



Council of the European Union
General Secretariat

Directorate-General Communication and Information
The Director-General

SGS16/09501

Brussels, **08 -11- 2016**

Mr Sven Giegold
Parlement européen
Bât. Altiero Spinelli
05F163
60, rue Wiertz
B-1047 Brussels

Subject: Your confirmatory application

Dear Sir,

Please find enclosed the reply from the Council to your confirmatory application dated 1 February 2016.

Statutory remedy notice

Pursuant to Article 8(1) of Regulation (EC) No 1049/2001, we draw your attention to the possibility to institute proceedings against the Council before the General Court or to make a complaint to the Ombudsman. The conditions for doing so are laid down in Articles 263 and 228 of the Treaty on the Functioning of the European Union respectively.

Yours sincerely,

Reijo KEMPPINEN

**REPLY ADOPTED BY THE COUNCIL ON 8 NOVEMBER 2016
TO CONFIRMATORY APPLICATION 03/c/01/16,
made by email on 1 February 2016,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to a number of documents related to 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 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 6 October 2015 the applicant submitted a very large request for public access concerning any room documents or other written input prepared in the context of the work of the Code of Conduct group on business taxation since its coming into existence (i.e. 9 March 1998).
2. Due to the large number of documents covered by the request, and to the complexity of their identification and examination, the General Secretariat of the Council entered in a dialogue with the applicant with a view to finding a fair solution, as provided for in Article 6(3) of Regulation 1049/2001. In particular, the General Secretariat asked the applicant to further define his request. On 2 December 2015, the applicant submitted a new request for public access to 15 room documents and other written input (non-papers, aide-memoires or the like) of the Code of Conduct group on business taxation.

3. On 22 January 2016, the General Secretariat provided a first reply to the applicant's request. With its reply, the General Secretariat granted public access to six documents. However, the General Secretariat refused to grant full access to five room documents of the Code of Conduct group pursuant to Article 4 (1) (a), fourth indent (protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State) and Article 4 (3), second subparagraph (protection of the decision making process) of Regulation No 1049/2001.
4. In his confirmatory application dated 1 February 2016, the applicant asks the Council to reconsider this position to refuse to grant full access to the five room documents. He claims that full release of these documents would not affect the negotiating process and diminish the chances of the Council reaching an agreement, as it is argued by the General Secretariat, but, on the contrary, increase pressure from civil society on countries blocking an agreement in the Council and that therefore full disclosure of the documents is in the public interest.
5. The Council has reassessed, in full consideration of the principle of transparency underlying Regulation No 1049/2001 and in the light of the applicant's comment, whether full public access can be provided to the requested documents. To that end, it has also re-consulted the European Commission pursuant to Article 4(4) of Regulation No 1049/2001. Taking into account all relevant aspects, the Council has come to the conclusions set out below.
6. The remainder of the applicant's request has been dealt with by the General Secretariat in a second reply on 22 February 2016. In that reply the General Secretariat has granted partial access to one document and refused public access to three other documents.

THE CONTEXT

7. 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 market¹. However, the adoption of measures at Union level has been limited to date due to the unanimity requirement for the adoption thereof.
8. Nevertheless, 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 Union. To that end, on 1 December 1997, the Council and the Representatives of the Governments of the Member States meeting within the Council adopted a Code of Conduct for business taxation², 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 within the Union. Clearly, the scope of the Code of Conduct is much broader than the potential Union competence provided for in the Treaties.
9. The same resolution has provided for a peer review mechanism based on the 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 1998³ 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.

¹ Article 115 TFEU.
² OJ C 2, 6.1.1998, p. 1.
³ OJ C 99, 1.4.1998, p. 1.

10. 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 cooperate loyally in the framework of the Code of Conduct and provide relevant information about laws and administrative practices in the business taxation area.
11. 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 respective meetings of the Council, as appropriate.
12. 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.
13. 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 ⁴, 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"*.

14. 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 legal 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 coordination⁵. 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.
15. These remarks concerning the nature of the 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 1049/2001 and assessing whether access to the requested documents can be given.

⁴ Council document 15148/15

⁵ 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.

THE APPLICABLE EXCEPTIONS

16. The requested documents come within the remit of the exception of 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 No 1049/2001) and the protection of the Council's decision making process (Article 4(3) of Regulation No 1049/2001).
17. At the outset, the General Secretariat 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 No 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4.
18. 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"*⁶.
19. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest in this area, it has no choice but to refuse access, because *"it is clear from the wording of Article 4(1)(a) of Regulation No 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"*⁷.

⁶ Judgment of the Court of Justice of 1 February 2007 in case C-266/05 P, Sison v Council, para 35.

⁷ Judgment of the Court of Justice of 1 February 2007 in case C-266/05 P, Sison v Council, para 46.

20. 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 and it is barred from taking into account other legitimate interests in order to override the conclusion that giving access to a document would harm the protected interest.
21. As regard the exception provided for in Article 4(3), 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 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, be it before or after the decision-making process comes to an end.

