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**NOTE**

From:	General Secretariat of the Council
To:	Working Party on Information
No. prev. doc.:	7050/20; 7051/20
Subject:	Public access to documents - confirmatory application 09/c/01/20

Delegations will find in Annex the Council's draft reply on the above-mentioned confirmatory application, as agreed by the Working Party on Information, following the written consultation launched on 5 May 2020 which ended on 11 May 2020.

**DRAFT REPLY ADOPTED BY THE COUNCIL ON ...  
TO CONFIRMATORY APPLICATION 09/c/01/20,  
made by email on 26 March 2020,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,  
for public access to several documents of the Code of Conduct group**

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 20 February 2020 the applicant introduced an initial application for 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. (Ref. 20/0417-jdg)".
2. On 5 March 2020, the General Secretariat replied to this application by identifying 6 documents, and fully releasing three documents while refusing access to one document, namely document WK 2121/20. The remaining two documents were already public and the applicant was informed that he could have access on them via the public register of Council documents.

3. On 26 March 2020, the applicant introduced a confirmatory application against the General Secretariat's refusal of access as mentioned above. In substance, the applicant contends therein that the General Secretariat has not properly identified the documents, and has not given sufficient explanations for the application of the exceptions to the right of access concerning the protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State (Article 4(1)(a), fourth indent, of Regulation No 1049/2001), and as regards the protection of the decision-making process (Article 4(3), first subparagraph, of Regulation No 1049/2001).
4. The Council has reassessed this application in full consideration of the principle of transparency underlying Regulation No 1049/2001 and in the light of the applicant's arguments.

## THE CONTEXT

5. In the absence of Union legislation, business taxation, that is direct taxation, falls within the competence of Member States. The Union has competence in this field only with regard to measures that directly affect the establishment or functioning of the internal market.<sup>1</sup>
6. Since 1997, the Member States have recognised the importance to promote at the European level a coordinated action against unfair tax practices, without prejudice to the respective spheres of competence of the Member States and the Community. To that end, on 1st December 1997, the Council and the Representatives of the Governments of the Member States meeting within the Council adopted a Resolution containing a Code of Conduct for business taxation<sup>2</sup>, which entails a political commitment not to introduce new tax measures and to roll back existing ones which provide for a significantly lower effective level of taxation than those levels which generally apply in a Member State and, as a consequence, affect or may affect in a significant way the location of business activity of the Union. The scope of the Code of Conduct is broader than the potential Union competence provided for in the Treaties.

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<sup>1</sup> Article 115 TFEU.

<sup>2</sup> OJ C 2, 6.1.1998, p. 1.

7. The same Resolution has provided for a peer review mechanism based on exchange of information among the Member States and on the assessment of existing or proposed tax measures by a dedicated group composed by representatives of the Member States. By its conclusions of 9 March 1998 <sup>3</sup> the Council established the Code of Conduct group (Business Taxation), which is composed of a high-level representative of each Member State, to assess the tax measures that may fall within the scope of the Code and to oversee the provision of information on those measures.
8. The members of the group evaluate carefully the effects that tax measures (current and planned) may have on other Member States, *inter alia* in view of how the activities concerned are effectively taxed throughout the Union. The reviews of the group may result in recommendations to the Council. During the review process, Member States are called on to cooperate loyally in the framework of the Code of Conduct and provide relevant information about laws and administrative practices in the business taxation area.
9. The Council has taken significant steps to make the public at large more acquainted with the work of the Code of Conduct group and it is fully committed to continue increasing transparency in the group's activities. In particular, in line with paragraph H of the Resolution, the group reports regularly on the measures assessed with the assistance of the Commission. These reports are forwarded to the Council for deliberation. The reports and the Council conclusions in connection with them are published following the respective meetings of the Council, as appropriate.
10. However, it has to be pointed out that from its very conception, it has been essential to the functioning of the Code of Conduct group that it could serve as a forum in which Member States would be able to freely exchange views on each other's tax measures and their conformity with the Code of Conduct on Business Taxation. When engaging in discussions of this kind, Member States have always assumed that they would be conducted in a spirit of confidentiality and mutual trust and have reasonably continued to rely on such an assumption ever since.

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<sup>3</sup> OJ C 99, 1.4.1998, p. 1.

