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Committee on Economic and Monetary Affairs (Member) | Committee on Transport and Tourism (Substitute)
EU-South Africa Interparliamentary Delegation (Member) | EU-India Interparliamentary Delegation (Substitute)

Fabio De Masi - European Parliament - Rue Wiertz 60 - WIB 03M031 - 1047 Brussels

Stephen Quest
Director General
Directorate General Taxation and Customs Union
European Commission

Brussels 21 April 2016

Dear Mr Quest,

Thank you for your letter dated 11 April 2016 as well as for the additional documents made available from the work of the Code of Conduct Group (CoCG).

When recapitulating the procedural history of this request, you correctly recite my confirmatory application dated 18 November 2015. Please note however that I did not lodge "a confirmatory application with a request reduced in its scope", but a confirmatory application with respect to my entire initial request which read as follows: "Any formal and informal notes, minutes or other written records from the European Commission as well as any room document or other written input prepared by the Commission in the context of the work of the Code of Conduct Group on business taxation since its inception on 09/03/1998." The reduced scope was introduced as an alternative request only, as also re-iterated in my reply dated 19 December 2015 to your message from 16 December 2015.

As regards the substance of your answer to this alternative request, I take note of the information provided on my points 1 and 2 of the reduced scope and I look forward to receiving supplementary information regarding point 3 in due course.

While the overview of harmful tax measures is of great help for our work, and I thank your services for having compiled this list, I am afraid that I cannot entirely follow the legal argumentation substantiating the limitations to my request as regards the provisions of meeting minutes from the CoCG. I shall re-explain my views on this below in three points.

1) While the list of 62 identified documents seems to generally cover a larger time span than the one I referred to in the alternative request, I am not certain about the completeness of this list with respect to the period of January 2010 till November 2015 which I asked for. Visibly, no information has been included after April 2015. Further, a range of individual minutes seem to be missing for this period, mostly for meetings of the subgroup of the CoCG, which of course forms an integral part of the work of this forum.

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2) I maintain my view that the **exemption of Art. 4 (3) Transparency Regulation cannot be applied** in this case. The refusal of access to documents of the CoCG based on this principle violates the right established in Art. 15(3) TFEU in conjunction with Art. 2(1) Transparency Regulation.

When listing documents relating to the broad subjects discussed in the CoCG (e.g. administrative practices, exchanges with third countries, hybrid mismatches etc.), you only give a general justification for your decision of non-disclosure by citing the sensitivity of information, alleging that the diffusion of these documents would undermine the decision-making process in the CoCG. No substantiated explanation is given as to **how** the disclosure of data would seriously undermine the decision-making process.¹

The reasoning that the refusal of full access to a document is justified by the fact that the required document is connected to an activity mentioned in the exemptions of the regulation, is not sufficiently grounded in the case-law of CJEU rulings.² The COM should rather provide detailed information on the extent to which access to this document would actually and specifically seriously undermine the decision-making process of the Council.³ Seriously undermining the public interest must be foreseeable and not of a hypothetical nature only.⁴ It is necessary to demonstrate that the protected public interest is actually being undermined.⁵ Arguments like “Risk limiting the progress of the work ahead”, “would undermine the chances of successful future results”, “would be jeopardized if positions and arguments of delegations were to be revealed”, “negotiations risk being damaged if earlier positions and arguments are made public” are not in any possible interpretation a substantiated explanation as to how disclosure of documents and data can seriously undermine the decision-making process.

Thus, according to the general exemptions mentioned in Art. 4(3) Transparency Regulation, access to the documents created by the COM on the activities of the CoCG may not be refused. Art. 4(3) subparagraph 1 Transparency Regulation then provides for refusal of access to a document drawn up by an institution for internal usage or received by it, and regarding which no decision has yet taken by the institution if disclosure of the document would seriously undermine the decision-making process of the institution and there is no public interest which outweighs this consideration. However, neither exemption to the transparency requirement apply in this case, for the following reasons:

¹ For this requirement see Alemanno, Unpacking the principle of openness in EU law: transparency, participation and democracy, in: *E.L.Rev.* 39 (2014), p. 72 et seq.

