



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR BUDGET

The Director-General

Brussels, 14 December 2021

By email to:

[ask+request-10246-](mailto:ask+request-10246-862022bc@asktheeu.org)

862022bc@asktheeu.org

with acknowledgment of receipt

Subject: Your application for access to documents – Ref GestDem No 2021/7224

Dear Professors Alemanno and Pech,

We refer to your e-mail dated 22 November 2021, registered the following day under GESTDEM number 2021/7224, by which you request access to documents in accordance with Regulation (EC) No. 1049/2001¹ ('Regulation 1049/2001').

1. DOCUMENTS CONCERNED

You request access to 'two letters signed by Director-General for Budget Gert-Jan Koopman and sent to the Hungarian and Polish governments on November 19, 2021 arguing that problems with the independence of the judiciary, ineffective prosecution of corruption, and deficiencies in public procurement could pose a risk to the EU's financial interests' (the 'letters').

To support your request, you also refer to a tweet by the European Commission Chief Spokesperson, Mr Mamer, confirming the existence of these letters, and to articles by media outlets allegedly reporting their content.

The letters were sent by the Commission services pursuant to Article 6(4) of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget² ('Regulation 2020/2092') and are therefore part of the Commission files under Article 6 of Regulation 2020/2092.

¹ Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L145 of 31.5.2001, p. 43.

² OJ L 433I, 22.12.2020, p. 1.

Professors Alemanno and Pech
c/o The Good Lobby
Rue d'Arlon 53
1000 Brussels, Belgium

Having carefully examined your request, I have come to the conclusion that your application cannot be granted, as disclosure is prevented by one of the exceptions to the right of access laid down in Article 4 of Regulation 1049/2001.

2. APPLICABLE EXCEPTIONS

As the effects of granting access to documents under Regulation 1049/2001 are *erga omnes*, in the sense that such documents become public, the disclosure of the requested documents at this stage might hurt the protection of lawful interests, as set forth in Article 4 of Regulation 1049/2001.

Pursuant to Article 4(1)(a), fourth indent, of Regulation 1049/2001, the Commission shall refuse access to a document where its disclosure would undermine the protection of the public interest as regards the financial policy of the European Union. According to the case law, the Commission enjoys a wide discretion when considering whether access to a document may undermine the public interest³.

The financial policy of the European Union includes budgetary matters and the protection of the financial interests of the Union. As the letters are part of the Commission files under Article 6 of Regulation 2020/2092, whose purpose is to protect the sound financial management of the Union budget and the financial interests of the Union from breaches of the principles of the rule of law, the requested documents are manifestly covered in their entirety by the exception set out in Article 4(1)(a), fourth indent of Regulation 1049/2001.

Pursuant to Article 4(2), third indent of Regulation 1049/2001 the Commission shall refuse access to a document where its disclosure would undermine the protection of the purpose of inspections, investigations and audits.

Pursuant to Article 4(3) of Regulation 1049/2001, access to the documents drawn by the Commission or received by it in relation to a matter where the decision has not been taken shall be refused if the disclosure of the documents would seriously undermine the Commission's decision making process.

These exceptions aim at protecting the Commission's capacity to ensure that Member States and undertakings comply with their obligation under European Union law. For the effective conduct of pending investigations it is of utmost importance that the Commission's investigative strategy, preliminary assessments of the case and planning of procedural steps remain confidential.

As said above, the letters are part of the Commission's files under Article 6 of Regulation 2020/2092. As such, they contain information from which the direction of the Commission's assessment under Regulation 2020/2092, the future procedural steps which it may take, as well as its strategy may be revealed to the public. This information could easily be misinterpreted or misrepresented as indications of the Commission's possible final assessment in this case.

In addition, as the letters were sent pursuant to Article 6(4) of Regulation 2020/2092, which clearly refer to an intermediate step of the procedure established by that Regulation, set to

³ See judgment of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, ECLI:EU:T:2007:114, paragraph 40; see also judgment of 6 October 2021 T-827/17 *Aeris Invest Sàrl v ECB*, T-827/17, ECLI:EU:T:2021:660, paragraph 159.

gather information necessary for the Commission's assessment, it is clear that they relate to a matter where a decision has not been taken.

The procedure set by Article 6 of Regulation 2020/2092 does not provide for third parties, other than the Member State concerned, to have access to letters sent by the Commission services or pursuant to Article 6(4). In analogy to State aid proceedings, if access to these letters were granted, that would modify and call into question the procedure set by Regulation 2020/2092⁴.

Furthermore, under the procedure set by Article 6 of Regulation 2020/2092, the Commission relies, among other things, on submissions by the Member State concerned which typically contain sensitive data. Disclosure of this information would risk jeopardising the the climate of mutual trust between the authorities of the Member State and the Commission, in line with the principle of sincere cooperation (Article 4(3) TEU).

In view of the foregoing, the requested documents are manifestly covered in their entirety by the exceptions set out in Article 4(2), third indent, and Article 4(3) of Regulation 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) and (3) of Regulation 1049/2001, the exception to the right of access contained in that Article must be waived if there is an overriding public interest in disclosing the documents requested. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public (as opposed to private interests of the applicant) and, secondly, overriding, *i.e.* in this case it must outweigh the interest protected under Article 4(2), third indent, and Article 4(3) of Regulation 1049/2001.

In your application you have not established arguments that would present an overriding public interest to disclose the documents. Consequently, the prevailing interest in this case lies in protecting the effectiveness of the Commission's activities under the procedure set by Article 6 of Regulation 2020/2092.

4. PARTIAL ACCESS

I have also considered the possibility of granting partial access to the documents for which access has been denied, in accordance with Article 4(6) of Regulation 1049/2001. However, the general presumption of non-disclosure invoked above also applies to partial disclosure for the documents concerned and, consequently, no partial access can be granted.

⁴ In *TGI*, a case which concerned an access to documents request to all documents in two State aid cases, the Court of Justice upheld the Commission's refusal and held that there exists with regard to the exception related to the protection of the purpose of investigations a general presumption that disclosure of documents in the file would undermine the purpose of State aid investigations. The Court reasoned that this follows from the fact that under the State aid procedural rules the interested parties, other than the Member State concerned, have no right to consult the documents in the administrative file and should such access be granted under Regulation 1049/2001 the nature of the procedure is likely to be modified and thus the system for review of State aid would be called into question. See judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, ECLI:EU:C:2010:376, paragraphs 58-59.

With regard to your reference to articles which appeared on the internet, some of which allegedly cite excerpts of the letters or disclose their contents, the Commission did not disclose the letters to the press and it does not comment or confirm leaks. For that reason, your warrant that the contents of the letters were already disclosed and that therefore the Commission should give access to them should not be granted.

5. MEANS OF REDRESS

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position, by writing to the Commission's Secretary-General at the address below, confirming your initial request. You have fifteen (15) working days in which to do so from receipt of this reply after which your initial request will be deemed to have been withdrawn.

The Secretary-General will inform you of the result of this review within fifteen (15) working days from the registration of your request, either granting you access to the documents or confirming the refusal. In the latter case, you will be informed of how you can take further action.

All correspondence should be sent to the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu.

Yours sincerely,

Electronically signed

Gert Jan KOOPMAN