



Council of the
European Union

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REV 1

INF 190
API 121

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 23/c/01/20

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 2 July 2020 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 14 October 2020 (Annex 2);
- confirmatory application dated 4 November 2020 and registered on 5 November 2020 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 2 July 2020 - 14:57]

From: Vicky Cann <ask+request-8282-17d7b77a@asktheeu.org>

Sent: Thursday, July 2, 2020 14:57

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

Subject: access to documents request - Digital services tax

Dear Council of the EU,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting all agendas; minutes / notes of discussions; position papers; and any other documents relating to Council deliberations, since 1 January 2019, where the EU's Digital Services Tax proposal, and/ or the OECD's negotiations on a similar tax, were discussed.

Yours faithfully,

Vicky Cann
CEO
Rue d'Edimbourg 26
1050 Brx



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, 14 October 2020

Ms Vicky Cann
Email: ask+request-8282-17d7b77a@asktheeu.org

Ref. 20/1233-jdg/nb

Request made on: 02.07.2020

Dear Ms Cann,

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

You have requested "all agendas; minutes / notes of discussions; position papers; and any other documents relating to Council deliberations, since 1 January 2019, where the EU's Digital Services Tax proposal, and/ or the OECD's negotiations on a similar tax, were discussed."

The General Secretariat of the Council has identified the following documents as corresponding to your request:

- WK 7902 2020 INIT, "Letter to OECD - digital taxation"
- WK 5870 2020 INIT, "Economic impact assessment (digital taxation)"
- WK 2260 2020 INIT, ""Digital taxation: economic impact analysis - Letter from OECD"

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).

- WK 1733 2020 REV 1, "Update on the OECD Project "Tax Challenges Arising from the Digitalisation of the Economy"
- WK 1619 2020 INIT, "Presidency steering note"
- CM 1425 2020 INIT, "Working Party on Tax Questions (Direct Taxation - Digital)"
- WK 724 2020 INIT, "Presentation for the WPTQ - digital taxation"
- WK 540 2020 INIT, "Tax challenges arising from digitalisation - Presidency discussion paper"
- ST 5169 2020 INIT, "Tax challenges arising from digitalisation - Presidency discussion paper"
- ST 5109 2020 REV 1 "Tax challenges arising from digitalisation - Exchange of views"
- CM 1124 2020 INIT, "Working Party on Tax Questions (Direct Taxation - Digital)"
- ST 5109 2020 INIT, "Tax challenges arising from digitalisation - Exchange of views"
- WK 13225 2019 INIT, "Hungary's Position Paper on the compatibility of the Pillar 2 Proposals with EU law"
- WK 13201 2019 INIT, "Initial discussion on EU law compatibility of Pillar 2"
- CM 4733 2019 INIT, "Working Party on Tax Questions (Direct Taxation - Digital) - MORNING ONLY"
- ST 13405 2019 COR 1, "Digital taxation State of play"
- ST 13405 2019 INIT, "Digital taxation State of play"
- WK 11873 2019 INIT, "OECD Presentation"
- WK 11769 2019 INIT "Preliminary results pillar 2 - Presentation by the Commission"
- WK 11448 2019 INIT "Tax challenges arising from the digitalisation of the economy"
- CM 4398 2019 INIT "Working Party on Tax Questions (Direct Taxation - Digital) - MORNING ONLY"
- WK 11162 2019 INIT "Presentation by Presidency"
- WK 11161 2019 INIT "Presentation by the Hungarian delegation"
- WK 11055 2019 INIT "Presentation by the Commission"
- WK 11070 2019 INIT "Presentation by the Presidency"
- WK 10988 2019 INIT "Tax challenges arising from digitalisation"

