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JUDGMENT OF THE GENERAL COURT (Seventh Chamber)
29 November 2012 (*)
(Access to documents – Decision 2004/258/EC – Documents concerning the government debt and government deficit of a Member State – Refusal of access – Exception relating to the economic policy of the Union or of a Member State – Partial refusal of access)

In Case T–590/10,

**Gabi Thesing,** residing in London (United Kingdom),
**Bloomberg Finance LP,** established in Wilmington, Delaware (United States),
represented by M. Stephens and R. Lands, Solicitors, and T. Pitt-Payne QC,

applicants,

v

**European Central Bank (ECB),** represented initially by A. Sáinz de Vieuña Barroso, M. López Torres and S. Lambrinoc, and subsequently by M. López Torres and S. Lambrinoc, acting as Agents,

defendant,

APPLICATION for annulment of the decision of the ECB's Executive Board, which was notified to Ms Thesing by letter of the President of the ECB of 21 October 2010, rejecting an application by Ms Thesing for access to two documents concerning the government deficit and debt of the Hellenic Republic,

THE GENERAL COURT (Seventh Chamber),

composed of A. Dittrich (Rapporteur), President, I. Wiszniewska-Białecka and M. Prek, Judges,
Registrar: N. Rosner, Administrator,
having regard to the written procedure and further to the hearing on 14 June 2012,
gives the following

**Judgment**

**Background to the dispute**

The first applicant, Ms Gabi Thesing, is a journalist. She works for the second applicant, Bloomberg Finance LP, which operates in London (United Kingdom) under the name of Bloomberg News.

On 20 August 2010, the first applicant requested the European Central Bank (ECB) to grant access to document SEC/GovC/X/10/88a, entitled 'The impact on government deficit and debt from off-market swaps. The Greek case' ('the first document'), and to document SEC/GovC/X/10/88b, entitled 'The Titlos transaction and possible existence of similar transactions impacting on the euro area government debt or deficit levels' (the second document). Those documents concerned the use of derivative transactions in financing deficit and in government debt management.

By letter of 17 September 2010, the ECB's Director-General of the Secretariat and Language Services informed the first applicant of the decision not to grant access to the requested documents.

On 28 September 2010, the applicants sent a confirmatory application to the ECB, under Article 7(2) of Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB documents (OJ 2004 L 80, p. 42). That application requested that the Executive Board of the ECB review the ECB's position relating to the refusal to grant access to the documents at issue.

By letter of 21 October 2010, the President of the ECB informed the first applicant of the decision of the ECB's Executive Board confirming the decision contained in the letter of 17 September 2010 to refuse access to the documents at issue ('the contested decision'). That refusal was based, in the case of those two documents, on the protection of the public interest so far as concerns the economic policy of the European Union and the Hellenic Republic and on the protection of the ECB's internal deliberations and consultations, pursuant to the second indent of Article 4(1)(a) and Article 4(3) of Decision 2004/258. As regards the second document only, the refusal was also based on the protection of the commercial interests of a natural or legal person, under the first indent of Article 4(2) of that decision.

**Procedure and forms of order sought**

By application lodged at the Registry of the General Court on 27 December 2010, the applicants brought the present action.

By document lodged at the Registry of the General Court on 11 April 2011, Mr Athanasios Pitsiorlas applied for leave to intervene in this case in support of the form of order sought by the applicants. By order of the President of the Seventh Chamber of the General Court of 14 July 2011, the application was refused.

Upon hearing the report of the Judge-Rapporteur, the Court (Seventh Chamber) decided to open the oral procedure.

By way of measures of organisation of procedure under Article 64 of its Rules of Procedure, the Court sent a written question on 14 May 2012 to the ECB, to which the ECB was requested to reply at the hearing.

By way of a measure of inquiry pursuant to Article 65 of the Rules of Procedure, by order of 21 May 2012 the General Court ordered the ECB to produce the two documents at issue, and stated that they would not be disclosed to the applicants. The ECB complied with that measure of inquiry within the prescribed time-limit.

By letter lodged at the Registry of the General Court on 30 May 2012, the applicants requested that further evidence offered in support be placed in the file, namely the judgment of the European Court of Human Rights in *Gillberg v. Sweden* of 3 April 2012 (not yet published in the *Reports of Judgments and Decisions*). By decision of the President of the Seventh Chamber of the Court of 31 May 2012, that request was granted.

