Council of the European Union

Brussels, 3 December 2020
(OR. en)

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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 27/c/02/20

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 21 September 2020 and registered on the same day (Annex 1);
- replies from the General Secretariat of the Council dated 27 October 2020 and 1 December 2020 (Annex 2);
- confirmatory application dated 2 December 2020 and registered on the same day (Annex 3).

ANNEX 1

[E-mail message sent to access@consilium.europa.eu on 21 September 2020 - 12:51 using the electronic form available in the Register application]

From: **DELETED**
Sent: Monday, September 21, 2020 12:51 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: **DELETED**

Requested document(s): I would like to request all documents (incl working papers, room documents, st-documents, emails, etc.) related to subject 2 (Draft assessment MS' compliance with the 2016 guidance on the condition and rules for the issuance of tax rulings) of the meeting of the Fiscal Counselors/Attaches of 21 September 2020 (see doc CM 3535/20).

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, 27 October 2020

DELETED
Email: **DELETED**

Ref. 20/1646-6.3-jdg/vk

Request made on: 21.09.2020

Dear **DELETED**,

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

The General Secretariat is examining your request on the basis of the applicable rules.[2] We wish, however, to draw your attention to Article 6(3) of Regulation (EC) No 1049/2001 on access to documents, which provides that "In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution."

Your request regarding "all documents (incl working papers, room documents, st-documents, emails, etc.) related to subject 2 (Draft assessment MS' compliance with the 2016 guidance on the condition and rules for the issuance of tax rulings) of the meeting of the Fiscal Counselors / Attaches of 21 September 2020 (see doc CM 3535/20) 2) Monitoring of the implementation of the 2016 COCG 'Guidelines on the conditions and rules for the issuance of tax rulings'

[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).

[2] 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).

- Draft assessment" involves documents requiring the consultation of all Delegations, as well as an interinstitutional consultation.

As such, the General Secretariat is unable to process your request within the required 15 working days deadline.[3] Under these circumstances, and taking into account that this new request extends the scope of your previous requests 20/0417 and 20/1224, we hope that you will be able to accept that your request will be gradually processed.

Yours sincerely,

Fernando FLORINDO

[3] Article 6(3) of Regulation (EC) No 1049/2001.

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, 1 December 2020

DELETED
Email: **DELETED**

Ref. 20/1646-jdg/jl

Request made on: 21.09.2020
Deadline extension: 27.10.2020

Dear **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 (incl working papers, room documents, st-documents, emails, etc.) related to subject 2 (Draft assessment MS' compliance with the 2016 guidance on the condition and rules for the issuance of tax rulings) of the meeting of the Fiscal Counselors/Attaches of 21 September 2020 (see doc CM 3535/20)."

The General Secretariat of the Council has identified documents WK 9557/2020, WK 2871/2020 REV 1, WK 2871/2020 REV 2, WK 2873/2020 REV 1, WK 2873/2020 REV 1 COR 1, WK 2873/2020 REV 1 COR 1 ADD 1, and CM 3535/20.

The General Secretariat of the Council has also identified the replies from Croatia, Hungary (email of 22 July 2020), Latvia (email of 6 July 2020), Malta, Romania (document and email of 22 July 2020), Slovenia (email of 20 July 2020).

1) Please find attached document CM 3535/20**.**

[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).

2) Following a consultation on the basis of Article 4(5) of Regulation (EC) 1049/2001, Luxemburg, Germany, Bulgaria, Austria, France and Spain, disagreed with disclosure of their replies as appearing in the identified documents. These Member States argued that complex discussions are still ongoing. As a result, release of the documents would seriously undermine the possibility to have an open exchange within the Council and thus the Council's decision-making process pursuant to Art. 4(3) of Regulation 1049/2001.

As a result, under Article 4(6) of Regulation No 1049/2001, please find attached a partially accessible version of the replies from Croatia, Hungary (email of 22 July 2020), Latvia (email of 6 July 2020), Malta, Romania (document and email of 22 July 2020), and Slovenia (email of 20 July 2020), read in connection with Article 4(1)(a), 4th indent, 4(3), and Article 4 (5) of Regulation No 1049/2001, for the reasons set out below, and in accordance with EU data protection rules[2].

