

Reply by the European Commission to the proposal for a solution on the European Commission's refusal to give public access to documents concerning the French national plan under the Recovery and Resilience Facility - Complaint by [REDACTED], ref. case 1129/2022/MIG

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

In May 2021, the applicant requested access to '[...] all documents regarding the interactions that the General secretariat had with the French government when working on the draft plan. That includes among others: emails or letter exchange between the Recover EU task force and the French authorities; minutes or summaries of meetings or visioconferences between both; proposals or documents sent by the French government to the task force, and possible replies from the task force with comments or corrections.

[The applicant] would also like to present a request regarding possible contacts between the Task force and French non-governmental stakeholders, such as lobbying groups, professional federations, NGOs, think tanks or private companies.

Again [the applicant] would like to see all documents regarding interactions between these entities and the Recover EU task force. That includes among others: emails or letter exchanged; minutes or summaries of meeting or visioconference between both; proposals or positions papers sent by these entities to the task force, and possible replies from the task force.'

In its initial reply of 6 July 2021, registered under reference number Gestdem 2021/2929, the Recovery and Resilience Task Force of the Secretariat-General identified 46 (sets of) documents in Annex I and 37 documents in Annex II. It granted wide partial access to the documents in Annex II, based on the protection of personal data under Article 4(1)(b) of Regulation (EC) No 1049/2001.

As regards the documents in Annex I, the Recovery and Resilience Task Force refused access to these documents on the basis of the exceptions provided for in 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) and the first subparagraph (protection of the ongoing decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

The applicant submitted a confirmatory application with respect to the refusal to grant access to the documents in Annex I.

In June 2022, after having consulted with the third parties concerned, that is, the French authorities and two industry stakeholders, the Secretariat-General adopted a confirmatory decision. It granted full or partial access to 35 documents and refused access to the remaining sets of documents on the basis of the exceptions provided for in 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) and the first

subparagraph of Article 4(3) (protection of the ongoing decision-making process) of Regulation (EC) No 1049/2001.

All documents were identified individually in the revised Annex I attached to the confirmatory decision, containing also an indication of the type of disclosure per document and the applicable exceptions under Article 4 of Regulation (EC) No 1049/2001.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

In June 2022, the complainant turned to the European Ombudsman. In his letter, the complainant argued that, in his confirmatory application, he had put forward four arguments in favour of disclosure of the documents, access to which had been refused initially:

- the lack of argumentation regarding the risk to the public interest, which was therefore ‘purely hypothetical’;
- the fact that the public interest exception can only apply for a limited period of time, in accordance with Article 4 (7) of Regulation (EC) No 1049/2001;
- the fact that the decision-making process on the recovery plan was completed within the Commission, which rendered the application of Article 4(3) of Regulation (EC) No 1049/2001 invalid;
- the major importance of the recovery plan for the French economy, making the disclosure of the documents requested an ‘overriding public interest’ and rendering Article 4(3) inapplicable.

The complainant argued that the Commission’s response regarding his first two arguments was unclear, as it relied above all on the margin of manoeuvre to determine whether or not there is a risk to the public interest.

He considered the Commission’s position incorrect that the decision-making process was ongoing given that the recovery plan could be amended in the future. In the complainant’s view, the Commission had already validated the initial plan, and an ex-post amendment should have been considered as a new procedure, as is the case for any legal text. The complainant highlighted the importance for French taxpayers to understand the implications of the design of a plan that will disrupt their economy and their daily life.

III. THE EUROPEAN OMBUDSMAN'S INQUIRY AND PROPOSAL

The Ombudsman opened an inquiry. In July 2022, the Commission provided a copy of the documents concerned to the Ombudsman.

On 24 January 2023, the Ombudsman sent a Proposal for a solution on the Commission's refusal to give public access to documents concerning the French national plan under the Recovery and Resilience Facility (hereafter 'RRF').