² CJEU, Judgment of 27 February 2014, *Commission/Enbw Energie Baden Württemberg* (365/12 P, no. 64) with further proof.

³ CJEU, Judgment of 27 February 2014, *Commission/Enbw Energie Baden Württemberg* (365/12 P, no. 64) with further proof.

⁴ Wegener, in: Calliess/Ruffert, *TEU/TFEU, Comments*, 4th Edition, Munich 2011, Art. 15 TFEU, marginal nos. 32. 35; Court of Justice, Judgment of 7 February 2002, *Kuijjer/Rat – II* (T-211/00, [2002], II-485, no. 56).

⁵ Dupont-Lassalle, *Accès aux documents et protection des relations internationales*, in: *Revue Mensuelle Lexisnexis Juriclasseur* 10/2014, p. 17 et seq.

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(a) Prohibition of a general refusal of access

In your letter you write: “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”.

If such an exemption mechanism with regard to the general principle of transparency was to be accepted, the right of the public to access documents would be thwarted, without objective grounds having to be provided. This contradicts the case-law of the CJEU which considers assurance of confidentiality a priori and without justification to be inadmissible⁶ because otherwise the practical effectiveness of the right of access to documents would be considerably restricted.⁷

General assertions of confidentiality are not sufficient as a required reason with regard to Art. 4 Transparency Regulation.⁸ If confidentiality classification is required, it may then satisfy the exemption rules of Art. 4 Transparency Regulation; in the present case it could therefore seriously undermine the decision-making process of the institution (Art. 4(3) Transparency Regulation).

This would mean that in each individual case and regardless of the previous classification of documents by Member States, the Commission must examine to what extent this is important for the protection of public safety, defence and military matters, international relations and the financial, monetary or economic policy of the Community or a Member State. Only this procedure can guarantee that no general remedy can be applied to the "sensitivity" of information, but that a decision is made based on the alleged protection of interests in each specific case.

(b) No undermining of the decision-taking process

Nor can access be refused to documents of the CoCG which are drawn up for internal use and which refer to such matters on which the Council has already made a decision by invoking a supposed undermining of the decision-making process.

Art. 4(3) subparagraph 1 Transparency Regulation, which you refer to, only applies to such matters in which the institution has not yet made a decision. However, in your letter, you refer to very broad topics debated by the CoCG and, then, assume that information on these topics, for which work stretches over very long periods and where actual decisions are manifold and scattered over time, should generally not be disclosed. This extremely wide definition of "matters" on which a decision could or could not be taken is in my view by no means covered in the specific meaning of Art 4(3) subparagraph 1 Transparency Regulation.

⁶ CJEU, Judgment of 18 December 2007, Sweden/Commission, IFAW (64/05 P, Reports 2007, I-11398, no. 64) with citations.

⁷ CJEU, *ibid.*, with citations.

⁸ Frenz, *Handbuch Europarecht, Europäische Grundrechte*, Heidelberg 2009, no. 4716.

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Moreover, regarding documents subject to Art. 4(3) subparagraph 1 Transparency Regulation (also for those on which no decision has yet been made), serious undermining of the decision-making process must be given. Therefore, when balancing the general transparency principle with protection of the decision-making process, a refusal of access to documents can only be justified when there is a more serious level of undermining than when the other exemptions in Art. 4 Transparency Regulation are accepted.⁹ However, this must be justified in detail. This is missing in your decision of 11 April 2016.

Finally I argue that the CoCG is not an “institution” according to Art. 4(3) Transparency Regulation. Thus the protection of the integrity of the decision-making process in the CoCG does not exist in this case. A point of reference could only be the decision-making process in the council. But the extent to which opening up access to documents drawn up by the COM within the framework of the activities of the CoCG could seriously undermine the decision-making process in the Council has not been explained in any case.