The parties' oral arguments and their answers to the questions put by the Court were heard at the hearing of 14 June 2012.

The applicants claim that the Court should:

annul the contested decision;

order the ECB to grant the applicants access to the documents at issue;

order the ECB to pay the costs.

The ECB contends that the Court should:

dismiss the action as inadmissible in its entirety or, in the alternative, dismiss the second applicant's action as inadmissible;

dismiss the applicants' second head of claim as inadmissible;

dismiss the action as unfounded;

order the applicants to pay the costs.

**Law**

*Admissibility*

The ECB, while not raising a plea of inadmissibility under Article 114(1) of the Rules of Procedure, contends that the action is totally or partially inadmissible. In its submission, the applicants' action is inadmissible in its entirety since the application was not signed by their lawyer. Moreover, the second applicant's action is inadmissible, first, on the ground that it does not have standing to bring legal proceedings since it did not request access to the documents at issue, and, second, on the ground that it cannot achieve the application's objective because it has no right of access to the ECB's documents. In addition, the ECB asserts that the applicants' second head of claim, requesting the Court to order the ECB to grant them access to the documents at issue, is inadmissible. Lastly, the ECB contends that the applicants' arguments, set out in the reply, relating to an alleged infringement of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), are not consistent with Article 48(2) of the Rules of Procedure and are thus inadmissible.

The alleged absence of a signature on the application by the applicants' lawyer

The ECB contends that the action is inadmissible on the ground that the application that it received was not signed by the applicants' lawyer. Under the first subparagraph of Article 43(1) of the Rules of Procedure, the original of every pleading must be signed by the party's agent or lawyer. In the present case, the original of the application was signed by the applicants' lawyer. The argument of the ECB by which it seeks to claim that the action is inadmissible on the ground that the application was not signed by the applicants' lawyer must therefore be rejected.

Admissibility of the second applicant's action

The ECB contends that the second applicant's action is inadmissible, first, on the ground that it does not have standing to bring legal proceedings since it did not request access to the documents at issue and, second, on the ground that it cannot achieve the application's objective because it has no right of access to the ECB's documents.

The applicants assert that the first applicant made her initial application for access to the documents at issue both on her own behalf, and on behalf of the second applicant. In any event, the second applicant was party to the confirmatory application. Moreover, the second applicant can achieve the objective referred to in the application since it operates throughout the Union and has seats in Member States other than the United Kingdom. In addition, it has an interest in the success of the first applicant's application.

Since the applicants have brought a single action the admissibility of which is not in doubt in relation to the first applicant – which has not moreover been contested by the ECB – it is not necessary, for reasons of procedural economy, to examine the admissibility of the action as regards the second applicant (see, to that effect, Case C–313/90 *CIRFS and Others* v *Commission* [1993] ECR I–1125, paragraph 31, and Joined Cases C–71/09 P, C–73/09 P and C–76/09 P *Comitato 'Venezia vuole vivere'* v *Commission* [2011] ECR I-0000, paragraph 37; judgment of 7 October 2010 in Case T–452/08 *DHL Aviation and DHL Hub Leipzig* v *Commission*, not published in the ECR, paragraph 27, and judgment of 16 December 2010 in Case T–191/09 *HIT Trading and Berkman Forwarding* v *Commission*, not published in the ECR, paragraph 24).

Admissibility of the applicants' second head of claim

The ECB submits that the applicants' second head of claim is inadmissible inasmuch as it requests the Court to order the ECB to grant access to the documents at issue.

It is settled case-law that the Court is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them. That limitation of the scope of judicial review applies to all types of contentious matters that might be brought before it, including those concerning access to documents (Case T–204/99 *Mattila* v *Council and Commission* [2001] ECR II–2265, paragraph 26, upheld in Case C–353/01 P *Mattila* v *Council and Commission* [2004] ECR I–1073, paragraph 15). When the Court annuls an act of an institution, that institution is required, under Article 266 TFEU, to take the measures necessary to comply with the Court's judgment (Case C–41/00 P *Interporc* v *Commission* [2003] ECR I–2125, paragraph 28).

The second head of claim is therefore inadmissible.

