



Council of the  
European Union

041452/EU XXVII. GP  
Eingelangt am 27/11/20

Brussels, 27 November 2020  
(OR. en)

13396/20

INF 203  
API 133

#### NOTE

---

From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 26/c/01/20

---

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 15 October 2020 and registered on the same day (Annex 1);
- replies from the General Secretariat of the Council dated 6 November 2020 and 10 November 2020 (Annex 2);
- confirmatory application dated 25 November 2020 and registered on 26 November 2020 (Annex 3).

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 15 october 2020 - 16:00]

**From:** Emilio <ask+request-8655-648aa4b7@asktheeu.org>

**Sent:** Thursday, October 15, 2020 16:00

**To:** TRANSPARENCY Access to documents (COMM) [Access@consilium.europa.eu](mailto:Access@consilium.europa.eu)

**Subject:** access to documents request - Access to some Council legislative preparatory documents coded as "WK" and not registered in the Council Register of documents

Dear Council of the European Union,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting

- in compliance with art. 11 of the cited Regulation 1049/01, a listing of the Council documents coded as "WK" linked to pending EU legislative procedures debated in the Council working groups or by the Coreper in September 2020

- in compliance with art. 12 of the cited Regulation 1049/01, the texts of the following documents : WK 5230/17, WK 12197/17, WK 12197/2017 REV1, WK 10931/17 as well as of the other mre recent WK documents related to the legislative procedure 2016/0107(COD) amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (CBCR).

Yours faithfully,

Emilio De Capitani

---



**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, 6 November 2020

Mr Emilio De Capitani  
Email: ask+request-8655-648aa4b7@asktheeu.org

Ref. 20/1858-mj/mf

Request made on: 15.10.2020

Dear Mr De Capitani,

Thank you for your request for access to:

*"- in compliance with art. 11 of the cited Regulation 1049/01, a listing of the Council documents coded as "WK" linked to pending EU legislative procedures debated in the Council working groups or by the Coreper in September 2020*

*- in compliance with art. 12 of the cited Regulation 1049/01, the texts of the following documents : WK 5230/17, WK 12197/17, WK 12197/2017 REV1, WK 10931/17 as well as of the other more recent WK documents related to the legislative procedure 2016/0107(COD) amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (CBCR)".<sup>1</sup>*

Please find attached the requested list of WK.

---

<sup>1</sup> 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).

The General Secretariat is still conducting consultations necessary to the examination of the second part of your request. Therefore, we have to extend the deadline to reply to this part of your request by 15 working days, until 27 November 2020.

Yours sincerely,

Fernando FLORINDO

Enclosure

---



**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 November 2020

Mr Emilio De Capitani  
Email: ask+request-8655-648aa4b7@asktheeu.org

Ref. 20/1858-ADD jdg/ns

Request made on: 15.10.2020

Dear Mr De Capitani,

Further to the letter sent to you on 6 November 2020 regarding the first part of your request of 15 October 2020, the General Secretariat of the Council has finished the examination of the second part of your request, i.e. your request for access to "- in compliance with art. 12 of the cited Regulation 1049/01, the texts of the following documents : WK 5230/17, WK 12197/17, WK 12197/17 REV1, WK 10931/17 as well as of the other more recent WK documents related to the legislative procedure 2016/0107(COD) amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (CBCR)".<sup>2</sup>

In addition to the documents you have mentioned, the General Secretariat of the Council has identified the following documents as corresponding to your request: WK 12550/19 REV 1, WK 12550/19 INIT, WK 11222/19 INIT, WK 694/19 INIT, WK 694/19 REV 1, WK 6662/18 INIT, WK 14969/17 REV 1, WK 14969 /17 INIT, WK 10862/17 INIT, WK 8500/17 INIT.

---

<sup>2</sup> 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).

Please find attached documents **WK 12550/19 REV 1**, **WK 12550/19 INIT**, **WK 11222/19 INIT**, **WK 694/19 INIT**, **WK 694/19 REV 1**, **WK 10862/17 INIT**, and **WK 8500/17 INIT**.

I regret to inform you that access to documents **WK 6662/18 INIT**, **WK 14969/17 REV 1**, **WK 14969/17 INIT**, **WK 5230/17**, **WK 12197/17**, **WK 12197/2017 REV1**, and **WK 10931/17** cannot be given for the reasons set out below.

