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BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGMENT OF RECEIPT

Subject: Request for access to documents

Ref.: Your request of 19 February 2018 registered under reference GestDem 2018/1148.

Dear Mr. Logue,

I refer to your request for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, concerning the written observations submitted by the parties and interveners in Joined Cases C-154/15, C-307/15 and C-308/15².

The written observations submitted by the following parties have been identified in response to your request:

Case C-154/15:

1. The European Commission,
2. the Government of the United Kingdom,
3. the Czech Government,
4. the Spanish Government,
5. Cajasur Banco SAU and
6. Francisco Gutiérrez Naranjo.

¹ OJ L 145, 31.05.2001, page 43.

² Judgment of the Court of 21 December 2016 in Joined Cases C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980.

Joined Cases C-307/15 and C-308/15:

7. The European Commission,
8. the Government of the United Kingdom,
9. the Spanish Government,
10. the Polish Government,
11. Banco Bilbao Vizcaya Argentaria (BBVA),
12. Banco Popular Español S.A.,
13. Emilio Irlés López and Teresa Torres Andreu.

1. WRITTEN OBSERVATIONS SUBMITTED BY THE EUROPEAN COMMISSION

With regards to the Commission's observations, after a concrete assessment of the requested documents, I am pleased to inform you that access can be granted (documents under numbers 1 and 7).

Please note that personal data has been expunged. More specifically, the initials of the Commission's officials not having the function of senior management staff have been redacted. This information must be protected under the exception provided for in Article 4 (1)(b) of Regulation (EC) 1049/2001 ("*protection of personal data*")³, in accordance also with the European Union legislation regarding the protection of personal data.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable⁴. According to Article 8(b) of this Regulation⁵, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. Those two conditions are cumulative.

I consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

If you wish to receive the expunged personal data, I invite you to provide us with arguments showing the need to have the personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data would be disclosed.

Please note that the exception of Article 4(1)(b) has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

³ "*The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*".

⁴ Judgment of the Court of 29 June 2010 in *Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378.

⁵ OJ L 8, 12.1.2001, page. 1.

2. WRITTEN OBSERVATIONS SUBMITTED BY OTHER PARTIES

2.1. Disclosed documents

As far as the written observations submitted by other parties are concerned, in accordance with Article 4(4) of Regulation (EC) 1049/2001, the European Commission has consulted the authors of the respective documents on their disclosure.

I would like to inform you that the Government of the United Kingdom, the Czech, the Spanish and Polish Governments, as well as Cajasur Banco SAU and Francisco Gutiérrez Naranjo have agreed to the disclosure of their documents (documents under numbers 2 to 6 and 8 to 10).

Emilio Irlés López and Teresa Torres Andreu have not replied to our consultations (document under number 13). However, as the Court of Justice has recognised in its judgment in joined cases C-514/07P, C-528/07P and C-532/07P, in cases where the proceedings have been closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings lodged to the Court of Justice would undermine the judicial activities of the Court⁶.

Since the cases concerned by the request are now closed, and in the absence of an objection from the authors of the documents concerned, I would like to inform you that access may also be granted to the relevant documents in accordance with Regulation (EC) No 1049/2001.

Please note that personal data has been expunged in accordance with the exception for the protection of personal data, as explained above. More specifically, the handwritten signatures, the professional emails of the agents representing the Government of the United Kingdom, as well as the initials of the Court's lawyers-linguists have been redacted.

Accordingly, you will find enclosed a copy of the documents under numbers 2 to 6, 8 to 10 and 13), expunged of personal data where necessary. Please note that these documents are available in Spanish, the language of the proceedings, and in the language of the respective Member State, while also a French translation has been prepared by the Court's services. In accordance with the preferences stated in your email of 23/02/2018, you will find attached the English version for the observations submitted by the Government of the United Kingdom and the French version for the rest of the documents.

2.2. Refused documents: written observations submitted by Banco Bilbao Vizcaya Argentaria (BBVA) and by Banco Popular Español S.A. (BPE) (documents under numbers 11 and 12).