- WK 10973 2019 INIT "OECD presentation"
- WK 10921 2019 INIT "Tax challenges arising from digitalisation"
- CM 4117 2019 INIT "Working Party on Tax Questions (Direct Taxation - Digital)"
- CM 4014 2019 INIT "Fiscal Attachés (Direct Taxation - Digital)"
- WK 8652 2019 INIT "Tax challenges arising from digitalisation - Presentation"
- WK 8650 2019 INIT "Economic Analysis of Corporate Tax Reform Options (for the EU) - Presentation"
- WK 8649 2019 INIT "Example based impact of the Pillar 1 proposals - Presentation"
- WK 8553 2019 INIT "Example based impact of the Pillar 1 proposals"
- WK 8545 2019 INIT "Exploring the possible ways forward on the issue of Pillar 2 and its compatibility with EU law"
- WK 8515 2019 INIT "Methodology for the economic analysis of the proposals on international corporate tax reform"
- CM 3536 2019 INIT "Working Party on Tax Questions (Direct Taxation - Digital)"
- WK 8212 2019 INIT "Tax challenges arising from the digitalisation of the economy"
- WK 7156 2019 INIT "International tax reform: way forward for the EU"
- CM 3154 2019 INIT "Working Party on Tax Questions (Direct Taxation - Digital) - MORNING ONLY"
- ST 9150 2019 INIT "Digital taxation in the international context - Letter by Commissioner Moscovici - Issues Paper on the reform of international corporate taxation: "Business taxation 21"
- ST 9148 2019 INIT "Digital taxation in the international context Policy debate"
- WK 5704 2019 INIT "Digital taxation in the international context - Letter by Commissioner Moscovici - Issues Paper on the reform of international corporate taxation: ""Business taxation 21"""
- ST 6873 2019 COR 1 "Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services Political agreement"
- ST 6873 2019 INIT "Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services Political agreement"

- WK 2630 2019 REV 1 "Digital Taxation - Discussion in preparation of the political agreement at ECOFIN"
- WK 2260 2020 INIT "Digital taxation: economic impact analysis - Letter from OECD"
- WK 2630 2019 INIT "Digital Taxation - Discussion in preparation of the policy debate at ECOFIN"
- WK 2235 2019 INIT "Digital Advertising Tax - Presidency compromise text"
- CM 1522 2019 REV 1 "Working Party on Tax Questions (Indirect Taxation - Digital) - MORNING ONLY"
- CM 1522 2019 "Working Party on Tax Questions (Indirect Taxation - Digital) - MORNING ONLY"
- WK 1487 2019 INIT "Tax and Digitalization - OECD update - Presentation by the OECD"
- WK 1365 2019 INIT "OECD/G20 BEPS Project - ""Addressing the Tax Challenges of the Digitalisation of the Economy"" - Policy Note"
- WK 1093 2019 INIT "Digital Advertising Tax Directive - State of play and way forward"
- WK 260 2019 INIT ""Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services - Digital Advertising Tax – possible circumvention risks".

Please find attached documents CM 1425 2020 INIT, ST 5169 2020 INIT, ST 5109 2020 REV 1, CM 1124 2020 INIT, ST 5109 2020 INIT, CM 4733 2019 INIT, ST 13405 2019 INIT, ST 13405 2019 COR 1, CM 4398 2019 INIT, CM 4117 2019 INIT, CM 4014 2019 INIT, CM 3536 2019 INIT, CM 3154 2019 INIT, ST 6873 2019 INIT, ST 6873 2019 COR 1, CM 1522 2019, ST 9150 2019 INIT and CM 1522 2019 REV 1.

Please find attached a partially accessible version of documents WK 724 2020 INIT and WK 1733 2020 REV 1.² However, I regret to inform you that full access cannot be given for the following reasons. The parts of the documents that have to be withheld contain personal data which is to be protected pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 in conjunction with the data protection rules at EU level³.

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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39–98).

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

- WK 7902 2020 INIT, "Letter to OECD - digital taxation"
- WK 1619 2020 INIT, "Presidency steering note"
- WK 540 2020 INIT, "Tax challenges arising from digitalisation - Presidency discussion paper"
- WK 13225 2019 INIT, "Hungary's Position Paper on the compatibility of the Pillar 2 Proposals with EU law"
- WK 13201 2019 INIT, "Initial discussion on EU law compatibility of Pillar 2"
- WK 11873 2019 INIT, "OECD Presentation"
- WK 11769 2019 INIT "Preliminary results pillar 2 - Presentation by the Commission"
- WK 11448 2019 INIT "Tax challenges arising from the digitalisation of the economy"
- WK 11161 2019 INIT "Presentation by the Hungarian delegation"
- WK 11070 2019 INIT "Presentation by the Presidency"
- WK 10988 2019 INIT "Tax challenges arising from digitalisation"
- WK 10973 2019 INIT "OECD presentation"
- WK 10921 2019 INIT "Tax challenges arising from digitalisation"
- WK 8650 2019 INIT "Economic Analysis of Corporate Tax Reform Options (for the EU) - Presentation"
- WK 8649 2019 INIT "Example based impact of the Pillar 1 proposals - Presentation"
- WK 8553 2019 INIT "Example based impact of the Pillar 1 proposals"
- WK 8545 2019 INIT "Exploring the possible ways forward on the issue of Pillar 2 and its compatibility with EU law"
- WK 8212 2019 INIT "Tax challenges arising from the digitalisation of the economy"
- ST 9148 2019 INIT "Digital taxation in the international context Policy debate"
- WK 5704 2019 INIT "Digital taxation in the international context - Letter by Commissioner Moscovici - Issues Paper on the reform of international corporate taxation: ""Business taxation 21"""
- WK 2630 2019 INIT "Digital Taxation - Discussion in preparation of the policy debate at ECOFIN"

