



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 25 October 2018

Mr Nicholas Haagensen
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in Crisis
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BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGMENT OF RECEIPT

Subject: Request for access to documents

Ref.: Your request of 27 July 2018 registered under reference GestDem 2018/4071

Dear Mr Haagensen,

I refer to your request for access to documents, under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹.

In accordance with the fair solution agreed upon on 24 May 2018, the Legal Service has split your request in two consecutive batches. On 26 July 2018 you have received the first reply concerning case C-370/12 (Pringle).² The present reply refers to the second batch of your request concerning “*the legal submissions of the parties and interveners/observers in the Case C-62/14 (Gauweiler)*”.

The submissions in the Legal Service's files lodged with the Court of Justice by the different parties are the following:

1. European Commission
2. Mr Gauweiler,
3. Mr Bandulet,
4. Mr Huber and others,
5. Mr von Stein and others,
6. Fraktion DIE LINKE im Deutschen Bundestag,

¹ OJ L 145, 31.05.2001, page 43.

² [Ares\(2018\)3966929](#)

7. the Government of Germany,
8. the Government of Ireland,
9. the Government of Greece,
10. the Government of Spain,
11. the Government of France,
12. the Government of Italy,
13. the Government of Cyprus,
14. the Government of the Netherlands.
15. the Government of Poland,
16. the Government of Portugal,
17. the Government of Finland,
18. the European Parliament,
19. the European Central Bank.

Please note that although the judgment in the concerned case refers to the observations made by the Deutscher Bundestag, the Court of Justice has not notified to the Commission those observations. Article 2(2) of Regulation (EC) No 1049/2001 states that "*[T]his Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and its possession, in all areas of activity of the European Union*". Since the Commission does not hold the written submissions made by the Deutscher Bundestag, it is not in a position to deal with this part of your request.

1. COMMISSION'S WRITTEN OBSERVATIONS

As already communicated in our email of 16 August 2018, the submission lodged with the Court of Justice by the European Commission, is available at the link below:

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

You may reuse the European Commission's Written Observations free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the documents. Please note that the European Commission does not assume liability stemming from the reuse.

2. WRITTEN OBSERVATIONS SUBMITTED BY OTHER PARTIES

Submissions made by Mr. Gauweiler, Mr Bandulet a.o., Mr Huber a.o., Fraktion DIE LINKE im Deutschen Bundestag and by the German and Italian Governments were already made public by the Commission following a previous request for access to documents under Regulation (EC) No 1049/2001 (documents under numbers 2, 3, 4, 6, 7 and 12).

Please note that in the submission made by Mr Bandulet a.o. (document under number 3) the references to the content of a private unpublished study have been deleted in conformity with the exception provided for in Article 4(2) first indent of Regulation (EC) No 1049/2001 ("*protection of the intellectual property*")³. Disclosure of this information would infringe the legitimate interests of the copyright owner and, consequently, it would be contrary to the obligation of protection foreseen in the referred exception.

³ *[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".*

Regarding the rest of submissions made by the third parties, the Commission has consulted the authors on the disclosure of their documents, in accordance with Article 4(4) of Regulation (EC) No 1049/2001.

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

- the Governments of Greece, Spain, Cyprus, Poland, Portugal and Finland as well as the European Parliament and the European Central Bank have agreed to the disclosure of their documents (documents under numbers 9, 10, 13 and 15 to 19).
- the Governments of Ireland and of the Netherlands have not replied to the Commission's consultations (documents under numbers 8 and 14).
- Mr von Stein a.o. and the Government of France have refused to grant access to their documents (documents under numbers 5 and 11). These parties consider that their submissions must remain confidential in accordance with exceptions provided for under Regulation (EC) No 1049/2001, as will be explained below.

2.1. Written submissions to be disclosed

Regarding the submissions for which the Commission has not received a reply (documents under numbers 8 and 14), I would like to inform you that access can be granted in accordance with Regulation (EC) No 1049/2001. The Court of Justice has stated in its *API* judgment⁴ that where court proceedings have been closed by a decision of the Court there are no longer grounds for presuming that disclosure of pleadings lodged with the Court would undermine those proceedings.

Since case C-62/14 has been closed by the judgement of the Court of Justice and in the absence of any objection from the concerned parties against disclosure of their submissions, I conclude that they can be disclosed under Regulation (EC) No 1049/2001.

Accordingly, in accordance with the language preferences stated in your email of 24 May 2018, please find attached:

- the Written Observations submitted by Mr Gauweiler, Mr Bandulet a.o. (an expunged version), Mr Huber a.o., Fraktion DIE LINKE im Deutschen Bundestag, the German Government, the European Parliament and the European Central Bank in German, the language of the procedure;
- a translation into German, prepared by the Court's services, of the submissions made by the Governments of Greece, Spain, Italy, Cyprus, The Netherlands, Poland, Portugal and Finland⁵;
- the Written Observations submitted by the Government of Ireland, in English.

