EUROPEAN COMMISSION

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Ms Jana Leutner
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Germany

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2020/5968**

Dear Ms Leutner,

I refer to your letter of 20 November 2020, registered on 21 November 2020, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 7 October 2020, addressed to the Directorate-General for Financial Stability, Financial Services and Capital Markets Union, you requested access to:

> '1. The interims study by BlackRock that is due regarding the contract on "Development of Tools and Mechanisms for the Integration of ESG Factors into the EU Banking Prudential Framework and into Banks' Business Strategies and Investment Policies". The tender specifications state that, "the interim study shall be submitted by the contractor to the contracting authority within 6 months after the date on which the contract entered into force." as the contract award notice was published in April 2020, the interim study should be out in October 2020.

[1] OJ L 345, 29.12.2001, p. 94.

[2] OJ L 145, 31.5.2001, p. 43.

2. The comments by DG FISMA and if relevant other directorates in the European Commission on the interim study as soon as they are out. The tender specifications state that, "the contracting authority will comment on the document submitted within 30 days after the date of its reception".'

The Directorate-General for Financial Stability, Financial Services and Capital Markets Union has identified the following documents as falling under the scope of your request:

- Preliminary draft interim study 'Development of tools and mechanisms for the integration of environmental, social and governance (ESG) factors into the EU banking prudential framework and into banks' business strategies and investment policies' as submitted by BlackRock Investment Management Ltd to the European Commission's services on 1 October 2020, reference Ares(2020)5179373 (hereafter 'document 1');
- Cover email from the European Commission containing general comments on the draft interim study, 16 October 2020, reference Ares(2020)5607455 (hereafter 'document 2'), which includes the following annex:
    - Preliminary draft interim study 'Development of tools and mechanisms for the integration of environmental, social and governance (ESG) factors into the EU banking prudential framework and into banks' business strategies and investment policies' containing detailed revisions (hereafter 'document 2.1');

In its initial reply of 9 November 2020, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union refused access to these documents based on the exceptions of the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, the following documents have been identified at confirmatory stage as falling within the scope of your request:

- Preliminary draft interim study 'Development of tools and mechanisms for the integration of environmental, social and governance (ESG) factors into the EU banking prudential framework and into banks' business strategies and investment policies' as submitted by BlackRock Investment

Management Ltd to the European Commission's services on 16 October 2020, reference Ares(2020)5604451 (hereafter 'document 3');

– Email from the European Commission containing comments on the draft interim study, 30 October 2020, reference Ares(2020)6162102 (hereafter 'document 4');

– Final interim study 'Development of tools and mechanisms for the integration of environmental, social and governance (ESG) factors into the EU banking prudential framework and into banks' business strategies and investment policies' as submitted by BlackRock Investment Management Ltd to the European Commission's services on 8 December 2020, reference Ares(2020)7459441 (hereafter 'document 5').

I can inform you that full access is granted to document 5.

As regards documents 1, 2, 2.1, 3 and 4, I regret to inform you that I have to confirm the initial decision of Directorate-General for Financial Stability, Financial Services and Capital Markets Union to refuse access, based on the exceptions of Article 4(1)(b) (protection of the privacy and the integrity of the individual), the first indent of Article 4(2) (protection of commercial interests) and the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data'.

In its judgment in Case C-28/08 P (*Bavarian Lager*)[3], the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[4] (hereafter 'Regulation (EC) No 45/2001') becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free

[3] Judgment of the Court of Justice of 29 June 2010, *European Commission* v *The Bavarian Lager Co. Ltd* (hereafter referred to as *'European Commission* v *The Bavarian Lager* judgment') C-28/08 P, EU:C:2010:378, paragraph 59.

[4] OJ L 8, 12.1.2001, p. 1.

movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC[5] (hereafter 'Regulation (EU) 2018/1725').

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 'requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with […] [the Data Protection] Regulation'[6].

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person […]'.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), 'there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life'[7].

Documents 2 and 4 contain personal data such as the names, addresses and phone numbers of persons who do not form part of the senior management of the European Commission. Moreover, it contains names of third party interlocutors.

The names[8] of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, 'personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if '[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests'.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

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5 OJ L 295, 21.11.2018, p. 39.

6 *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

7 Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others* v *Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

8 *European Commission* v *The Bavarian Lager* judgment, cited above, paragraph 68.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data[9]. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

2.2. Protection of the commercial interests of a natural or legal person and of the decision-making process

The first indent of Article 4(2) of Regulation (EC) No 1049/2001 provides 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'.

The first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 provides that '[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

[9] Judgment of the Court of Justice of 16 July 2015, *ClientEarth* v *European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

In accordance with the case-law of the Court of Justice, 'a European Union institution may take into account cumulatively more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 when assessing a request for access to documents held by it'[10]. Accordingly, the exceptions relating to the protection of the decision-making process and of commercial interests are, in the present case, closely connected.

The documents you request are related to an ongoing public contract for a study on the development of tools and mechanisms for the integration of ESG factors into the EU Banking Prudential Framework and into banks' business strategies and investment policies. This contract was awarded to BlackRock Investment Management Ltd following the tender procedure FISMA/2019/024/D. For the successful realisation of the contract and, consequently, of the study, it is essential that the Commission and BlackRock maintain a frank and open communication in a climate of confidence, free from external pressure.

