



## EUROPEAN COMMISSION

LEGAL SERVICE  
The Director General

Brussels, 30<sup>th</sup> March 2021

**By email**

Mr Alexander Johnston  
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**Subject: Request for access to documents**

Ref.: Your request of 22 February 2021 registered on 25 February 2021 under reference GestDem2021/1067

Dear Mr Johnston,

I refer to your above-referenced request for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>.

Your request concerns the following written observations submitted in the Case C-493/17 (*“Weiss and others”*):

- the European Central Bank (“ECB”);
- the French Government;
- the German Government.

**1. ASSESSMENT OF THE WRITTEN OBSERVATIONS OF THE THIRD PARTIES**

The Commission has consulted the authors of the respective documents on their disclosure, in accordance with Article 4(4) of Regulation (EC) No 1049/2001.

Following these consultations, I would like to inform you that:

- the ECB refuses access to its written observations, considering that they are covered by the exception provided for in the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 (*“the financial, monetary or economic policy of the Community or a Member State”*), as will be explained in point 2.1;

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<sup>1</sup> OJ L 145, 31.05.2001, page 43.

- the Government of France refuses access to its written observations, considering that they are covered by the exceptions provided for in Article 4(2), second and third indents of Regulation (EC) No 1049/2001 (“*protection of court proceedings*” and “*protection of the purpose of investigations*”), as will be explained in points 2.2 and 2.3;
- the Government of Germany refuses access to its written observations, considering that they are covered by the exception provided for in Article 4(2), second indent of Regulation (EC) No 1049/2001 (“*protection of court proceedings*”) as will be explained in point 2.2.

## 2. REASONS FOR REFUSAL

As stated above, the ECB and the Governments of France and Germany have refused access to their written observations, considering that they are covered by the exceptions provided for in Article 4(1)(a) and Article 4(2), second and third indents of Regulation (EC) No 1049/2001.

Given that third parties estimate that their written observations are entirely covered by the exceptions mentioned above and they cannot be made publicly available, the Commission is unable to grant access to the documents requested.

### 2.1. *Protection of the financial, monetary or economic policy*

Article 4(1)(a), fourth 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 : [...] – the financial, monetary or economic policy of the Community or a Member State.”

In its response to the Commission’s consultation, the ECB indicates that its written observations contain confidential information regarding monetary policy considerations and argues that disclosing them at present may lead to misinterpretation and reduce the ECB’s ability to react in emergency situations. Furthermore, the ECB considers that disclosure might have an impact on the expectations, behaviour and decisions of market participants and create unwarranted uncertainty about the functioning of the Public Sector Purchase Programme (PSPP). Finally, the ECB considers that releasing the written observations could hinder its ability to take decisions, thus hampering the smooth functioning of the Eurosystem’s monetary policy.

Accordingly, the ECB concludes that the document requested is covered by the abovementioned exception and cannot be disclosed, even partially.

Please note that the exception of Article 4(1)(a), first indent (“*protection of the financial, monetary or economic policy*”) has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

### 2.2. *Protection of court proceedings*

The Governments of France and Germany have informed the Commission that they oppose disclosure of their written observations since covered by the exception set out in Article 4(2), second indent, of Regulation (EC) No 1049/2001, which 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 maintain the independence of the EU institutions in their dealings with the Court and to ensure the proper course of justice. In this sense, the Court of Justice has recognized 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 Court.<sup>2</sup>

However, the Court has admitted the possibility that disclosure of pleadings relating to court proceedings which are closed but that are connected to other proceedings which remain pending may create a risk that the later proceedings might be undermined.<sup>3</sup>

The French and German authorities indicate that their written submissions are intrinsically linked to the judgment of the German Federal Constitutional Court of 5 May 2020 and to the pending national proceedings. Those authorities consider that, despite the judgment of 5 May 2020, the main proceedings which gave rise to the preliminary ruling C-494/17 cannot be considered closed. In fact, the German Federal Constitutional Court gave the ECB three months to justify the proportionality of the Public Sector Purchase Programme (PSPP). In this respect, the French authorities argue that their written observations in Case C-493/17 contain an analysis of the question of the proportionality of that Programme.

Against this background, the French and German authorities maintain that public disclosure of the written observations lodged with the Court Justice in Case C-493/17 would seriously undermine the ongoing proceedings before the by German Federal Constitutional Court.

Consequently, the requested documents must be refused in their entirety since they are covered by the exception provided for in Article 4(2), second indent, of Regulation (EC) No 1049/2001.

### 2.3. Protection of the investigations

The French authorities consider that their written observations are also covered by the exception provided for in Article 4(2), third indent, of Regulation (EC) No 1049/2001, which states by way of exception that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] – the purpose court proceedings [...] unless there is an overriding public interest in disclosure*".

In this respect they argue that, having regard to the judgment rendered by the German Federal Constitutional Court, it is reasonable to think that the European Commission is likely to open an infringement procedure against Germany for a breach of jurisdiction. In their view, that pre-litigation procedure would have an obvious connection with the judicial proceedings relating to Case C-493/17. In the light of this, the French authorities consider that it is justified, at present, to refuse to disclose the written observations submitted by the French government in the context of Case C-493/17, based on the exception for the protection of investigations laid down in Article 4(2), third indent, of Regulation (EC) No 1049/2001.

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<sup>2</sup> Judgment of the Court of Justice of 21 September 2010, Joined Cases C-514/07P, C-528/07P and C-532/07P, *Sweden and Others v API and Commission*, ECLI:EU:C:2010:541, paragraphs 130 and 131.

<sup>3</sup> *Ibid.*, paragraphs 132 and 133.

### **3. 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 interests protected under Article 4(2), second and third indents of that Regulation. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the refused documents that would outweigh the public interest in the protection of the ongoing national proceedings and a possible infringement procedure against a Member State.

### **4. 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 Secretariat-General at the address below:

European Commission  
Secretariat-General  
Unit C.1. 'Transparency, Document Management and Access to Documents'  
BERL 7/076  
B-1049 Brussels

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,

[*signed electronically*]  
Daniel CALLEJA CRESPO