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LIMITE

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OMBUDS 11
JUR 283
INST 149

'I/A' ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

No. prev. doc.: 7220/22

Subject: Complaint 1703/2021/AMF to the European Ombudsman
= approval of draft reply

1. At the meeting of the Working Party on Information on 28 April 2022, delegations examined a draft reply from the Council to the European Ombudsman, as set out in 7220/22, as regards a request for additional observations as regards the abovementioned complaint¹. All delegations agreed to the draft reply.
2. In view of the above, the Permanent Representatives Committee is asked to recommend that the Council:
 - approve the reply, as set out in the Annex, at a forthcoming meeting;
 - decide to publish the result of the vote.

¹ 6960/22

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,² 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.³ 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.⁴ 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.⁵

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

³ See paragraph 40 of the response to the confirmatory application.

⁴ See paragraph 29 of the response to the confirmatory application.

⁵ 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.

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.

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,