



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 17 July 2020

By email

Mr Nicholas Haagensen
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Denmark

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Subject: Request for access to documents

Ref.: Your request of 13 May 2020 registered on 14 May under reference GestDem 2020/2851

Dear Mr Haagensen,

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 documents¹.

Your request concerns “*The legal observations of the parties and interveners in the Case C-493/17 (Weiss and others).*”

1. IDENTIFICATION OF THE DOCUMENTS

In response to your request, the written observations submitted by the following parties have been identified:

1. the European Commission;
2. the European Central Bank (“ECB”);
3. the Deutsche Bundesbank;
4. the Finnish Government;
5. the French Government;
6. the German Government;
7. the Greek Government;
8. the Italian Government;
9. the Portuguese Government;
10. Mr Lucke *a.o.*;
11. Mr Weiss *a.o.*;
12. Mr von Stein *a.o.*

¹ OJ L 145, 31.05.2001, page 43.

Although, according to the judgment of the Court of Justice², Peter Gauweiler had submitted written observations, the Court of Justice did not notify this document to the Commission. Article 2(3) of Regulation (EC) No 1049/2001 states that “[T]his regulation shall apply to all documents held by an institution [...]”. Since the Commission does not hold the submission made by Mr Gauweiler, it is unable to consider it for the purpose of your request.

2. COMMISSION’S WRITTEN OBSERVATIONS (DOCUMENT 1)

The Commission 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_fr.htm

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3. WRITTEN OBSERVATIONS OF THE OTHER PARTIES (DOCUMENTS 2 TO 12)

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 Deutsche Bundesbank, the Governments of Finland, Greece, and Portugal as well as Mr Lucke a.o. and Mr Weiss a.o. have agreed to the disclosure of their written observations (documents 3, 4, 7, 9, 10 and 11) with the exception of some personal that is covered by the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001, as will be explained below in point 6;
- the ECB (document 2) 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 5.1;
- the Government of France (document 5) 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 5.2 and 5.3;
- Germany (documents 6) 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 5.2;
- the Government of Italy (document 8) and Mr von Stein a.o. (document 12) did not reply to the Commission's consultations.

4. WRITTEN OBSERVATIONS DISCLOSED (DOCUMENTS 3, 4 AND 7 TO 12)

With regard to the documents for which the Commission did not receive a reply to its consultations (documents 8 and 12), I would like to inform you that access can be granted in accordance with Regulation (EC) No 1049/2001.

² Judgment of the Court of Justice of 11 December 2018, ECLI:EU:C:2018:1000.

In fact, the Court of Justice has recognised in its judgment in Joined Cases C-514/07P, C-528/07P and C-532/07P that, 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 would undermine those proceedings³.

Since Case C-493/17 is now closed, and in the absence of an objection from the Italian Government and the applicant, I conclude that access can be granted to the relevant documents in accordance with Regulation (EC) No 1049/2001, with the exception of some personal data, as will be explained in point 6.

Accordingly, please find enclosed :

- a copy of the German translation, made by the services of the Court of Justice, of the written observations by Finland, Italy and Portugal (documents 4, 8 and 9) and a redacted version of the written observations by Greece (document 7)⁴.
- a redacted version of the submissions by the Deutsche Bundesbank (document 3), Mr Lucke a.o. (document 10), Mr Weiss a.o. (document 11) and Mr von Stein a.o. (document 12) in German⁵.

Please note that these 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.

5. WRITTEN OBSERVATIONS REFUSED (DOCUMENTS 2, 5 AND 6)

5.1. Protection of the financial, monetary or economic policy (document 2)

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.

³ 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.

⁴ Original versions were in the respective language of each Member State.

⁵ The language of the proceedings.

5.2. Protection of court proceedings (documents 5 and 6)

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 Court⁶. 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 undermined⁷.

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 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.

5.3. Protection of the investigations (document 5)

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

⁶ See footnote 3.

⁷ *Ibid.*, paragraphs 132 and 133.

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.

6. PROTECTION OF PERSONAL DATA (DOCUMENTS 2, 5 AND 6)

As mentioned in point 3, some personal data has been redacted in the documents disclosed since covered by the exception provided for in Article 4 (1)(b) of Regulation (EC) No 1049/2001, in accordance with the European Union legislation regarding the protection of personal data. This information is the following:

- phone, email address, private address and handwritten signatures of the lawyers acting for the Deutsche Bundesbank, Mr Lucke *a.o.*, Mr Weiss *a.o.* and Mr von Stein *a.o.* (first and last pages of documents 3, 10, 11 and 12);
- phone and email address of the lawyer acting for the Greek Government (last page of document 7). On this page a comment of the Court of Justice on the quality of the French translation has also been deleted;
- the full addresses of the interveners (first page of document 10);
- the name and the handwritten signatures of the Court's officials (first page of documents 10 and 11).

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 in Case C-28/08P, when access to documents containing personal data is requested, the Data Protection Regulation, *i.e.* Regulation (EU) 2018/1725⁸, becomes fully applicable⁹.

Article 3(1) of Regulation (EU) 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 data¹⁰.

As regards the personal data of the officials of the institutions, the General Court has confirmed, in its judgment in Case T-39/17, that the information such as names, signatures, functions, telephone numbers and other information pertaining to staff members of an institution fall within the notion of "private life", regardless of whether this data is registered

⁸ 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).

⁹ Judgment of the Court of Justice of 29 June 2010, Case C-28/08 P, 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 (EU) 2018/1725.

¹⁰ 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.

in the context of a professional activity or not¹¹. Therefore, the names and the handwritten signatures of the Court's officials (documents 10 and 11) as well as the comment on the quality of the translation (document 7) must be refused, since this information constitutes personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

Furthermore, the Court has recognized in its judgment in Joined Cases C-465/00, C-138/01 and C-139/01 that *"there is no reason of principle to justify excluding activities of a professional nature [...] from the notion of private life"*¹². On this basis, the above-mentioned personal data relating to the lawyers representing the Deutsche Bundesbank, Greece, Mr Lucke *a.o.*, Mr Weiss *a.o.* and Mr von Stein *a.o.* have been redacted in documents 3, 7, 10, 11 and 12, since they also 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 met 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.

According to Article 9(1)(b) of Regulation (EU) 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 subjects 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 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 disclosure of the personal data concerned.

¹¹ Judgment of the General Court of 19 September 2018, Case T-39/17, *Chambre de commerce and d'industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission*, ECLI:EU:T:2018:560, paragraphs 37, 38 and 43.

¹² 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.

7. 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 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.

8. 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: 8