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NOTE

From: General Secretariat of the Council

To: Working Party on Information

No. prev. doc.: 13396/20

Subject: Public access to documents
- Confirmatory application No 26/c/01/20

Delegations will find attached a draft reply to confirmatory application No 26/c/01/20
(see 13396/20).

**DRAFT REPLY ADOPTED BY THE COUNCIL ON ...
TO CONFIRMATORY APPLICATION 26/c/01/20,
made by email on 25 November 2020 and registered on 26 November 2020
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents WK 5230/2017, WK 10931/17, WK 12197/2017,
WK 12197/2017 REV1, WK 14969/17, WK 14969/17 REV 1, and WK 6662/18**

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) 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 15 October 2020 the applicant introduced an initial application for access to "in compliance with art. 11 of the cited Regulation 1049/01, a listing of the Council documents coded as "WK" linked to pending EU legislative procedures debated in the Council working groups or by the Coreper in September 2020; in compliance with art. 12 of the cited Regulation 1049/01, the texts of the following documents : WK 5230/17, WK 12197/17, WK 12197/2017 REV1, WK 10931/17 as well as of the other more recent WK documents related to the legislative procedure 2016/0107(COD) amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (CBCR)".
2. On 6 November 2020, the General Secretariat replied to this application by producing the requested lists of WK documents. On 10 November 2020 the General Secretariat released documents WK 12550/19 REV 1, WK 12550/19 INIT, WK 11222/19 INIT, WK 694/19 INIT, WK 694/19 REV 1, WK 10862/17 INIT, and WK 8500/17 INIT. Access was refused in full for documents WK 6662/18 INIT, WK 14969/17 REV 1, WK 14969/17 INIT, WK 5230/17, WK 12197/17, WK 12197/2017 REV1, and WK 10931/17.

3. On 25 November 2020, the applicant introduced a confirmatory application against the General Secretariat's reply. The applicant considers that the WK documents included in the requested lists as provided by the General Secretariat should be referred in the Council Register. The applicant also challenges the refusal of access to the seven documents listed above. In substance, the applicant contends therein that the General Secretariat has not given sufficient explanations for the application of the exception to the right of access as regards protection of the decision-making process (Article 4(3), first subparagraph of Regulation (EC) No 1049/2001).
4. The Council has reassessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and in the light of the applicant's comments, whether public access can be provided to the documents fully withheld in the General Secretariat's reply. It has in particular carried out renewed consultations of the Member States on the documents concerned. The Council has come to the conclusions set out below.
5. In so doing the Council has carefully scrutinized the content of the documents, having due regard to the current state of play on negotiations related to these issues.

General Context

6. In April 2016, the European Commission presented a proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (CBCR), as a response to the challenge posed by corporate income tax avoidance.
7. It refers to European Council Conclusions of 18 December 2014 regarding the urgent need to advance efforts in the fight against tax avoidance and to the European Parliament's call for increased transparency in the area of corporate taxation in order to "improve tax collection, make the work of tax authorities more efficient and ensure increased public trust and confidence in tax systems and governments."

8. To enhance public scrutiny, the proposal requires multinational enterprises (MNEs) active in the EU, whether headquartered there or outside and with turnover of more than EUR 750m, to publicly disclose in a specific report the income tax they pay in the EU and in each Member State, along with other relevant information.
9. The proposal is highly sensitive from a political point of view as regards the establishment of positions in the Member States which requires the involvement and coordination between a large number of domestic actors.
10. On the substance, the Council meanwhile continues to debate its negotiating position, building on Presidency compromise texts. This state of play has been presented twice to the European Parliament, under Romanian Presidency and Finland's Presidency¹. The proposal has first been put for discussion on the Council agenda during Finland's Presidency, on 28 November 2019, in a public deliberation². On this occasion, the proposed compromise text tabled by the Presidency with a view to reaching a General Approach, and thus starting the negotiations with the European Parliament³, did not reach the necessary qualified majority, with Malta, Austria, Cyprus, Sweden, Latvia, the Czech Republic, Hungary, Estonia, Ireland, Luxembourg, Slovenia and Croatia opposing and Germany and the United Kingdom abstaining⁴. Subsequently, the file has not been on the Council agenda under Croatian Presidency and German Presidency.

¹ 18 April 2018 and 22 October 2019.

