



Council of the
European Union

Brussels, 28 January 2021
(OR. en)

5688/21

INF 15
API 10

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 03/c/01/20

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 2 December 2020 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 21 January 2021 (Annex 2);
- confirmatory application dated 25 and 27 January 2021 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 2 December 2020 - 15:16]

Dear representative of the General Secretariat of the Council,
Thank you very much for your reply and your clarification.

The main reason that full access to the requested documents in your letter of 27 October was 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. I understand from your below email that it is not possible to submit this argument in the below already ongoing confirmatory application process.

I would therefore like to withdraw the below confirmatory application and file - via this email - a new initial application for the same documents as previously requested under my in initial 20/1224 information request.

Pls note that I filled today a confirmatory for another request. Its concerns the same type of topic but they relate to an other EU Code of Conduct Group meeting (not covered on this information request). Pls note that I do not want to withdraw this confirmatory application.

Thank you very much for processing this information request.

Kind regards,

DELETED



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, 21 January 2021

DELETED

Email: **DELETED**

Ref. 20/2273-jdg/jl

Request made on: 02.12.2020

Deadline extension: 23.12.2020

Dear **DELETED**,

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

You requested public access to "the same documents as previously requested under my in initial 20/1224 information request."

The General Secretariat of the Council has not identified new documents since the reply to your initial application 20/1224 (letter from 27 October 2020, ref. 20/1224-jdg/nb), including your confirmatory application 09/c/01/20 (letter from 19 May 2020, ref. SGS20/1558).

1) Documents **WK 546/2020**, **WK 546/2020 REV1**, **WK 546/2020 REV 2**, **ST 5815/20** and **CM 1522/20** are already in your possession since the reply to your request 20/0417 (our letter from 5 March 2020, Ref. 20/0417-jdg).

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) Documents **WK 2873/2020 ADD 1 REV 1**, **WK 2873/2020 ADD 2**, **WK 2873/2020 ADD 3**, **WK 2873/2020 ADD 4**, **WK 2873/2020 ADD 5**, **WK 2873/2020 ADD 6**, **WK 2873/2020 ADD 7**, **WK 2873/2020 ADD 8**, **WK 2873/2020 ADD 9**, and **WK 2873/2020 ADD 10** are already in your possession since the reply to your initial application 20/1224 (our letter from 27 October 2020, ref. 20/1224-jdg/nb).

3) The email replies, including their attached documents, from Belgium (10 February 2020), Cyprus (4 February 2020), the Czech Republic (25 February 2020 and 16 June 2020), Denmark (19 February 2020 and 29 May 2020), Estonia (26 February 2020), Spain (28 February 2020), Finland (25 February 2020), Greece (1 March 2020), Croatia (27 February 2020), Hungary (6 March 2020), Ireland (14 February 2020), Italy (28 February 2020), Lithuania (2 March 2020), Latvia (18 and 19 February 2020), Malta (24 February 2020), Netherlands (18 February 2020), Poland (2 March 2020), Portugal (24 February 2020), Romania (28 February 2020 and 29 June 2020), Slovenia (26 February 2020 and 19 June 2020), the Slovak Republic (17 February 2020), and Sweden (5 May 2020) are already in your possession since the reply to your initial application 20/1224 (our letter from 27 October 2020, ref. 20/1224-jdg/nb), in accordance with EU data protection rules².

4) Please find attached the email replies, including their attached documents, from Bulgaria (24 February 2020), Croatia (29 June 2020), Cyprus (17 June 2020), France (28 February 2020), Greece (29 June 2020) and Luxemburg (28 February 2020), in accordance with EU data protection rules³.

5) Following a consultation on the basis of Article 4(5) of Regulation (EC) 1049/2001, Austria disagreed with disclosure of its reply and associated documents, including document **WK 2873/2020 ADD 1** of 13 March 2020 which is a cover note for the reply. Austria argues that the reply is part of the internal working process of the Code of Conduct Group. Release of the information contained therein would seriously undermine the workability of the Code of Conduct Group and thus the Council's decision-making process, even after the decision has been taken⁴. In addition, the Austrian reply contains tax information and reveals internal processes and detailed information on investigation activities which are not public and, in the absence of any overriding public interest, are not intended for publication⁵. In light of the circumstances of the case, the General Secretariat of the Council considers the reasons raised by Austria in order to oppose the disclosure of its reply and associated documents as legitimate.

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.

³ 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.

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

⁵ Article 4(2), third indent, of Regulation (EC) No 1049/2001.

6) Following a consultation on the basis of Article 4(5) of Regulation (EC) 1049/2001, Germany and Sweden disagreed with full disclosure of their reply and associated documents. Germany and Sweden argue that the replies are part of the internal working process of the Code of Conduct Group. Release of the information contained therein would seriously undermine the workability of the Code of Conduct Group and thus the Council's decision-making process, even after the decision has been taken⁶. In addition, Sweden considers that full disclosure of its reply and associated documents, including document **WK 2873/2020 ADD 11** of 13 March 2020 which is a cover note for the reply, would be detrimental to its economic and financial policy 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 Union⁷. In light of the circumstances of the case, the General Secretariat of the Council considers the reasons raised by Germany and Sweden in order to oppose the full disclosure of their reply and associated documents as legitimate.

