



Brussels, 23 March 2020
(OR. en)

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API 36

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 08/c/01/20

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 20 February 2020 and registered on 21 February 2020 (Annex 1);
- reply from the General Secretariat of the Council dated 4 March 2020 (Annex 2);
- confirmatory application dated 19 March 2020 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu 20 February 2020 - 21:19 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of: **DELETED**

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): All documents (room documents, working papers, ST-Documents, (informal) meeting minutes drafted by Council Secretariat representatives, etc) on the Directive as regards disclosure of income tax information by certain undertakings and branches (public country-by-country reporting) related to the years 2016-2019.

1st preferred linguistic version:

2nd preferred linguistic version:



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, 4 March 2020

DELETED

Email: **DELETED**

Ref. 20/0416-mw/nb

Request made on: 20.02.2020
Registered on: 21.02.2020

Dear **DELETED**

Thank you for your request for access to documents of the Council of the European Union.¹

We have identified the documents listed below as related to your request.

Please find attached the following documents:

ST 13685/17 REV 1
CM 4250/17
CM 2732/17
ST 8904/17
ST 10525/17
CM 1235/17 REV 2
CM 1235/17 REV 1
CM 1235/17
ST 15243/16
WK 12193/2017

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

ST 963717
WK 14969/2017
ST 9637/17 COR 1
CM 2925/17 REV 1
ST 7949/16
WK 10862/2017
CM 4652/17
ST 13685/17
CM 3916/17
ST 10525/17 COR 1
CM 2925/17
ST 7949/16 ADD 1
ST 7949/16 ADD 2
WK 14969/2017 REV1
ST 7898/18 COR1
ST 11438/18
ST 11439/18
ST 5134/19
ST 5134/19 COR1
ST 8520/19
ST 11189/19
ST 14038/19
ST 14038/19 COR1
ST 14038/19 ADD1
ST 15285/19
ST 5095/20
WK 6662/2018
CM 3107/18
CM 1086/19
CM 4246/19
WK 11222/2019
CM 4246/19 COR1
CM 4718/19

Please also find attached a partially accessible version of documents WK 8500/2017, WK 3319/2017, WK 694/2019, WK 694/2019 REV1, WK 12550/2019 and WK 12550/2019 REV1.² However, I regret to inform you that full access cannot be given for the reasons set out below.

These documents contain personal data about identified people. For reasons of personal data protection, these data have been blacked out.³

Disclosure of the personal data would undermine the protection of privacy and the integrity of the individuals.⁴

² Article 4(6) of Regulation (EC) No 1049/2001.

³ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295 21.11.2018, p. 39).

⁴ Article 4(1)(b) of Regulation (EC) No 1049/2001.

I regret to inform you that access to the following documents cannot be given for the reasons set out below.

WK 5230/2017: Comments received from delegations on CBCR Proposal - 08/05/2017

WK 12197/2017: Consolidated table with Delegations' contributions - 27/10/2017

WK 12197/2017 REV1: Consolidated table with Delegations' contributions - 18/07/2018

WK 10931/17: Delegations comments received after the Working Party meeting on 20 of September 2017 - 06/10/2017

These documents concern a difficult issue which is still under discussion within the preparatory bodies of the Council.

They give details of progress made and thereby reflect the difficulties that still need to be addressed before the Council can reach a political agreement. Release to the public of the information contained in them would severely affect the negotiating process and diminish the chances of the Council reaching an agreement.

Disclosure of the documents would therefore seriously undermine the decision making-process of the Council.

Having examined the context in which the documents were drafted and the current state of play on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in their disclosure.

As a consequence, the General Secretariat has to refuse access to the documents at this stage.⁵

We have also looked into the possibility of releasing parts of the documents.⁶ However, as the information contained in the documents forms an inseparable whole, the General Secretariat is also unable to give partial access at this stage.

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.⁷

Yours sincerely,

Fernando FLORINDO

Enclosures

⁵ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

⁶ Article 4(6) of Regulation (EC) No 1049/2001.

