



Council of the
European Union

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Eingelangt am 27/03/20

Brussels, 27 March 2020
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API 37

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 09/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 5 March 2020 (Annex 2);
- confirmatory application dated 26 March 2020 and registered on 27 March 2020 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 20 February 2020 - 21:23 using the electronic form available in the Register application]

From: **DELETED**

Sent: Thursday, February 20, 2020 9:23 PM

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

Subject: Electronic Request for Access

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, e-mails) on the 'Monitoring of the implementation of the 2016 COCG 'Guidelines on the conditions and rules for the issuance of tax rulings' (incl. Overview of Member States' responses to the agreed questionnaire) related to 2020.



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, 5 March 2020

Mr **DELETED**
Email: **DELETED**

Ref. 20/0417-em/ns

Request made on: 20.02.2020
Registered on: 21.02.2020

Dear Mr **DELETED**,

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

You requested public access to "All documents (room documents, working papers, ST-Documents, (informal) meeting minutes drafted by Council Secretariat representatives, e-mails) on the 'Monitoring of the implementation of the 2016 COCG 'Guidelines on the conditions and rules for the issuance of tax rulings' (incl. Overview of Member States' responses to the agreed questionnaire) related to 2020."

The General Secretariat of the Council has identified documents **WK 546/2020**, **WK 546/2020 REV1**, **WK 546/2020 REV 2**, **ST 5815/20**, **CM 1522/20**, and **WK 2121/2020**.

Please find attached documents **WK 546/2020**, **WK 546/2020 REV1**, **WK 546/2020 REV 2**.

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).

Documents 5815/20 and CM 1522/20 are public documents and can be found in the Council public register (<https://www.consilium.europa.eu/en/documents-publications/public-register/>).

As regards document WK 2121/20, the General Secretariat regrets to inform you that access cannot be given because it reflects very delicate issues pertaining to fiscal policies. Release of WK 2121/20 would interfere with the economic and fiscal policy of the European Union and of the Member States. It would therefore undermine the protection of the public interest as regards the financial, monetary or economic policy of the EU and of the Member States.

Additionally, document WK 2121/20 is only a preliminary overview of an ongoing assessment. Release of this document would seriously undermine ongoing internal discussions, putting in jeopardy a successful outcome. As a consequence, the General Secretariat has to refuse access to document WK 2121/20 pursuant to Article 4(1)(a), fourth indent, Article 4(3), first and second subparagraphs of Regulation (EC) No 1049/2001.

Having examined the context in which document WK 2121/20 was drafted and the current state of play on these matters, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in their disclosure. The General Secretariat has also looked into the possibility of releasing parts of the document. However, as the information contained forms an inseparable whole, the General Secretariat is unable to give partial access to it under Article 4(6) of Regulation (EC) No 1049/2001.

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.²

Yours sincerely,

Fernando FLORINDO

(Enclosures)

² 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.

[E-mail message sent to access@consilium.europa.eu on 26 February 2020 - 19:21]

From: **DELETED**

Sent: Thursday, March 26, 2020 7:21 PM

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

Cc: **DELETED**

Subject: Confirmatory Application Ref. 20/0417-jdg

Dear representative of the Council,

On February 20th 2020, I requested from the Council to grant public access to "All documents (room documents, working papers, ST-Documents, (informal) meeting minutes drafted by Council Secretariat representatives, e-mails) on the 'Monitoring of the implementation of the 2016 COCG 'Guidelines on the conditions and rules for the issuance of tax rulings' (incl. Overview of Member States' responses to the agreed questionnaire) related to 2020."

The General Secretariat has identified the following six documents WK 546/2020, WK 546/2020 REV1, WK 546/2020 REV 2, ST 5815/20, CM 1522/20, and WK 2121/2020 as documents in its possession falling into the scope of my request.

To the extent not already publicly accessible, the Council agreed to make these documents available to the public, with exception of document WK 2121/20.

With regard to this latter document the Council considered a possible right to public access under the transparency regime established by regulation 1049/2001, but decided that public access could not be granted, because according to the legal opinion held by the Council,

“[Document 2121/20] reflects very delicate issues pertaining to fiscal policies. Release of WK 2121/20 would interfere with the economic and fiscal policy of the European Union and of the Member States. It would therefore undermine the protection of the public interest as regards the financial, monetary or economic policy of the EU and of the Member States.