Admissibility of the arguments relating to an alleged infringement of Article 10 of the ECHR

The applicants submit, in the reply, that the refusal to grant them access to the documents at issue is an infringement of their right to receive information under Article 10 of the ECHR. In order to avoid a breach of the rights conferred by that provision, it is necessary to construe the exceptions to the right of access referred to in Article 4 of Decision 2004/258 in the manner indicated by the applicants.

As regards the admissibility of those arguments, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the original application must state the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a plea or an argument which amplifies a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, must be declared admissible (Case T–252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 39).

In the present case, the pleas put forward in the application allege infringement of Article 4 of Decision 2004/258. The alleged infringement of Article 10 of the ECHR by an incorrect interpretation of Article 4 of Decision 2004/258 was raised only at the stage of the reply, and no reasons were provided for the absence of those arguments in the application.

However, those arguments relate, in essence, to the interpretation of the right of access to a document under Decision 2004/258. In the applicants' submission, the ECB ought, under Article 6 TEU, to have taken account of Article 10 of the ECHR when interpreting Article 4 of Decision 2004/258 in order to avoid infringing the latter provision. The applicants' arguments therefore relate to the effects of Article 10 of the ECHR in the light of the exceptions to the right of access under Article 4 of that decision. It is therefore apparent that those arguments amount to an amplification of the pleas alleging infringement of Article 4 of Decision 2004/258 in that they are closely connected with the pleas put forward in the application. They must therefore be considered admissible.

Admissibility of the arguments relating to partial access to the documents at issue under Article 4(5) of Decision 2004/258

In the application, the applicants did not raise the issue of partial access to the documents at issue. In the light of the ECB's assertion in the defence that the applicants did not contest, in the application, the decision not to grant partial access, the applicants invited the Court, in the reply, to consider, in the alternative, whether the ECB ought to have made partial disclosure of those documents.

It must be pointed out that, since the conditions for admissibility of an action and of the complaints set out therein are a matter of public policy, the Court may consider them of its own motion in accordance with Article 113 of the Rules of Procedure (see, to that effect, Case C–160/08 *Commission* v *Germany* [2010] ECR I–3713, paragraph 40).

First, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the application must state the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure.

In the light of the foregoing, it must be concluded that the applicants' arguments concerning Article 4(5) of Decision 2004/258 are inadmissible, given that they were not relied upon in the application. Moreover, it must be pointed out that those arguments do not constitute an amplification of the pleas set out by the applicants in the application.

Article 4(5) of Decision 2004/258 is not closely connected with Article 4(1) to (3) of that decision. Although the concrete, individual examination of the exceptions referred to in Article 4(1) to (3) of Decision 2004/258 is indeed an essential condition for deciding whether to grant partial access to the documents at issue (see, by analogy, Case T–36/04 *API* v *Commission* [2007] ECR II–3201, paragraph 56), examination of such a possibility does not concern the conditions for the application of the exceptions at issue provided for in Article 4(1) to (3) of that decision. The requirement of such an examination flows from the principle of proportionality. In the context of Article 4(5) of Decision 2004/258, it must be considered whether the aim pursued in refusing access to the documents at issue may be achieved even if one removes only the passages which might harm one of the public interests protected by Article 4(1) and (2) of that decision or which contain opinions for internal use

as part of deliberations and preliminary consultations within the ECB or with the national central banks ('the NCBs') (see, to that effect and by analogy, Case C–353/99 P *Council* v *Hautala* [2001] ECR I–9565, paragraphs 27 to 29, and Case T–264/04 *WWF European Policy Programme* v *Council* [2007] ECR II–911, paragraph 50).

Second, it is apparent from Article 44(1)(c) of the Rules of Procedure that, in the application, the subject-matter of the proceedings and the summary of the pleas in law must be stated sufficiently clearly and precisely to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. In order to ensure legal certainty and the sound administration of justice it is necessary, for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, but coherently and intelligibly, in the application itself (see order in Case T–481/08 *Alisei* v *Commission* [2010] ECR II–117, paragraph 89 and the case-law cited).

In the present case, it was in their reply that the applicants requested the Court to consider whether the ECB ought to have made partial disclosure of the documents at issue, whilst they did not put forward any arguments in this respect in the application.

It follows that the applicants' arguments relating to Article 4(5) of Decision 2004/258 must also be rejected as inadmissible on the ground that they do not comply with the requirements referred to in Article 44(1)(c) of the Rules of Procedure.

