

Decision in case 1700/2020/OAM on how the European Commission dealt with a request for public access to a legal note on the German constitutional court's ruling about the European Central Bank and the Court of Justice of the EU

Decision

Case 1700/2020/OAM - **Opened on** 09/10/2020 - **Decision on** 27/01/2021 - **Institution concerned** European Commission (No maladministration found) |

The case concerned the European Commission's refusal to grant public access to a note of its legal service on the German constitutional court's ruling concerning a programme of the European Central Bank and a related judgment of the Court of Justice of the EU. In refusing access to the document, the Commission relied on the need to protect the Union's financial, monetary and economic policy, as well as the need to protect legal advice and its decision-making process.

The Ombudsman inspected the document and found that there was no obvious error in the Commission's assessment. She thus closed the inquiry finding no maladministration.

The judgment of the German constitutional court is unprecedented in terms of possible consequences on the EU legal order. The Ombudsman recognises that the public has an interest in being reassured that the Commission is properly assessing and, where needed, acting upon such consequences, in accordance with its role as guardian of the Treaties. She is confident the Commission will continue to keep the public informed, to the extent possible, of any future steps it decides to take in response to the judgment.

Background to the complaint

1. Since the financial crisis began in 2007, the European Central Bank (ECB) has introduced several 'non-standard monetary policy measures' to support growth and help achieve its target inflation rate. One such measure was the implementation of 'quantitative easing' [1] through its asset purchase programmes such as the Public Sector Purchase Programme (PSPP). The PSPP consisted of the purchase of bonds issued by euro area central, regional and local governments, agencies and European institutions to foster market liquidity.



- 2.** Several groups of individuals have brought actions before the German federal constitutional court concerning various decisions of the ECB on the PSPP. The German constitutional court decided to submit questions to the Court of Justice of the EU (Court of Justice) concerning the validity of the PSPP programme in the light of EU law. In December 2018, the Court of Justice found that the PSPP does not infringe EU law. [2]
- 3.** On 5 May 2020, the German constitutional court handed down a ruling [3] declaring the judgment of the Court of Justice, and the PSPP, as unlawful and having no binding effect in Germany. The German authorities were given a transitional period of three months to further assess and make sure the ECB justifies the programme's proportionality, which would allow for its continuation in Germany.
- 4.** The judgment of the German constitutional court is unprecedented and has led to debates on the principle of primacy of EU law - that is the superiority of *European law* over national *law* - and on the authority of the Court of Justice over national courts concerning the interpretation of EU law. The judgment also puts in the spotlight the Euro system, particularly the ECB's asset purchase programmes. Following the judgment, the Commission has published a statement [4] saying that it was analysing it and was looking into possible future steps, including possible infringement proceedings [5] against Germany.
- 5.** In June 2020, the complainant requested public access [6] to all documents produced or held by the legal service of the Commission relating to the German constitutional court ruling.
- 6.** The Commission identified two documents as falling within the scope of the request. It refused access to both documents based on the need to protect the Union's monetary policy, the need to protect legal advice, as well as the need to protect its decision-making process. [7]
- 7.** In August 2020, the complainant asked the Commission to review its decision (by making a so-called 'confirmatory application'). The complainant clarified that the review concerned one of the two documents only, namely a note of the legal service to the attention of the head of the cabinet of the President of the Commission.
- 8.** Since the complainant did not receive a reply from the Commission within the prescribed deadline, he turned to the Ombudsman on 3 October 2020. He was dissatisfied with the Commission's failure to comply with the statutory time limits in replying to his request and he wished to receive access to the document.
- 9.** The Commission replied to the complainant's request for review on 21 October 2020, confirming its initial assessment and refusing to provide public access to the document. The inquiry
- 10.** The Ombudsman opened an inquiry into the Commission's refusal to grant public access to the note of the legal service related to the German constitutional court judgment



(hereinafter 'the document'). In the course of the inquiry, the Ombudsman's inquiry team examined the requested document.

Arguments presented

Arguments presented by the Commission

11. The Commission explained that the document contained legal preliminary views on the sensitive issues regarding the ECB's asset purchase programmes and the legal consequences of the judgment in that regard. There was a reasonably foreseeable and non-purely hypothetical risk that disclosing the content of document would impact on the Commission's ability to safeguard the proper functioning of the Euro system and the EU monetary policy. [8]

12. According to the Commission, the document also included a preliminary legal analysis of the judgment and its legal consequences. It presented different options in terms of responding to the judgment and their legal and political implications, including the possibility of starting infringement proceedings against Germany. The Commission therefore considered that disclosure would jeopardise its interest in receiving frank, objective and comprehensive legal advice. [9]

13. The Commission stated that at the time of the adoption of the confirmatory decision it has not yet taken a decision on how to respond to the judgment. It was still considering options and these were analysed in the requested document. Disclosure would affect its decision-making process [10], by undermining its ability to have objective internal deliberations and to take decisions free from external pressure.

14. The Commission noted that the application of the exception for the protection of the monetary policy cannot be overridden by another public interest. As for the exceptions for the protection of legal advice and the decision-making process, these can be waived if there is an overriding public interest. However, the Commission concluded that the arguments put forward by the complainant were of a general nature and could not provide an appropriate basis to justify disclosure.