Additionally, document WK 2121/20 is only a preliminary overview of an ongoing assessment. Release of this document would seriously undermine ongoing internal discussions, putting in jeopardy a successful outcome. As a consequence, the General Secretariat has to refuse access to document WK 2121/20 pursuant to Article 4(1)(a), fourth indent, Article 4(3), first and second subparagraphs of Regulation (EC) No 1049/2001.

Having examined the context in which document WK 2121/20 was drafted and the current state of play on these matters, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in their disclosure. The General Secretariat has also looked into the possibility of releasing parts of the document. However, as the information contained forms an inseparable whole, the General Secretariat is unable to give partial access to it under Article 4(6) of Regulation (EC) No 1049/2001.”

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 after receiving this reply.

Reasoning of the confirmatory application

I claim that the Council erred in its factual and legal evaluation of the initial request and subsequently refused access without a sufficient legal basis to do so. My claim is based on the following considerations:

a. Inadequate identification of (requested) documents

First of all, there is reason to believe that the list of documents identified by the Council in its response from 5th of March 2020 is incomplete. In my original request, I requested to grant access to all documents referring to the substance matter specified in my request, and explicitly named e-mails as one possible type of documents. Yet the Council did not identify any e-mails originating from either the Council's own staff or from delegations of member states.

My suspicion is that the Council might not have identified all e-mails in its possession falling into the scope of my request. This assumption is in particular based on information derived from the

Monitoring Guidance: 2016 Guidelines on the Conditions and Rules for the Issuance of Tax rulings – Standard requirements for Good Practice by Member States (paragraph 8),

which calls upon the member state delegations to return their replies on the agreed questionnaire to the Commission services with the Chair and the Council Secretariat in copy. Consequently it can be expected that the Council also has the responses by Member States' civil servants at its disposal, but did not identify these in the decision. Also, other emails falling within the scope of my request may not have been identified.

b. Exceptions applied by the Council

(1) Article 4 I (a), 4th indent of Regulation 1049/2001

The Council refused access to document 2121/20 based primarily on the exception under article 4 I (a), 4th indent of regulation 1049/2001, relying on the assumption that the disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Community or a Member State. In order to justify its decision, the Council stated in its decision that the document in question reflects a very delicate issues pertaining to fiscal policies. I assert that the reasoning brought forward by the Council in order to rely on the exception, fails to meet the standard of justification established by regulation 1049/2001 and the case law of the European Court of Justice.

Regulation 1049/2001 substantiates the democratic rights granted to European citizens in EU primary law, especially in articles 1 and 10 of the TEU as well as in article 15 TFEU. In that respect the Court has stated in its decision in *Access Info Europe v Council of the European Union (Case C-280/11 P)* that it becomes clear from the teleological and systematic interpretation of the regulation, that European Institutions have to grant widest access possible to its citizens. The Court reasoned in the following way:

“in accordance with recital 1 to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 TEU of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 to that regulation, the public right of access to documents of the institutions is related to the democratic nature of those institutions (Joined Cases C-39/05 P and C-52/05 P Sweden and Turco v Council [2008] ECR I-4723, paragraph 34; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P Sweden and Others v API and Commission [2010] ECR I-8533, paragraph 68; and Case C-506/08 P Sweden v MyTravel and Commission [2011] ECR I-6237, paragraph 72).

To that end, Regulation No 1049/2001 is designed – as is stated in recital 4 and reflected in Article 1 – to confer on the public as wide a right of access as possible to documents of the institutions (Sweden and Turco v Council, paragraph 33; Sweden and Others v API and Commission, paragraph 69; and Sweden v MyTravel and Commission, paragraph 73).” (Access Info Europe v Council of the European Union, paragraphs 27-28)

Subsequently the Court held that while exceptions deviating from this fundamental principle are still possible, these have to be interpreted strictly and restrictively, asserting that

“if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying. Moreover, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (Sweden v MyTravel and Commission, paragraph 76 and the case-law cited).” (Access Info Europe v Council of the European Union, paragraph 31)

Following this line of reasoning, the Council in its decision should have explained in how far publication of document 2121/20 constitutes an actual, specific and reasonably foreseeable risk of undermining the protection of the financial, monetary or economic policy of the Community or a Member State.