⁷ Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EU) No 2018/1725, if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

From: **DELETED**

Sent: Thursday, March 19, 2020 12:44

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

Subject: Confirmatory Application Ref. 20/0416-mw/nb (topic: documents public country-by-country reporting)

Dear representative of the Secretariat of the Council,

On the 20th of February 2020 I made a request (Ref. 20/0416-mw/nb) for access to all documents (room documents, working papers, ST-Documents, (informal) meeting minutes drafted by Council Secretariat representatives, etc) on the Directive as regards disclosure of income tax information by certain undertakings and branches (public country-by-country reporting) related to the years 2016-2019.

On behalf of my initial request, the Council identified a number of documents relating the request and granted partial access to a part of these documents based on Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.

At the same time the Council granted only partial access to some documents (namely documents WK 8500/2017, WK 3319/2017, WK 694/2019, WK 694/2019 REV1, WK 12550/2019 and WK 12550/2019 REV1), and fully denied access to others (i.e. documents WK 5230/2017: Comments received from delegations on CBCR Proposal - 08/05/2017, WK 12197/2017: Consolidated table with Delegations' contributions - 27/10/2017, WK 12197/2017 REV1: Consolidated table with Delegations' contributions - 18/07/2018, WK 10931/17: Delegations comments received after the Working Party meeting on 20 of September 2017 - 06/10/2017)

With this letter I want to express my objections to the legal opinion that forms the basis of the Council decision and, pursuant to Article 7(2) of Regulation (EC) No 1049/2001 ask the Council to review this decision within 15 working days of receiving this reply.

Reasoning of the confirmatory application

The Council bases its refusal on the following arguments:

With regard to the documents for which partial access was granted, it is stated that disclosure would reveal personal information of individuals, and therefore would undermine the protection of privacy and the integrity of the individuals.

For as far as the refusal of access is based on considerations relating to the protection of privacy and integrity of individuals I do not claim that the Council erred in its evaluation and therefore accept the decision.

- Furthermore the Council in its decision fully refused access to a number of documents, stating that disclosure would seriously undermine the decision making-process of the Council (The Council hereby refers to the exception from the general right to access, following from article 4 [3] Reg. 1049/2001)
- With regard to this exception, the Council also stated that it could not identify any evidence suggesting an overriding public interest in their disclosure (which refers to article 4 [3] last sub-sentence Reg. 1049/2001)
- Finally the Council also considered to grant partial access to these documents, in line with the principle of widest possible access to documents of Union institutions following from article 4 [6] regulation 1049/2001 and the case law of the Court. Yet, the Council holds the view that the information contained in the documents forms an inseparable whole, making the Council unable to give partial access at this stage.

I claim that the Council erred in its factual and legal evaluation of the initial request in the following ways:

(1) First of all, the Council insufficiently substantiated why disclosure of the requested documents would seriously undermine the decision making process of the Council.

- The decision gives the following reasoning for the decision:

“These documents concern a difficult issue which is still under discussion within the preparatory bodies of the Council. They give details of progress made and thereby reflect the difficulties that still need to be addressed before the Council can reach a political agreement. Release to the public of the information contained in them would severely affect the negotiating process and diminish the chances of the Council reaching an agreement. Disclosure of the documents would therefore seriously undermine the decision-making process of the Council.”

- The Court has confirmed multiple times (*Council v Access Info Europe*, paragraph 30; *Sison v Council*, paragraph 63; *Sweden and Turco v Council*, paragraph 36; *Sweden and Others v API and Commission*, paragraph 73; and *Sweden v MyTravel and Commission*, paragraph 75) that where exceptions derogate from the principle of the widest possible public access to documents, these exceptions must be interpreted and applied strictly. Furthermore according to the Court's view institutions in these situations are required to explain how disclosure of that document could specifically and actually undermine the interest protected by the exception (*Council v Access Info Europe*, paragraph 31).

In the present case, the Council merely relies on vague considerations, stating that the documents concern a "difficult issue" on which no political agreement has been reached in the Council. This consideration is purely rhetorical and abstract. The Council bases its decision solely on the fact that the documents concern an issue which is still under discussion, without substantiating in how far a release to the public could undermine the decision making process of the Council in the concrete and individual case.