11. More specifically, since the establishment of the Code of Conduct group in 1998, the Council has repeatedly indicated that it was essential that discussions held within the group remain confidential, while increasing its visibility:
- the Council conclusions of 9 March 1998 establishing the Code of Conduct indicate that the Council "*agrees that the work of the group shall be confidential*";
  - this principle was recalled by the Council conclusions of 8 December 2015 <sup>4</sup>, where the Council "expresses the wish to improve the visibility of the work of the Code of Conduct group and agrees therefore that its results, in particular its 6-monthly reports, are systematically made available to the public" but "insists however on the confidentiality of the group's deliberations with a view to protect the public interest as regards the economic policy of Member States".
12. Moreover, the exchange of information within the Code of Conduct group has been regulated in detail in the Resolution of the Council and the representatives of the governments of the Member States, meeting within the Council, annexed to the Council conclusions of 1 December 1997. Hence, a specific framework is in place which provides for the exchange of information within the Code of Conduct group between the Member States and the Commission and between Member States themselves. The Resolution does not lay down a right of access for third parties to documents that are discussed within the group. This is inherent to the nature of the Code of Conduct that is an instrument of coordination among Member States which remain the subjects and the addressees of that coordination.<sup>5</sup> Its activities do not concern the Union as such but are essentially of an intergovernmental nature. A generalised access of the public to the documents would jeopardise the balance which Member States have sought to ensure when they agreed to establish the Code of Conduct group.
13. These remarks concerning the nature of the Code of Conduct group and the legal framework in which it was set up have to be duly taken into account when interpreting the relevant provisions of Regulation No 1049/2001 and assessing whether access to the requested documents can be given.

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<sup>4</sup> Council document 15148/15

<sup>5</sup> See seventh recital of the Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997.

## THE APPLICABLE EXCEPTIONS

14. The documents concerned by this confirmatory application come within the remit of the exception of the protection of the public interest as regards the financial, monetary or economic policy of the Community or a Member State (Article 4(1)(a), fourth indent, of Regulation No 1049/2001) and the protection of the decision making process (Article 4(3), first subparagraph, of Regulation No 1049/2001).
15. At the outset, the Council recalls that, according to the established case law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of Regulation No 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4.
16. On the one hand, *"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"*.<sup>6</sup>
17. On the other hand, 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 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"*.<sup>7</sup>
18. Therefore, the Council enjoys a wide discretion in assessing the probable impact of the release of a document on the financial, monetary or economic policy of the Union or a Member State – and, where applicable, on international relations – 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.

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<sup>6</sup> Judgment of the Court of Justice of 1 February 2007 in case [C-266/05](#) P, Sison v Council, para 34.

<sup>7</sup> Judgment of the Court of Justice of 1 February 2007 in case [C-266/05](#) P, Sison v Council, para 46.

19. As regards the exception provided for in Article 4(3), first subparagraph, the Council points out that in order to allow for an effective political peer review between Member States in a sensitive area of taxation, it is of particular importance to ensure workable preparatory discussions of the Code of Conduct group. In that regard, it should be stressed that the group's reports and the Council conclusions must be agreed between Member States by consensus. The requested documents are preparatory working documents outlining certain issues to be considered in the political discussion in the group. The political workability of that delicate mechanism would be jeopardised if Member States or the EU Institutions had to take into account the possibility that preparatory documents forming the basis for the discussions may be made public, all the more so when the decision-making process has not yet come to an end.
20. Under the circumstances described in paragraphs 5-19 above, the Council considers that it is reasonable to presume that Code of Conduct documents on issues that are still debated are indeed covered by at least one of the exceptions mentioned, and in particular the specific exception applying to protection of the public interest as regards financial, monetary or economic policy of the Union or a Member State (Article 4(1)(a), fourth indent, of Regulation No 1049/2001).
21. What is more, the Council notes that the facts in Access Info case<sup>8</sup> to which the applicant refers – which concerned documents drawn-up in the context of a decision-making procedure in which the Council acted in its legislative capacity – differ substantially from the situation at hand. The documents concerned by the present request do not pertain to a legislative process, but to the activities of the Code of conduct group, which as mentioned above are essentially of an intergovernmental nature.

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<sup>8</sup> Judgment of the Court of Justice of 17 October 2013 in case C-280/11 P, Council v. Access Info Europe.