These documents contain exploratory options and possible compromise solutions relating to an ongoing discussion on a particularly difficult and sensitive legislative file relating to tax transparency and tabled by the previous Commission in 2016. Despite several years of negotiations, no compromise could yet be found for agreeing a Council negotiating position. As a result, the proposal has not been on the Council agenda since Finland's Presidency, on 28 November 2019, in a public deliberation, when no majority could be found on a way to proceed.<sup>3</sup>

These documents are not meant to become public at this stage of the negotiation since their release would severely affect the negotiating process and diminish the chances of the Council reaching an agreement on a text. The latter is necessary as a mandate to launch the negotiations with the European Parliament in order to agree on the legislative act. Disclosure of the documents would therefore seriously undermine the decision making-process of the Council.

The General Secretariat of the Council has also looked into the possibility of releasing parts of the documents.<sup>4</sup> However, as the exception to the right of access applies to their entire content, the General Secretariat is unable to give partial access.

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

As a consequence, the General Secretariat of the Council has to refuse access to these documents.<sup>5</sup>

---

<sup>3</sup> Document [14038/19](#) + [COR 1](#)

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

<sup>5</sup> Article 4(3), first subparagraph, - in absence of any evidence of an overriding public interest in release - 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.<sup>6</sup>

Yours sincerely,

Fernando FLORINDO

Enclosures

---

---

<sup>6</sup> 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](mailto:access@consilium.europa.eu) on 25 November 2020 - 23:31]

**From:** Emilio <ask+request-8655-648aa4b7@asktheeu.org>

**Sent:** Wednesday, November 25, 2020 23:31

**To:** TRANSPARENCY Access to documents (COMM) [Access@consilium.europa.eu](mailto:Access@consilium.europa.eu)

**Subject:** Internal review of access to documents request - Access to some Council legislative preparatory documents coded as "WK" and not registered in the Council Register of documents

Council Ref. 20/1858-ADD jdg/ns

Dear Representative of the General Secretariat of the Council,

Referring to my initial request of access to some Council legislative preparatory documents coded as "WK" and not registered in the Council Register of documents I have to thank you for the transmission of the list of the 374 WK documents linked to legislative procedures diffused inside the Council in September 2020.

However the fact that none of them has yet been referred on the Council Register seems to me against art. 11 of Regulation 1049/01 which requires them to be published “without delay” on the register of the internal Council documents. Moreover art. 12 of the same Regulation requires the proactive publication of preparatory documents of legislative nature as an essential condition to raise the awareness of the EU citizens on the progress made in the legislative preparatory works. A timely publication on the Institution’s Register seems to me a precondition for :

- Preserving the equality of EU citizens, “who shall receive equal attention from EU institutions, bodies, offices and agencies” as stated by art.9.1 TEU;
- Supporting “the right (of every citizen) to participate in the democratic life of the Union” as required by art 10.3 TEU which also states that “Decisions shall be taken as openly and as closely as possible to the citizen”.
- Implementing the EP and Council obligation of ensuring the “..publication of the documents relating to the legislative procedures” required by art.15.3 last al. TFEU.



Needless to say that some of these objectives were already present in Regulation 1049/01 before the entry into force of the Lisbon Treaty but are now clearly stated at primary law level and confirmed by the EU Charter of fundamental rights by so acquiring a new constitutional dimension which should not be threatened by the internal practices of the EU institutions. In this perspective, in my opinion the Council practice started in 2011 (and generalised since 2014) of omitting or delaying the publication on the Council Register of thousands of legislative preparatory documents (coded as WK) go against not only art. 11 and 12 of Regulation 1049/01 but hinders the objective of making easier the participation of Citizens to the EU democratic life as required now by the Treaties.

On the second part of my request which was focused specifically on the WK documents linked to the legislative procedure 2016/0107(COD) amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (so called “Country by Country report” - CBCR) I have to thank you for the transmission of some of these WK documents but I don’t share the Council legal reasoning refusing the access to the following legislative preparatory documents :

- Council Presidency Note on the subject (docs WK 14969/17 INIT, as well as WK 14969/17 REV 1);
- Comments received from delegations on CBCR Proposal (doc WK 5230/17);
- Consolidated table with Delegations' contributions (docs WK 12197/17 as well as WK 12197/2017 REV1);
- Delegations comments received after the Working Party meeting on 20 of September 2017 - 06/10/2017 (doc. WK 10931/17);
- As well as document WK 6662/18 INIT (whose subject I have been unable to find as it is not referred in the Council’ Register) .