Regarding the exception based on the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, the Ombudsman acknowledges that the EU institutions enjoy a wide margin of discretion when deciding on what the protection of this public interest calls for in terms of disclosure of documents and that, consequently, the inquiry is limited to determining if there were a manifest error in the Commission's assessment on which it based its decision to refuse access so as to protect the financial, monetary or economic policy of the Member State concerned. However, the Ombudsman considers that the redacted parts of the documents do not consist of sensitive information **throughout**. The Ombudsman provides a few examples in support of this statement, namely:

- the fact that the majority of the emails¹ at issue in the reply mainly list the attachments that have been transmitted with them, which are also described in the table of identified documents that was shared with the complainant;
- large parts of the internal meeting minutes at issue² are, in the Ombudsman's opinion, rather general in nature or concern the progress of the exchanges with the Member State or the progress in drafting the Recovery and Resilience Plan (hereafter 'RRP'). According to the Ombudsman, it is not clear how disclosure of some of this information could undermine the public interest protected under the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001;
- the Ombudsman argues that parts of the Commission's assessment³ of draft chapters of the RRP do not seem to be particularly sensitive in the sense that their disclosure would undermine the protection of the financial, monetary or economic policy of France.

Finally, the Ombudsman mentions that some parts of the documents at issue appear to constitute environmental information or information about emissions into the environment within the meaning of the Aarhus Regulation⁴.

¹ According to the EO, this concerns, for example, documents 1, 8, 17, 25, 35 (including its attachments other than the draft chapters of RRP, large parts of which seem to be already in the public domain), 40, 41 43.

² According to the EO, this concerns, for example, documents 4, 6, 7, 12, 16, 18 and 19. Relevant parts include, for instance, meeting summaries, agenda items or conclusions.

³ According to the EO this concerns for example, the introductory paragraphs of the Commission's comments attached to document 27 as well as its feedback concerning the "targets and milestones" do not appear to be sensitive.

⁴ Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental

With respect to the exception under the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, the Ombudsman contests the Commission suggestion that the decision-making process at issue can extend to the year 2026, which is the deadline for the adoption of payment decisions by the Commission, subject to the fulfilment of the relevant milestones and targets. Furthermore, the Ombudsman argues that the Commission has not provided any argument showing how precisely the disclosure of the documents, which are related to the setting of milestones, could seriously undermine its evaluation of these milestones. In the Ombudsman's view, it is not clear how documents pertaining to the closed negotiations of an RRP are qualified as documents in an ongoing decision-making process related to the compliance with the RRP.

Consequently, the Ombudsman argues that the Commission should re-examine those documents to which it refused to give access based on the fourth indent of Article 4(1)(a) and the first subparagraph of 4(3) of Regulation (EC) No 1049/2001, with a view to giving the complainant significantly increased public access.

IV. THE EUROPEAN COMMISSION'S REPLY TO THE OMBUDSMAN'S PROPOSAL

The Commission hereby submits the following comments regarding the Ombudsman's proposal for a solution.

As explained in the confirmatory decision, the Secretariat-General consulted the French authorities and another third-party in accordance with Articles 4(4) and 4(5) of Regulation (EC) No 1049/2001, as the documents originated from these parties. In the framework of its confirmatory decision of 3 June 2022, the Commission granted full or partial access to 35 additional documents, and refused access to the remaining documents, the majority of which originated from the French authorities.

Indeed, in reply to the Commission's consultation, the French authorities made use of the option given to Member States by Article 4(5) of Regulation (EC) No 1049/2001 and asked the Commission not to disclose the documents which they had sent to the Commission in the context of the preparation of the plan. The French authorities based their objections on the exception relating to the protection of the public interest as regards the economic policy of the Member State laid down in the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 and gave proper reasons in support of their position. The Commission found that these explanations are based on existing reasons and duly referred to them in the confirmatory decision. It concluded that the explanations provided by the national authorities were *prima facie* well founded and duly reasoned.

However, the Ombudsman considers that the Commission's decision to refuse access based on the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 is not

justified given the material content and the nature of the documents in question and provides concrete examples in this regard.

Such conclusion is however based on a detailed analysis *in concreto* of the documents concerned, which, in the Commission's opinion, exceeds the obligations imposed on the institutions as far as documents originating from a Member State are concerned. Indeed, it is clear from the Court's case-law that the obligation to carry out a specific and individual examination of the documents does not apply where the request for access concerns a document originating from a Member State, as referred to in Article 4(5) of Regulation (EC) No 1049/2001⁵.