Consequently, the applicants' arguments relating to the possibility of granting partial access must be rejected as inadmissible.

*Substance*

The applicants put forward three pleas in law in support of their action. The first alleges infringement of the second indent of Article 4(1)(a) of Decision 2004/258 in so far as the ECB incorrectly interpreted the exception to the right of access relating to the protection of the public interest so far as concerns the economic policy of the Union and the Hellenic Republic. The second plea concerns the exception to the right of access relating to the protection of the commercial interests of a natural or legal person, under the first indent of Article 4(2) of that decision. The third plea alleges infringement of Article 4(3) of that decision relating to the protection of the ECB's internal deliberations and consultations.

With respect to the first plea, alleging infringement of the second indent of Article 4(1)(a) of Decision 2004/258, the applicants claim, in essence, that the ECB incorrectly based its refusal to grant them access to the documents at issue on the exception to the right of access provided for in that provision, given that disclosure of those documents would not undermine the protection of the public interest, so far as concerns the economic policy of the Union and the Hellenic Republic.

Under the second indent of Article 4(1)(a) of Decision 2004/258, the ECB is to 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 Union or a Member State.

With respect to the legal framework applicable to the right of access to ECB documents, it must be observed that the second paragraph of Article 1 TEU is devoted to the openness of the Union's decision-making process. In this respect, Article 15(1) TFEU states that, in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies are to conduct their work as openly as possible. According to the first subparagraph of Article 15(3) TFEU, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, is to have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with that paragraph. Moreover, according to the second subparagraph of Article 15(3), the general principles and limits on grounds of public or private interest governing this right of access to documents are to be determined by the European Parliament and the Council of the European Union, by means of regulations, acting in accordance with the ordinary legislative procedure. In accordance with the third subparagraph of Article 15(3) TFEU, each institution, body, office or agency is to ensure that its proceedings are transparent and is to elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph of Article 15(3) TFEU. According to the fourth subparagraph of Article 15(3) TFEU, the Court of Justice of the European Union, the ECB and the European Investment Bank are to be subject to this paragraph only when exercising their administrative tasks.

Decision 2004/258 seeks, as recitals 1 and 2 in the preamble thereto state, to authorise wider access to ECB documents than that which existed under the system established by Decision ECB/1998/12 of the ECB of 3 November 1998 concerning public access to documentation and the archives of the ECB (OJ 1999 L 110, p. 30), while at the same time protecting the independence of the ECB and of the NCBs, and the confidentiality of certain matters specific to the performance of the ECB's tasks. Article 2 (1) of Decision 2004/258 therefore gives any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, a right of access to ECB documents, subject to the conditions and limits defined in that decision.

That right is subject to certain limits based on reasons of public or private interest. More specifically, and in accordance with recital 4 in the preamble thereto, Decision 2004/258 provides, in Article 4, for a system of exceptions authorising the ECB to refuse access to a document where disclosure of that document would undermine one of the interests protected by Article 4(1) and (2) or where that document contains opinions for internal use as part of deliberations and preliminary consultations within

the ECB or with NCBs. Since the exceptions to the right of access referred to in Article 4 of Decision 2004/258 derogate from the right of access to documents, they must be interpreted and applied strictly.

Thus, if the ECB decides to refuse access to a document which it has been asked to disclose under Article 4(1) of Decision 2004/258, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in that provision – upon which it is relying. Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical (see, by analogy, Case C–506/08 P *Sweden* v *MyTravel and Commission* [2011] ECR I-0000, paragraph 76 and the case-law cited).

With respect to the extent of the review of the legality of an ECB decision refusing public access to a document on the basis of the exception relating to the public interest provided for in the second indent of Article 4(1)(a) of Decision 2004/258, the ECB must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by that exception could undermine the public interest. The European Union judicature's review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers (see, by analogy, Case C–266/05 P *Sison* v *Council* [2007] ECR I–1233, paragraph 34).