Please note that personal data has been expunged. More specifically, the address, phone numbers and private emails of the lawyers representing the parties as well as the references of the Court's officials and the written signatures have been blanked out since this information is covered by the exception provided for in Article 4 (1)(b) of Regulation (EC) No 1049/2001

⁴ Judgment of the Court of Justice of 21 September 2010 in joined cases *Sweden and Others v API and Commission*, C-514/07P, C-528/07P and C-532/07P, ECLI:EU:C:2010:541, paragraphs 130 and 131.

⁵ An English version of the documents sent in German is not available.

("protection of personal data")⁶ in accordance with the European Union legislation regarding the protection of personal data. In this regard, the General Court has confirmed in its recent judgment of 19 September 2018 that the written signatures and the information relating to the institutions officials falls within the notion of "private life"⁷. The references⁸ 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 2(a) of Regulation (EC) No 45/2001⁹.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable¹⁰. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. Those two conditions are cumulative.

I consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

If you wish to receive the personal data, I invite you to provide us with arguments showing the need to have the personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data would be disclosed.

The exception of Article 4(1)(b) has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

Please note that the disclosed documents were transmitted by the Court of Justice to the Commission in its capacity as participant to the Court proceedings at stake. Access is granted for information only and cannot be re-used without the agreement of the originator, who holds a copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

2.2. Refusal of the Written Observations submitted by Mr von Stein a.o. and by the French Government (documents under numbers 5 and 11)

As already mentioned, the French Government and Mr von Stein a.o. have refused to grant access to their written observations. More precisely,

- concerning the observations submitted by Mr. von Stein a.o., the author objects to the disclosure considering that it would prejudice its copyright and the confidentiality of the communication between lawyer and their clients.

⁶ "The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data".

⁷ Judgment of the General Court of 19 September 2018 in case port de Brest v Commission, T-39/17 ECLI:EU:T:2018:560, paragraphs 37, 38 and 43.

⁸ Judgment of the Court of Justice of 29 June 2010 in *Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 68.

⁹ 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 (Official Journal L 8, 12.1.2001, page 1)..

¹⁰ Ibid, paragraph 63.

- the French authorities object to the disclosure on the basis of the exception for the protection of pending court proceedings and legal advice.

i) Protection of commercial interests of a natural or legal person, including intellectual property (document under number 15)

Article 4(2) first 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: [...] commercial interests of a natural or legal person, including intellectual property."

The lawyer representing Mr. von Stein a.o., has informed the Commission that his clients opposed any third party's access to their submission to the Court of Justice. The author of the document considers that its disclosure would prejudice his copyright as well as the legitimacy of professional secrecy in relations between lawyers and their clients and with the Courts. In the light of this, the Commission is not in a position of disclosing the requested document.

ii) Protection of the court proceedings (document under number 11)

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 the above referred *API* judgement 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 undermined¹¹.

In this specific case, the French authorities indicate that, although Case C-62/14 is now closed, similar issues are presently subject of discussion in the context of another request for a preliminary ruling in Case C-493/17¹² and, in particular, the question of the delimitation between the activities of the European Central Bank falling under the monetary policy and those relating to the economic policy. In these circumstances the French Government considers that disclosing its Written Observations in Case C-62/14 would be likely to harm the principle of equality of arms and the serenity of the proceedings not only in the pending Case C-493/17 before the Court of Justice but also in the main proceedings before the German Constitutional Court, procedure in which the French government is not a party and, consequently, it cannot defend itself.

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

¹¹ Ibid, paragraphs 132.

¹² Case C-493/17, *Heinrich Weiss and Others*.
<http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-493/17>

iii) Possibility of granting partial access to the refused submissions

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access. However, after careful examination of the documents and considering the arguments put forward by the concerned parties, I have come to the conclusion that the refused documents are entirely covered by the invoked exceptions so that a partial disclosure cannot be granted without harming the protected interests.

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 disclosing the Written Observations of Mr. von Stein a.o., and the Government of France as well as the refused parts of the submission made by Mr Bandulet e.o., which would outweigh the public interests in the protection of the invoked interests i.e. the protection of the copyright and the protection of the pending proceedings both before the Court of Justice and the German Constitutional Court.

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 Secretary-General at the following address:

European Commission
Secretary-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 5/282
B-1049 Brussels

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

The Secretary General will inform you of the result of this review within 15 working days from the date of registration of your request. You will either be given access or your request will be rejected in which case you will be informed of how you can take further action.

Yours sincerely,



Luis ROMERO REQUENA

Attachments: 16