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DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION

The Director-General

11 04. 2016

Brussels,
Taxud R2/SV – ARES(2016)1382203

Mr Fabio De Masi
European Parliament
WIB 03M031
rue Wiertz 60
BE – 1047 BRUSSELS

by e-mail and registered mail

Dear Mr De Masi,

Subject: Your application for access to documents – Ref GestDem No 2015/5101

I refer to your e-mails, registered on 29 September 2015, in which you make a request for access to documents under Regulation 1049/2001¹ encompassing any informal notes, from Commission representatives attending meetings of the Code of Conduct group on business taxation since 9 March 1998 as well as any room document prepared by the Commission in the context of the work of the Code of Conduct group since 1998.

On 29 October 2015, you received a reply from my predecessor providing you with a certain number of documents and inviting you to submit a more focused request in accordance with the provisions of Article 6 of Regulation 1049/2001.

On 18 November 2015, you lodged a confirmatory application with a request reduced in its scope to the following 3 items:

1- a copy of the summary database produced by the European Commission on the basis of the work of the Code of Conduct Group and other fora covering corporate taxation which contains a list and/or assessment of all potentially harmful tax practices in European Union Member States.

¹ OJ L 145 of 31.05.2001, p. 43

2- the European Commission's minutes of Code of Conduct Group meetings between 01/01/2010 and 15/11/2015,

3- all room documents prepared by the European Commission for Code of Conduct Group meetings dealing with patent boxes as well as the use, application and exchange between administrations of tax rulings and/or advance pricing agreements.

On 16/12/2015, my services proposed a solution on the above-mentioned three points offering that for documents under indents 1 and 2, the reply will be provided between 15 and 30 working days from the date of your agreement to the proposed solution. Regarding documents under indent 3, it was proposed to provide the reply between 15 and 30 working days from the date of departure of the first reply. You agreed with this proposal on 19 December 2015.

On 19 January, my services informed you about the consultation process engaged with the Member States and about its impact on the originally foreseen deadline and were hopeful to meet the deadline of 9 February 2016.

Unfortunately, the work triggered by that consultation on sensitive documents proves to be more cumbersome and lengthy than originally foreseen.

In this context, your request has been dealt with in accordance with Regulation 1049/2001 and the present letter is a reply addressing documents referred to under items 1 and 2 above.

A- As regards the database on harmful tax practices in Member States, I would like to inform that there is none among my services. Nevertheless, and in view of the information concerning the format to be understood for this kind of document, my services have drawn up a grid listing the existing harmful measures in place in March 2016. You will find a copy of this document attached to the present letter (referred to as document 63 – Ares(2016)1702413).

B- As regards the Commission's minutes, we have identified the following documents:

- 1- meeting report of 1998.05.08, Ares(2015)5242321
- 2- meeting report of 1998.07.16, Ares(2015)5242503
- 3- meeting report of 1999.02.16-17, Ares(2015)5242557
- 4- meeting report of 1999.10.14-15, Ares(2015) 5242613
- 5- meeting report of 2000.02.22, Ares(2015)5242770
- 6- meeting report of 2000.04.19, Ares(2015)5248327
- 7- meeting report of 2000.09.20, Ares(2015)5248380
- 8- meeting report of 2001.01.16, Ares(2015)5248594
- 9- meeting report of 2005.02.24, Ares(2015)5248876
- 10- meeting report of 2005.05.24, Ares (2015) 5248955
- 11- meeting report of 2005.09.15, Ares(2015)5249004
- 12- meeting report of 2005.10.18, Ares(2015)5249052
- 13- meeting report of 2005.11.23, Ares(2015)5249136
- 14- meeting report of 2006.03.28, Ares(2015)5249172
- 15- meeting report of 2006.04.27, Ares(2015)5249225
- 16- meeting report of 2006.10.11, Ares(2015)5249276
- 17- meeting report of 2007.02.13, Ares(2015)5249617
- 18- meeting report of 2008.11.18, Ares(2015)5249689
- 19- meeting report of 2009.05.15, Ares(2015)5249751

