



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION

The Director-General

Brussels, 20. 05. 2016
Taxud R2/SV – ARES(2016)2809738

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 letter of 21 April following my reply of 11 April 2016 about your abovementioned request.

I- First of all, I would like to inform you that there are no reports drafted by Commission officials further to meetings of the subgroup of the Code of Conduct Group. As the meetings mostly cover one topic, meeting reports have been considered irrelevant because the outcome of the subgroup meeting appear in the working document presented in a forthcoming meeting of the Code of Conduct Group main group.

II- As regards the meeting reports of the Code of Conduct Group, you raise the question of the completeness of the list, in particular between April 2015 until 15 November 2015. These reports have been inadvertently omitted and we have identified the following documents:

- 1- meeting report of 12 June 2015
- 2- meeting report of 23 July 2015
- 3- meeting report of 7 September 2015
- 4- meeting report of 21 October 2015.

I would stress that Commission officials' 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.

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.

III- On the basis of the reply of national authorities, I have the pleasure to grant partial access to the abovementioned documents.

Full access to Documents 1, 3 and 4 cannot be granted because they 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 recent positions were to be revealed.

Documents 1, 3 and 4 also contain 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 1 and 3 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 discussions on monitoring of its implementation and functioning and its interpretation as well as other related subjects 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.

Moreover, documents 1 and 4 contain information about discussions with Liechtenstein which are still on-going. Disclosing information about the arguments of third countries as well as those of the Member States in relation to this dialogue would risk damaging the relationship between the parties and would undermine the chances of successful future results.

Document 1 contains 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 Member States in relation to what has been discussed in the Code of Conduct Group. Such negotiations risk being damaged if earlier positions and arguments are made public.

Documents 1 and 4 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. It is also relevant to note that work on this subject is carried out in parallel in the OECD. If Member States positions' in the Code of Conduct Group were revealed, this would not only compromise the progress of work in the Code of Conduct Group but also in the OECD.

Documents 2, 3 and 4 contain information about the future of the Code of Conduct which is still being discussed. The issues that fall under these discussions relate to sensitive issues on the scope of the Code as well as to procedural issues. They are therefore not only discussed in the Code of Conduct Group but also linked to complicated technical discussions in other fora that may also concern other separate initiatives in the tax area. The revelation of the arguments and positions of delegations would at this stage of discussions risk to limit progress on this file not only in the Code of Conduct Group but also in other fora and in relation to other files or initiatives.

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 whilst discussions on a subject matter are taking place. 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) of Regulation 1049/2001.

Before the final position has been approved by the Code of Conduct, 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 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- Finally, I address the points raised in your letter about the application of exceptions of Article 4 of Regulation 1049/2001 to parts of the 62 internal minutes.

First of all, I would like to come back to the nature of the documents at stake: internal minutes drawn by my services further to meetings among representatives of the Member States. The origin of the documents lay with the Member States which implied that my services had to consult Member States in accordance with the provisions of Article 4(5) of the Regulation even if the documents are not, formally speaking, documents from Member States. Member States had several meetings about the issue of disclosing documents and reached the conclusion that information on finalized issues could be released but information about subject matters still under discussion had to be assessed in view of the protection of the decision-making process of the Code of Conduct Group.

On that basis, my services carefully assessed the 62 documents, bearing in mind that for information on pending issues, only information which could seriously undermine the decision-making process of the Code of Conduct Group should be redacted.

As a result, access was granted to all documents either in full (12 + 17 without personal data) or in parts (33).

- You challenge the redaction of personal data in some documents. Some documents have been redacted to remove names of natural persons who work for the European Commission or who work for the Member States. These elements clearly constitute personal data as defined in Article 2(a) of 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 data ('Regulation 45/2001').

Pursuant to Regulation 45/2001, personal data must be processed fairly and lawfully. Any processing must be necessary and proportionate for a specific purpose. Furthermore, Article 8(b) of Regulation 45/2001 provides that the Commission can only transmit personal data to an applicant, if the latter establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced¹. Nothing in your letter of 21 April shows the necessity of having these personal data transmitted to you. Consequently, the necessity of disclosing the abovementioned personal data is not demonstrated and its disclosure has to be refused pursuant to Article 4(1)(b) of Regulation 1049/2001.

- Moreover, you consider that the protection of the decision making process of the Code of Conduct Group should not be invoked to refuse access to parts of documents.

You consider that only a general justification has been provided to exclude the disclosure of parts of documents. Nevertheless, more than to give a general explanation about the fact there are on-going discussions in the Code of Conduct Group, we explained what the state of play was for each subject matter concerned and why it implied we had to redact some documents (see part III of my letter of 11 April). My services analysed the documents in view of the latest discussions and have redacted the documents accordingly.

¹ OJ L 8 of 12.1.2001, p. 14 Judgment of 29.6.2010 in Case C-28/08 P, *Bavarian Lager*

The redacted parts of the documents are indeed parts of the documents which disclosure would seriously undermine the protection of the decision making process of the Code of Conduct Group. The subject matters at stake are "the future of the Code"; patent boxes; hybrids; negotiations with Liechtenstein; Gibraltar tax regimes; inbound profit transfers; outbound profit transfers; administrative practices.

- You invoke a general refusal of access to these documents but as explained above, each document has been assessed individually on the basis of the result of the consultation of the Member States and all documents were fully or partly disclosed which contradicts your assertion of a general refusal of access.

- The documents represent views of representatives of Member States in their professional capacity and to disclose them when they relate to pending issues would carry the serious risk that they would not provide the Group with exhaustive information about a specific issue and that they would not express free and honest views during meetings. If national views were systematically disclosed, there would be a risk of self-censorship which would not allow the Group to reach valid conclusions and would seriously undermine the decision-making process of the Group as acknowledged by the Court of first Instance ².

- The fact that the subject matter is manifold and that some issues have been under discussion for a certain number of years is not an argument which prevents from applying an exception laid down in Regulation 1049/2001 (T-424/14, ClientEarth versus Commission).

- You argue that the Code of Conduct Group is not an Institution and that therefore the protection of the decision making process does not exist. The Group has been established by the Council Decision of 9 March 1998 and has been set up within the framework of the Council. The Group is therefore part of that Institution and documents related to that Group fall under Regulation 1049/2001.

- According to you, a prevailing public interest lays in the fact there should be disclosure of documents because they refer to prejudicial tax measures which may affect significantly the location of business activities and hence their taxation. You do not raise a specific public interest but you merely refer to the transparency principle which you put in balance with the protection of the decision making process. The purpose of the Group is to finalise solutions regarding some tax measures that may lead to harmful tax competition and the potential result of relocation of business and business profits. Those solutions would not be achieved without openness from Member States about their measures and it is only if their openness is protected under the exception of Article 4(3) that it will be possible to reach an agreement on a solution or a guidance on how national legislation should be drafted or applied in order to avoid harmful tax competition and the ensuing distortions of the Internal Market.

VI- 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

² Judgment of Court of First Instance of 9 September 2008 (T-403/05)

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

Yours faithfully,

A handwritten signature in black ink, appearing to read "Stephen Quest". The signature is written in a cursive style with a large initial 'S'.

Stephen Quest

Annexes: as stated above