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**Council of the European Union**  
General Secretariat  
Directorate-General Communication and Information - COMM  
*The Director-General*

Brussels, 28 -08- 2018

Ms Vicky Cann  
CEO  
Rue d'Edimbourg 26  
1050 Brussels

**Subject:** your confirmatory application

Dear Ms Cann,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 8 May 2018.

You will also find the documents to which the Council decided to grant full access (WK 12193/17, WK 14969/17 and WK 14969/17 REV 1).

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<sup>1</sup> or to make a complaint to the Ombudsman<sup>2</sup>. 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

Enclosures

<sup>1</sup> For deadlines and other procedural requirements concerning the institution of proceedings at the General Court, please refer to the following page: [http://curia.europa.eu/jcms/jcms/Jo2\\_7040/en/](http://curia.europa.eu/jcms/jcms/Jo2_7040/en/)

<sup>2</sup> Any complaint to the Ombudsman must be made within two years of receiving the institution's final position on the matter. The Ombudsman's online complaint form is available at: <https://secure.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces>

**REPLY ADOPTED BY THE COUNCIL ON 28 AUGUST 2018  
TO CONFIRMATORY APPLICATION 10/c/01/18,  
made by email on 8 May 2018,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,  
for public access to documents WK 5230 2017 INIT, WK 12197 2017 INIT,  
WK 12193 2017 INIT, WK 14969 2017 INIT, WK 14969 2017 REV 1 and  
WK 10931 2017 INIT**

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 23 March 2018, the applicant submitted a request for access to "all agendas; minutes / notes of discussions; position papers; and any other documents relating to Council deliberations on the 'Proposal for Directive of the European Parliament and the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches', which is also known as country by country reporting".
2. In its reply dated 7 May 2018, the General Secretariat of the Council provided all the documents related to the file which were already public and available through the Council's public register. Two documents were also partially released pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 since disclosure of the personal data contained in them would undermine the protection of privacy and the integrity of the individuals. Access was refused to six other documents, pursuant to Article 4(3), first subparagraph of Regulation No 1049/2001, since their disclosure would seriously undermine the decision-making process of the Council.

3. In its confirmatory application dated 8 May and registered on 14 May 2018 together with further e-mail dated 9 May 2018, the applicant asks the Council to reconsider this position concerning the six documents mentioned above.
4. In substance, the applicant contends therein that the General Secretariat has not given sufficient explanations for the application of the exceptions to the right of access as regards protection of the decision-making process (Article 4(3), first subparagraph, of Regulation No 1049/2001).
5. The applicant notes that the European Ombudsman has recently asked the Council to publish more documents of this type. Reference is made to the recommendation of the European Ombudsman to disclose the positions of the Member States proactively and in a timely manner.
6. The applicant disagrees that no overriding public interest in disclosure of the documents exists, pointing out that country-by-country reporting is a file of importance and of public interest, concerning transparency of taxes paid by multinational corporations.
7. Finally, the applicant notes that no "minutes / notes of discussions" of the Working Party on Company Law have been sent.
8. 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 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.
9. 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**

10. 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).
11. The topic of tax transparency has gained particular importance as a tool in the fight against tax avoidance and tax evasion, particularly in the field of corporate income tax and aggressive tax planning. Cooperation between tax authorities aims at allowing them to obtain information covering the global business of multinational enterprises (MNEs).
12. The proposal is presented as a response to the challenge posed by corporate income tax avoidance and to "intensified public demand" relating to the payment of taxes by multinational enterprises (MNEs) in the countries where their profits are produced. 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."
13. The proposal is highly sensitive from a political point of view also as regards the establishment of positions in the Member States which requires the involvement and coordination between a large number of domestic actors. This sensitivity is further increased by domestic changes of government and/or elections and as regards the proposal, and in particular by the discussions concerning the legal basis and the scope of the proposal.
14. Some Member States have proposed a change to the legal basis for the proposal. However, this change to the legal basis has been rejected by the European Parliament and the Commission. To change the legal basis unanimity of member states would be required and difficult discussions on this topic are still ongoing.
15. On the substance, the Council meanwhile continues to debate its negotiating position, building on Presidency compromise texts.

**The exception concerning the protection of the decision making process (Art.4.3 first subparagraph of the Regulation) as regards documents WK 5230/17, WK 12197/17 and WK 10931/17**

16. 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.
17. Document WK 12197/17 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.
18. 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.
19. 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.
20. 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.

21. 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 a political agreement.
22. The requested documents include free and frank discussions between Member States on the basis that that were never meant to become public. 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.
23. Disclosure of certain information at a moment when delegations are seeking to find the appropriate balance of the various interests involved, would expose them with certainty to undue pressures by stakeholders directly or indirectly affected by the legislative measures under discussion. This pressure would also affect the negotiating process.
24. Release to the public of the information contained in documents WK 5230/17, WK 12197/17 and WK 10931/17 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. In that regard, the Council considers that the legitimate public interest in release of the information does not outweigh the equally legitimate need to protect the decision-making process.
26. The Council therefore must confirm the refusal of access to these documents, pursuant to - in absence of any evidence of an overriding public interest in release - Article 4(3), first subparagraph, of Regulation No 1049/2001.
27. 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.

**The exception concerning the protection of the decision making process (Art.4.3 first subparagraph of the Regulation) as regards documents WK 12193/17, WK 14969/17 and WK 14969/17 REV 1**

28. Document WK 12193/17 is a working document from the Presidency to the Working Party on Company Law (CBCR). It contains an explanatory note as regards changes introduced in the text of the Presidency compromise proposal in document ST 13685/17.
29. Documents WK 14969/17 and the revised version WK 14969/17 REV 1 are a note from the Presidency to the Working Party on Company Law (CBCR) for further work in the legislative file.
30. Having regard to the state of play in this issue, the Council has also reassessed the possibility to grant access to these documents.
31. Here again, it has in particular carried out renewed consultations with the Member States concerned by these documents.
32. From this reassessment it seems possible to disclose information contained in the documents without undermining the protection of the Council's decision making process.

**Minutes of the Working Party on Company Law**

33. There is no meeting minutes from the Working Party on company Law (CBCR).

**Conclusion**

34. For the above-mentioned reasons, the Council concludes that:
    - Pursuant to Article 4.3 (first subparagraph) of Regulation 1049/2001, no access can be granted to documents WK 5230/17, WK 12197/17 and WK 10931/17.
    - Full access can be granted to documents WK 12193/17, WK 14969/17 and WK 14969/17 REV 1.
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