It is true that the European Union judicature set out those principles in relation to the extent of the review concerning the exceptions to the right of access to the documents referred to in Article 4(1)(a) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). However, the reasoning on which those principles are based is also valid in a case where the ECB refuses to grant access to a document under the second indent of Article 4(1)(a) of Decision 2004/258. The wording of that latter provision is identical to the wording of the fourth indent of Article 4(1)(a) of Regulation No 1049/2001. In addition, a refusal decision based on the second indent of Article 4(1)(a) of Decision 2004/258 is, just like a decision based on the fourth indent of Article 4(1)(a) of Regulation No 1049/2001, of a complex and delicate nature which calls for the exercise of particular care and the criteria set out in those two provisions are very general (see, to that effect, *Sison* v *Council*, paragraph 43 above, paragraphs 35 and 36).

First, with respect to the applicants' arguments that the ECB incorrectly failed to take account of the public interest considerations in favour of disclosure and that there is a compelling public interest for disclosure of the documents at issue which would in fact further the public interest, the Court notes that the exceptions to the right of access to documents provided for in Article 4(1)(a) of Decision 2004/258 are framed in mandatory terms. It follows that the ECB is obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist, and no weighing up of an 'overriding public interest' is provided for in that provision, in contrast with the exceptions referred to in Article 4(2) and (3) of that decision (see, by analogy, Joined Cases T–3/00 and T–337/04 *Pitsiorlas* v *Council and ECB* [2007] ECR II–4779, paragraph 227 and the case-law cited).

Consequently, those arguments of the applicants and their arguments put forward as justification for the overriding public interest alleged must be rejected as irrelevant in the context of the examination of whether the ECB correctly applied the exception to the right of access provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

Second, the applicants assert that, contrary to the ECB's submission in its letters of 17 September and 21 October 2010, disclosure of the documents at issue would not undermine the protection of the public interest so far as concerns the economic policy of the Union and the Hellenic Republic. That disclosure would not bear a substantial and acute risk of misleading the public and the markets. Moreover, the fact that the European Commission was carrying out a thorough examination of the relevant issues in the framework of the excessive debt procedure does not constitute a factor against disclosure.

In the light of those arguments, it is therefore necessary, in respect of each document referred to in the application, to examine whether the contested decision is vitiated by a manifest error of assessment.

With respect to the first document, the ECB justified its refusal to grant access to that document by stating, in its letters of 17 September and 21 October 2010, that that document contained ECB staff assumptions and views regarding the impact of off-market swaps on government deficit and on government debt with a particular view to the case of the Hellenic Republic on the basis of partial data that were available at the time the document was drafted in order to give a snapshot of the situation in March 2010. In the ECB's submission, the information contained in that document was outdated at the time of the request for access. Disclosure of that information would bear the substantial and acute risk of severely misleading the public in general and the financial markets in particular. In a very vulnerable market environment, that disclosure would affect the proper functioning of the financial markets. Thus, disclosure of the information contained in that document would undermine public confidence as regards the effective conduct of economic policy in the Union and the Hellenic Republic. Moreover, as an additional element, the ECB noted, by way of justification for the refusal to grant access to that document, that the issues examined in the document at issue were then part of a thorough examination by the Commission in the framework of the excessive deficit procedure, and that the result of that examination would be published in due time.

The first document, submitted by the ECB in response to the measures of inquiry ordered by the Court (see paragraph 10 above), contains, in essence, a description of the manner in which the financial instrument of off-market swaps functions, ECB staff assumptions and views regarding the impact of those swaps on government debt and on government deficit with a particular view to the case of the Hellenic Republic and of possible action envisaged. In particular, that document contains an analysis of the possible impact of the operation of the financial instrument of off-market swaps on the government debt and government deficit of the Hellenic Republic on the basis of various assumptions made in accordance with data which were available at the time that that document was drafted, relating to the manner in which off-market swaps operate.

The first document therefore deals with aspects relating to the economic policy of the Union and the Hellenic Republic and falls within the scope of the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258; moreover, the applicants do not contest this.

As regards the issue whether disclosure of the first document would specifically and effectively undermine the protected interest in question, it is common ground, as the ECB stated in its letter of 21 October 2010, that, at the time of the adoption of the contested decision, the European financial markets were in a very vulnerable environment. The stability of those markets was fragile, in particular, because of the economic and financial situation of the Hellenic Republic. It is also common ground that that situation and the related sales of Greek financial assets were causing strong depreciations in the value of those assets, which also triggered losses for Greek and other European holders. The applicants did not dispute that that development had the potential of leading to negative spillover effects on the solvency and funding conditions of other issuers and countries in the euro area. In such an environment, it is clear that market participants use the information disclosed by central banks and that their analyses and decisions are considered a particularly important and reliable source to assess current and prospective financial market developments. Moreover, the ECB was entitled to find that public confidence is an essential element affecting the proper functioning of the financial markets. The ECB was not indeed contradicted in this respect by the applicants.

