



EUROPEAN COMMISSION

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Mr Stefan Grasgruber-Kerl
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Vienna
Austria

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION No (EC) 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2021/2495**

Dear Mr Grasgruber-Kerl,

I refer to your letter of 5 May 2021, registered on the same day, 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 documents² (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delay in the handling of your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 18 April 2021, you requested access to, I quote:

- “Österreichischer Aufbau- und Resilienzplan 2020-2026” / Austrian contribution to the European Recovery Fund (Document delivered by the Austrian government in April 2021.’

In its initial reply of 4 May 2021, the Recovery & Resilience Task Force identified two sets of documents as falling under the scope of your request, namely:

- First Draft of the Austrian Recovery and Resilience Plan (RRP), received on 13 April 2021, reference Ares(2021)2492711(hereafter ‘document 1’);

¹ Official Journal L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

- First Draft of the Austrian RRP, received on 13 April 2021, reference Ares(2021)2510245 (hereafter ‘document 2’)

I consider your request to be limited to the Austrian draft plan delivered by the Austrian government in April 2021.

The Recovery & Resilience Task Force refused access to these documents on the basis of the exception provided for in the fourth indent of Article 4(1)(a) (protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State) and the first subparagraph of Article 4(3) (protection of the ongoing decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application you request a review of this position.

I would like to clarify that several documents were registered under the same Ares reference as they concern the same subject matter.

The documents falling within the scope of your request are the following:

- First Draft of the Austrian Recovery and Resilience Plan, Annex I ‘Reforms and Investment’ containing description of the individual components of the plan and Excel table containing the economic impact assessment corresponding to ‘document 1’;
- Annex I ‘Reforms and Investment’ and Excel table containing the economic impact assessment, corresponding to ‘document 2’.

Finally, I would also like to clarify that ‘document 2’ consists of a corrected version of one component of the draft plan delivered on the same day by the Austrian authorities.

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 service concerned at the initial stage.

Following this review, and taking into account the reply of the authorities of the Member State concerned, I regret to inform you that access to the requested documents must be refused based on the exceptions of the fourth indent (protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State) of Article 4(1)(a), of the first subparagraph (protection of the decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning the assessment are set out below

2.1. Consultation of the Austrian authorities

According to Article 4(4) and 4(5) of Regulation (EC) No 1049/2001, as regards third party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed. According to Article 4(5) of the same Regulation, a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

As the requested documents originate from Austria, in accordance with Article 4(4) and (5) of Regulation (EC) No 1049/2001, the Secretariat-General of the European Commission launched a consultation with the Austrian authorities as to the possible disclosure of the documents in question.

In reply to these consultations, the Austrian authorities opposed the disclosure of the documents invoking Article 4(5) of Regulation (EC) No 1049/2001.

In their reply, the Austrian authorities argued that the requested documents are not official documents, but preliminary and incomplete drafts shared confidentially in view of the preparation of the final plan, submitted formally on 30 April 2021.

The Austrian authorities referred to Article 25 ‘Transparency’ of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (hereafter ‘Regulation (EU) 2021/241’)³, and argued its purpose is the creation of a fruitful cooperation between Member States and the European Commission and that if preliminary drafts are published, this could paralyse the work of the EU institutions involved.

The Austrian authorities argued that Article 4(1)(a) of Regulation (EC) No 1049/2001 applies, as the publication of confidential and informal drafts, which had not yet been politically agreed upon, may endanger public security in Austria, as it may lead to unjustified speculation on possible/alleged political events and thus to political manifestations and destabilisation. Therefore, the Austrian authorities argued that the publication of the documents would be contrary to the public interest of Austria, as it would undermine its economic policy.

In the opinion of the Austrian authorities, there is also a risk of undermining Article 4(3) of Regulation (EC) No 1049 as only the final plan was given a positive assessment by the European Commission, whereas the documents in question are non-coordinated versions, which were not politically endorsed and which do not allow any conclusions to be drawn.

Therefore, in the opinion of the Austrian authorities, public disclosure of the documents at this stage would undermine the protection of the decision-making process and the public interest as regards the financial, monetary or economic policy of the Union or a Member State in the sense of Article 4(3) and the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001.

³ OJ L 57, 18.2.2021, p. 17.

In its judgment in Case T-74/16 (*Pagkyprios Organismos Ageladotrofon v Commission*), the General Court considered that ‘before refusing access to a document originating from a Member State, the institution concerned must examine whether that Member State has based its objection on the substantive exceptions in Article 4(1) to (3) of Regulation No 1049/2001 and has given proper reasons for its position. Consequently, when taking a decision to refuse access, the institution must make sure that those reasons exist and refer to them in the decision it makes at the end of the procedure’⁴.

The General Court clarified in this judgment that the institution ‘must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document applied for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access provided for in Article 4(1) to (3) of the regulation applies’⁵.

Moreover, according to the case-law regarding Article 4(5) of Regulation (EC) No 1049/2001, ‘the institution to which a request for access to a document has been made does not have to carry out an exhaustive assessment of the Member State’s decision to object by conducting a review going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/2001’⁶.