Arguments presented by the complainant

15. The complainant stated that, if the document was merely the analysis of a judgment in legal terms, he failed to see how its disclosure would impede the legal service's capacity to provide advice or the decision-making process of the Commission. He considered that this would be different if the document contained recommendations for different courses of political action.

16. In addition, the complainant failed to see how the document could contain sensitive legal views with regard to the ECB's purchase programmes sufficient to disrupt the EU monetary policy upon disclosure. He considered that the Commission had interpreted this exception too broadly.

17. According to the complainant, there was an "*enormous public interest*" in the German



constitutional court ruling since it led to uncertainty regarding fundamental constitutional questions on the legal architecture of the EU. While the public has been informed of the political standpoint of the EU institutions [11], this should be complemented by the Commission's interpretation "*from a legal perspective*".

The Ombudsman's assessment

18. Concerning the exemption for the protection of the public interest as regards the EU's and the Member States' financial, economic and monetary policy, the institutions enjoy wide discretion when determining whether the public interest could be undermined by the disclosure of certain information. [12] Any substantive review of such a decision must therefore be limited to examining whether there has been an obvious error in the institution's assessment.

19. The Commission argued that disclosure would undermine its capacity to safeguard the functioning of the Euro system and the EU monetary policy. The Ombudsman has reviewed the document and finds that the Commission's view is not manifestly wrong.

20. Under the EU's rules on public access to documents, the public interest as regards the protection of the EU's monetary policy cannot be overridden by any other public interest. Therefore, the complainant's arguments regarding an overriding public interest in disclosure cannot be taken into account in this case.

21. The Ombudsman therefore considers that there was no maladministration by the Commission in refusing access to the document at issue. Its position that no meaningful partial access is possible is also reasonable in this case.

22. Given that the exception for the protection of the monetary policy was validly invoked the Ombudsman has not conducted an in-depth assessment as regards the other exceptions invoked by the Commission, that is the need to protect legal advice and the Commission's decision-making process. That having been said, the Ombudsman is of the preliminary view that the Commission has validly invoked them. It is in the public interest that the Commission can obtain frank and complete legal advice on these specific matters, in order to allow it to react properly to the judgment of the German constitutional court. It is reasonable to consider that releasing the documents could seriously undermine that interest.

23. That said, the judgment of the German constitutional court is unprecedented in terms of possible consequences on the EU legal order. Likewise, it is also significant as regards the ECB's asset purchase programmes, since the question of proportionality in relation to the objectives of monetary policy might be raised for programmes other than the PSPP.

24. The Ombudsman recognises that the public has an interest in being reassured that the Commission is properly assessing and, where needed, acting upon such consequences, in



accordance with its role as guardian of the Treaties. She notes that the Commission has sought to inform the public to the extent possible, including that one of the options considered was opening an infringement procedure against Germany. According to publicly available information, at the time of the confirmatory decision, the Commission has not yet taken a decision on how to respond to the judgment. [13] In its initial reply to the complainant, it also provided extensive general information on the content of the document, and explained the context in which it had been drawn up.

25. As regards the complainant's dissatisfaction with the delay in receiving a reply from the Commission, the Ombudsman acknowledges the delay should not have happened. She therefore yet again urges the Commission to deal with requests for public access to documents within the applicable deadlines in the future, and to take whatever steps are necessary to prevent similar delays.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

There was no maladministration by the European Commission.

The complainant and the European Commission will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 27/01/2021

[1] More information is available on the ECB website:

https://www.ecb.europa.eu/explainers/show-me/html/app_infographic.en.html

[2] Judgment of the Court of Justice of 11 December 2018, Case C-493/17 *Weiss a.o.* , available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=208741&pageIndex=0&doclang=EN&mode=>

Press release available at:

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180192en.pdf>

[3] Judgment of the BVerfG Second Senate of 05 May 2020 - 2 BvR 859/15, available at http://www.bverfg.de/e/rs20200505_2bvr085915en.html

[4] Statement by President von der Leyen of 10 May 2020

https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_846

[5] According to the EU treaties, the Commission may take legal action – an infringement



procedure – against an EU country that, is in breach, or fails to implement, EU law. More information is available at:

https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

[6] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN> .

[7] In accordance with Articles 4(1)(a), 4(2) and 4(3) of Regulation 1049/2001.

[8] Article 4(1)(a), fourth indent of Regulation 1049/2001

[9] Article 4(2), second indent of Regulation 1049/2001

[10] Article 4(3), first subparagraph of Regulation 1049/2001

[11] The complainant referred to the statement by President von der Leyen of 10 May 2020 referenced in footnote 4 and to a press release of the Court of Justice of 8 May 2020 available at:

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf>

[12] See, for example, judgment of the General Court of 11 July 2018, *ClientEarth v Commission* , T-644/16, paragraphs 23 -25, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=203913&pageIndex=0&doclang=EN&mode->

[13] See also the reply of the Commission of 18 November 2020 to a question from Members of the European Parliament

https://www.europarl.europa.eu/doceo/document/P-9-2020-004295-ASW_EN.html