² https://video.consilium.europa.eu/event/en/23801?start_time=0

³ Document 14038/19 + COR 1 (available in the Council Public Register: <https://www.consilium.europa.eu/en/documents-publications/public-register/>)

⁴ See minutes of the Competitiveness Council of 28 and 29 November 2019 in document 14881/19, p. 4. (available in the Council Public Register: <https://www.consilium.europa.eu/en/documents-publications/public-register/>)

Articles 11 and 12 of Regulation (EC) No 1049/2001

11. In the first part of his confirmatory application, the applicant contends that the WK documents listed have not yet been referenced in the public register of Council documents, which would be contrary to Articles 11 and 12 of Regulation (EC) No 1049/2001. The Council notes that the applicant acknowledges in its confirmatory application that the requested list of WK documents has been transmitted by the General Secretariat of the Council, on 6 November 2020.
12. As regards the applicant's request to make WK documents fully available in the public register of Council documents, the Council notes that Regulation (EC) No 1049/2001 does not directly link the obligation under Articles 11 and 12 thereof to the right to access to documents under Article 2(1). As expressly held by the Court of Justice in its judgment of 2 October 2014, "compliance with the duty to register documents cannot therefore be enforced by means of an application for access to documents"⁵. Therefore, such a request cannot be addressed in the context of a confirmatory application.
13. The Council notes that the General Secretariat regularly establishes lists of all WKs related to ongoing decision making procedures, notably, those concerning legislative files, and makes them available in the public register of Council documents⁶. This is done pursuant to Article 12(4) of Regulation (EC) No 1049/2001, which provides that "where direct access is not given through the register, the register shall as far as possible indicate where the document is located".

⁵ Judgment of the Court of 2 October 2014 in Case C- 127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraph 44.

⁶ On this file: ST 8520/19, ST 8714/19, ST 8835/17, ST 15186/17, ST 15192/17, ST 5367/18, ST 11438/18, ST 11439/18, ST 11189/19 and 5124/20.

Article 16(8) TEU and Article 15(2) TFEU

14. The applicant also contends that according to Article 16(8) of the Treaty on European Union and Article 15(2) of the Treaty on the Functioning of the European Union, legislative preparatory debates should be clearly announced in the draft agendas and held in public. The Council would like to recall that contrary to what the applicant contends, the above mentioned Treaty provisions state that "the Council shall meet in public when it deliberates and votes on a draft legislative act". In order to implement these provisions, all working parties, Coreper and Council agendas relating to the preparation of legislative acts are public upon release⁷, and Council debates in legislative matters are held in public through public transmission by audiovisual means, notably in an overflow room and through broadcasting in all official languages of the institutions of the European Union using videostreaming⁸. The Council therefore considers that its obligations under Article 16(8) of the Treaty on European Union and Article 15(2) of the Treaty on the Functioning of the European Union are correctly fulfilled.

The exception concerning the protection of the decision making process (Article 4(3), first subparagraph of Regulation (EC) No 1049/2001) as regards documents WK 5230/2017, WK 10931/17, WK 12197/2017, WK 12197/2017 REV1, WK 14969/17, WK 14969/17 REV 1, and WK 6662/18

15. Document WK 14969/17 and REV1 is a working paper from the General Secretariat of the Council to the Working Party on Company Law (CBCR). It contains a Presidency note to the Delegations on the file.
16. Document WK 6662/18, is a working paper from the General Secretariat of the Council to the Working Party on Company Law (CBCR). It contains a Flash note from the Presidency to the Delegations on the file.

⁷ On this file: Working Party on Company law agendas when the file was discussed: CM 2154/16, CM 2675/16, CM 2865/16, CM 3438/16, CM 3680/16, CM 3680/16 REV1, CM 4090/16, CM 4090/16 REV1, CM 4751/16, CM 4751/16 REV1, CM 4855/16, CM 4855/16 REV1, CM 5066/16, CM 1235/17, CM 1235/17 REV1, CM 1235/17 REV2, CM 2732/17, CM 29025/17, CM 29025/17 REV1, CM 3916/17, CM 4250/17, CM 4652/17, CM 3107/18, CM 1086/19, CM 4246/19, CM 4246/19 COR1, and CM 4718/19. High Level Working Party (Taxation): CM 4706/16 REV1. Coreper agendas: ST 13980/19 Council : ST 14323/19; ST 14452/19 & 14452/1/19 REV 1.

