



## TAX3 Public Hearing “The Fight against Harmful Tax Practices within the European Union and Abroad”

Tuesday, 15 May 2018

### Written answers to questions of TAX3 Committee

*Question 1: Could you share with the committee how has the Council reacted to your suggestions for improvement and recommendations of this February on the Transparency of the Council legislative process (Case: OI/2/2017/TE)? Which are the transparency efforts to which the Council has committed to? Is the Council planning to take action and how?*

The Council has not yet replied to the Ombudsman’s recommendations and suggestions for improvement made following her inquiry into the transparency of the Council legislative process (OI/2/2017/TE). The three-month deadline for sending a detailed opinion on her recommendations elapsed on 9 May 2018. The Council informed the Ombudsman that it will not be able to respond before early July. We have told the Council that, as communicated to it before, we will not extend the deadline given the importance of the issue.

*More specifically on taxation:*

*Question 2: Did you encounter obstacles in identifying Member States positions on files in the area of taxation? How were these obstacles compared to other policy fields?*

During the inquiry into the Council legislative process the Ombudsman did not specifically focus on taxation. Therefore, it is difficult to give precise details outside the format of an actual complaint about a specific taxation related matter. The Ombudsman welcomes any complaint made to her within her mandate.

Within the scope of her Council inquiry, the Ombudsman’s inquiry team inspected three legislative files of the Council that were finalised in 2016: the Data Protection Regulation<sup>1</sup>, the Decision on tackling undeclared work<sup>2</sup> and the Directive on the accessibility of websites and mobile applications of public sector bodies<sup>3</sup>. The inspection aimed to give the Ombudsman an insight into how the Council General Secretariat produces, distributes, registers and publishes documents tabled at meetings of Council preparatory bodies.

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<sup>1</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

<sup>2</sup> Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work.

<sup>3</sup> Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies.

The inspection showed that, only in some cases, were the identities of Member States that take positions in preparatory bodies recorded. In other cases, Member States were not identified as supporting any particular position and, instead, there were references to unidentified “delegations”.

*Question 3: What main recommendations did you make in cases related to taxation policy?*

The Ombudsman’s strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process is not concerned with any particular legislative proposal or policy area. The inspection of the three legislative files aimed to give the Ombudsman a general insight into the Council General Secretariat’s practices (see answer to Question 2).

The main recommendations that the Ombudsman made to the Council following her inquiry focused on the Council’s failure to record systematically the identity of Member States taking positions in preparatory bodies. (Case C-280/11 P para. 40 states that Regulation No 1049/2001 aims to ensure public access to the entire content of Council documents including Member State positions). The Ombudsman also criticised the widespread practice of restricting access to legislative documents while the decision-making process is ongoing via the so-called LIMITE marking.

*Question 4: In previous ad hoc committees on taxation issues, the European Parliament had only very restricted access to documents of Council and Commission, with most parts of the documents blackened and Member States claiming that they have a right to request that their positions were not disclosed. Do you think that this restricted access to documents is justified? To what extent could the European Ombudsman cooperate with the European Parliament to have an easier access to documents of the Commission, the Council and in particular of the Code of Conduct Group on Business Taxation?*

The Ombudsman has the mandate to look into the EU institutions’ application of the EU’s rules on public access to documents, that is, Regulation 1049/2001<sup>4</sup>. Generally, EU institutions must grant public access to documents, except 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 Ombudsman assesses the EU institutions’ reasons for (partially) refusing access to documents on a case-by-case basis and after having inspected the non-disclosed or partially disclosed documents. Where the Ombudsman finds that the EU institution or body was wrong to refuse access to the requested documents, she may recommend that it grant full or partial access to the documents in question.

In February 2018, the Ombudsman introduced a new fast-track procedure to deal with access to documents complaints, under which she is able to take a decision within two months of receiving the complaint. Complaints from Members of European Parliament

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<sup>4</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43 (Regulation 1049/2001).

concerning a (partial) refusal to access to documents could be dealt with by the Ombudsman under this new procedure.

*Question 5: The European Parliament TAXE, TAX2 and PANA Committees requested access to the European Commission's documents referring to the Member States' implementation of the directives. However, such documents have arrived in a very confidential way, so that they could not be used except for Member's own knowledge. What would be the Ombudsman position regarding the transparency of the information regarding the implementation of EU legislation?*

The Ombudsman assesses the EU institutions' reasons for (partially) refusing access to documents on a case-by-case basis and after having inspected the non-disclosed or partially disclosed documents, based on the provisions in Regulation 1049/2001 (see answer to Question 4). To answer this question, the Ombudsman would need to see the concrete documents and assess the reasons given by the European Commission for (partially) refusing access to them.

*Question 6: Does the working methods of the Code of Conduct Group on Business Taxation and Members thereto meet transparency and accountability standards required by the Ombudsman? What changes would you suggest to increase its transparency and accountability? Does the Ombudsman consider the possibility of opening an investigation into the working methods of the Code of Conduct Group on Business taxation?*

The Ombudsman has not received any complaint concerning the transparency of the Code of Conduct Group on Business Taxation. The Group is a formal preparatory body of the Council. Issues concerning its administrative practices, including those relating to its transparency and accountability, could therefore fall within the scope of the Ombudsman's mandate.