BBVA and BPE have refused to grant access to the requested documents. Both banks consider that their written observations must remain confidential in accordance with the exceptions provided for under article 4(2) first indent ("*protection of commercial interests*") and second indent ("*protection of court proceedings*") of Regulation (EC) No 1049/2001.

Article 4(2), first indent of Regulation (EC) No 1049/2001 states by way of exception that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure*". BBVA considers that the content of the written observations must be protected since a possible disclosure would prejudice its rights of intellectual property.

⁶ Judgment of 21 September 2010 in joined cases *Sweden and Others v API and Commission*, C-514/07P, C-528/07P and C-532/07P, ECLI:EU:C:2010:541, paragraphs 130 and 131.

BPE is also of the opinion that disclosure of the requested observations would undermine the commercial interests of the bank. More precisely, BPE has explained that the observations contain the legal assessment made by the bank of the so-called "*cláusulas suelo*" ("*floor clauses*"), including the analysis of the conditions for mortgage loans. This analysis reflects the general policy of the bank and not only in respect of the specific proceedings, and, as a result, is exceptionally sensitive in terms of commercial value.

Furthermore, Article 4(2) second indent states by way of exception that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings [...] unless there is an overriding public interest in disclosure*".

The purpose of the exception for the protection of court proceedings is to protect the integrity of court proceedings and to ensure the proper course of justice. In this sense, the Court of Justice has recognised in its judgment in joined cases C-514/07P, C-528/07P and C-532/07P that disclosure of pleadings lodged before the Court of Justice in pending court proceedings is presumed to undermine the protection of these proceedings. The Court has furthermore stated that with the closure of the proceedings there are no longer grounds to presume that disclosure of the pleadings would undermine the judicial activities of the Court⁷. However, the Court has admitted the possibility that disclosure of pleadings relating to court proceedings, which are closed but connected to other proceedings which remain pending, may create a risk that the later proceedings might be undermined⁸.

Accordingly, both BBVA and BPE consider that disclosure of their legal argumentation could harm their position in similar proceedings concerning the "*cláusulas suelo*" which are currently ongoing before national Courts in Spain. As BPE in particular has explained, disclosure of the requested document would compromise the equality of arms, since the bank's position would be made known to the public, undermining its position in the pending proceedings, whereas the other parties to the proceedings would not be bound by a similar obligation of disclosure.

In view of the authors' refusal, the Commission is not in position to grant access to the written observations submitted by BBVA and BPE.

3. REUSE OF THE DOCUMENTS

Regarding the observations submitted by the European Commission (documents under numbers 1 and 7), please note that you may reuse the documents disclosed free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the reuse.

With reference to the disclosed documents submitted by third parties (documents under numbers 2 to 6, 8 to 10 and 13), they have been transmitted by the Court of Justice to the Commission in its capacity as participant to the Court proceedings at stake. They are disclosed for information only and cannot be re-used without the agreement of the originator, who holds a copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

⁷ Judgment of 21 September 2010 in joined cases C-514/07P, C-528/07P and C-532/07P - *Sweden v API and Commission, API v Commission and Commission v API*, EU:C:2010:541, paragraphs 130 and 131.

⁸ *Ibid*, paragraph 132.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001, the exception to the right of access must be waived if there is an overriding public interest in disclosing the requested document. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interest protected under Article 4(2) first and second indents. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the refused document that would outweigh the public interest in the protection of commercial interests and of the ongoing national proceedings.

5. MEANS OF REDRESS

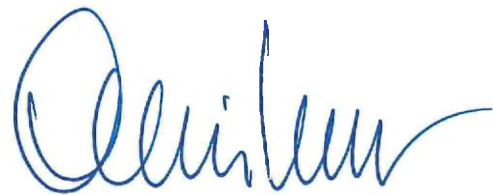
Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretary-General at the address below.

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Bruxelles

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

The Secretary General will inform you of the result of this review within 15 working days from the date of registration of your request. You will either be given access or your request will be rejected in which case you will be informed of how you can take further action.

Yours sincerely,



Luis ROMERO REQUENA

Attachments: 11