The confidentiality of the exchanges is also emphasised in part II.8 of the published general conditions of the service contract[11]. More specifically, according to paragraph II.8.1 '[t]he contracting authority and the contractor must treat with confidentiality any information or documents, in any format, disclosed in writing or orally relating to the performance of the contract and identified in writing as confidential.' The contractor has explicitly identified the preliminary drafts of the study as confidential in writing, according to the paragraph stipulated above, and the European Commission is bound to its contractual obligations to keep this information confidential.

Documents 1 and 3 constitute different preliminary draft versions of the study that have not been validated, submitted by BlackRock to the Commission pursuant to the contract. Documents 2, 2.1 and 4 consist of more general, as well as very detailed, comments from Commission services on certain parts of the draft report, either collated in an email exchange (in documents 2 and 4), or as 'track changes' in the draft report itself (in document 2.1). Following significant progress on the study, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission decided to validate an interim version of the study submitted by BlackRock on 8 December 2020 (document 5) and proactively published it after seeking agreement from its author.

The preliminary draft versions of the study (documents 1 and 3) contain preliminary data and assessments, which have been subsequently modified and consolidated into the final interim study (document 5). The preliminary drafts that have not been validated are based on preliminary or incomplete data and analysis and their release would put in the public domain misleading data, considerations and conclusions. Their release could generate confusion and there is a real and foreseeable risk that these documents could be erroneously mistaken for a final position of the Commission, which could put

[10] Judgment of the General Court of 13 September 2013, *Netherlands* v *Commission*, T-380/08, EU:T:2013:480, paragraphs 26 and 34.

[11] Available at https://etendering.ted.europa.eu/cft/cft-documents.html?cftId=5201.

unwarranted pressure on the European Commission or BlackRock Investment Management.

The comments are provided by individual staff members of the Commission on the preliminary draft version of the study (in documents 2, 2.1 and 4) and they do not engage the institution nor present its official position on the matter. They contain general and detailed frank comments on the methodology used, on the level of detail of certain sections, pointing out inconsistencies in the data or in certain passages etc. Public access to the relevant documents is likely to bring a serious harm to the institution's decision-making process, as it would deter members of the European Commission from putting forward their views on the above-referred and other related matters in an open and independent way and without being unduly influenced by the prospect of disclosure.

Please note that the jurisprudence of the Union Courts has recognised that the capacity of the staff of the institutions to express their opinions freely must be preserved, to avoid the risk that the disclosure would lead to future self-censorship. Indeed, as the General Court has held, 'the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process'[12].

Moreover, public disclosure of these comments would also undermine the commercial interest of BlackRock by disclosing its methodology, the winning tenderer used for the purpose of drafting the study. Moreover, negative or critical comments could also undermine the reputation of the company.

Indeed, the General Court confirmed on several occasions that the protection of a commercial undertaking's reputation can require the (partial) refusal of documents based on Article 4(2), first indent of Regulation 1049/2001[13].

Consequently, I consider that the use of the exceptions under the first indent of Article 4(2) (protection of commercial interests) and the first subparagraph of Article 4(3) (protection of the ongoing decision-making process) of Regulation (EC) No 1049/2001 is justified, and that access to documents 1, 2, 2.1, 3 and 4 must be refused on that basis.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and 4(3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that 'Commission's position on how to integrate ESG risks into banking rules should be transparent' considering the huge

[12] Judgment of the General Court of 15 September 2016, *Phillip Morris* v *Commission*, T-18/15, EU:T:2016:487, paragraph 87.

[13] Judgments of the General Court of 15 January 2013, Case T-392/07, *Strack v Commission*, EU:T:2013:8, paragraph 228 and of 26 April 2016, Case T-221/08, *Strack v Commission*, EU:T:2016:242, paragraph 210.

importance the success of the Green Deal and sustainable finance strategy has for citizens. You further add that '[i]t is of major public interest to know where the Commission stands when it comes to implement the ambitious sustainability goals it set for itself with the announcement of the Green Deal. Granting access to the Commission's comments on the interim study by BlackRock is a question of respect towards EU citizens, as well as a basic element of democratic transparency'.

These are general considerations and cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the document in question[14]. You do not provide sufficient arguments showing why, having regard to the specific facts of the case, a public interest is so pressing that it overrides the need to protect the document in question. As mentioned above, these comments reflect the position of individual staff members and do not engage the institution as a whole.

In this context, please note that general considerations cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question. In fact, I consider that the public interest has been served in this matter by the full disclosure of the validated final interim study (document 5).

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(2) and 4(3) of Regulation (EC) No 1049/2001.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness[15], provides further support to this conclusion.

Please note also that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested.

However, for the reasons explained above, no meaningful partial access can be granted to documents 1, 2, 2.1, 3 and 4 without undermining the interests described above.

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[14] Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

[15] Judgment of the Court of Justice of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau Gmbh*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; *Commission* v *Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

Providing partial access to the preliminary draft versions of the interim report, that were marked as confidential by the contractor, would allow for a comparison with the final validated report, giving a clear indication on what parts and what issues the Commission was discussing with the contractor, which in turn would open up both parties to external pressure and jeopardise the successful completion of the contract.

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

As regards document 5, this is fully disclosed. Please note that this document is a study carried out by external experts. It does not reflect the position of the Commission and cannot be quoted as such.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission
Ilze JUHANSONE
Secretary-General

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION

Enclosures: (1)