



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 12 April 2021

By email

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Subject: Request for access to documents

Ref.: Your request of 8 March 2021 registered under reference GestDem 2021/1332

Dear Mr Fennelly,

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,¹ by which you request the following written observations in Case C-62/14 - *Gauweiler*.

1. European Commission;
2. European Parliament;
3. European Central Bank;
4. France;
5. Germany.

1. WRITTEN OBSERVATIONS SUBMITTED BY THE COMMISSION (DOCUMENT 1)

The Commission's written observations have already been made public following a previous request for access under Regulation (EC) No 1049/2001. This document is publicly available on the Legal Service's website, following the link:

http://ec.europa.eu/dgs/legal_service/submissions_cour_en.htm.

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¹ OJ L 145, 31.05.2001, page 43.

2. WRITTEN OBSERVATIONS SUBMITTED BY OTHER PARTIES (DOCUMENTS 2 TO 5)

As far as the written observations of the other parties are concerned, 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 European Parliament, the European Central Bank and the Government of Germany have agreed to the disclosure of their written observations (documents 2, 3 and 5);
- the Government of France (document 4) refuses access to its written observations, considering that they are covered by the exceptions provided for in Article 4(1)(a), fourth indent and Article 4(2), second and third indents and of Regulation (EC) No 1049/2001 (“*protection of the financial, monetary or economic policy of the Community or a Member State*”, “*protection of court proceedings*” and “*protection of the purpose of investigations*”), as will be explained in *points 3.1, 3.2 and 3.3*.

Please note that some personal data has been deleted in documents 3 and 5, in accordance with Article 4 (1)(b) of Regulation (EC) No 1049/2001, as explained in *point 4* below.

Accordingly, you will find enclosed a copy of the expunged versions of documents 3 and 5, as well as the original version of document 2 in German, the language of the proceedings. Please note that English versions are not available.

The disclosed documents were transmitted by the Court of Justice to the Commission in its capacity as participant in the court proceedings. Access to them is granted for information only and they cannot be re-used without the agreement of the originators, who may hold the copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

3. REFUSAL OF THE WRITTEN OBSERVATIONS SUBMITTED BY FRANCE (DOCUMENT 4)

3.1. Protection of the financial, monetary or economic policy of the Community or a Member State

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 this regard, the French authorities mention that the Member States have a wide margin of appreciation for the purposes of determining whether the disclosure of documents falling within the fields covered by this exception is liable to harm the public interest.²

In its response to the Commission’s consultation, the French Government indicates that the disclosure of their written observations risks undermining European monetary policy because they discuss the existence of an internal audit of the Eurosystem and the absence of the purchase of certain securities by the Banque de France.

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

² Judgment of the General Court of 13 January 2011, Case T-362/08, *IFAW Internationaler Tierschutz-Fonds v Commission*, ECLI:EU:T:2011:6, paragraphs 104 and 105.

3.2. Protection of court proceedings

Article 4(2) second 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 court proceedings [...] unless there is an overriding public interest in disclosure*".

The purpose of the above-mentioned exception is to protect the integrity of court proceedings and to ensure the proper course of justice. In this regard, the Court has admitted in Joined Cases C-514/07P, C-528/07P and C-532/07P (*API* judgment), 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 undermined³.

In this specific case, the French authorities indicate that, although Case C-62/14 and the national court proceedings which gave rise to the reference for a preliminary ruling in the context of this case are now closed, two related proceedings are still pending before the German Constitutional Court.

On the one hand, following the judgment of 5 May 2020, the applicant Peter Gauweiler considers that the Bundestag and the Federal Government are still required to act with the ECB so that the Governing Council meets the requirements of the judgment of the Federal Constitutional Court of Karlsruhe, in connection with the monitoring of compliance with the principle of proportionality. On the other hand, the Alternative für Deutschland (AfD) group in the Bundestag announced in a press release on 28 August 2020 that it had filed a complaint relating to the "Pandemic Emergency Purchase Program", the monetary policy program launched by the ECB in March 2020 in order to combat the economic crisis linked to the Covid-19 pandemic.