In the light of the content of the first document and the environment in which the European financial markets found themselves, as described above, the Court takes the view that the ECB did not commit a manifest error of assessment in considering, in its letters of 17 September and 21 October 2010, that disclosure of the information contained in the first document would specifically and effectively undermine the public interest so far as concerns the economic policy of the Union and the Hellenic Republic.

In support of its arguments regarding the substantial and acute risk of severely misleading the public in general and the financial markets in particular in a very vulnerable market environment, the ECB asserts that assumptions and views of members of its staff regarding the impact of off-market swaps on government deficit and on government debt, which are contained in the first document, were based on partial information that was available at the time the document was drafted in order to give a snapshot of the situation in March 2010.

In this respect, it must be stated that it is apparent from the case-file that the first document, which is based on information that was available before the end of February 2010, was examined by the ECB's Executive Board on 2 March 2010 and submitted to the ECB's Governing Council on 3 March 2010. Since access to that document was definitively refused on 21 October 2010, and therefore more than seven months after it was drafted, it is possible to conclude that that document did not contain, at the time of the definitive refusal, updated data regarding the impact of off-market swaps on government deficit and on government debt, in particular, of the Hellenic Republic. That is corroborated by the fact that on 22 April 2010, Eurostat (the Statistical Office of the European Union) issued a press release, regarding the first notification excessive deficit procedure, presenting the deficit and debt figures for the EU Member States for 2006 to 2009 and including a reservation on the Greek data citing, inter alia, uncertainties in the recording of off-market swaps. In this respect, Eurostat also announced investigations which might lead to a revision of the deficit and debt figures.

None the less, the fact that, on 21 October 2010, the data contained in the first document were outdated and that they gave only a snapshot of the factual situation at the time that the document was drafted does not permit the conclusion that, in the event of disclosure of that document, financial market participants would also have regarded as outdated and therefore of no value ECB staff assumptions and views regarding the impact of off-market swaps on government deficit and on government debt which are contained in that document.

Although it is true that those participants are professionals who can be expected to use information taken from documents in the context of their work, the fact remains that they consider assumptions and views originating from the ECB to be particularly important and reliable for assessing the financial market. It cannot reasonably be precluded that, even if those assumptions and views were made on the basis of data available well before 21 October 2010, they would have been regarded as still valid on that date. Moreover, it can be assumed that, by relying on those assumptions and views that were based on a certain known factual situation, those professionals might have inferred, on the basis of additional data, assumptions and views allegedly held by the ECB regarding the government deficit and government debt at the time that the ECB definitively refused access to that document. In this respect, any clarification by the ECB on the disclosed version of that document, indicating that the information contained therein was no longer up to date, would not have been able to prevent disclosure of that

document from misleading the public and financial market participants in particular on the situation regarding the government deficit and government debt as assessed by the ECB.

In the light of the very vulnerable environment in which the financial markets found themselves at the time of adoption of the contested decision, the assessment that such an error would undermine the economic policy of the Union and the Hellenic Republic cannot be rejected as manifestly incorrect. Indeed, such an error might have had negative consequences on access, in particular for that Member State, to the financial markets and might therefore have affected the effective conduct of economic policy in the Hellenic Republic and the Union.

The ECB was therefore entitled to base its refusal to grant access to the first document on the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

With respect to the second document, the ECB justified its refusal to grant access to that document by stating, in its letter of 17 September 2010, that it contained the ECB's staff assumptions and views regarding the 'Titlos' transaction, the possible existence of similar transactions impacting on the euro area government debt or deficit levels, the relevance for the Eurosystem collateral framework, associated risk control measures, and their possible revision. According to the ECB, Titlos plc is a special purpose financial vehicle that was created on 26 February 2009 by the National Bank of Greece. Titlos plc issued a certain amount in euro of asset-backed securities due in September 2039. The ECB specifies that the underlying asset for the asset-backed securities named 'Titlos' was an interest rate swap between the National Bank of Greece and the Hellenic Republic. The 'Titlos' asset was required to be eligible as collateral for Eurosystem credit operations, and this was assessed by the central bank of another Member State after consultation with the ECB. According to the ECB's reasoning in its letter of 17 September 2010, since that document was closely connected with the first document, it also fell within the exception to the right of access referred to in the second indent of Article 4(1)(a) of Decision 2004/258. Subsequently, in its letter of 21 October 2010, the ECB no longer made a distinction between the first and second document in its statement of reasons for the refusal. According to the ECB, the reasoning set out in paragraph 49 above relating to the refusal to grant access to the first document was therefore also valid in relation to the second document.