In order to do so, the Council merely stated that “[Document 2121/20] reflects very delicate issues pertaining to fiscal policies.”

This justification clearly falls short of fulfilling above described standard. First of all the term “delicate issue” is not defined in any legal source by the EU institutions. Citizens consequently would have to guess what the normative implications are. In common use, the term *delicate* can be read as (amongst other meanings) referring to an issue that is sensitive in nature and requires special care or attention. Yet only asserting that the matter has to be handled with special care does not illustrate the existence of an actual, specific and reasonably foreseeable risk of undermining the protection of the financial, monetary or economic policy of the Community or a Member State. Much rather the fact that the matter is *delicate* can already be derived from the mere act of applying any exception under the regulation. The explanatory remark by the Council therefore fails to provide any additional explanatory value, and does not enable the addressee to review any of the considerations on which the Council bases its decision. Much rather the Council relies on a general presumption of secrecy with regard to the financial, monetary and economic policy of the Community or its member states, which can be applied wherever it is convenient to the institution concerned.

(2) Article 4 III of regulation 1049/2001

Additionally the Council makes use of the exception under article 4 III of regulation 1049/2001 in order to justify the refusal, stating that “Release of this document would seriously undermine ongoing internal discussions, putting in jeopardy a successful outcome”.

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, without substantiating in a comprehensive way a causal link between release of the documents and the undermining of the decision making process of the council.

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 to the public the process of formation of will within the Council.

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*.

(3) Public interest in disclosure (Article 4 III, last half sentence)

The Council states in its decision that, taking into consideration the context in which the document was drafted, as well as the state of play on the matter, it could not identify any evidence suggesting an overriding public interest in disclosure. This argument can't be upheld.

Document 2121/20 contains member state's responses to a questionnaire regarding member state's progress on the implementation of the '2016 Guidelines on the Conditions and Rules for the Issuance of Tax rulings– Standard requirements for Good Practice by Member States', which was agreed upon in the Code of Conduct Group (Business Taxation) in 2016. Consequently the document most likely gives information on the progress of member states' efforts to implement this agreed guidance.

The guidance has the purpose of reducing harmful tax competition between Member States and aggressive tax planning practices by multinational companies by increasing the level of legal certainty, consistency, uniformity and openness and transparency in member states administrative tax ruling practices.

This was necessary, because tax competition between member states, which enables aggressive tax planning by multinational enterprises, has increasingly become a societal problem and a focal area of European policy making, not least since the LuxLeaks scandal in 2014, which demonstrated the systematic use of tax avoidance schemes by multinational enterprises, enabled by the fiscal authorities of Luxembourg by means of granting - non-transparent - tax rulings.

Incentivized by the public pressure created in the aftermath of the affair, various European institutions, in particular the Code of Conduct Group, have identified the need to strengthen convergence of ruling practices of national administrative authorities, in order to ensure a level playing field for economic activity within the Union. Yet, it became more and more clear that lacking cooperation and political commitment by member states form a considerable obstacle to tackling this issue, as member states are reluctant to share information on their respective practices, because they rely on the revenues generated by companies attracted with preferential tax deals.

Yet, these practices not only result in distrust amongst member states and harmful jurisdictional competition, but on top of that give the public reason to doubt the lawfulness and fairness of national taxation schemes, and prevent genuine democratic control of governments' actions by means of public scrutiny.

As it has been pointed out by another European Institution, the European Parliament's 'Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect' in its report (2015/2066 INI) from 5th November 2015, subjecting these practices to public scrutiny is part of democratic control within the EU. As, given their negative impact on society as a whole, these practices can only persist as long as they remain undisclosed, or are tolerated.

The Council would do well in taking serious the interests of the citizens it is supposed to represent, by confirming the existence of a public interest in disclosure.

Thank you very much for processing this confirmatory application.

Kind regards,

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