The General Court also clarified that the institution dealing with the request for public access is not required to carry out a specific and individual examination of a document originating from a Member State that refused to grant access thereto⁷.

The Secretariat -General has carried out an assessment at first sight of the reply provided by Austria. Following this assessment, I conclude that the Austrian authorities have based their substantive opposition to disclosure of the requested documents on the exceptions of the fourth indent (protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State) of Article 4(1)(a) and the first subparagraph (protection of the decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001, and have given proper reasons in support of their position.

These arguments *prima facie* justify the application of the exceptions invoked by the national authorities for the reasons set out below.

⁴ Judgment of the General Court of 8 February 2018, *Pagkyprios Organismos Ageladotrofon v Commission*, T-74/16, EU:T:2018:75, paragraph 55.

⁵ *Pagkyprios Organismos Ageladotrofon v Commission* judgment quoted above, paragraph 56.

⁶ *Ibid*, paragraph 57.

⁷ *Ibid*, paragraphs 60 and 61.

2.2. Protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State and the decision-making process

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’⁸. Accordingly, the exceptions relating to the protection of the financial, monetary or economic policy and the decision-making process are, in the present case, closely connected.

2.2.1. Protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State

The fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Community or a Member State public security’.

I would like to underline that documents disclosed under Regulation (EC) No 1049/2001 are disclosed to the public at large (*‘erga omnes’*) and not only to the applicant who originally requested the documents.

As far as the protection of the financial, monetary or economic policy is concerned, the Court of Justice stressed in the *In ‘t Veld* ruling that the institutions ‘must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest’⁹.

Consequently, ‘the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exception [...] relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’¹⁰.

Moreover, the General Court ruled that, as regards the interests protected by the above-mentioned Article, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care.

⁸ Judgment of the General Court of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraphs 26 and 34.

⁹ Judgment of the Court of Justice of 3 July 2014, *Council v In ‘t Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

¹⁰ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

Such a decision requires, therefore, a margin of appreciation'¹¹. This was further confirmed by the Court of Justice¹².

Following the assessment of the national authorities' reasons for refusal, I consider these reasons to be *prima facie* proper.

According to Article 18(3) of Regulation (EU) 2021/241, 'the recovery and resilience plan presented by the Member State may be submitted in a single integrated document together with the National Reform Programme and shall be officially submitted, as a rule, by 30 April. A draft recovery and resilience plan may be submitted by Member States from 15 October of the preceding year'.

The identified documents were drafted by the Austrian national authorities. They include confidential exchanges on the draft recovery and resilience plan of Austria, submitted to the European Commission for consultation purposes, as a preparatory step for the purpose of the final submission of the plan.

The Austrian plan sets out the reforms and public investment projects that Austria plans to implement with the support of the Recovery and Resilience Facility that is the key instrument at the heart of NextGenerationEU, and contains projects that cover the entire lifetime of the Recovery and Resilience Facility until 2026. It is structured around four policy priorities. These include reform and investment measures relating to the green recovery, covering renovation, mobility, biodiversity, circular economy, and climate neutrality; digital recovery, covering broadband, schools, public service, and enterprises, knowledge based recovery, including research, up- and reskilling, education, and strategic innovation and fair recovery, encompassing healthcare, resilient communities, art and culture, and reforms.

The European Commission assessed Austria's plan based on the criteria set out in Regulation (EU) 2021/241. The European Commission's analysis considered, in particular, whether the investments and reforms set out in the plan contribute to effectively addressing challenges identified in the context of the European Semester, contain measures that effectively support the green and digital transitions, and contribute to strengthening the growth potential, job creation and economic and social resilience of the Member State.

The requested documents specify in detail an extensive set of reinforcing reforms and investment projects, and in particular details about the initially suggested milestones and targets, as well as details about the background for the foreseen costs and other specific details about financial planning and policy of Austria.

¹¹ Judgment of the General Court of 11 July 2018, *ClientEarth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23. See also Judgment of the Court of Justice of 3 July 2014, *Council v In 't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

¹² Judgment of the Court of Justice of 19 March 2020, *ClientEarth v European Commission*, C-612/18 P, EU:C:2020:223, and paragraphs 68 and 83.

Having conducted an assessment at first sight of the requested preliminary documents, and in view of the justifications provided by the Member State from which they originate, I consider that the release of the documents at this stage could negatively impact the economic policy of Austria, given the size of the plan on the Gross Domestic Product. Disclosing the detailed withheld information would produce serious political implications that could negatively impact the disbursements of the EUR 3.46 billion.

Furthermore, public access to these documents may lead to interferences and speculations and eventually entail risks to financial stability. Taking into account their preliminary nature, it is likely that access to the documents would lead to unjustified speculations on the financial policy of the Member State by means of textual comparisons. Their disclosure would also generate unwarranted pressures on the European Commission and the other European Union institutions. Given the preliminary nature and the content of the documents requested, I consider this risk as reasonably foreseeable and non-purely hypothetical.

In this context, I note that the General Court has expressly recognised that if the release of documents would open the door to speculation and have a negative impact on the stability of a Member State's financial, monetary or economic policy, this can warrant the use of the exception provided for in the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001¹³.

