

Letter from the European Ombudsman to the Council of the EU on its refusal to give public access to documents concerning a legislative proposal on the taxation of digital services

Correspondence - 30/09/2021

Case 1703/2021/AMF - Opened on 30/09/2021 - Decision on 30/05/2022 - Institution concerned Council of the European Union (No maladministration found) |

Director-General of the Legal Service

Council of the European Union

Dear Ms X,

The Ombudsman has received a complaint from Corporate Europe Observatory against the Council of the EU. She has asked me to deal with the case on her behalf.

The complainant asked the Council for public access to “ *all agendas; minutes / notes of discussions; position papers; and any other documents relating to Council deliberations, since 1 January 2019, where the EU’s Digital Services Tax proposal, and/ or the OECD’s negotiations on a similar tax, were discussed*”.

The Council has identified 53 documents as falling within the scope of the complainant’s request. Through its initial decision of 14 October 2020 and its confirmatory decision of 14 January 2021, the Council has granted full or partial access to 43 of those documents. In its complaint to the Ombudsman, the complainant takes issue with the non-disclosure of the entire content of the remaining 10 documents, as established by the confirmatory decision.

According to the Council, the legislative proposal on the taxation of digital services is highly sensitive from a political point of view and involves the coordination of many domestic actors. The identified documents contain “*free and frank discussions that were not meant to become public at this stage of the negotiation. Premature disclosure would not stimulate debates in the Council or between the institutions but more likely dissuade Member States from sharing such details in the future in a climate of mutual trust*”. The Council further said that the position of



the Union in multilateral negotiations with the OECD and G20 would be weakened if its internal views and negotiation strategy were made public while the negotiations are still ongoing. The Council added that the disclosure of the documents might affect the work of democratically elected governments and the possible arrangements that businesses may decide to take, which would consequently undermine the financial and economic policy of the EU and its Member States.

In view of the above, the Council refused the disclosure of the documents as it was likely to a) undermine the protection of the public interest as regards international relations and the financial and economic policy of the EU and its Member States [1] and b) undermine the ongoing decision making process [2] and there was no overriding public interest in disclosure..

We have decided to open an inquiry into the complaint against the Council's decision to refuse access to the following 10 documents under Regulation 1049/2001:

WK 260 2019 INIT "Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services - Digital Advertising Tax – possible circumvention risks".

WK 8515 2019 INIT "Methodology for the economic analysis of the proposals on international corporate tax reform"

WK 8650 2019 INIT "Economic Analysis of Corporate Tax Reform Options (for the EU)- Presentation"

WK 10988 2019 INIT "Tax challenges arising from digitalisation"

WK 11055 2019 INIT "Presentation by the Commission"

WK 11769 2019 INIT "Preliminary results pillar 2 - Presentation by the Commission"

WK 13225 2019 INIT "Hungary's Position Paper on the compatibility of the Pillar 2 Proposals with EU law"

WK 2260 2020 INIT "Digital taxation: economic impact analysis - Letter from OECD"

WK 5870 2020 INIT "Economic impact assessment - Digital taxation"

WK 7902 2020 INIT "Letter to OECD - digital taxation"

Regulation 1049/2001 states that applications for access should be handled promptly. It is in line with this principle that the Ombudsman also seeks to deal with cases such as this as quickly as possible.

As a first step, we consider it necessary to review the documents at issue in the complainant's



request. We would therefore be grateful if the Council could provide us with copies of the ten identified documents, preferably in electronic format (through encrypted e-mail [3]).

The documents subject to the public access request will be treated confidentially, along with any other material the Council chooses to share with us that it marks confidential. Documents of this kind will be handled and stored in line with this confidential status and will be deleted from the Ombudsman's files shortly after the inquiry has ended.

The Council's position has been set out in its confirmatory reply of 14 January 2021. However, should the Council wish to provide additional views, to be taken into account by the European Ombudsman during this inquiry, we would be grateful if they could be provided to us. It may also be useful for my inquiry team, after they have reviewed the documents, to meet with the Council services.

We would be grateful if the Council could let us know by when it can respond to this inquiry request. The inquiries officer responsible for this inquiry is Ms Angela Marcos Figueruelo.

Yours sincerely,

Rosita Hickey Director of Inquiries

Strasbourg, 30/09/2021

[1] Article 4(1)(a), third and fourth indents, of Regulation 1049/2001

[2] Article 4(3) of Regulation 1049/2001

[3] Encrypted emails can be sent to our dedicated mailbox.