(c) Prevailing public interest in access

Finally, public interest contrary to the assumption of an exemption must also be determined. Such “public interest” should be a specific public interest, which outweighs the interest protected by the exception provision.¹⁰ The applicant must present concrete conditions justifying a prevailing public interest in the diffusion of the corresponding documents.¹¹

The prevailing public interest within the framework of the CoCG lies specifically in the fact that its contents refer to prejudicial tax measures which may significantly affect the location of business activities in the Union¹² and hence taxation, for example, is no longer levied at the place of real commercial activity (letterbox companies). Prejudicial tax measures, according to letter B of the Code of Conduct, are measures which, measured against the taxation level usually implemented in the corresponding Member States, bring about a clearly lower effective taxation of companies, including zero taxation.¹³

3) I would like to also challenge your application of the exemption in Art. 4(1)(b) Transparency Regulation. Under figure II you cite the exemption under Art. 4(1)(b) Transparency Regulation and mention the protection of privacy and integrity of the individual, especially the provisions in the data protection regulation 45/2001.

⁹ Fahey, EU Foreign Relations Law: Litigating to Incite Openness in EU Negotiations, in: EJRR 4/2014, p. 553 et seq.

¹⁰ Abazi & Hillebrandt, The legal limits to confidential negotiations, in: Common Market Review 52 (2015), p. 825 et seq.

¹¹ CJEU Judgment of 2 October 2014, Strack/Commission (127/13 P, [2015], 2250, no. 128) with citations.

¹² Decisions of the Council and government representatives of the Member States in the Council on 1 December 1997 on a Code of Conduct for Company Taxation, point A of the Code of Conduct for tax measures aimed at business taxation.

¹³ Decisions of the Council and government representatives of the Member States in the Council on 1 December 1997 on a Code of Conduct for Company Taxation, point B of the Code of Conduct for the tax measures aimed at Business Taxation.

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With regard to this exemption, a narrow interpretation is applied regarding restrictions of the right of full access to documents in accordance with the case-law of the court.¹⁴ Personal privacy encompasses the rights of the individual in private and family life, home and correspondence.¹⁵ Integrity as a subject of protection is not anchored in law and, depending on the interpretation, means the integrity or inviolability of these goods.¹⁶

First, you should provide detailed reasons as to what extent the documentation of prejudicial state policies on Business Taxation affects personal privacy and integrity of individuals. Documents where Member State officials speak on behalf of Member State governments on applicable or planned tax measures of the Member States and in documents on the administrative practice and interpretation of tax laws in Member States, including legal and administration regulations, clearly do not affect the need to protect personal privacy and integrity of the individual.

Second, even if these subjects of protection were affected, this would not automatically prioritize them vis-à-vis the interests of the public. The CJEU is not undertaking an abstract consideration of the protected legal subjects of Regulations 45/2001 and 1049/2001, but interrelates these regulations.¹⁷ According to the court, the right of access to documents as provided for in Art. 2 Transparency Regulation, corresponds to a legal obligation for “processing” personal data in the sense of Art. 5(b) of Regulation 45/2001.¹⁸

I again argue, that the disclosure of data and documents of the CoCG is a public interest as stated in Art. 8(a) of Regulation 45/2001.

Third, the court also determines that the transmission of personal data, to which the exemption under Art. 4 Transparency Regulation does not apply, does not in principle undermine the rightful interests of the persons concerned according to Art. 8(b) of Regulation 45/2001.¹⁹

I hope that in light of my further explanations you will be able to re-consider my request for documents and be able to respond to it fully.

Yours sincerely,

Fabio De Masi

¹⁴ CJEU, Judgment of 17 October 2013, Access Info Europe/Council (280/11 P, no. 30), with citations.

¹⁵ Frenz, Handbuch Europarecht, Europäische Grundrechte, 2009, Heidelberg, no. 4679.

¹⁶ Frenz, Handbuch Europarecht, Europäische Grundrechte, 2009, Heidelberg, no. 4680.

¹⁷ Frenz, Handbuch Europarecht, Europäische Grundrechte, 2009, Heidelberg, no. 4683.

¹⁸ Court of Justice, Judgment of 8 November 2007, Bavarian Lager/Commission (194/04, [2007], II-4523, no. 106).

¹⁹ Court of Justice, Judgment of 8 November 2007, Bavarian Lager/Commission (194/04, [2007], II-4523, no. 108).

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