- WK 2630 2019 REV1 "Digital Taxation - Discussion in preparation of the policy debate at ECOFIN"
- WK 2235 2019 INIT "Digital Advertising Tax - Presidency compromise text"
- WK 1487 2019 INIT "Tax and Digitalization - OECD update - Presentation by the OECD"
- WK 1365 2019 INIT "OECD/G20 BEPS Project - ""Addressing the Tax Challenges of the Digitalisation of the Economy"" - Policy Note"
- WK 1093 2019 INIT "Digital Advertising Tax Directive - State of play and way forward"
- WK 260 2019 INIT ""Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services - Digital Advertising Tax – possible circumvention risks"

These documents contain analysis, notes and presentations from the Presidency, Delegations and third parties relating to negotiations and discussions regarding digital taxation, and in particular the draft Digital Services Tax Directive and Digital Advertising Tax Directive.

These negotiations are still ongoing and require unanimity within the Council. The release of the requested documents to the public would affect the negotiating process since delegations may come under additional pressure from stakeholders. It would therefore diminish the chances of reaching an agreement within the Council. For the Council to reach an agreement on these negotiations, Member States hold initial consultations and exploratory talks. Revealing the contents of such talks before an agreement has been reached would interfere with the negotiations and could jeopardise the conclusion of an agreement within the Council. Disclosure of the requested documents would therefore seriously undermine the decision making-process of the Council.

As a consequence, the General Secretariat has to refuse access to these documents.⁴

We have also looked into the possibility of releasing parts of the documents.⁵ 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 documents were drafted, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in their disclosure.

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

⁵ Article 4(6) 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 5870 2020 INIT, "Economic impact assessment (digital taxation)"
- WK 2260 2020 INIT, ""Digital taxation: economic impact analysis - Letter from OECD"
- WK 11162 2019 INIT "Presentation by Presidency"
- WK 11055 2019 INIT "Presentation by the Commission"
- WK 8652 2019 INIT "Tax challenges arising from digitalisation - Presentation"
- WK 8515 2019 INIT "Methodology for the economic analysis of the proposals on international corporate tax reform"
- WK 7156 2019 INIT "International tax reform: way forward for the EU"
- WK 2260 2020 INIT "Digital taxation: economic impact analysis - Letter from OECD"

These documents contain analysis, notes and presentations from the Presidency, Delegations and third parties relating to negotiations and discussions regarding digital taxation, and in particular the draft Digital Services Tax Directive and Digital Advertising Tax Directive. These documents relate to digital taxation in the international context and are interlinked with discussions and issues relating to national digital taxes and ongoing third parties trade investigations.

These negotiations are still ongoing and require unanimity within the Council. The release of the requested documents to the public would affect the negotiating process since delegations may come under additional pressure from stakeholders. It would therefore diminish the chances of reaching an agreement within the Council. For the Council to reach an agreement on these negotiations, Member States hold initial consultations and exploratory talks. Revealing the contents of such talks before an agreement has been reached would interfere with the negotiations and could jeopardise the conclusion of an agreement within the Council. Disclosure of the requested documents would therefore seriously undermine the decision making-process of the Council.

In addition, the release to the public of the information contained in the documents could create expectations or unnecessary warning and thus could have a negative impact on the EU's financial system and undermine the protection of the public interest as regards the financial, monetary or economic policy of the EU.

Disclosure of the information contained in the documents would also have a negative impact on the relations of the European Union with its counterparts in the OECD and G20. Should its internal views and negotiation strategy be made public while negotiations are still ongoing, the position of the Union in such multilateral negotiations would be seriously weakened. Disclosure of the documents would therefore undermine the protection of the public interest as regards international relations, since the documents contain information on negotiations which are still under discussion within the Council on the approaches to be taken in international fora.

We have also looked into the possibility of releasing parts of the documents.⁶ 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 documents were drafted, 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 these documents⁷

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.⁸

Yours sincerely,

Fernando FLORINDO

Enclosures: 20

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

⁷ Article 4(3), first subparagraph, and Article 4(1)(a), third and fourth indent of Regulation (EC) No 1049/2001.