In addition, as far as documents originating from a Member State are concerned, 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 (EC) No 1049/2001⁶.

With respect to the documents which do not originate from the French authorities and which are concerned by the request, the Commission would like to recall that, as far as the protection of the financial, monetary or economic policy is concerned, 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'⁷.

The Ombudsman, while agreeing with the wide margin of appreciation conferred upon the Commission, considers that the information redacted in the documents is not sensitive, and concludes on this basis that the documents requested, concerning exchanges between the Commission and France or the progress in drafting the RRP, are not clearly and entirely covered by the exception of the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001.

The Commission would like to recall that it is the role of the EU Courts to rule on the legality of the use of the exceptions laid down in Regulation (EC) No 1049/2001. In this context, the General Court has confirmed in a recent case⁸ concerning access to documents of the RRF plan of another Member State, that the Commission was entitled to conclude that the disclosure of the documents would undermine, by reason of their

⁵ Judgments of 25 September 2014, *Spirlea v Commission*, T-669/11, EU:T:2014:814, paragraphs 80 to 84, and of 8 February 2018, *POA v Commission*, T-74/16, EU:T:2018:75, paragraphs 60 and 61.

⁶ Judgment of the General Court of 8 February 2018, *Pagkyrios Organismos Ageladotrofon v Commission*, T-74/16, EU:T:2018:75, paragraph 57.

⁷ Judgment of the Court of Justice of 3 July 2014, *Council v In't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

⁸ Judgment of the General Court of 15 February 2023, *Asesores Comunitarios v Commission*, T-77/22, EU:T:2023:69

preliminary nature and their content, the public interest as regards the financial and economic policy of the Member State in question⁹.

The documents requested in the present case are of preliminary nature and preceded the Commission's final endorsement of the French RRP. They were submitted by the French authorities as a preparatory step for the purpose of the final submission of the plan. The documents requested constituted an initial stage which is preliminary in nature, and forms part of a process in several stages designed to allow the disbursements that could benefit France at the end of that process. To this regard, the approval of a RRP by the Council 'is merely a step in the more general process of implementing the recovery and resilience facility' and, thus, '[t]he financial and economic impact of the implementation of the facility for recovery and resilience as regards the [Member State] does not end on the date of adoption of the Council Implementing Decision'¹⁰.

The General Court has confirmed that a textual comparison between draft components of the national plan and the version which had been the subject of a positive assessment by the Commission, which is publicly available, 'would have led to speculation as to the financial policy of the [Member State] or would have been liable to give rise to interference and speculation at each stage of the negotiation process concerning the implementation of the RRP'¹¹.

The General Court clarified, *inter alia*, that 'disclosure of the exchanges between the Member State concerned and the Commission could have been used in order to analyse whether the agreed milestones and targets were met. Disclosure of the requested documents would then have compromised the [Member State]'s negotiating position in its future applications for payment of the remaining financial contribution, which risked subjecting it to external pressure'¹².

Consequently, the Commission maintains its position that it was entitled to take into account the objections of the French authorities to refuse access to the withheld parts of the documents based on the exception of the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001. In this regard, the Commission made sure that the reasons presented by the French authorities existed, referred to them in the contested decision and ascertained that the relevant explanations appeared to be *prima facie* well founded.

The Commission also maintains its position that it was entitled to (partially) refuse access to its own documents based on the same exception as these documents reflect the discussions on specific issues related to the plan, such as the milestones and targets for each measure and component, as well as details on schedule of payments. They contain detailed preliminary information on the planned reforms and investment projects, on concrete distribution of disbursements of grants, and on other specific details about

⁹ Judgment in T-77/22, cited above, paragraph 63.

¹⁰ Judgment in T-77/22, cited above, paragraphs 58-59.

¹¹ *Idem*, paragraph 65.

¹² *Idem*, paragraph 66.

financial planning and policies, which warrant the use of this exception according to the Commission.

