



Opening remarks

TAX3 hearing on “The fight against harmful tax practices within the European Union and abroad”

*European Ombudsman, Ms. Emily O'Reilly
Brussels, 15 May 2:30 - 4:00 pm*

Good afternoon,

Thank you for the invitation to join you this afternoon to discuss the fight against harmful tax practices as well as the working methods of the Council. I will give you a short overview of my inquiry into the Council's accountability and access to documents, which I opened over a year ago and will close this week, and I am happy to take your questions afterwards.

The 2017 ‘Paradise Papers’, the second biggest leak of records relating to offshore investments and tax avoidance after the ‘Panama Papers’ of 2016, refocused public and political attention on global corporate taxation, tax havens, tax fraud, and the related issue of the challenges caused by income inequality.

Those revelations prompted the creation of this special committee and follows the work of earlier committees on how this significant issue is being dealt with at EU level and whether enough is being done to support the public interest in creating and maintaining a fair and equitable tax system within the EU and globally.

Transparency is clearly central to this work. Those who want to avoid public scrutiny of their tax strategies - even if legal - have a vested interest in maintaining maximum confidentiality. The jurisdictions in which these strategies are being executed - and the companies helping to execute them – may share that interest.

I note that Appleby, the company which held the Paradise papers, recently settled its breach of confidence lawsuit against the Guardian and the BBC the media companies that were part of the international consortium of investigative journalists that broke the story

Client confidentiality is of course an important part of enabling economic growth and facilitating business but it does not eclipse the public interest in making sure that the confidential actions are lawful and align with best practice.

Public institutions also need to be held accountable for their decision-making in the field. Ordinary people have little or no control over private companies and rely on public institutions to safeguard their interests. And that is the work that this committee is engaged in.

Accountability is possible only when relevant and timely information is available. Something that is invisible cannot be measured, cannot be evaluated. The EU institutions in general have a high level of easily accessible information available to the public, but the Council still has considerable room for improvement.

My Office has not received any specific complaint concerning the transparency of the Code of Conduct Group on Business Taxation or on the working methods of the Council in the area of taxation.

However, the Code of Conduct Group on Business Taxation is a formal preparatory body of the Council. Issues concerning the Group's administrative practices and therefore documents, could therefore fall within the scope of my mandate.

The most straightforward way for me to deal with transparency issues concerning this Group would be via a complaint in the event of access to a document or documents being denied or partial access only granted. That way, I could see whether a refusal to release was justified on the basis of the exemptions included in Regulation 1049.

High standards do not mean that everything needs to be transparent, or immediately transparent. Sometimes of course it is in the public interest for documents not to be published, or not published until the appropriate time.

The transparency regulation, Regulation 1049/2001, essentially takes as its starting point the presumption that documents held by the EU will be released unless a specific exemption applies.

Some exemptions are subject to a public interest override – in other words, even if a harm – such as commercial damage - may occur as a result of release, the public interest in release may override that.

Some exemptions are deemed to be mandatory – they are records relating to public security, defence and military matters, international relations and the financial, monetary or economic policy of the Union-. No public interest test has to be applied but the institution has to give reasons for refusal nonetheless.

Where 3rd party countries are concerned – and this would include some of the countries deemed to enable tax avoidance – if a request is made for their documents sent to the EU to be released, the 3rd party country will be consulted but any possible refusal has to be in line with a valid exemption in Regulation 1049. Similarly, if a Member State requests an EU institution not to disclose a document it has sent to the EU, it has to be assessed whether this request is in line with a valid exemption under the Regulation.

Taxation is obviously a very sensitive and contested issue within the EU. It is sensitive domestically for Member States but also for the EU as a whole when it comes to trading and diplomatic relations with third countries some of whose tax regimes may damage EU interests by depriving it of revenue.

One can see therefore how the impulse to deal with some of these matters through opaque diplomacy may clash with the demands of transparency and the mandatory exemptions in Regulation 1049 may come into play.

The Code of Conduct Group on Business Taxation is tasked with important preparatory work on several important tax issues, including the examination of existing potentially harmful tax competition within the EU and the drafting of a list of third countries with non-cooperative jurisdictions for tax purposes.

It advises the Council on what countries should be on that list, what they need to do to be taken off it, and whether enough has been done to justify being taken off. This work would seem to demand a high level of transparency if the public is to be reassured that appropriate action is being taken to protect their interests. However, as I noted earlier, one can see how some of this work could lead to transparency challenges.

As I said, I have not received any specific complaints vis a vis the Group. However, my office receives few complaints concerning the Council in general, which may be due to the limited knowledge most EU citizens have about it as an institution. My work on the Council's accountability has so far focused on discussions on draft legislation taking place with its preparatory bodies, in the working parties and in COREPER.

I launched a strategic inquiry on that matter in March 2017. Council and Parliament are co-legislators but that linkage breaks down when it comes to accountability standards.