⁸ 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 4 November 2020 - 22:15]

From: Vicky Cann <ask+request-8282-17d7b77a@asktheeu.org>

Sent: Wednesday, November 4, 2020 22:15

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

Subject: Internal review of access to documents request - Digital services tax

Dear Council of the European Union,

Please pass this on to the person who reviews confirmatory applications.

I am filing the following confirmatory application with regards to my access to documents request 'Digital services tax'.

You correctly summarised that I requested “all agendas; minutes / notes of discussions; position papers; and any other documents relating to Council deliberations, since 1 January 2019, where the EU’s Digital Services Tax proposal, and/ or the OECD’s negotiations on a similar tax, were discussed.”

You have granted partial access to certain documents under Article 4(1)(b) of Regulation (EC) No 1049/2001. You have also refused disclosure of other documents under Article 4(1)(a), and Article 4(3) Regulation (EC) No 1049/2001.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, I ask the Council to review this decisions taking in the following considerations.

1. A fair balance was not found between the right of access to documents and the right to personal data protection.
2. Harm test under Article 4(1)(a), international relations and the financial, monetary or economic policy of the Community or Member State, has not been explicitly proven
3. In relying on Article 4(3) Regulation (EC) No 1049/2001, it was not demonstrated that disclosure of the documents would cause a reasonable foreseeable, non-hypothetical harm, nor was the public interest properly considered.
4. 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. Under Recital 6, an even wider access should be granted to institutions acting in a legislative capacity.
5. The Council has failed to consider that that the right of access to information is particularly strong for public watchdogs such as journalists, civil society and human rights organisations.

1. A fair balance was not found between the right of access to documents and the right to personal data protection.

While I do not argue that the documents I am requesting contain the names of individuals, I believe that in this case, the Council has failed to reconcile the right to protection of personal data with the right to freedom of information, especially considering the public interest in this information.

Article 9(3) of Regulation (EU) 2018/1725 Union institutions and bodies shall reconcile the right to the protection of personal data with the right of access to documents in accordance with Union law.

Under Regulation (EU) 2018/1725, the Council is legally obliged to balance the protection of personal data with the right of access to documents. You have not shown that you have carried out the balancing needed.

In addition, regarding the release of personal data, the EU institutions and other EU Member States allow for the release of specific personal data for the public interest. These documents contain the names of public officials who are taking important decisions on behalf of the citizens of the EU. Knowing who is taking part in the decision-making process on our behalf, and who is influencing those decision, is of extreme public importance.

I argue that, due to the current context of the documents, the names of these individuals within should not be given such high levels of data protection. The Court of Justice has established that, given the need for accountability and transparency of public authorities, there exists some expectation of disclosure of personal data among public officials:

public figures have generally already accepted that some of their personal data will be disclosed to the public, and may even have encouraged or made such disclosure themselves. It is necessary therefore to take that environment into account when assessing the risk of the legitimate interests of public figures being prejudiced in the context of the application of Article 8(b) of Regulation No 45/2001, and in weighing those interests against the necessity of transferring the personal data requested. (1)

Advocate General Cruz Villalón has endorsed a similar line of argument, according to which the law should be relaxed where personal data is not the main object of a request, but rather incidental to a request for public documents. (2)

I do not seek any personal data other than the names of those officials involved in these negotiations, and certainly not any other or any sensitive personal data, rather I argue that, in light of the public interest arguments made below, the release of these documents in full is proportionate, necessary and justified.

2. Harm test under Article 4(1)(a), international relations and the financial, monetary or economic policy of the Community or Member State, has not been explicitly proven

Access to a subset of eight (8)³ of the identified documents has been refused under Article 4(1)(a), on grounds of both protection of international relations and of the financial, monetary or economic policy of the Community or Member State. You have asserted that partial access to these documents cannot be granted as the exception to the right of access applies to the entire document.

With respect to the protection of the financial, monetary or economic policy of the Community or a Member State, you argue that: the release to the public of the information contained in the documents could create expectations or unnecessary warning and thus could have a negative impact on the EU's financial system and undermine the protection of the public interest as regards the financial, monetary or economic policy of the EU.

Simply stating that the release of the documents could have a “negative impact” is not a sufficient demonstrating the harm to such a level that would compensate denying a citizen their fundamental right of access to documents.