For more details on the justification provided with respect to the exception under the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 and the consultation of the French authorities, the Commission refers the Ombudsman's services to section 2.1 and 2.2.1 of the confirmatory decision.

With respect to the exception provided for in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, the Commission provided in section 2.2.3 of the confirmatory decision detailed explanations regarding the decision-making process related to the recovery and resilience plans and the reasons why it considers it is still ongoing.

Even if the General Court did not rule on the application of the present exception in the above-mentioned judgment, it provided useful elements the Commission would like to refer to in the present letter. In particular, the General Court noted that 'the consequences of the RRP for the financial and economic policy of that Member State did not end on the date of adoption of the implementing decision of 13 July 2021 and [...] were the subject of permanent negotiations between the Commission and the [Member State], in particular as to whether the milestones and targets set out in the RRP had been met, in the context of the general implementation process for the recovery and resilience facility concerning that Member State'¹³. It further noted that 'disclosure of such documents risked undermining the progress of the forthcoming negotiations on the various stages of implementation of the RRP'¹⁴.

In any event, the Commission would like to recall that the exception laid down in the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, which is applicable to the redacted parts of the documents, is sufficient to justify the refusal of these parts of the documents for the reasons explained above.

The Commission considers therefore that it has complied with the case-law and the applicable legal settled standard. It has provided the largest possible meaningful access to the documents at stake.

Finally, the Commission holds on to its assessment that the considerations brought by the complainant in order to demonstrate the existence of an overriding public interest, were of a general nature, and could not be equated to the specific circumstances required by the case-law to demonstrate such interest¹⁵. Even if the applicant had provided justifications that would demonstrate the existence of an overriding public interest in the documents, *quod non*, the Commission notes that Article 4(1)(a) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

¹³ Idem, paragraph 61.

¹⁴ Idem, paragraph 64.

¹⁵ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2104:2250, paragraph 128.

The Commission considers the Ombudsman's reference to the Aarhus Regulation not applicable to the situation herewith, as the measures contained in the French RRP do not relate to 'emissions into the environment' within the meaning of the Aarhus Regulation, in line with the relevant case-law¹⁶.

Finally, as explained in the framework of the Commission's reply to complaint under reference 925/2022/LDS, the key documents and information related to the Recovery and Resilience Facility and its implementation are proactively published on the European Commission dedicated site and in the Recovery and Resilience Scoreboard¹⁷.

The published documents include: the Commission proposals for Council Implementing Decisions and Annexes, the Staff Working Documents, the Operational Arrangements agreed with Member States, the preliminary assessments of the payment requests and the Commission Implementing Decisions authorising the disbursements of the financial contributions.

The national plans are prepared by Member States, hence their publication falls under their responsibility. To promote transparency of national plans, Member States were invited to publish their final plans on a dedicated web page¹⁸ and the European Commission compiles the links to the Member States' websites¹⁹.

The Commission remains fully committed to ensuring that EU citizens can access accurate, timely, and relevant information on this instrument and the implementation of the national recovery and resilience plans, while respecting the legal obligations as set out in the RRF Regulation.

In reply to requests for access to documents on the RRF plans received by the Commission, documents have been disclosed either in full, or partially, with redactions based on the justifications laid down in Regulation (EC) No 1049/2001, as interpreted by the case-law.

¹⁶ https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/fiche_thematique_-_environnement_-_en.pdf.

¹⁷ https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en
Recovery and Resilience Scoreboard (europa.eu) :
https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/common_indicators.html?lang=en#:~:text=The%20Recovery%20and%20Resilience%20Scoreboard%20includes%20a%20set,objectives%20and%20the%20overall%20performance%20of%20the%20RRF

¹⁸ Guidance to Member States Recovery and Resilience Plans, Commission Staff Working Document, Brussels, 22.1.2021, SWD(2021)12 final, p.51.

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

V. CONCLUSIONS

The Commission takes note of the arguments of the Ombudsman and, after careful assessment of all the elements in the case, considers that its confirmatory decision of 3 June 2022 was in line with Regulation (EC) No 1049/2001 and the relevant case-law on access to documents at the point in time in which it was taken.

For the Commission

Věra JOUROVÁ

Vice-President