⁸ <https://video.consilium.europa.eu/home/en>

17. Document WK 5230/17 is a working paper from the General Secretariat of the Council to the Working Party on Company Law (CBCR). It contains the comments received from delegations on CBCR Proposal after the Working Party meeting on 29 March 2017.
18. Document WK 12197/17 and REV1 is a working paper from the General Secretariat of the Council to the Working Party on Company Law (CBCR). It contains a consolidated table with contributions from delegations following up the Working party on 11 September 2017.
19. Document WK 10931/17 is a working paper from the General Secretariat of the Council to the Working Party on Company Law (CBCR). It contains the comments received from the delegations after the Working Party meeting on 20 of September 2017.
20. The Council notes that after having examined individual documents WK 5230/17, WK 12197/17 and WK 10931/17, they are of the same nature i.e. contain revised versions of parts of the draft directive proposing modifications and drafting suggestions as a result of the meetings of the Working Party on Company Law (CBCR) of 29 March 2017, 11 September 2017 and 20 September 2017.
21. The topic of tax transparency is currently under discussion. The views and reflections in the documents are neither exhaustive nor final and do not necessarily reflect the final position of Member States. Disclosure of the documents at this stage of the decision-making process is likely to put into question the final choices made by Member States and would create unnecessary uncertainty on their intentions.
22. Many of the elements set out in the documents are the result of difficult negotiations between the Member States. They give details of progress made and thereby reflect the difficulties that still need to be addressed before the Council can reach an agreement for a General Approach.
23. The requested documents include free and frank discussions between Member States on the basis that that were not meant to become public at this stage of the negotiations. Release would seriously undermine the mutual trust and confidence that enable the working group to perform effectively and thus undermine the workability of the working group. Moreover, any disclosure at this stage when a decision has not yet been taken would seriously affect the outcome of those negotiations.

24. Release to the public of the information contained in documents WK 14969/17 WK 6662/18, WK 14969/17 REV 1, WK 5230/17, WK 12197/17, WK 12197/17 REV1 and WK 10931/17 at a moment when delegations are seeking to find the appropriate balance of the various interests involved, would severely affect the negotiating process and diminish the chances of the Council reaching an agreement. Disclosure of documents would therefore seriously undermine the decision making-process of the Council.
25. 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. The Council has particularly taken into consideration the public interest in transparency for documents that relate to legislative procedures. The Council wishes to underline that it fully acknowledges that the principle of transparency is particularly pressing in relation to decision-making processes of a legislative nature, since openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize the information which has formed the basis of a legislative act.⁹
26. It is in light of those considerations that the Council granted public access to several documents covered by the applicant's request already at the initial stage (see in that regard paragraph 2 above). This file has also been debated in public sessions of the Council and several other documents pertaining to it have been made public and are available in the Council's register of documents. Therefore, the refusal to disclose a limited number of documents concerned by the applicant's request does not amount to denying citizens the possibility to obtain information about the legislative decision-making process in question.
27. The Council equally considers that the legitimate public interest in release of the information does not outweigh in this particular case the equally legitimate need to protect the decision-making process.
28. On the one hand, following its specific assessment of the content and context of documents enumerated in paragraphs 15 to 20 above, the Council concluded that there are objective reasons that show that there is a reasonably foreseeable risk that disclosure would seriously undermine the decision-making process.

⁹ See for example in this respect Judgment of the General Court of 22 March 2018 in Case T-540/15, *De Capitani v Parliament*, EU:T:2018:167, paragraph 78.

29. On the other hand, the applicant's arguments on the public interest in disclosure, as exposed in the confirmatory application, are of a very general nature. The applicant seems to suggest that following the adoption of the Lisbon Treaty all documents pertaining to internal discussions within the Council on legislative files, in particular containing information on "the position and the arguments debated by the national delegations" and on "the way how the debate is progressing on a specific legislative procedure" should be made directly accessible to the public. However, this assertion amounts to refusing the institutions any discretion to refuse to grant access to documents drawn up in the framework of a legislative decision-making, which is an interpretation that has been expressly rejected in the case-law¹⁰.

Moreover, those arguments do not provide any indication specifically pertaining to the documents and the decision-making process at issue and are based on general considerations that cannot provide an appropriate basis for establishing that, in the present case, an overriding public interest prevails over the reasons the refusal to grant access.

30. The Council therefore must confirm the refusal of access to these documents, pursuant to Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

31. The Council has furthermore considered the possibility of giving partial access to the requested documents. It has come to the conclusion that no partial access can be given, as each of the documents is part of an inseparable whole.

Conclusion

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

Pursuant to Article 4(3), first subparagraph of Regulation (EC) 1049/2001, no access can be granted to documents WK 14969/17 WK 6662/18, WK 14969/17 REV 1, WK 5230/17, WK 12197/17, WK 12197/17 REV1 and WK 10931/17.

¹⁰ 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: "That line of argument amounts to denying the institutions the possibility of justifying a refusal to grant access to legislative documents on the basis of the exception set out in the first subparagraph of Article 4(3) of Regulation No 1049/2001, despite the fact that that exception does not exclude the legislative process from its scope. Thus, it remains open to the institutions to refuse, on the basis of that provision, to grant access to certain documents of a legislative nature in duly justified cases".