The second document, which was submitted by the ECB in response to the measures of inquiry ordered by the Court (see paragraph 10 above), contains, in essence, the background to the 'Titlos' transaction as well as an examination carried out by ECB staff of the financial structure of that transaction and the possible existence of similar transactions. In this respect, the manner in which the Hellenic Republic used off-market swaps and the consequences of those swaps for existing risks were inter alia analysed. Moreover, that document contains several conclusions regarding the Hellenic Republic and the Eurosystem based on the analyses carried out.

That document therefore deals with aspects relating to the economic policy of the Union and the Hellenic Republic and falls within the scope of the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258; moreover, the applicants do not contest this.

As regards the issue whether disclosure of the second document would specifically and effectively undermine the protected interest in question, the Court notes that the content of that document is closely connected with that of the first document. In a very vulnerable environment for the financial markets such as that which existed at the time of adoption of the contested decision (see paragraph 52 above), it must be stated that the ECB's assessment that disclosure of the analyses and conclusions contained in the second document would undermine the economic policy of the Union and the Hellenic Republic is not vitiated by a manifest error. Even if those analyses and conclusions were based on the partial data available at the time that the second document was drafted, their disclosure might have influenced the financial markets and their assessment of the situation regarding the government deficit and the government debt of the Hellenic Republic in the same manner as disclosure of the first document (see paragraphs 56 to 58 above). Such repercussions might have had negative consequences on access, in particular for that Member State, to the financial markets and might therefore have affected the effective conduct of economic policy in the Hellenic Republic and the Union.

Consequently, the ECB was entitled to base its refusal to grant access to the second document on the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

In so far as the ECB based its refusal to grant access to the documents at issue on the exception referred to in the second indent of Article 4(1)(a) of Decision 2004/258, the contested decision is not therefore vitiated by a manifest error of assessment.

That conclusion is not undermined by the applicants' arguments relating to Article 10 of the ECHR.

The applicants claim that, in order to avoid a breach of their rights under Article 10 of the ECHR, it is necessary to construe and apply the exception referred to in the second indent of Article 4(1)(a) of Decision 2004/258 in the manner stated by the applicants. In this respect, they refer to the judgments of the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary* of 14 April 2009, *Kenedi v. Hungary* of 26 May 2009 (not yet published in the *Reports of Judgments and Decisions*) and *Gillberg v. Sweden*, paragraph 11 above.

Article 10 of the ECHR provides, in its relevant part, that everyone has the right to freedom of expression and that this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society

for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence.

In this respect, the Court observes that Article 52(3) of the Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389; 'the Charter'), which has the same legal value as the Treaties in accordance with the first subparagraph of Article 6(1) TEU, provides that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR. However, that provision is not to prevent Union law providing more extensive protection.

Pursuant to Article 52(7) of the Charter, the explanations drawn up as a way of providing guidance in the interpretation of the Charter, namely the Explanations relating to the Charter (OJ 2007 C 303, p. 17), are to be given due regard by the courts of the Union and of the Member States.

It is apparent from the Explanations relating to the Charter that Article 10 of the ECHR corresponds to Article 11 of the Charter, according to which everyone is to have the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The freedom and pluralism of the media are to be respected.

According to Article 52(1) and (2) of the Charter of Fundamental Rights, any limitation on the exercise of the rights and freedoms recognised by that charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties. That being so, it is clear that Article 11 of the Charter, in conjunction with Article 52(1) and (2) of the Charter, contains rights which correspond to those guaranteed by Article 10 of the ECHR. Those articles of the Charter must therefore be given the same meaning and the same scope as Article 10 of the ECHR, as interpreted by the case-law of the European Court of Human Rights (see, by analogy, Case C–400/10 PPU *McB* [2010] ECR I–8965, paragraph 53, and Case C–256/11 *Dereci and Others* [2011] ECR II-0000, paragraph 70).

