot be given for the reasons set out below.

Document WK 4084/2023 of 24 March 2023 is a Presidency steering note addressed to Delegations on the automatic exchange of tax information with third countries and its interaction with the General Data Protection Regulation (GDPR). It contains a state of play of the ongoing work on this topic.

Document WK 4085/2023 of 24 March 2023 is a paper by the Spanish delegation to Delegations. It contains a proposal for amendment of the directive on administrative cooperation in the field of taxation (DAC).

Document WK 4378/2023 of 3 May 2023 is a document from the Spanish delegation to Delegations. It contains a presentation made by the Spanish delegation regarding a proposal for amendment of the directive on administrative cooperation in the field of taxation (DAC).

Making these documents fully public, at this preliminary stage of the ongoing work and discussions, could undermine the international relations of MS.

As a preliminary remark, signing international agreements on the exchange of tax information falls within the competence of the Member States.

The ongoing discussions cover a number of policy and legal considerations, which are also relevant in the context of the ongoing and future negotiations of international agreements on tax information exchanges by Member States (for example, the Multilateral Competent Authority Agreement (MCAA) for the automatic exchange of information reported by Digital Platforms or the MCAA for the automatic exchange of information on Crypto-Assets). Therefore, disclosure of these documents would weaken the Member States negotiating position, increase the risk of jeopardising the negotiating process as a whole and thereby undermine the protection of their international relations. Furthermore, non-EU countries could refrain from subscribing international agreements on tax information exchanges: as a result of disclosure, doubts can arise about the stability of the

matters and/or texts under negotiations (Working Party on Tax Questions and Council work has not been concluded yet).

Disclosure would also undermine the protection of the public interest as regards the financial, monetary or economic policy of the Community or a Member State.

Efficient flow of international data exchange for tax purposes, in line with the globally agreed standards, constitutes the necessary instrument to fight tax fraud in a globalised world. Therefore, also considering the arguments set out above, disclosure of these documents at this stage could harm the fight against tax fraud. For example, these documents can be used for comparing the current content of international agreements on the exchange of tax information or the ones that are being or are going to be negotiated by Member States, which may create difficulties for the signature of this kind of international agreements. Disclosure could also facilitate challenging the exchanges carried out under the international agreements that are currently in force. This would amount to creating obstacles in the fight against international tax fraud, given that the intended result of such efforts would be to hinder international exchanges of tax information. If these efforts are successful, the hindrances to the exchange of tax information that they would create could generate loopholes, cases of absence of information or grounds to obtain it, where the product of tax fraud could be hidden out of reach of the tax administrations of Member States. In a globalised world, any obstacle to the exchange of tax information amounts to an obstacle to the prosecution of tax fraud. Thus, non-disclosure of these documents is also based on the reasonable probability of the intent that the requested documents will be used with the intent to hamper international exchanges of tax information and thereby the fight against tax fraud, which would undermine the fiscal policy of Member States.

Disclosure would also undermine the institution's decision-making process.

Disclosure of these documents could lead to that non-EU countries could attempt influencing possible conclusions of this work to the benefit of their interests (the results of which would require unanimous support by Member States). Delegations of Member States meeting in the Council or its preparatory bodies at this stage have to conduct the necessary analysis and release of any preliminary information may also have any of these described consequences. Regarding these particular documents or parts thereof, it must be underlined that a frank and open discussion between Member States is necessary, even more so if it is taken into account that it pertains to a domain as sensitive as taxation. If such documents are released officially, while that discussion is still taking place, Member States will be vulnerable to attempts to influence their position.

Full disclosure of the documents would therefore seriously undermine the protection of the public interest as regards international relations, as regards the financial, monetary or economic policy of the Union or a Member State and as regards the Council's decision making process.

As a consequence, the General Secretariat has to refuse full access to the documents.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to documents WK 4084/2023, WK 4085/2023 and WK 4378/2023. However, in accordance with Article 4(6) of Regulation (EC) No. 1049/2001, you may have access to the table in document WK 4085/2023 concerning the application of Art. 46 of the GDPR in the context of the automatic exchange of tax information with third countries.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.

Yours sincerely,

Fernando FLORINDO

Enclosures: 3

[E-mail message sent to access@consilium.europa.eu on Sunday, 14 May, 2023 13:10]

From: **DELETED**

Sent: dimanche 14 mai 2023 13:10

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Cc: **DELETED**

Subject: FATCA | Request to review refusal to disclose documents

Dear Mr Florindo

COMM Ref. 23/1165 and 23/1166-mw/sr

Ombudsman Ref. Complaint 201/2022/JK - for information only

Please see attached un response to your letter dated 10 May.