Similarly, with respect to protection of international relations, you have similarly asserted a “negative impact”, explaining that: Disclosure of the information contained in the documents would also have a negative impact on the relations of the European Union with its counterparts in the OECD and G20. Should its internal views and negotiation strategy be made public while negotiations are still ongoing, the position of the Union in such multilateral negotiations would be seriously weakened. Disclosure of the documents would therefore undermine the protection of the public interest as regards international relations, since the documents contain information on negotiations which are still under discussion within the Council on the approaches to be taken in international fora.

Here we should stress that a mere “negative” impact is not a the level of test required, given that, as the Court of Justice of the European Union has stated, an EU body “remains obliged (...) to explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in that provision, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.”⁽⁴⁾ This has not been done, and certainly not specifically for each document. Indeed, it has not been made clear if both the economic policy and the international relations exceptions apply in their entirety to each and every one of these eight (8) documents.

It is important to underline here that the harm to a protected interest has to be such as to justify the denial of the fundamental right of access to documents as protected by the treaties. More specifically, the harm has to be such that the strong presumption of openness of legislative documents, as established by the treaties, is limited. The Council has not demonstrated that this is the case.

In addition, should the Council be able to identify and persuasively argue that some part of the information in these documents meets the standard of being information that should be reserved in order to protect financial, monetary or economic policy of the EU, there will nevertheless be some other parts of the documents that can be released, and hence that partial access is possible.

With respect to the protection of international relations, it should be stressed that this is largely an ongoing negotiation within the European Union space, between its Member States. The mere fact that there has been some consultation with or input from the OECD and G20, which are inter-governmental bodies/processes, is not sufficient to consider that international relations are at stake. This process cannot be considered to be precisely analogous to negotiations with third countries.

Furthermore, with respect to the digital taxation analysis developed by the OECD is, it is to be presumed that such a document is likely to be based largely on already publicly-available information, and hence, at a minimum, partial access to this documents should be possible.

3. In relying on Article 4(3) Regulation (EC) No 1049/2001, it was not demonstrated that disclosure of the documents would cause a reasonable foreseeable, non-hypothetical harm, nor was the public interest properly considered.

There are certain documents which you have refused to disclose. In your response, you state that these documents contain: “analysis, notes and presentations from the Presidency, Delegations and third parties relating to negotiations and discussions regarding digital taxation, and in particular the draft Digital Services Tax Directive and Digital Advertising Tax Directive.”

You further state that due to the fact that these negotiations are still ongoing and require unanimity within the Council: “the release of the requested documents to the public would affect the negotiating process since delegations may come under additional pressure from stakeholders. It would therefore diminish the chances of reaching an agreement within the Council. For the Council to reach an agreement on these negotiations, Member States hold initial consultations and exploratory talks. Revealing the contents of such talks before an agreement has been reached would interfere with the negotiations and could jeopardise the conclusion of an agreement within the Council. Disclosure of the requested documents would therefore seriously undermine the decision making-process of the Council.”

You have refused access under Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 and state that partial access cannot be granted as the exception to the right of access applies to the entire document. It was not demonstrated that release of the documents would cause a reasonable foreseeable, non-hypothetical harm.

In Case T 233/09 Access Info Europe v Council, the General Court confirmed that the mere fact that a document concerns an interest protected by an exception to disclosure is not sufficient to justify the application of that exception.

Such application may be justified only if access to that document could specifically and effectively undermine the protected interest. Moreover, the risk of the protected interest being undermined must not be purely hypothetical and must be reasonably foreseeable. It is up to the institution concerned to weigh the specific interest which must be protected through non-disclosure of part of the requested document in the circumstances against the general interest in the entire document being made accessible.(5)

In merely claiming that the disclosure of the requested documents would seriously undermine the decision making-process, the Council is not sufficiently demonstrating a non-hypothetical and reasonably foreseeable risk in order to rely on Article 4(3).

- The EU institutions must take decisions as openly as possible and ensure public participation.

Article 4(3) is subject to an overriding public interest. You state that there is no such interest in this case. I would like to expressly state that I do not agree with your assessment, as there does in fact exist an overriding public interest in the release of these documents, one that the Council has failed to recognise.

Given the importance of public participation in EU decision-making and the treaty obligation imposed upon the EU to take decisions as closely as possible to the citizens, the public interest test in being granted access to these documents has not been correctly considered.

Article 15 of the Treaty on the Functioning of the European Union states:

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

As stated in [Case C-280/11 P](#), the Court lays out the “advantage” of increased openness is that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise 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).(6)

In order for the public to fully participate in Council decision making, citizens must be able to follow decisions as they are happening. Just communicating finalised decisions with European citizens once they are made, without giving them a chance to have an input, is not a democratic system.