I conclude that the reasons provided by Austria justify that the requested documents cannot be disclosed in accordance with the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 due to the detailed information on financial and economic policy in Austria under the Recovery and Resilience Facility, which, if disclosed to the public at this stage, could undermine the protection of '[...] the financial, monetary or economic policy of a Member State'.

2.2.1. Protection of the decision-making process

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'. As explained above, *prima facie*, the Austrian authorities have provided proper justifications on how the draft Plan submitted by these authorities would undermine the decision-making process, in addition to the financial and economic interests at stake.

¹³ Judgment of the General Court of 26 April 2018, *Espírito Santo Financial v European Central Bank*, T-251/15, EU:T:2018:234, paragraph 92.

On 21 June 2021, the European Commission adopted a positive assessment of Austria's recovery and resilience plan¹⁴. The Commission has adopted a proposal for a Council Implementing Decision to provide €3.5 billion in grants to Austria under the RRF¹⁵. The Council adopted the Council Implementing Decision on 13 July 2021, based on which €450 million were disbursed to Austria in pre-financing on 28 September 2021. This represents 13% of the total allocated amount for Austria.

In addition, the operational arrangements that will further specify elements, in particular, for the monitoring and implementation of the plan, in accordance with Article 20(6) of Regulation (EU) 2021/241, are still to be agreed between the European Commission and Austria.

The European Commission will authorise further disbursements based on the satisfactory fulfilment of the milestones and targets outlined in the Council Implementing Decision, reflecting progress in the implementation of the investments and reforms. When carrying out the assessment, the European Commission acts in close cooperation with the Member State concerned.

Therefore, the decision-making process is not concluded with the approval of the recovery and resilience plan of Austria, as the European Commission has to decide whether the milestones and targets are implemented and the performance of the Member State is satisfactory.

The negotiations between the European Commission and Austria on the recovery and resilience plan lasted for several months and were carried out in conditions of strict confidentiality, which is necessary in order to make progress on a document of technical and political complexity. During this phase, the European Commission provided specific recommendations to Austria to help it address outstanding issues. When carrying out the assessment, the European Commission acts in close cooperation with the Member State in a climate of mutual trust.

Disclosing the requested documents, at the present stage, would strain the working relations between the European Commission and the Austrian national authorities. As a result, the European Commission would be deprived of the possibility to explore all available paths for the ongoing decision-making process.

Clearly, the disclosure of preliminary drafts, against the position taken by the authorities, would undermine the climate of mutual trust with the Member State concerned and seriously undermine the ongoing decision-making, the independence and objectivity of which must be ensured.

¹⁴ https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3052

¹⁵ https://eur-lex.europa.eu/resource.html?uri=cellar:45ad725b-d27a-11eb-ac72-01aa75ed71a1.0002.02/DOC_1&format=PDF

Consequently, I conclude that the reasons provided by Austria justify that, pursuant to the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, access cannot be granted to the requested documents, as their public disclosure would seriously undermine the ongoing decision-making process.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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

The exception laid down in the first subparagraph of Article 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.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal¹⁶.

In your confirmatory application, you argue that Member States are required to consult with the civil society on the Recovery and Resilience Fund plans. You further argue that this was done by the Austrian government by establishing an e-mail address, however that civil society organisations never received replies or the draft plans. Finally, you argue that the civil society needs access to these draft plans to make the consultation process meaningful, to see which points have been taken up and which ones declined.

I would like to clarify that the way Member States conduct consultations with stakeholders consultation is decided at the national level. There is no legal requirement or obligation, pursuant to Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility, for Member States how to consult stakeholders.

Furthermore, I would like to note that the right of access to documents is not a general and absolute right, but may be subject to limitations and restrictions, as recognised by the Courts¹⁷.

Transparency is indeed an essential component of the decision-making process of the EU. Furthermore, I agree that sharing information regarding national recovery and resilience plans with the public is particularly important.

¹⁶ Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, T-727/15, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

¹⁷ See judgment of the General Court of 3 May 2018, *Malta v Commission*, T-653/16, EU:T:2018:241 paragraph 160.

I would like to underline that the European Commission has put significant efforts to increase the transparency of its work in the recent past. The fact that other documents regarding the same subject matter have already been made publicly available on the Europa website¹⁸, only reinforce this conclusion.

It needs to be noted that national plans are prepared by Member States, hence their publication falls primarily under their responsibility. In an effort to promote transparency of National plans, the European Commission compiles the links to the Member States' websites¹⁹.

Although it is for the applicant to demonstrate the existence of such an overriding public interest in disclosure, I have not been able to identify any public interest in the disclosure of the refused documents capable of overriding the public interest protected by the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

Consequently, I have come to the conclusion that no overriding public interest in disclosure of the requested documents could be established.

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, public disclosure of any part of the documents would endanger the interests protected at this stage of the procedure. Therefore, no partial access is possible without undermining the interests described above.

¹⁸ https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en#the-recovery-and-resilience-facility;

¹⁹ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3126
https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en#national-recovery-and-resilience-plans

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