## INDIVIDUAL ASSESSMENT OF THE REQUESTED DOCUMENTS

22. First, it is relevant to respond to the applicant's remarks as regards the identification by the General Secretariat of the Council of documents relevant to this request. As the applicant correctly assumes, delegations sent their replies on the agreed questionnaire on 2016 Guidelines on the Conditions and Rules for the Issuance of Tax rulings by email. Those replies were directly used in order to produce document WK 2121/20 INIT and their content and substance is identical to the content of document WK 2121/20 INIT, whereas no other emails falling within the scope of the request have been identified. Nevertheless, for the purposes of this confirmatory reply, the abovementioned replies of the Member States have also been assessed.
23. The Council has reassessed the request on the basis of the reasons stated in the confirmatory application and consulted the Member States having submitted a reply on the basis of Article 4 (5) of Regulation (EC) 1049/2001. Three of the Member States concerned disagreed with disclosure. Member States argued that such disclosure would be detrimental to their 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 Union or its Member States pursuant to Article 4 (1), (a), 4th indent of Regulation (EC) 1049/2001. Furthermore, some of the said Member States were also of the view that the matter has been under negotiation for several years with complex discussions still ongoing, so a release 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.
24. In light of the circumstances of the case, the Council considers the reasons raised by the Member States in order to oppose the disclosure of their relevant contributions as legitimate.
25. Document WK 2121/20 INIT of 21 February 2020 is a working paper originating from the General Secretariat of the Council to the Code of Conduct Group (Business Taxation). It contains a Preliminary overview of Member States' responses to the agreed questionnaire (as of 21/02/2020), on the Monitoring of the implementation of the 2016 COCG 'Guidelines on the conditions and rules for the issuance of tax rulings'.



26. This document is very recent and concerns difficult issues that are still debated within the Code of Conduct group. Its release is likely to trigger unwarranted and undesirable behaviour by economic operators which would interfere with Member States' fiscal policy.
27. As regards this document, it should be noted that the peer-review mechanism, which is one of the core tasks of the Code of Conduct group, is a very sensitive issue. Early public disclosure of the details of these discussions – where Member States are judging each other's tax regimes – would severely impede the search for solutions for what has been identified as harmful tax regimes, increasing instead of reducing distortions in the single market and often resulting in excessive losses of tax revenue or negatively impact on the way business activity is located within the Union.
28. The Council therefore considers that the requested documents fall under the specific exception applying to protection of the public interest as regards financial, monetary or economic policy of the Union or a Member State (Article 4(1)(a), fourth indent, of Regulation No 1049/2001).
29. Release would also affect the decision-making process, as explained in paragraph 19, since the issues concerned continue to be discussed and disclosure despite the refusal of the Member States concerned would seriously hamper the efforts of progress in the discussions. The Council has to strike a balance between the need to protect the decision making process and the legitimate interest in transparency, taking into account all relevant aspects and the context in which the documents were drafted, as explained in paragraphs 5-19 above. In this regard, the Council considers that the legitimate public interest in the release of the information does not outweigh the equally legitimate need to protect the decision-making process.
30. In any event, even if the Council considered that the prevalence of a public interest in disclosure over the protection of the decision-making process was established, it would still have to refuse access to the requested documents since, as abovementioned, Article 4(1) of Regulation (EC) No 1049/2001 does not provide for a test of balancing the harm to the protected interest against the public's interest in disclosure. On the contrary, once the Council has come to the conclusion that release would indeed undermine the public interests protected pursuant to the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, this conclusion is not mitigated by any obligation – or even possibility – to take into account "an overriding public interest in disclosure" as is the case for Article 4(3) of the Regulation.

31. The Council has furthermore considered the possibility of giving partial access to document WK 2121/20 INIT in line with the considerations set out in paragraphs 22-23.
32. Though access in full to document WK 2121/20 INIT must be refused, pursuant to Article 4(1)(a), fourth indent, and Article 4(3), first subparagraph 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 in paragraphs 22-23.

## CONCLUSION

33. For the above-mentioned reasons, the Council concludes that pursuant to Article 4(1)(a), fourth indent, and Article 4(3), first sub-paragraph, of Regulation No 1049/2001, no access can be granted to the email from Belgium (10 February 2020), from Ireland (13 February 2020) and from Slovakia (17 February 2020).
34. The Council also concludes that access can be granted to the email from Cyprus (4 February 2020), from the Netherlands (18 February 2020), from Latvia (19 February 2020), and from Denmark (19 February 2020), in accordance with EU data protection rules<sup>9</sup>.
35. For the above-mentioned reasons, the Council concludes that pursuant to Article 4(1)(a), fourth indent, and Article 4(3), first sub-paragraph, of Regulation No 1049/2001, only partial access can be granted to document **WK 2121/20 INIT**.

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<sup>9</sup> 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.