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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Complaint No. 1703/2021/AMF - Approval of Council's draft reply

1. On 2 July 2020, the complainant lodged an access to documents request to the Council. On 14 October 2020, the General Secretariat replied to this application by identifying 53 documents and fully releasing 18 documents. Partial access was granted to 2 documents and access was refused to 33 documents.
2. On 4 November 2020, the applicant introduced a confirmatory application against the General Secretariat's reply (23/c/01/20). By its decision of 14 January 2021 (document **12676/20**), the Council granted full access to documents WK 1365 2019 INIT, WK 1487 2019 INIT, WK 1733 2020 REV 1, WK 5704 2019 INIT, WK 8649 2019 INIT, WK 10973 2019 REV1 (an updated version of WK 10973 2019 INIT), WK 11070 2019 INIT, and WK 11162 2019 INIT. The Council granted partial access to documents WK 724 2020 INIT, WK 11161 2019 INIT and WK 11873 2019 REV1 (an updated version of WK 11873 2019 INIT) pursuant to Articles 4(1)(b) and 4(6) of 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").

The Council also granted partial access to documents WK 1093 2019 INIT, WK 2235 2019 INIT, WK 2630 2019 INIT, WK 7156 2019 INIT, WK 8212 2019 INIT, WK 8545 2019 INIT, WK 8553 2019 INIT, WK 8652 2019 INIT, ST 9148 2019 INIT, WK 10921 2019 INIT, WK 11448 2019 INIT, WK 13201 2019 INIT, WK 540 2020 INIT, and WK 1619 2020 INIT, pursuant to Article 4(3), first subparagraph, and Article 4(1)(a), third and fourth indent of Regulation (EC) No 1049/2001, in conjunction with Article 4(6) of Regulation (EC) No 1049/2001. The Council refused access to documents, WK 260 2019 INIT, WK 8515 2019 INIT, WK 8650 2019 INIT, WK 10988 2019 INIT, WK 11055 2019 INIT, WK 11769 2019 INIT, WK 13225 2019 INIT, WK 2260 2020 INIT, WK 5870 2020 INIT, and WK 7902 2020 INIT, pursuant to Article 4(3), first subparagraph, and Article 4(1)(a), third and fourth indent of Regulation (EC) No 1049/2001.

3. On 24 September 2021 a complaint to the European Ombudsman was lodged following the Council's reply to confirmatory application 23/c/01/20 (document **12676/20**) as regards the refusal to grant full public access to certain documents related to the Digital Services Tax proposal, and/or the OECD's negotiations on a similar tax.
4. By letter of 30 September 2021, the Ombudsman's services informed the General Secretariat of the Council of the complaint concerning the Council's decision of 14 January 2021, and of the Ombudsman's decision to open an inquiry of the matter. The Ombudsman's services requested an inspection of the 10 documents to which the Council had refused access. The Ombudsman's services also invited the Council to provide additional views in relation to the inquiry, should it deemed it necessary.
5. Delegations were informed of the complaint and the Ombudsman letter requesting an inspection of the relevant documents on 5 October 2021 (documents **12499/21 + ADD1**).
6. Coreper was informed of the matter and approved the letter to the Ombudsman authorising the inspection of documents held by the Council in relation to complaint 1703/2021/AMF on 11 October 2021 (document **12502/21**).

7. Ombudsman's services carried out the inspection of the documents, and met with officials from the General Secretariat of the Council on 11 November 2021. As a follow-up, the Ombudsman requested access to the email consultations launched by the General Secretariat of the Council on the basis of Article 4(4) of Regulation (EC) No 1049/2001 when preparing the Council's draft reply to confirmatory application 23/c/01/20.
 8. By letter of 16 February 2022 the Ombudsman asked further explanations related to the inspected documents. Delegations were informed thereof (document **6960/22**).
 9. Delegations will find in the Annex to this note a draft reply to the Ombudsman's request for explanations. In this draft reply, it is proposed to grant access to 5 documents which were not initially released in the response to the confirmatory application as a result of the current status of the file. In addition to that, the draft reply provides further explanations regarding the inspected documents. Further to the views expressed by delegations, the draft reply will be submitted to Coreper/ Council for approval.
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DRAFT REPLY

**TO THE REQUEST FOR ADDITIONAL OBSERVATIONS OF THE COUNCIL AS
REGARDS THE INQUIRY OF THE EUROPEAN OMBUDSMAN INTO
COMPLAINT 1703/2021/AMF**

Brussels, XXX

Ms Emily O'Reilly
European Ombudsman
1, Avenue du Président Robert Schuman
B.P. 403
F-67001 Strasbourg Cedex

Subject: Your letter of 16 February 2022 concerning the complaint 1703/2021/AMF

Dear Ms O'Reilly,

Thank you for your letter of 16 February 2022 inviting the Council of the European Union ("Council") to provide further explanations regarding the non-disclosure of documents WK 5870/2020, WK 2260/2020 and WK 7902/2020 in the response to the confirmatory application No 23/c/01/20. In particular, how the reciprocal trust between the EU and the Organisation of Economic Co-operation and Development (OECD) would have been undermined by the disclosure of these documents at the time of the adoption of the confirmatory decision.