INDIVIDUAL ASSESSMENT OF THE REQUESTED DOCUMENTS

22. The partially refused documents are room documents issued by the Commission. Room documents are preparatory documents circulated shortly ahead of or even during specific meetings of Code of Conduct group in order to prepare and facilitate the discussions in relation to a specific agenda item. They can take different forms (working papers, letters, notes, reports, bullet points, presentations) and do not constitute official Council documents.
23. In order to comply with the obligation stemming from Article 4(4) of Regulation 1049/2001, the General Secretariat of the Council has consulted the Commission from which the documents originate with a view to assessing whether their full disclosure was likely to specifically and effectively undermine the interests protected by Article 4 of Regulation 1049/2001. The General Secretariat of the Council did so in preparation of the first reply and has proceeded to a new and more thorough consultation following the submission of the confirmatory application.

24. Room document 5, prepared for the meeting of the Code of Conduct group on 30 January 2013, is a revised draft guidance note relating to four categories of fiscal regimes and notably interest regimes, royalties' regimes, intermediary regimes and special economic zones.

The document contains comments received by Member States as well as a table with comments from Member States and the Commission's response.

In its report to the ECOFIN Council of December 2014, the group indicated that the preparation of guidance and application notes required further work and consequently negotiations were still ongoing between the Member States' representatives.

Having consulted the Commission, the Council considers that information provided by Member States on these topics are very sensitive. Full release of this document would put in the public domain information the Member States have shared, assuming that it would remain confidential and thus not harm the present financial and economic interest of the Union or its Member States.

Taking into account the specific sensitive context of the Code of Conduct, full disclosure of this document cannot be granted as the information contained in it relates to a delicate matter which is still under discussion. In that context, disclosure of this information would trigger avoidance strategies by businesses, harming the financial and economic policy of Member States, and given this sensitive background also jeopardise the chances of reaching an agreement on relevant issues. By consequence, full disclosure of the document would seriously undermine not only the protection of the economic and financial policy of Member States but also the decision-making process.

Having examined the context in which the document was drafted and the current state of play on these matters, on balance the Council cannot identify any evidence suggesting an overriding public interest in its full disclosure.

Nevertheless, the Council considers that access can be given to parts of the document containing the Commission's revised draft guidance and additional comments from Belgium while other comments by delegations have to be withheld.

As a consequence, the Council has to refuse full access to this document pursuant to Article 4(1)(a), fourth indent (protection of the public interest as regards the financial, monetary and economic policy of the European Union or a Member State) and Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001 (protection of the decision making process).

25. Room document 6 of 29 May 2013 concerns the Model Instruction on cross-border rulings prepared by the Committee for Administrative Co-operation on Taxation (CACT). The document contains Member States' responses regarding administrative practices related to cross border rulings and transparency and exchange of information in the area of transfer pricing.

Some deleted parts in the document relate to exchange of information on the proper enforcement of tax legislation in Member States. Release of these parts of the document would identify strategies of given national tax authorities concerning tax collection with the consequence that it would prove more difficult for them to properly carry out their duties and render the strategies in force inefficient.

The Council considers that disclosure of the deleted parts in the document would undermine the protection of the public interest as regards the financial policy of the Member States in accordance with the fourth indent of Article 4(1)(a) of Regulation 1049/2001.

The document at stake also contains positions expressed by representatives of Member States who act in their professional capacity with the legitimate expectation that their position would not be made public. Under these circumstances, the representatives' freedom to express their views would be curtailed if they would have to take into account that their opinion would be disclosed to the public upon request once discussions on a subject matter are finalised. Disclosure of positions taken by delegations would breach the trust between representatives of Member States and the Commission for forthcoming discussions and that would seriously undermine the decision-making process protected by Article 4(3), second subparagraph of Regulation 1049/2001.

Taking into account the context and the state of play on this matter, the Council considers that there is no overriding public interest in full disclosure of the document which would outweigh the need to protect the decision-making process of the institution.

The Council points out that as the document concerned includes only the answers of 15 Member States, the deletion of the names of Member States makes difficult to make the link between the contents of an answer and the Member State, which is deemed sufficient to avoid this harm.

Therefore, the Council considers that access can be given to the document containing elements of discussion with only parts identifying the Member States making comments having to be withheld. Some references to other documents are to be withheld, too.

26. Room document 5 of 22 October 2013 concerns monitoring guidance on inbound profits. The document contains Member States' comments which are included in annex 1 to the document. A summary of the responses is included in annex 2. The document concerns the topic of inbound profits, which the group has discussed in view of developing guidance notes.

The public report adopted on 19 June 2015 confirms the ongoing negotiations on inbound profits between Member States. The drafting of these guidance notes was mandated by the Council, but it could still not be finalised and continues to be the subject of strenuous discussions.

The redacted parts of the document concern the monitoring of inbound profit transfers by drafting a guidance note. According to the mandate entrusted by the Council, the group will undertake efforts to consolidate, per type of regime, various case-by-case assessments into general guidance or application notes for future use. As already mentioned, these guidance notes are still not finalised.