3) Document **WK 9557/2020** of 15 September 2020 is a cover note for a Commission services document. It contains a Preliminary assessment - Compliance with 2016 guidelines on the conditions and rules for the issuance of tax rulings. Document **WK 2871/2020 REV 1** of 3 July 2020 is a cover note for a Commission services document. It contains a Questionnaire on 2016 Guidelines on the Conditions and Rules for the Issuance of Tax rulings – Standard requirements for Good Practice by Member States – Overview table (State of play as of 29 June 2020). Document **WK 2871/2020 REV 2** is an updated version of document WK 2871/2020 REV 1. Document **WK 2873/2020 REV 1** of 7 July 2020 is a working paper originating from the General Secretariat of the Council to the Code of Conduct Group (Business Taxation). It contains a compilation of Member States' Responses to the questionnaire on the 2016 Guidelines on the conditions and rules for the issuance of tax rulings – Standard requirements for Good Practice by Member States (Revised table). Document **WK 2873/2020 REV 1 COR1** of 15 September is an updated version of document WK 2873/2020 REV1. Document **WK 2873/2020 REV 1 COR 1 ADD 1** of 15 September is a working paper originating from the General Secretariat of the Council to the Code of Conduct Group (Business Taxation). It contains a compilation of Member States' additional clarifications to the questionnaire on the 2016 Guidelines on the conditions and rules for the issuance of tax rulings – Standard requirements for Good Practice by Member States.

4) The General Secretariat of the Council regrets to inform you that access to documents **WK 9557/2020**, **WK 2871/2020 REV 1**, **WK 2871/2020 REV 2**, **WK 2873/2020 REV 1**, **WK 2873/2020 REV 1 COR 1**, **and WK 2873/2020 REV 1 COR 1 ADD 1** cannot be given because they reflect very delicate issues pertaining to fiscal policies. Disclosure of these documents would interfere with the economic and fiscal policy of the European Union and of the Member States and should therefore be refused in view of the need to protect the public interest as regards the financial, monetary or economic policy of the Union or its Member States pursuant to Article 4(1)(a), 4th indent of Regulation (EC) 1049/2001.

2 Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 9(3) of 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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39–98.

5) According to the established case law of the European Court of Justice (ECJ), the public interest exceptions laid down in Article 4(1)(a) of Regulation (EC) No. 1049/200, are subject to a particular regime if compared to the other exceptions included in Article 4. In this regard, "the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No. 1049/2001 could undermine the public interest" 3. Furthermore, once the Council has come to the conclusion that release would indeed undermine the public interest in this area, it has no choice but to refuse access, because "it is clear from the wording of Article 4(1)(a) of Regulation (EC) No. 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests" . Therefore, the Council enjoys a wide discretion in assessing the probable impact of the release of document regarding international relations policy and it is barred from taking into account other legitimate interests in order to override the conclusion that giving access to a document would harm the protected interest.

6) In addition, documents **WK 9557/2020**, **WK 2871/2020 REV 1**, **WK 2871/2020 REV 2**, **WK 2873/2020 REV 1**, **WK 2873/2020 REV 1 COR 1**, **and WK 2873/2020 REV 1 COR 1 ADD 1** are only a preliminary overview of an ongoing assessment. Release of these documents would seriously undermine ongoing internal discussions, putting in jeopardy a successful outcome. As a consequence, the General Secretariat of the Council has to refuse access to these documents pursuant to Article 4(3), of Regulation (EC) No 1049/2001.

7) Having examined the context in which documents **WK 9557/2020**, **WK 2871/2020 REV 1**, **WK 2871/2020 REV 2**, **WK 2873/2020 REV 1**, **WK 2873/2020 REV 1 COR 1**, **and WK 2873/2020 REV 1 COR 1 ADD 1** 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.

8) The General Secretariat of the Council has also looked into the possibility of releasing parts of the documents. Though access in full to documents **WK 9557/2020**, **WK 2871/2020 REV 1**, **WK 2871/2020 REV 2**, **WK 2873/2020 REV 1**, **WK 2873/2020 REV 1 COR 1**, **and WK 2873/2020 REV 1 COR 1 ADD 1** must be refused, pursuant to Article 4(1)(a), fourth indent, and Article 4(3) of Regulation No 1049/2001, read in connection with Article 4(5) of Regulation No 1049/2001, partial access can be granted under Article 4(6) of Regulation No 1049/2001, in the light of the considerations set out above.

[3] Judgment of the Court of Justice of 1 February 2007 in case C-266/05 P, Sison v Council, para 34.

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.[4]

Yours sincerely,

Fernando FLORINDO

Enclosures: 17

[4] 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 2 December 2020 - 15:02]

From: **DELETED**
Sent: Wednesday, December 2, 2020 3:02 PM
To: TRANSPARENCY Access to documents (COMM) Access@consilium.europa.eu
Subject: Re: Ref. 20/1646-jdg/jl

Dear representative of the General Secretariat of the Council,

Thank you very much for your reply and the redacted documents.

Nonetheless, I would like to submit a confirmatory application.

The main reason that full access to the requested documents is refused relates to the fact that this subject/file was still ongoing in the EU Code of Conduct Group. Yesterday, the Ecofin endorsed the most recent progress report of the Code of Conduct Group (see doc: 13151/20) which indicates on pag. 7 that this work now been closed. I therefore believe that the reasons for refusing access no longer apply.

Thank you very much for processing this information request.

Kind regards,

DELETED