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NOTE

From: General Secretariat of the Council

To: Working Party on Information

No. prev. doc.: 13305/20

Subject: Public access to documents
- Confirmatory application No 27/c/02/20

Delegations will find attached a draft reply to confirmatory application No 27/c/02/20
(see 13305/20).

**DRAFT REPLY ADOPTED BY THE COUNCIL ON ...
TO CONFIRMATORY APPLICATION 27/c/02/20,
made by email on 2 December 2020
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to 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 (EC) 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 21 September 2020 the applicant introduced an initial application for 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)" (Ref. 20/1646-6.3-jdg/vk).
2. On 1 December 2020, the General Secretariat replied to this application by identifying seven documents, and 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). The General Secretariat fully released one document, and partially released the remaining six documents and the six replies.
3. On 2 December 2020, the applicant introduced a confirmatory application against the General Secretariat's refusal of access as mentioned above. The applicant considers that following the endorsement of the progress report of the Code of Conduct Group¹, all the identified documents should be released in their entirety.

¹ CM 4973/20, ST 12979/20 pt. 49, and 13151/20 ADD 5.

4. The Council has reassessed this application in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and in the light of the applicant's argument.

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.²
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 taxation³, 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.
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 1998⁴ 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

² Article 115 TFEU.

³ OJ C 2, 6.1.1998, p. 1.

⁴ OJ C 99, 1.4.1998, p. 1.

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.
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 ⁵, 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".

⁵ Council document 15148/15

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.⁶ 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 (EC) No 1049/2001 and assessing whether access to the requested documents can be given.

THE APPLICABLE EXCEPTIONS

14. Part of 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 Union or a Member State (Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001) and the protection of the decision making process (Article 4(3), second subparagraph, of Regulation (EC) 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 (EC) No 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4.

⁶ 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.

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"*.⁷
17. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest in such an area, it has no choice but to refuse access, because *"it is clear from the wording of Article 4(1)(a) of Regulation No (EC) 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"*.⁸
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. When the Council arrived at the conclusion that the public interest related to such policy could be endangered by the disclosure of a specific document, the Council has no other choice than refusing its disclosure; The protection of other legitimate interests is not to be put in balance in such a case with the necessity to protect the public interest related to the financial, monetary or economic policy of the Union or a Member State.
19. As regards the exception provided for in Article 4(3), second 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 functioning of such a 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 even after the decision-making process of a specific singled document has come to

⁷ Judgment of the Court of Justice of 1 February 2007 in case [C-266/05](#) P, Sison v Council, para 34.

⁸ Judgment of the Court of Justice of 1 February 2007 in case [C-266/05](#) P, Sison v Council, para 46.

an end. This is particularly the case given the sensitive subject matter discussed which relates to the fiscal policies of the Member States and how these policies are implemented. The requested documents remain relevant for these policies and its implementation even after the Council decision-making close and the Code of Conduct Group may be seized of these matters in the future again; they have a long lasting effect going beyond the moment of adoption of a specific act.

INDIVIDUAL ASSESSMENT OF THE REQUESTED DOCUMENTS

20. 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.
21. 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).
22. Document **WK 2871/2020 REV 2** is an updated version of document WK 2871/2020 REV 1.
23. 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).
24. Document **WK 2873/2020 REV 1 COR1** of 15 September contains a correction to document WK 2873/2020 REV1.
25. 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.

26. The General Secretariat has received 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).

I. Documents to which full public access is granted

27. The Council has reassessed the request on the basis of the reasons stated in the confirmatory application. It has reconsulted the Member States on the basis of Article 4(5) of Regulation (EC) No 1049/2001. Having thoroughly examined the content of the documents and taking into account the state of play on the matter, the Council considers that full public access can be given to documents **WK 2873/2020 REV 1**, **WK 2873/2020 REV 1 COR 1**, and **WK 2873/2020 REV 1 COR 1 ADD 1**, as well as to the reply from Croatia and Malta.