Premature disclosure of these drafts - prepared for internal use of the Code of Conduct group - could be detrimental for the good functioning of the group and would seriously prejudice the ongoing decision-making process which has not yet been concluded.

It follows that the withheld parts of the document mentioned above cannot be released pursuant to the exception in Article 4(3), first subparagraph (protection of the decision making process), of Regulation 1049/2001.

The duration of this work cannot be predicted with any precision as it is still fully ongoing and the timetable of the discussions is itself under discussion. For these reasons, any disclosure at this stage would carry a risk of premature conclusions, amongst the general public, on the currently existing or planned national tax measures. This, in turn, would harm the present financial/economic interests of the Union or Member States.

For that reason, the Council has to refuse full access to this document pursuant to Article 4(1)(a), fourth indent (protection of the public interest as regards the financial, monetary and economic policy of the Union or a Member State).

Having examined the context in which the document was drafted and the current state of play on these matters, on balance the Council cannot identify any evidence suggesting an overriding public interest in its full disclosure.

Nevertheless, the Council considers, that access can be given to parts of the document containing general information, all comments from Member States having to be withheld.

27. Room document 7 of 18 March 2014 and room document 4 of 22 October 2014 contain Member States' comments and Commission assessments on patent boxes and reflect the group's discussions on the possible harmfulness of Member States' intellectual property regimes and the assessment of existing regimes.

The issue of patent boxes has been subject to discussion in the Code of Conduct group for the last two years. Furthermore, it has been decided that it will be addressed again in the Code of Conduct group, after the OECD has presented the results of its discussions on patent boxes in its Forum on Harmful Tax Practices (FHTP). It is expected that the Code of Conduct group will subsequently reopen its deliberations on patent boxes and decide on EU patent boxes in relation to the FHTP results.

Although there is a partial agreement on patent boxes, the documents mentioned above, received by the group for internal use, contain descriptions and views of delegations on issues that required further work in the Code of Conduct group, and where the decision still had to be taken.

For these reasons, any disclosure at the initial stage would have carried a risk of premature conclusions, amongst the general public, on the currently existing or planned national tax measures. This, in turn, would have harmed the financial/economic interests of the Union and of Member States concerned. Most of these comments therefore had to be withheld in the initial phase.

28. The Council considers that full disclosure of the requested documents would still affect the negotiating processes concerning patent boxes in relation to FHTP and diminish the chances of the Council reaching an agreement. Full disclosure of these documents is likely to undermine the protection of Member States' financial policy and the workability of the Code of Conduct group, as set out in points 20 and 21 above.

These documents, which have been prepared for internal use as part of deliberations and preliminary consultations, concern issues that are still the subject of ongoing discussions and contain informally voiced internal opinions and assessments related to tax measures. Full disclosure of the documents would thus seriously undermine the decision-making processes.

As the comments concerned contain delicate information on national fiscal policies and their possible evolution, full release of this information would also trigger reactions by businesses which would interfere with the economic and fiscal policy of the Member States concerned. It would therefore also undermine the protection of the public interest as regards the financial, monetary or economic policy of the Union and of the Member States.

29. It needs to be noted that the outcome of both the Code of Conduct work and EU Institutions' work in this area is already public. Access to that information therefore does not require full release of the requested documents.

Regarding the exception provided for in Article 4 (3), second subparagraph, of Regulation No 1049/2001, the Council has made up the balance between the need to protect the decision-making process and the interest in transparency underlying Regulation No 1049/2001. In doing so, it has duly taken into account the importance of transparency, as recognised by the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights, while noting at the same time, that these documents do not relate to legislative procedures and that the discussions concerned have taken place outside the normal institutional framework of the Union. Given that the outcome of these discussions has already been made public, the Council has come to the conclusions that, on balance, the legitimate public interest in release of the remaining information does not outweigh the equally legitimate need to protect the decision-making process in a sensitive area not subject to the normal institutional procedures of the Union and where, therefore, good cooperation between Member States in a spirit of mutual trust and willingness to compromise is of paramount importance. Contrary to the applicant's assertion that full release of these documents would increase pressure from civil society on countries blocking an agreement in the Council and therefore full disclosure of the documents is in the public interest, the nature of discussions in the Code of Conduct group, which entirely depends on each Member State's goodwill entails that such heightened pressure is not at all conducive to positive stimulation of debates, but more likely to dissuade Member States from sharing delicate details in the future in a climate of mutual trust. This, in turn, would seriously reduce the chance of successful discussions and, hence, the outcome of the internal deliberations in the Code of Conduct group.

30. The Council considers that access cannot be granted to most parts of the documents containing Member States' comments and/or Commission assessments on the basis of Article 4 (1) (a), fourth indent, and of Article 4 (3) of Regulation No 1049/2001. Public access can on the other hand be given to parts of the documents which do not contain Member States' comments as well as to some comments for which the potential impact of release appears to not warrant application of the above-mentioned exception. Furthermore, some document references withheld in the initial phase can also be released.
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