According to your letter “These documents contain exploratory options and possible compromise solutions relating to an ongoing discussion on a particularly difficult and sensitive legislative file relating to tax transparency and tabled by the previous Commission in 2016. Despite several years of negotiations, no compromise could yet be found for agreeing a Council negotiating position. As a result, the proposal has not been on the Council agenda since Finland's Presidency, on 28 November 2019, in a public deliberation, when no majority could be found on a way to proceed. These documents are not meant to become public at this stage of the negotiation since their release would severely affect the negotiating process and diminish the chances of the Council reaching an agreement on a text. The latter is necessary as a mandate to launch the negotiations with the European Parliament in order to agree on the legislative act. Disclosure of the documents would therefore seriously undermine the decision making-process of the Council.”

In my opinion the Council reasoning does not take into account that since the entry into force of the Lisbon Treaty the EU Legislative activity has a new constitutional dimension compared to the pre-existing legal situation where legislative activity was incidentally cited only by art. 207.3 TCE, and was focused on the internal organisation of the Council by recognising to this Institution a wide scope of discretion on the way of preserving its decision process.

Regulation 1049/01 still mirror in art.4.3 this situation and unfortunately notwithstanding a parliamentary vote on December 2011 has not yet been amended to take in account the entry into force of the Lisbon Treaty and notably the new constitutional standing of EU legislative activity.

This situation create a legal tension between the notion of the "protection of the Council decision making process" as understood in the Pre-Lisbon era and the new obligations arising directly from the Treaties. The latter define now in a different way than Regulation 1049/01 what has to be considered "legislative activity" and directly establish that legislative preparatory debates should be clearly announced in the draft agendas and held in public (art. 16.8 TEU and art 15.2 TFEU) so that it remains unclear how they should be "protected" from the public scrutiny. In the absence of a clear position of the court of Justice on this tension between two conflicting provisions I am convinced that the new Treaty provisions should override in case of conflict the different provisions of art. 4.3 of Regulation 1049/01 and the Council practices of hiding internal debates until the adoption of EU legislative measures.

For these reasons making proactively accessible the position and the arguments debated by the national delegations (docs WK 5230/17, WK 12197/17, WK 12197/2017 REV1 WK 10931/17 and, maybe WK 6662/18 INIT) seems to me the only way of complying with the Treaties provisions and making Citizens aware of the position of the national delegations inside the Council and on the way how the debate is progressing on a specific legislative procedure such as the CBCR.

I was also surprised of discovering that, apparently, no outcome of proceedings of the Council working group meetings has yet been drafted since 2016 and published on the Council Register by so giving the possibility of understanding indirectly the position of the national delegations. Moreover, also the summary record of the Coreper who discussed this issue before the Competitiveness Council is so elusive that an EU Citizen can hardly have an idea of role played by the national delegations inside the Council. on the CBCR legislative proposal. Furthermore, if "...the proposal has not been on the Council agenda since Finland's Presidency, on 28 November 2019, in a public deliberation, when no majority could be found on a way to proceed" how almost one year after, the publication of the WK documents cited above could undermine the Council decision making process ?

In my opinion the right of an European Citizen of knowing what arguments have been raised by the national delegations may even be stronger if a legislative proposal like the CBCR (which is still strongly supported by the European Parliament) has stalled or has been abandoned inside the Council. In a recent judgment also the Court of Justice has recognized the right of EU Citizens of understanding the reasons why a proposal is not progressing or has been abandoned (see, mutatis mutandis, the "ClientEarth" 2018 case (Case C 57/16 P). Needless to say the same Court was already very clear in recognizing the right of EU Citizens in knowing the position of the national delegations during a legislative negotiation (see case C-280/11 P, Council of the European Union v Access Info Europe).

The same favor for legislative transparency has been recently shared by the since openness contributes to strengthening democracy by allowing citizens to scrutinize the information which has formed the basis of a legislative act. (See for example p.78 of Judgment of the General Court of 22 March 2018 in Case T-540/15, De Capitani v Parliament.)

Avoiding the redaction of record of the Council working group meetings, delaying or omitting the publication of internal Council preparatory WK documents, hiding the names and the arguments of the national delegations seem to me all initiatives that, taken together, are threatening the very essence of the fundamental right of an EU Citizens to have access to legislative preparatory debates on a given legislative proposal such as the CBCR.

I hereby confirm my demand to grant full public access to the documents WK 5230/2017, WK 12197/2017, WK 12197/2017 REV1, and WK 10931/17 by so making known the positions of the representatives of national Governments who are, according to the Treaty "democratically accountable either to their national Parliaments, or to their citizens".(art.10.2 TEU).

Hoping that this confirmatory request could be accepted I thank you for your attention.

Yours faithfully,

Emilio DE CAPITANI

(\*) A full history of my request and all correspondence is available on the Internet at ASK The EU Internet page

---