Best regards,

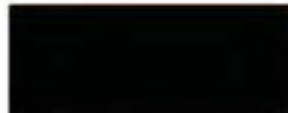
DELETED

Your Ref: 23/1165 and 23/1166

Sent via email

Mr Fernando Florindo
Head of Unit (DG Communication and Information - COMM)
Council of the European Union
Brussels

Cc: PET/EU Ombudsman/EU Petitioners



14 May 2023

Dear Mr Florindo

**AEOI | Refusal to disclose documents part of consistent pattern to frustrate GDPR in this area
Request for a formal review**

I am writing further to your refusal to provide any meaningful access to the documents requested in our information access requests dated 14 April 2023 (see [here](#) and [here](#)).

1. **Your decision dated 10 May**

"Full disclosure of the documents would seriously undermine the protection of the public interest as regards international relations, as regards the financial, monetary or economic policy of the Union or a Member State and as regards the Council's decision-making process."

3. **Serious questions about the inclusion of the OECD**

Access to information enhances transparency in the work carried out by EU institutions and underpins the EU's democratic process.

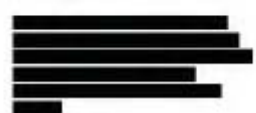
In the case in hand, the European Council asked the OECD to give a presentation to the European Council, the European Commission and Member States on the data protection implications of automatic information exchange.

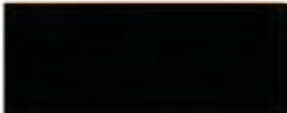
However:

<ul style="list-style-type: none"> The OECD has been heavily criticised by the EU's own data protection working party for failing to take into account 'serious' and 'worrying' data protection concerns, also in the light of relevant case law from the European Court of Justice – see letters dated 21 June 2012 and 12 December 2016. 	"worrying concerns"
<ul style="list-style-type: none"> The Secretary-General of the OECD has ruled that the OECD does not owe any data protection duties to citizens whose data is exchanged under AEOI. 	"above the law"
<ul style="list-style-type: none"> The EU has come under intense scrutiny from the European Parliament in relation to its response to these data protection concerns – see Resolution TA-B-2018-0316 dated 5 July 2018, Resolution P9_TA(2021)0256 dated 20 May 2021, Study PE 604.967 dated 14 May 2018 and Study Update PE 734.765 dated September 2022. 	"deplorable"
<ul style="list-style-type: none"> Internal EU documents released to Sophie in 't Veld MEP following a lengthy legal wrangle show that (a) the Commission had 'worrying' concerns about the data protection implications of FATCA, (b) the and (b) the Commission's own experts warned about the possible clash between the CRS developed by the OECD and CJEU case law and that DAC2 could be illegal. 	"illegal"



doc. 76046314.1





<ul style="list-style-type: none"> Internal documents suggest that the European Commission misled the European Parliament in relation to the existence and extent of data protection concerns on the work carried out on FATCA and by the OECD. 	"misleading"
<ul style="list-style-type: none"> Only last week, the European Parliament renewed its concerns in relation to the framework for transatlantic transfer of data, which is relevant for FATCA – see Resolution P9_TA(2023)0204 dated 11 May 2023, echoing the conclusions reached by Taxud in relation to FATCA as early as December 2011 that the US offered lower data protection safeguards. 	"lower standards"

3. Request for full disclosure

The OECD considers itself above data protection laws and has been strongly criticised by the European data protection authorities for failing to take into account data protection concerns and the case law issued by the CJEU when approaching automatic exchange of information.

Seen in this light, the Council's decision to ask the OECD to present on data protection and rely on its advice appears irrational and requires a higher degree of public scrutiny.

Last month, the EU Ombudsman ruled that an attempt from the EDPB to resist a similar request of information amounted to 'maladministration'.

Previously, MEPs noted during a public hearing that the EU's handling of FATCA is "Kafkaesque".

Your heavily redacted response confirms the impression of EU institutions at work to frustrate EU citizens' fundamental rights and shield themselves from further criticism for the poor manner in which they have been handling this file.

There is a consistent pattern here, as evidenced by the frequent interventions from the EU Ombudsman¹ to [force](#) disclosure of documents and the EU's refusal to actively deal with GDPR complaints (discussed [here](#) and [here](#)).

Presidency steering note
10712/2022 (Presidency Position – 2022)
 10712/2022 (Presidency Position – 2022)

[Redacted content]

Please therefore, will Council review its decision to refuse a full and transparent disclosure of the documents requested on 14 April.

Best regards,

Partner

¹ Cases 1398/2013/ANA; 2177/2017/STI; 1102/2021/VB; 201/2022/JK, joint cases 509/2022/JK and 1698/2022/FA