In the light of the above, access to the observations submitted by the Government of France must be refused.

3.3. Protection of the purpose of 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 it is reasonable to envisage that, having regard to the judgment delivered by the German Federal Constitutional Court, the Commission is likely to open an infringement procedure against Germany. The French authorities consider that such a procedure should, in the present context, be assimilated to an investigation procedure within the meaning of that article. In their view, the pre-litigation procedure would have an obvious connection with the judicial proceedings relating to the *Gauweiler* case.

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-62/14, based on the exception for the protection of investigations laid down in Article 4(2), third indent, of Regulation (EC) N0 1049/2001.

³ Judgment of the Court of Justice of 21 September 2010, Joined Cases C-514/07P, C-528/07P and C-532/07P, *Sweden a.o. v API and Commission*, ECLI:EU:C:2010:541.

4. PROTECTION OF PERSONAL DATA (DOCUMENTS 3 AND 5)

As stated above, some personal data has been redacted in the disclosed documents *i.e.* the handwritten signatures of the lawyers acting on behalf of the European Central Bank in document 3, as well as the contact details and handwritten signatures of the lawyers representing the Government of Germany in document 5.

Article 4(1)(b) of Regulation (EC) No 1049/2001 states by way of exception that “*the 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*”.

As the Court of Justice has ruled, when access to documents is requested containing personal data, the Data Protection Regulation, *i.e.* Regulation (EU) No 2018/1725,⁴ becomes fully applicable.⁵

Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data “*means any information relating to an identified or identifiable natural person [...]*”. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.⁶

With regard to the personal data such as names, signatures, functions, telephone numbers and other information relating to the institution's officials, the General Court has recognised in its judgment in Case T-39/17 that they fall within the notion of “private life” regardless of whether this data is registered in the context of a professional activity⁷ and, therefore, it constitutes personal data in the meaning of Article 3(1) of Regulation (EU) No 2018/1725. Consequently, the handwritten signatures of the lawyers acting on behalf of the European Central Bank in document 3 have been redacted.

Furthermore, in its judgment in Joined Cases C-465/00, C-138/01 and C-139/01 the Court has confirmed that “*there is no reason of principle to justify excluding activities of a professional nature [...] from the notion of private life*”.⁸

On this basis, the contact details and handwritten signatures of the lawyers representing the Government of Germany in document 5 have been deleted, since it constitutes personal data in the meaning of Article 3(1) of Regulation (EU) No 2018/1725.

⁴ 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 movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 205 of 21.11.2018, page 39).

⁵ Judgment of the Court of Justice of 29 June 2010, Case C-28/08P, *European Commission v The Bavarian Lager Co. Ltd*, ECLI:EU:C:2010:378, paragraphs 59 and 63. Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation (EC) 2018/1725.

⁶ Judgment of the Court of Justice of 20 December 2017, Case C-434/16, *Peter Nowak v Data Protection Commissioner*, ECLI:EU:C:2017:994, paragraphs 33-35.

⁷ Judgment of the General Court of 19 September 2018, Case T-39/17, *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission*, ECLI:EU:T:2018:560, paragraphs 37, 38 and 43.

⁸ Judgment of the Court of Justice of 20 May 2003, Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof and Others v Österreichischer Rundfunk*, ECLI:EU:C:2003:294, paragraph 73.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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 met and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) No 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation (EU) No 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established 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 request, 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 subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subject concerned would be prejudiced by 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 above-mentioned 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.

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) first indent 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 the ongoing national proceedings and a possible infringement procedure against a Member State.

Please note that the exceptions of Article 4(1)(a), first indent (*"protection of the financial, monetary or economic policy"*) and Article 4(1)(b) (*"protection of personal data"*) have an absolute character and do not envisage the possibility of demonstrating the existence of an overriding public interest.

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 Bruxelles

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

Yours sincerely,

[signed electronically]
Daniel CALLEJA CRESPO

Attachments: 3