



Council of the
European Union

Brussels, 29 January 2021
(OR. en)

13306/2/20
REV 2

LIMITE

INF 201
API 131

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.

INDIVIDUAL ASSESSMENT OF THE REQUESTED DOCUMENTS

14. 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.
15. 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).
16. Document **WK 2871/2020 REV 2** is an updated version of document WK 2871/2020 REV 1.

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.

17. 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).
18. Document **WK 2873/2020 REV 1 COR1** of 15 September contains a correction to document WK 2873/2020 REV1.
19. 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.
20. 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).
21. 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 2871/2020 REV 1**, **WK 2871/2020 REV 2**, **WK 2873/2020 REV 1**, **WK 2873/2020 REV 1 COR 1**, **WK 2873/2020 REV 1 COR 1 ADD 1**, and **WK 9557/2020**. Full public access may be given to the replies from Croatia, Hungary (email of 22 July 2020), Latvia (email of 6 July 2020), Malta, Romania (document and email of 22 July 2020), and Slovenia (email of 20 July 2020), with the exception of personal data which is protected by the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 9 of Regulation (EU) 2018/1725⁷.

7 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.

CONCLUSION

22. For the above-mentioned reasons, the Council concludes that full public access can be granted to documents **WK 2871/2020 REV 1**, **WK 2871/2020 REV 2**, **WK 2873/2020 REV 1**, **WK 2873/2020 REV 1 COR 1**, **WK 2873/2020 REV 1 COR 1 ADD 1**, and **WK 9557/2020**. Full public access may be given to the replies from Croatia, Hungary (email of 22 July 2020), Latvia (email of 6 July 2020), Malta, Romania (document and email of 22 July 2020), and Slovenia (email of 20 July 2020), with the exception of personal data which is protected by the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 and Article 9 of Regulation (EU) 2018/1725⁸.
23. The Council notes that the positive decision regarding these documents is based on an individual analysis of their content and the specific circumstances of the present case. It does under no circumstances constitute a precedent for the future, since each application shall be assessed and judged on its own merit, pursuant to the established practice of the Council.

8 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.