However, pursuant to Article 4(1)(a), 4th indent and Article 4(3), second subparagraph, of Regulation (EC) 1049/2001, read in connection with Article 4 (5) of Regulation No 1049/2001, partial access to the email reply by Germany (24 February 2020 and 22 June 2020) can be granted under Article 4(6) of Regulation No 1049/2001. A partially accessible version of the email reply by Germany (24 February 2020 and 22 June 2020) is attached. A partially accessible version of the email reply by Sweden (24 February 2020), and in accordance with EU data protection rules⁸, is attached.

7) Document **WK 2121/2020 INIT** of 21 February 2020 is a cover note for a Monitoring of the implementation of the 2016 COCG 'Guidelines on the conditions and rules for the issuance of tax rulings' - Preliminary overview of Member States' responses to the agreed questionnaire (as of 21/02/2020). Document **WK 2871/2020 INIT** of 18 March 2020 is a cover note for a Commission services document. It contains a Preliminary overview of Member States' responses to the agreed questionnaire (as of 11 March 2020), on the 2016 Guidelines on the conditions and rules for the issuance of tax rulings – Standard requirements for Good Practice by Member States. Document **WK 2873/20 INIT** of 13 March 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.

Please find attached document **WK 2121/2020 INIT**.

⁶ Article 4(3), second subparagraph of Regulation (EC) No 1049/2001.

⁷ Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001.

⁸ 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.

The General Secretariat of the Council regrets to inform you that access to documents **WK 2871/2020 INIT**, and **WK 2873/2020 INIT** cannot be given because they are part of the internal working process of the Code of Conduct Group. Release of the information contained in documents **WK 2121/2020 INIT**, **WK 2871/2020 INIT**, and **WK 2873/2020 INIT** would seriously undermine the workability of the Code of Conduct Group and thus the Council's decision-making process, even after the decision has been taken.

As a consequence, the General Secretariat of the Council has to refuse access to documents **WK 2871/2020 INIT**, and **WK 2873/2020 INIT**⁹.

Having examined the context in which documents **WK 2871/2020 INIT**, and **WK 2873/2020 INIT** 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 2871/2020 INIT**, and **WK 2873/2020 INIT** must be refused, pursuant to Article 4(3), second subparagraph of Regulation (EC) No 1049/2001, read in conjunction with Article 4(5) of Regulation (EC) No 1049/2001, partial access can be granted under Article 4(6) of Regulation (EC) No 1049/2001, in the light of the considerations set out above.

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.¹⁰

Yours sincerely,

Fernando FLORINDO

Enclosures: 12

⁹ Article 4(3), second subparagraph of Regulation (EC) No 1049/2001.

¹⁰ 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 27 January 2021 - 14:31]

Dear representative of the General Secretariat of the Council,

Thank you for this clarification. I agree with limiting my confirmatory application to the part dealing with refusal of access to documents.

Best, **DELETED**

[E-mail message sent to the applicant on 27 January 2021 - 12:00]

Dear **DELETED**,

It is our understanding that by redoing the partial access documents and having resent them to you, no attachment is now missing.

Consequently, only the part regarding the refusal of access to documents should now be examined by the Council in the confirmatory application.

Many thanks,

Yours sincerely,

TRANSPARENCY

[E-mail message sent to access@consilium.europa.eu on 25 January 2021 - 13:12]

Dear representative of the Council,

Thank you for your decision and submission of the various documents. They are of great value to my research. Nonetheless, I would like to submit a confirmatory application regarding '20/2273-jdg/jl' because (i) some attachments of some identified emails seem to be missing and (ii) access to information has – incorrectly - been refused because two Member States (Austria and Germany) did not agree with disclosure. I note that all (other) MS agreed with disclosure, with the exception of these two MS. Member States have no veto right under the European Transparency Regulation. It is unclear, or at least not explained, why the interests of these two Member States would be affected if their redacted information would be disclosed, while comparable information from other Member States could be disclosed. Finally, I would like to note that this topic is about transparency in the area of tax rulings. The EU wants MS to be transparent about their harmful tax rulings practices. I strongly support that call, but the EU itself must also be transparent when it comes to European policies that seek to make tax ruling practices of EU MS more open, transparent and fair. There is widespread public concern about tax avoidance by tax rulings; therefore transparency regarding European policies and MS compliance in this area is vital. Contrary to the Council's claim, a so-called overriding public interest can easily be identified. I kindly ask the Council to explain in more detail why this would not be the case. The Council's decision lacks any explanation on this point. In addition, I would like to note that the diplomatic Code of Conduct Group (and the EU MS) agreed on a pragmatic approach that information/documents regarding 'closed' cases

should be disclosed. Also Austria and Germany agreed to this working practice. In addition, I would like to point out that the Code of Conduct Group and the MS have promised to be more transparent about the work of the EU Code of Conduct Group and in particular regarding MS compliance with agreed guidance (soft law) of the Code of Conduct Group. The information that I requested covers such a matter.

Thank you very much for processing this request.
Kind regards,

DELETED