As a preliminary point, the Council wishes to reiterate the arguments expressed in the response to the confirmatory application. This confirmatory decision has not been challenged before the Court of Justice of the European Union and therefore the explanations given in this letter should not be understood as indication of its incorrectness. The Council therefore stands by the response given to the applicant at the time of the adoption of the decision.

That said, the Council wishes to provide the Ombudsman with further explanations on the context in which the decision was adopted and more particularly why the mutual trust between

the EU and the OECD would have been undermined by the disclosure of the documents at that particular time.

As mentioned in the response to the confirmatory application,¹ the legislative discussion on the European Commission's proposal for a Digital Services Tax at the EU level have been running in parallel to global negotiations on digital taxation in which other actors were involved to find a solution. One of these actors was the OECD, in which the EU Member States also actively negotiated.

At the time of the adoption of the confirmatory decision, the negotiations on the two-Pillar reform were at a crucial phase.² The OECD postponed its initial deadline of end 2020 for finding a global consensus to address the tax challenges arising from the digitalisation of the economy to mid-2021, and the Council put on hold the discussions on the legislative proposal for a Digital Service Tax in order to facilitate the work of the OECD.

In that context, the parties agreed that the Commission services papers presenting a methodology used by them to initially estimate the revenue impacts of the at the time OECD-led negotiations or potential reforms resulting from these were strictly confidential.³ The documents WK 5870/2020, WK 2260/2020 and WK 7902/2020 contained an exchange of letters between the Council and the OECD regarding those Commission services papers.

Therefore, once it has been agreed that certain contacts and negotiations were of confidential nature, both parties, the Council and the OECD, should agree that this was no longer the case. Indeed, the public release of a document involving two parties does not necessarily have the same consequences for both of them and can therefore lead to different assessments. This is intention behind the consultation process organised under Article 4(4) of Regulation (EC) 1049/2001, which does not bind the concerned institution's final assessment.⁴ Moreover, the EU must build trust with its international counterparts, and this necessarily includes trust in its ability to maintain the confidential nature of the talks.

¹ See paragraphs 2 and 6 of the response to the confirmatory application.

² See paragraph 40 of the response to the confirmatory application.

³ See paragraph 29 of the response to the confirmatory application.

⁴ See Case T-166/19 *Bronckers v Commission*, EU:T:2020:557, paragraphs 45 and 46, Case T-380/04 *Terezakis v Commission*, EU:T:2008:19, paragraph 60, and Case T-33/17 *Amicus Therapeutics UK and Amicus Therapeutics v EMA*, EU:T:2018:595, paragraph 59.

Additionally, the documents WK 5870/2020, WK 2260/2020 and WK 7902/2020 should be read together. As mentioned before, these documents contained a sequential exchange of letters between the OECD and the Council concerning the same topic. Consequently, any partial disclosure of the documents might lead the public to a misrepresentation of the context, the status and content of the negotiations, which could be prejudicial to their conclusion.

However, in October 2021, the OECD Inclusive Framework on Base Erosion and Profit Shifting (BEPS), in which more than 140 countries and jurisdictions collaborate, reached an agreement on a global solution on the general framework of the two-Pillar reform of the rules on international corporate taxation.

This political agreement concerned both Pillars I and II. While the technical work on Pillar I is still ongoing, technical work on the details of Pillar II is almost complete. The Pillar II rules are expected to be transposed into EU law through a Directive on ensuring a global minimum level of taxation for multinational groups in the Union. The negotiations on this Directive have significantly progressed, and the compromise text of the draft Directive (a public document) was discussed in the Council on 15 March 2022 without an agreement being reached.

Given these recent events, the reasons indicated in the response to the confirmatory application no longer justify the refusal of the disclosure of the documents WK 5870/2020, WK 2260/2020 and WK 7902/2020, as well as documents WK 260/2019 and WK 10988/2019.

As a consequence, the Council has decided to disclose to the applicant these documents.

Yours sincerely,

Enclosure