II. Documents to which partial access is granted

28. One Member State disagreed with disclosure as it is of the view that it would seriously undermine the Council's decision-making process, even after the decision has been taken, pursuant to Article 4(3), second subparagraph of Regulation (EC) No 1049/2001. Moreover, disclosure of that information would be detrimental to the economic and financial policy of that Member State 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), fourth indent of Regulation (EC) No 1049/2001.

29. In this regard, the Council points out that in order to allow for an effective political peer review between Member States in the sensitive area of taxation, it is of particular importance to ensure workable preparatory discussions of the Code of Conduct Group. It should also be stressed that the group's reports and the Council conclusions must be agreed between Member States by consensus.

30. The requested documents are preparatory working documents outlining certain issues to be considered in the political discussion in the group. Disclosure of the details of these discussions which constitute a peer-review mechanism – 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. 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, even after the decision has been taken. In particular, the sensitive subject matter relating to the fiscal policies of the Member States and how these policies are implemented remains sensitive even after the Council's decision-making process is closed and the Code of Conduct Group may be seized of these matters in the future again; they have a long lasting effect going beyond the moment of adoption of a specific act.

31. In addition, the Council endorsement of the report of the Code of Conduct Group referred to by the applicant does not imply that part of the exceptions provided for in Regulation (EC) No 1049/2001 cease to apply. Such interpretation would amount to refusing the institutions any discretion to refuse to grant access to documents, which is an interpretation that has been expressly rejected in the case-law⁹. This is all the more so as regards the activities of the Code of Conduct Group, which as mentioned above are essentially of an intergovernmental nature and are not subject to the principle of the wider access applicable when the Council acts in its legislative capacity. What is more, as explained in paragraph 11, the framework of the Code of Conduct Group provides for the confidentiality of the work of the group.
32. In light of the circumstances of the case, the Council considers the reasons raised by the Member State concerned in order to oppose the disclosure of its relevant contribution as legitimate.
33. The Council therefore considers that parts of 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 (EC) No 1049/2001).
34. As regards the exception provided for in Article 4(3), second subparagraph of Regulation (EC) No 1049/2001 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 5-13 above. Disclosure despite the refusal of the Member State concerned would seriously undermine the Council's decision-making process also for the future as the subject matter remains sensitive

⁹ See for example in this respect Judgment of the General Court in Case T-540/15, *De Capitani v Parliament*, EU:T:2018:167, paragraph 112.

and the Code of Conduct Group may be seized of these matters in the future again; they have a long lasting effect going beyond the moment of adoption of a specific act. 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.

PARTIAL ACCESS

35. The Council has furthermore considered the possibility of giving partial access to the requested documents **WK 9557/2020**, **WK 2871/2020 REV 1**, **WK 2871/2020 REV 2**, as well as to the replies from Hungary (email of 22 July 2020), Latvia (email of 6 July 2020), Romania (document and email of 22 July 2020), and Slovenia (email of 20 July 2020), in light of the considerations set out in paragraphs 20-344.

36. Though access in full to documents **WK 9557/2020**, **WK 2871/2020 REV 1**, **WK 2871/2020 REV 2**, as well as to the replies from 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) must be refused, pursuant to Article 4(1)(a), fourth indent and Article 4(3), second subparagraph of Regulation (EC) No 1049/2001, read in connection 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 light of the considerations set out in paragraphs 20-344.

CONCLUSION

37. For the above-mentioned reasons, the Council concludes that:

- access can be granted to documents **WK 2873/2020 REV 1**, **WK 2873/2020 REV 1 COR 1**, and **WK 2873/2020 REV 1 COR 1 ADD 1**, as well as to the replies from Croatia and Malta.

- pursuant to Article 4(1)(a), fourth indent and Article 4(3), second sub-paragraph, of Regulation (EC) No 1049/2001, only partial access can be granted to documents **WK 9557/2020**, **WK 2871/2020 REV 1**, **WK 2871/2020 REV 2**, as well as to the replies from Hungary (email of 22 July 2020), Latvia (email of 6 July 2020), Romania (document and email of 22 July 2020), and Slovenia (email of 20 July 2020).