20- meeting report of 2009.06.29, Ares(2015)5249810
21- meeting report of 2009.09.23, Ares(2015)5249841
22- meeting report of 2009.10.27, Ares(2015)5249877
23- meeting report of 2009.11.18, Ares(2015)5249954
24- meeting report of 2010.01.14, Ares(2015)5286866
25- meeting report of 2010.03.04, Ares(2015)5286935
26- meeting report of 2010.03.25, Ares(2015)5286974
27- meeting report of 2010.04.22, Ares(2015)5287001
28- meeting report of 2010.05.20, Ares(2015)5287116
29- meeting report of 2010.09.23, Ares(2015)5287167
30- meeting report of 2010.11.19, Ares(2015)5287287
31- meeting report of 2011.02.17, Ares(2015)5287322
32- meeting report of 2011.04.11, Ares(2015)5287364
33- meeting report of 2011.05.26, Ares(2015)5287440
34- meeting report of 2011.09.13, Ares(2015)5287481
35- meeting report of 2008.05.12, Ares(2015)5287051
36- meeting report of 2011.11.16, Ares(2015)5287611
37- meeting report of 2012.02.07, Ares(2015)5287668
38- meeting report of 2012.04.17, Ares(2015)5287925
39- meeting report of 2012.06.04, Ares(2012)5287983
40- meeting report of 2012.09.10, Ares(2012)1064465
41- meeting report of 2012.10.17, Ares(2012)5293579
42- meeting report of 2012.11.08, Ares(2012)1341469
43- meeting report of 2013.01.30, Ares(2013)164573
44- meeting report of 2013.01.31, Ares(2013)164732
45- meeting report of 2013.03.20, Ares(2015)5293667
46- meeting report of 2013.03.21, Ares(2015)5293723
47- meeting report of 2013.05.29, Ares(2015)5297560
48- meeting report of 2013.09.11, Ares(2015)5297597
49- meeting report of 2013.10.22, Ares(2015)5297633
50- meeting report of 2013.11.20, Ares(2015)5297687
51- meeting report of 2014.01.22, Ares(2015)5297920
52- meeting report of 2014.01.27, Ares(2014)245491
53- meeting report of 2014.03.18, Ares(2014)803192
54- meeting report of 2014.06.03, Ares(2014)1863050
55- meeting report of 2014.09.16, Ares(2014)3065596
56- meeting report of 2014.09.29, Ares(2015)5456687
57- meeting report of 2014.10.22, Ares(2014)3520171
58- meeting report of 2014.11.13, Ares(2015)5456570
59- meeting report of 2014.11.20, Ares(2014)3899424
60- meeting report of 2015.02.04, Ares(2015)5298085
61- meeting report of 2015.04.07, Ares(2015)1528188
62- meeting report of 2015.04.08, Ares(2015)5456762.

First of all, I would like to stress that Commission official draft reports for internal use concerning most meetings attended. These reports are usually of value only for a limited time, for instance in the preparation of the following meeting. Therefore they have not always been systematically saved or archived. This is particularly clear for the early years of the work of the Code of conduct. Some historic meeting reports have therefore been lost.

These documents are intended for internal Commission use only and have not been agreed or discussed with any of the other participants at the meeting. They therefore constitute a subjective view of the contents of the meetings covered and cannot in any way be regarded as official minutes of the meeting. Not all subjects and positions expressed are necessarily described in the report.

When consulted on the possible disclosure of the internal reports on meetings of the Code of Conduct Group, Member States agreed that information about issues which had been finalised in the Group could be released. Regarding pending issues still being discussed, Member States took the position that the information could not be disclosed on the basis of exceptions in Article 4 of Regulation 1049/2001.

I- On the basis of the reply of national authorities, I have the pleasure to grant full access to documents under items 4, 10, 13, 16, 17, 20, 22, 24, 27, 30, 32 and 35.

II- I also have the pleasure to provide partial access to documents 1, 2, 3, 5, 6, 7, 8, 12, 14, 15, 18, 19, 21, 23, 26, 29 and 43 expunged of personal data.

Pursuant to Article 4(1) (b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data².

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable³. According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the documents requested expunged from such personal data.

If you wish to receive these personal data, we invite you to provide us with arguments showing the need for having these personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data should be disclosed.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, to make a confirmatory application requesting the Commission to review this position.

² OJ L 8 of 12.1.2001, p. 1

³ Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, Commission/The Bavarian Lager Co. Ltd, not yet reported

III- Moreover, documents 9, 11, 33, 34, 36, 37, 38, 39, 40, 41, 42, 45, 47, 48, 49, 52, 53, 54, 55, 57, 59, 60 and 61 contain information regarding the on-going discussions on Gibraltar. Although the legislation has been changed since 2005, the issues currently discussed are linked to the discussions preceding the latest legislation. Therefore, the current discussions in the Code of Conduct Group would be jeopardised if the previous positions were to be revealed.

Document 21 contains information on current discussions on transparency of the Code of Conduct Group. In the framework of the current discussions on the future of the Code of Conduct transparency is one of the issues discussed. Disclosure of arguments and positions from previous discussions would have a negative impact on the progress of the current discussions on transparency.