The given reasoning strongly implies that the Council interprets the exception under art. 4 [3] of regulation 1049/2001 in the way that it generally seeks to exclude all internal documents drawn up by the Council from the right to access, if these documents show the progress of ongoing political negotiations

This interpretation not only infringes the principle of widest possible access with regard to documents held by EU institutions (compare *Sweden and Turco v Council*) which according to the applicable case law of the Court requires EU institutions to apply exceptions from the right to access restrictively, but also infringes the principle of proportionality by reducing the relevance of the second requirement of art. 4 [3] of regulation 1049/2001, namely that the disclosure would undermine the decision making process of the institution, in a way that renders it effectively meaningless. Yet the question, if the disclosure actually undermines the decision making process of the institution, is the crucial criterion to balance the public interest in access to information against the institution's interest to maintain an effective decision making process.

The Council effectively relies on a general presumption of secrecy with regard to documents which show the status quo of ongoing political negotiations within the Council. Consequently the Council does not attribute sufficient attention to balancing the competing interest and thereby fails to meet the standard of justification as established by the Court in *Council v Access Info Europe*.

- Moreover it is questionable if the Council's interpretation of the exception under article 4 [3] sufficiently takes into consideration the Court's view on transparency in the context of legislative procedures. The Court stated in *Council v Access Info Europe* (paragraph 33) with regard to the requirement of an actual and specific risk to justify no-disclosure, and the need to give the right to access the widest possible effect:

“those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, a fact reflected in recital 6 of Regulation 1049/2001, which states that wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinize all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights (Sweden and Turco v Council, paragraph 46).” Similarly the Court pointed out in *ClientEarth v Commission* that Regulation 1049/2001, i.e. recital 6 of that same regulation indicates that wider access to documents shall be granted in cases where EU institutions act in their legislative capacity (*Client Earth v Commission*, paragraph 84), whereas legislative documents have been defined widely as all documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States (*idem*, paragraph 85).

While my original request undoubtedly referred to documents drafted by the Council with regard to its legislative function, the considerations that form the basis of the Council decision do not show that special attention has been given to this legislative context. The exception that is applied by the Council can potentially cover both, legislative as well as non-legislative documents. Yet, based on the Council’s interpretation, article 4 [3] of regulation 1049/2001 is suitable to exclude virtually all ongoing legislative procedures from the right to access...

While article 4 [3] of regulation 1049/2001, according to wording and telos, can be applied in relation to both, legislative as well as non-legislative documents, interpreted in the way as the Council does in the present case, it seems especially problematic with regard to documents drafted in the course of a legislative procedure. This is because legislative procedures inherently involve an element of internal democratic decision making, as the representatives of the member states in the heterogeneous body which is the Council, attempt to agree on a common position.

Consequently, as the Council does not attribute substantial meaning to the question if disclosure actually and specifically undermines the decision making process, the exception under article 4 [3] of regulation 1049/2001 consequently can be invoked in all cases where documents relating to an ongoing legislative procedure are requested.

This interpretation, taken to its logical conclusions, implies that the Council generally requires secrecy in order to function properly, even when negotiating a legislative proposal, which seems to be in conflict with above mentioned considerations with regard to transparency in the context of legislative procedures.

It can only be speculated why the Council upholds this view. The Council response to my original request gives some indication here, as it can be deduced from the titles of the documents to which access was denied that these would enable a recipient to get insight into the opinions and negotiation positions of member state delegations. It seems likely here that the Council sees the danger that informing the public on the positions of the different delegations could expose these to undue pressure from the public. Yet it does not seem feasible how such pressure could actually undermine the decision making process of the Council.