While this house proactively publishes draft reports, amendments, and voting results, the Council restricts the access to most of its documents until after a legislative procedure is concluded.

The intent of the EU Treaties is that legislative deliberations must be sufficiently transparent for European citizens properly to exercise their democratic right to participate in the EU's decision-making process, and to hold those involved to account.

And to do that, they need to know at an appropriate time what position their member state is or has taken on a piece of EU legislation.

If that element remains opaque, then the 'blame Brussels' culture will continue with some citizens continuing to believe that faceless officials decide on legislation and not members of their own governments.

I also believe that making the positions of Member States publicly known, in a timely and accessible manner, can help reduce citizen alienation from the EU institutions. I fully appreciate the difficulties in getting consensus, or a majority vote, among 28 member states, but if the balance between behind closed doors diplomacy and accountability shifts too far behind those closed doors, the public interest is no longer served.

To get an overview of the Council's practices, I inspected 3 legislative files of the Council, although none of them in the area of taxation.

I found that the Council's current practices constitute maladministration because of its systematic failure even to record the identity of Member States taking positions in preparatory bodies, and because of its widespread practice of restricting access to ongoing legislative documents by assigning them with the so-called 'LIMITE' marking.

On 9 February of this year, I made three specific recommendations and several suggestions to the Council on how to improve its accountability. The Council failed to reply to my recommendations within the legally-prescribed three month timeframe, which elapsed last week on 9 May 2018. In view of the importance of the issue of legislative transparency, I decided to proceed with my inquiry and I will be most likely sending a Special Report to Parliament on the inquiry this week.

My understanding is that the AFCO and PETI committees will draft a report in response to my Special Report. All members will be able to participate in this process and my office is happy to keep your committee duly informed about the upcoming steps.

Taxation:

It is important however to point out that my inquiry is about the Council's *legislative* work. Legislative documents have a special transparency status under Regulation 1049 and must be made proactively available by the EU legislature. Generally speaking, under the Regulation and case law, a higher standard of transparency applies to legislative documents than to other non-legislative or administrative documents.

However, my inquiry is not limited to a specific policy field or legislative proposal. While the legislative files I inspected were all

adopted in accordance with the ordinary legislative procedure, this special transparency requirement extends to *all* legislative procedures.

My recommendations are meant to apply to legislative discussions in all preparatory bodies, including legislative proposals in the area of taxation, such as the current revision of the Anti-Money Laundering Directive.

With regard to non-legislative files, I understand that the Council's Code of Conduct Group on business taxation issues guidance notes and prepares Council conclusions, such as the EU list of non-co-operative jurisdictions for tax purposes. These are political commitments used to coordinate Member States' actions or express a political position; they are not legally binding. Such discussions are not "legislative" in nature and therefore do not fall within the scope of my present inquiry. This does not however mean that public access to this type of document cannot be sought or granted under Regulation 1049.

As you know, Parliament's previous inquiry committees on taxation faced significant issues accessing documents from the Council. Generally, all EU institutions must give public access to EU documents, unless they fall under one or more of the exceptions exhaustively listed in Article 4 of that Regulation. This also applies to documents related to the Code of Conduct Group for business taxation held by the Council. The Court of Justice has ruled, most notably in its Access Info Europe case, that "*Regulation No 1049/2001 aims to ensure public access to the entire content of Council documents, including, in this case, the identity of those who put forward the proposals.*" referring in this case to the Member State positions.

And while, the Court has placed special emphasis on legislative documents, it still unequivocally maintains that "*public access to the*

*entire content of Council documents constitutes the principle, or general rule, and that that principle is subject to exceptions which must be interpreted and applied **strictly**.*” I sometimes feel that the Council is operating from the opposite starting point where non-disclosure is the general rule and public access is the exception despite the clear intent of the Treaties and of the transparency regulation.

Conclusion

My office has the mandate to look into the EU institutions’ application of the EU’s rules on public access to documents, Regulation 1049/2001. As the Ombudsman, I have the power to inspect all EU documents, whether confidential or not, and can issue recommendations as to whether they should be published or not. Most of the time, I agree with the EU institution involved who refuses to publish for valid reasons, however sometimes we disagree.

I have not received any complaints yet directly related to the Code of Conduct Group for business taxation, but I will assess any complaint issued to me rapidly and in detail. My office can accept complaints not only from citizens, but MEPs, and also from Parliamentary Committees. All complaints concerning access to documents are now handled internally via a new Fast-Track procedure whereby my aim is to issue a decision within 40 days.

I hope that my explanations gave you a general overview of my inquiry into the Council’s legislative work and I hope that it was also helpful for your work in the field of taxation. As I said at the start, in the absence of specific complaints, my observations have necessarily to be general but I am happy to answer any questions you may have, and if needed my Office can follow up with written answers.

Thank you.