



EUROPEAN COMMISSION

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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2018/3720**

Dear Mr Giegold,

I refer to your email of 5 September 2018, registered on 6 September 2018, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 12 July 2018, you requested access to '[a]ny statistical information received for the evaluation report from the Commission to the European Parliament and the Council on the application of Council Directive (EU) 2011/16/EU on administrative cooperation in the field of direct taxation'. You underlined that '[you] would be in particular interested in figures referring to group requests (filed, answered, rejected and average time for responding)'.

Besides the issue of 'group requests', in your initial application you did not point to any particular type of data in which you would be interested (for example, data relating to a specific Member State or a specific form of administrative cooperation). Nor did you provide any explicit timeframe.

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

Therefore, I consider that your application relates to ‘[documents containing] [all] statistical information received [by the European Commission from the Member States] for the evaluation report [...] on the application of Council Directive (EU) 2011/16/EU on administrative cooperation in the field of direct taxation’, as well as the documents containing ‘figures referring to group requests (filed, answered, rejected and average time for responding)’.

Your application was attributed to the Directorate-General for Taxation and Customs Union, which provided its reply on 23 August 2018. In its reply, the Directorate-General explained that it collects the statistical data to which you requested access, in line with the provisions of Article 23(4) of Council Directive 2011/16/EU³ and the related Implementing Regulation 2018/99⁴.

In particular, the European Commission collects statistical data for all forms of administrative cooperation, other than mandatory automatic exchange of information, as listed in Annex IX of Implementing Regulation 2018/99. That information is provided by each Member State in the form of an *Excel* table, containing figures on administrative cooperation that took place in a given calendar year between the reporting Member State and the other Member States.

Additionally, the European Commission collects statistical data for mandatory automatic exchange of information falling under Article 8(1) and 8(3a) of Annex X-XI of Implementing Regulation 2018/99. The data includes general quantitative feedback of the information sent. The Directorate-General for Taxation and Customs Union clarified, however, that the data sets are provided in a format that is not intended to be read as such without the corresponding technical and functional specifications. The statistical data sets received from the Member States until 2018 are currently being analysed by the European Commission to prepare the report on automatic exchange of information based on Article 8b of Directive 2011/16/EU, which is expected to be published by the end of 2018.

Consequently, with regard to the first part of your application (‘[a]ny statistical information received for the evaluation report [...] on the application of Council Directive (EU) 2011/16/EU on administrative cooperation in the field of direct taxation’),

³ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, Official Journal, L 64, 11.3.2011, p. 1–12. The Directive was amended by: Directive 2014/107/EU on automatic exchange of financial account information, Directive 2015/2376/EU on automatic exchange of tax rulings and advance pricing agreements, Directive 2016/881/EU on automatic exchange of country by country reports, Directive 2016/2258/EU ensuring tax authorities have access to beneficial ownership information collected pursuant to the anti-money laundering legislation and Directive 2018/822/EU on automatic exchange of reportable cross border arrangements.

⁴ Commission Implementing Regulation (EU) 2018/99 of 22 January 2018 amending Implementing Regulation (EU) 2015/2378 as regards the form and conditions of communication for the yearly assessment of the effectiveness of the automatic exchange of information and the list of statistical data to be provided by Member States for the purposes of evaluating of Council Directive 2011/16/EU, Official Journal L 017, 23 January 2018 p. 29.

the European Commission identified the following documents (categories of documents) as falling under the scope of your application:

426 data sets concerning information relating to mandatory⁵ and other than mandatory⁶ exchanges between the Member States.

With regard to the second part of your application, concerning ‘group requests (filed, answered, rejected and average time for responding)’, the Directorate-General for Taxation and Customs Union informed you that mandatory collection of statistical data regarding this particular aspect is not explicitly envisaged in Implementing Regulation 2018/99. Indeed, this type of information can be considered as falling under the broader category of exchange of information provided for in Directive 2011/16/EU. However, given the growing interest in this type of request, in 2018 the European Commission asked, for the first time, the Member States to provide the statistical data, if available, on group requests made and received in 2017. The information on group requests was collected in the framework of the online survey (questionnaire) on the functioning of the above-mentioned Directive. The questionnaire included a series of (non-mandatory) questions concerning group requests.

Consequently, with regard to the second part of your application, the European Commission has identified the following documents (categories of documents) as falling under the scope of your application:

28 questionnaires received from the Member States in response to the online survey on the functioning of Directive 2011/16/EU⁷ with varying degrees of completion.

However, as underlined by the Directorate-General for Taxation and Customs Union, information included in the above documents could not be considered as complete with regard to the scope of your request, as the European Commission did not ask the Member States to provide data concerning the ‘average time for responding given’. Furthermore, as mentioned above, the collection of the data concerning this particular type of exchange on request is not explicitly envisaged in Implementing Regulation 2018/99, therefore the Member States could provide the corresponding information on a voluntary basis, and the resulting collected information may be incomplete.

Finally, in the view of the Directorate-General Taxation and Customs Union, in order to reply to the second part of your application, it would be necessary to retrieve and compile data from the above-mentioned questionnaires into a new document, which did not exist at the moment you submitted your initial application.

⁵ As explained, these data sets need to be read with the supporting technical and functional specifications.

⁶ In form of *Excel* tables.

⁷ Only the parts of the questionnaire containing the replies of the Member States concerning group request fall under the scope of your initial application.