If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information.(7)

Indeed, opening up these documents at a time when decision-making process is still ongoing, enables citizens to understand the options envisaged and the choices made by that institution and, thus, to be aware of the considerations underlying the action of the European Union. In addition, that disclosure puts those citizens in a position effectively to make their views known regarding those choices before those choices have been definitively adopted.(8)

‘it is rather a lack of public information and debate which is likely to give rise to doubts as to whether that institution has fulfilled its tasks in a fully independent manner and exclusively in the general interest’. (9)

4. 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. Under Recital 6, an even wider access should be granted to institutions acting in a legislative capacity.

Recital 4 in the preamble to Regulation (EC) No 1049/2001 states: The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents.

Article 1 of Regulation 1049/2001 states: ‘The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission ... documents ... in such a way as to ensure the widest possible access to documents.

In addition to this, the Regulation also states that a wider access should be granted to documents in cases where the institutions are acting in their legislative capacity. Recital 6 in the preamble to Regulation (EC) No 1049/2001 states:

“Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions’ decision-making process. Such documents should be made directly accessible to the greatest possible extent.”

The concerned documents contain analysis, notes and presentations from the Presidency, Delegations and third parties relating to negotiations and discussions regarding digital taxation, and in particular the draft Digital Services Tax Directive and Digital Advertising Tax Directive. These documents are being used by the Council acting in a legislative capacity. It is therefore under a legal obligation to make these documents directly accessible to the greatest possible extent.

5. The Council has failed to consider that the right of access to information is particularly strong for public watchdogs such as journalists, civil society and human rights organisations.

I would like to remind the Council that as I work within civil society, I have a specific “watchdog” function.

Therefore, when making this request as part of the exercise of my role as a public watchdog, I was exercising both my right of access to documents (Article 15 of the TFEU and Article 42 of the Charter of Fundamental Rights of the European Union) and also my right to freedom of expression and information, as protected by in Article 11 of the Charter of Fundamental Rights of the EU, which is analogous to Article 10 of the European Convention on Human Rights.

The European Court of Human Rights has established, through a series of judgments, that the right of access to information is particularly strong for public watchdogs such as journalists, civil society and human rights organisations.

Denying me this information is impeding my watchdog function, something that the European Court of Human Rights has established is an interference with freedom of expression and information.

“As the applicant was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression”.(10)

The Strasbourg Court has stated that public bodies cannot “allow arbitrary restrictions which may become a form of indirect censorship”.(11) In denying access to this information, the Parliament is creating barriers to the exercise of freedom of expression and information. The European Court of Human Rights has made clear that there is a positive obligation to eliminate such obstacles: “The State’s obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities”. (12)

Given that transparency is needed for civil society to carry out our watchdog activities, to contribute to public debate and decision making, there is a strong and specific purpose to transparency of how decisions are taken in EU institutions.

A full history of my request and all correspondence is available on the Internet at this address:
https://www.asktheeu.org/en/request/digital_services_tax

I look forward to hearing from you.

Yours faithfully,

Vicky Cann

1. Case T-115/13 Dennekamp v European Parliament (Dennekamp II) EU:T:2015:497, para 119
2. See Opinion of Advocate General Cruz Villalón, in Case C-615/13 P, ClientEarth et al. / European Food Safety Authority, ECLI:EU:C:2015:219, para 53. Villalón argues that “the ‘necessity’ to which Regulation No 45/2001 refers cannot be understood with the same rigour or scope when access is sought to documents quite devoid of public interest as when the application concerns information of obvious public interest and relating to an individual’s professional activities...”
3. We note that document WK 2260 2020 INIT has been included in the list twice, so it may be the case that we are talking about seven (7) documents here.
4. Judgment of 3 July 2014. Council of the European Union v Sophie in 't Veld.C-350/12P para. 64
5. Case T-233/09 Access Info Europe v Council
6. Case C-280/11 P Council v Access Info Europe, para 33
7. Case T-233/09 Access Info Europe v Council, para 69
8. Case C-57/16P ClientEarth v Commission
9. Case C-57/16P ClientEarth v Commission para 104
10. Youth Initiative for Human Rights v. Serbia, App. No. 48135/06, ECHR , 25 June 2013, para 24
11. Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05, ECHR, 14 April 2009, para 27
12. Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05, ECHR, 14 April 2009, para 36