Much rather, informing the public on the progress of political project in the form of legislative proposals seems capable of enabling a more fruitful and productive dialogue with the public, which is a prerequisite for adequate representation. Transparency of legislative procedures is a necessity to enable European Citizens to execute their democratic rights and control the actions of their elected representatives. More specifically citizens need to know which positions their representatives take on specific issues, in order to support the actions taken or express their disagreement via democratic elections. The actions of members of the Council make no exception here, only because the members are not elected in common and direct European elections but assigned by the governments of the member states. On the contrary, the fact that the Council is not directly legitimized in European elections enforces the need for transparency in the decision making process. Currently EU citizens can only influence the constitution of the Council via national elections. Yet, if there is no information available on how member state representatives behave and decide in the Council, it is impossible for citizens to express agreement or disagreement with the representation by their elected governments, because they don't know how their governments fill in the mandate that they have been given.

Denying citizens the possibilities to execute their democratic rights severely undermines the legitimacy of the actions of European Institutions, and might thereby do more harm to their decision making process than it is protecting it.

Taking into consideration that the Commission submitted the proposal on country-by-country reporting more than 3 years ago, without the Council subsequently having been able to reach an agreement on the matter at hand, it does not seem unlikely, that publication of the documents demonstrating the status quo of the negotiations could incentivize new political dynamics and a genuine societal discourse on a European level, as well as on the level of the member states, which might actually accelerate the Council negotiations.

(2) Even if the Council did not err in its evaluation by assuming that the disclosure would undermine its decision making process, the assessment would still be incorrect, as the Council did not consider an overriding public interest in disclosure:

- As it has been substantiated above, the citizens of the European Union have the right to know how they are being represented by their democratically elected governments, so they can take informed decisions in executing their right to vote. Keeping the public uninformed about how their national governments represent them, at the level of the European Union (in the Council) therefore prevents citizens from executing their democratic rights. Consequently, an overriding public interest should be assumed here.
- This public interest should carry even more weight taking into consideration the subject matter of the proposal in question. The amendment of the accounting directive, which the requested documents refer to, is supposed to result in a higher transparency in the area of corporate taxation, by uncovering how much taxes corporations effectively pay in different jurisdictions. The fight against corpo
- rate tax avoidance is a pressing issue, as tax planning of multinational entities leads to substantial welfare losses in the EU. Recent political project within the framework of the European Union, such as the Commission Action Plan for a fairer Corporate Tax system, as well as in other international organizations, such as for example the OECD's BEPS project, illustrate that Governments put the issue high on their political agendas. Furthermore, a number of tax avoidance affairs, such as the *LuxLeaks* in 2014 and the *Panama Papers* of 2016 have also brought the issue to public attention. This environment and need for action is also acknowledged in the preamble of the proposal submitted by the Commission, which in this context also references the European Parliament resolution of 16 December 2015 on bringing transparency, coordination and convergence to corporate tax policies in the Union. The Commission herein stresses the need for public scrutiny of corporate taxation regimes in order to regain public trust in the fairness of national taxation systems (Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, 5th recital). Consequently the Council decision not to grant access to the requested documents, thereby denying public scrutiny of the democratic processes that shape the national corporate taxation systems is fully inconsistent and in conflict with the objective of the Directive that is being discussed. In the contrary, the secrecy around the internal decision making process of the Council has and will continue to incentivize distrust amongst EU citizens towards the European Institutions.

Consequently an overriding public interest in disclosure should have been confirmed by the Commission in its decision.

(3) In addition to the above said, it seems highly questionable if the concerned documents really form an inseparable whole. If it is the Council's intention to protect certain member states from critique or undue pressure during the negotiations, this could also be achieved by anonymizing the documents in question. While this constitutes a non-ideal compromise, as this would not give citizens the possibility to know how their respective governments represent them in the Council, it could at least give the public an understanding of the issues that prevented an agreement so far. This would at least make it possible to have a public discussion on the substantive issues, which in turn would enable the national governments to collect input from their respective public (interest groups, NGOs, etc.) to enable better representation and might save the European Institutions some criticism, if the information that would be made public can convince the public that the Council members are in fact committed to finding a substantive solution on the issues at hand.

Thank you very much for processing this information request.

Looking forward to your response.

Kind regards,

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