Documents 25, 28, 59 and 61 contain information about administrative practices regarding rulings. Although the Model Instruction on the exchange of information on rulings was agreed by the Code Group in 2014, the monitoring of its implementation and functioning as well as possible further discussions have not been finalized. The release of arguments and positions of delegations concerning these aspects at this stage, when discussions are still pending concerning the implementation of the Model Instruction, would risk limiting the progress of the work ahead.

Documents 25, 28, 31, 39, 40, 41, 42, 45, 47, 48, 49, 50, 52 contain information about discussions with Switzerland. While the Joint Statement between Switzerland and the Member States has been signed, part of the commitment in that statement is to continue the dialogue to make sure that the parties fulfil the respective commitments and that new issues that arise are dealt with in accordance with the joint statement. Moreover, documents 34, 36, 37, 38, 55, 57, 60 and 61 contain information about discussions with Liechtenstein which are still on-going. Therefore, disclosing information about the arguments of third countries as well as those of the Member States would risk damaging the relationship between the parties and would undermine the chances of successful future results.

Documents 38, 39, 40, 41, 45, 48 and 57, 60 contain information about Inbounds. A guidance on inbound profit transfers has been agreed. However, discussions on the subject are currently on-going in the Code Group concerning the implementation of this guidance. These discussions are technically complicated and highly sensitive. The success of the discussions would be jeopardized if positions and arguments of delegations were to be revealed.

Documents 39, 40, 41, 42, 44, 46, 49, 51, 54, 56, 58 and 62 contain information about the type of solution to adopt in relation to hybrid mismatches. For certain types of hybrid mismatches a specific type of solution was finally agreed in 2014. However, the solutions will have to be different for different types of mismatches and therefore the general discussions are still relevant for the on-going and upcoming discussions in the Code Group. Furthermore, the issue of hybrid mismatches is covered in the Commission ATAP initiative (28 January 2016). The Commission has proposed solutions which will have to be discussed with MSs in relation to what has been discussed in the Code Group. Such negotiations risk being damaged if earlier positions and arguments are made public.

Documents 57 and 59 contain information about discussions with Mauritius. A dialogue has been opened and the Code of Conduct Group has been informed, but no final result is yet produced and the dialogue has not been closed. Therefore, disclosing information about the arguments of Mauritius as well as those of the Member States would risk damaging the relationship between the parties and would undermine the chances of successful results of the dialogue.

Document 57, 60 and 61 contain information about patent boxes: Some of the arguments concerning patent boxes that were brought forward before the agreement on the Nexus approach in November 2014 are connected to the currently on-going discussion on patent boxes. The current discussion on new Member States patent boxes and the interpretation of the Nexus approach is still pending and if negotiation positions, arguments and the views of delegations that are relevant for that current discussion were to be revealed this would risk seriously limiting progress on this file.

Document 60 contains information about the future of the Code of Conduct which is still being discussed. The revelation of the arguments and positions of delegations would at this stage of discussions risk to limit progress on this file.

On the basis of the above considerations, only partial access to the documents can be granted. Full access to the requested documents above cannot be provided on the basis of the fourth indent of Article 4, paragraph 1 (a) of Regulation 1049/2001 which states that: "*The institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards [...] the financial, monetary or economic policy of the Community or a Member State*", as well as on the basis of Article 4, paragraph 3, first sub-paragraph of Regulation 1049/2001 which states that: "*Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*".

Those above issues are still under discussion within the Code of Conduct Group. The documents at stake refer to 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).

Before the final texts have been approved by the Council, any publication of intermediate steps, positions and opinions will negatively affect the chances for a successful completion. Therefore, disclosure of the document at the present stage will seriously undermine the ongoing decision-making process. Moreover, such disclosure would undermine the effectiveness of the activities of the Code of Conduct Group and the measures it develops, thus having a negative impact on the fiscal revenue of the Member States.

Moreover, disclosure of some requested document referring to on-going discussions with third countries would undermine the protection of the public interest as regards public security in accordance with the third indent of Article 4 (1) (a) of Regulation 1049/2001 which states that "*The institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards (...) international relations*".


IV- You may reuse the documents or parts thereof falling under points I, II and III., free of charge for non-commercial and commercial purposes provided that the source is acknowledged, that you do not distort the original meaning or message of the document. Please note that the Commission does not assume liability stemming from the reuse.

V- In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours faithfully,



Stephen QUEST

Annexes: as stated above