The Directorate-General for Taxation and Customs Union underlined also that data collected from the Member States under Directive 2011/16/EU is covered by the confidentiality clause. Indeed, as provided for in points 1 and 2 of Article 23a of Directive 2011/16/EU, '[i]nformation communicated to the Commission pursuant to this Directive shall be kept confidential by the Commission in accordance with the provisions applicable to Union authorities and may not be used for any purposes other than those required to determine whether and to what extent Member States comply with this Directive' and '[i]nformation communicated to the Commission by a Member State under Article 23, as well as any report or document produced by the Commission using such information, may be transmitted to other Member States. Such transmitted information shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it.'

Taking the above-mentioned considerations into account, the Directorate-General for Taxation and Customs Union refused access to the documents containing the data requested in your application.

In your confirmatory application, you request a review of the position of the Directorate-General for Taxation and Customs Union. In particular, you point out that the reply of the above-mentioned Directorate-General does not demonstrate that 'divulging the information requested will cause any harm to the EU'. You also refer to the overriding public interest that, in your view, warrants public disclosure of the information requested.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply provided by the relevant service at the initial stage.

Following this review, I wish to inform you that I have to confirm the position of the Directorate-General for Taxation and Customs Union refusing access to the documents concerned, based on the exception of Article 4(3), first subparagraph, of Regulation 1049/2001, read in conjunction with the confidentiality provisions in Article 23a of Directive 2011/16/EU.

The detailed reasons are set out below.

2.1 The confidential nature of information provided under Directive 2011/16/EU and protection of the decision-making process

Article 4(3), first subparagraph of Regulation 1049/2001 provides 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’.

As explained by the Directorate-General for Taxation and Customs Union, the legislator established a confidentiality clause covering all information submitted by the Member States to the European Commission under Directive 2011/16/EU. It applies to the statistical information listed in Implementing Regulation 2018/99 and the qualitative information provided by the Member States to the European Commission under Article 23 of the above-mentioned Directive. That clause, included in Article 23a of Directive 2011/16/EU, applies to the data to which your initial application relates, as it was collected on the basis of Article 23 of Directive 2011/16/EU.

Public disclosure of the information included in the above-mentioned 426 data sets and 28 questionnaires would jeopardise the process of collecting the relevant statistical data under Directive 2011/16/EU, as it would create a risk of uncertainty in applying the EU legislation concerned. Indeed, public disclosure of the data requested under Regulation 1049/2001 would be seen by the Member States as a case of violation by the European Commission of the provisions of the legislation, which, as mentioned above, envisages the confidentiality of the data provided under Directive 2011/16/EU.

Consequently, the Member States would be less willing to cooperate with the European Commission in the context of the implementation of the above-mentioned Directive. That, in turn, would undermine the ability of the European Commission to propose and design new initiatives and actions in the area of taxation, as that ability is dependent on, among other things, the availability of the statistical data from the Member States.

Furthermore, the information requested constitutes raw statistical data that, if publicly disclosed, could be subject to misinterpretation or misuse. That, in turn, would put the European Commission under potential external pressure, for example in the context of the ongoing work relating to the preparation of the report on automatic exchange of information.

Finally, the disclosure of the information on exchange of information could have an effect on the behaviour of taxpayers and result in tax avoidance if they were to know how certain types of exchange of information are implemented in the Member States. It is in the general interest of the financial, monetary and economic policy of the Union and the Member States to combat tax avoidance and evasion and to avoid the distortion of business activities in the Union.

Consequently, the relationship with the Member States and the ongoing decision-making process linked to the implementation of the Directive 2011/16/EU would be seriously

undermined. Furthermore, the public disclosure of the data provided under the explicit confidentiality clause provided for in the EU legislation would also have a negative impact on the relationship of mutual trust between the European Commission and the Member States, as it could be perceived, as mentioned above, as a potential breach of the fundamental principle of certainty of legal order.

Consequently, public disclosure of the statistical data in question would undermine the ongoing decision-making process, as the release of that data against the provisions of Directive 2011/16/EU would affect the interaction between the European Commission and the Member States, not only in relation to the area of taxation, but also in other areas where EU legislation provides for similar confidentiality clauses.

I consider this risk as reasonably foreseeable and not purely hypothetical.

Having regard to the above, I consider that the use of the exception under Article 4(3), first subparagraph, of Regulation 1049/2001 is justified concerning statistical data included in 426 data sets and 28 questionnaires and that access thereto must be refused on that basis.

3. NO PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above.

Consequently, I conclude that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that ‘[...] in the view of the damage caused for national and EU public funding by possibly not using cross-border group requests to combat tax fraud, tax evasion and tax avoidance, [you are] of the opinion that there is an overwhelming public interest which overrides [the European Commission] concerns.’

Please note, however, that, even if members of the public have expressed an interest in the subject matter covered by the documents requested and have pointed to a general need for public transparency related thereto, the Court of Justice, in the *Strack* case, ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient merely to rely on that principle and its importance⁸. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure⁹.


In your confirmatory application, you do not refer to any specific overriding public interest that would warrant public disclosure of the specific type of information included in the document in question.

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the decision-making process grounded in Article 4(3), first subparagraph of Regulation 1049/2001.

5. MEANS OF REDRESS

I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General

⁸ Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2104:2250), paragraph 128.

⁹ *Ibid*, paragraph 129.