The Court notes that, with respect to the right of access to documents of the Union's institutions, bodies, offices and agencies, the Charter provides for a special fundamental right. Under Article 42 of the Charter, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, is to have a right of access to those documents, whatever their medium. However, the applicants did not claim that there was an infringement of that special right, but merely asserted an alleged infringement of the general right of freedom of expression guaranteed by Article 10 of the ECHR and Article 11 of the Charter. In so doing, they did not explain how, in their view, the ECB's conduct could amount to an infringement of Article 10 of the ECHR and Article 11 of the Charter.

With respect to the issue whether, for the purposes of the application of the second indent of Article 4 (1)(a) of Decision 2004/258, the ECB misconstrued the scope of the right of access as interpreted in the light of Articles 11 and 52 of the Charter and of Article 10 of the ECHR by refusing to grant access to the documents at issue, the applicants merely refer to the judgments of the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, *Kenedi v. Hungary*, paragraph 67 above, and *Gillberg v. Sweden*, paragraph 11 above.

However, those judgments do not permit the conclusion that, by refusing to grant access to the documents at issue, the ECB misconstrued the scope of the right of access as interpreted in the light of Articles 11 and 52 of the Charter and of Article 10 of the ECHR.

In *Kenedi v. Hungary*, paragraph 67 above, the European Court of Human Rights found that there had been an infringement of Article 10 of the ECHR on the ground that the measure in question in that case was not prescribed by law (see paragraph 45 of that judgment). In the present case, the refusal to grant access to the documents at issue was based on the second indent of Article 4(1)(a) of Decision 2004/258. That decision was adopted pursuant to Article 23(2) of ECB Decision 2004/257/EC of 19 February 2004 adopting the Rules of Procedure of the ECB (OJ 2004 L 80, p. 33), in conjunction with Article 12(3) of the Protocol on the Statute of the European System of Central Banks and of the ECB (OJ 1992 C 191, p. 68), and with Article 8 EC. That refusal sought to achieve the legitimate aim of protecting the public interest so far as concerns the economic policy of the Union and the Hellenic Republic.

Moreover, although it is true that, in *Gillberg v. Sweden*, paragraph 11 above, the European Court of Human Rights found that the applicant in that case did not, under Article 10 of the ECHR, have a negative right to refuse to make available the documents concerned (paragraph 94 of that judgment), that case can be distinguished from the present one. Whilst the documents concerned in *Gillberg v. Sweden*, paragraph 11 above, were not the property of the person who refused to grant access to them (paragraphs 92 and 93 of that judgment), in the present case, the documents at issue requested by the applicants were the property of the ECB. Moreover, unlike in *Gillberg v. Sweden* (paragraph 93 of that judgment), the ECB's refusal to grant access to those documents was not contrary to a court decision ordering the ECB to grant access to them.

As regards *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, it is true that that judgment deals with the need to limit the right of access to information. However, the facts in that case are not similar to those of the present case, and that judgment cannot therefore be usefully relied upon

in the present case. *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, concerned the refusal to communicate information relating to a constitutional complaint brought by a public figure on the ground of the personality rights of the latter. In that complaint, it was alleged that the opinions of public figures on public matters are related to their person and therefore constitute private data which cannot be disclosed without their consent (see paragraph 37 of that judgment). By contrast, this case does not concern alleged private data of a public figure.

Moreover, the Court notes that the contested decision does not contain a general prohibition on receiving ECB information relating to the government deficit and the government debt of the Hellenic Republic. In this respect, it should also be observed that, in applying the exceptions to the right of access provided for in Article 4 of Decision 2004/258, the ECB did not limit that right solely to documents falling within the exercise of its administrative tasks, as referred to in the fourth subparagraph of Article 15(3) TFEU (see paragraph 39 above).

With respect to the applicants' arguments that the public must have access to information regarding, first, the level of debt of the Hellenic Republic and, second, the question whether the Greek authorities provided complete and correct information to Eurostat on the Greek Government debt, including the off -market swap operations, it must be stated that, at the time of adoption of the contested decision, the Eurostat report entitled 'Report on Greek Government deficit and debt statistics' of 8 January 2010 explained the persistent weaknesses of the Greek fiscal data by reference to instances of misreporting by the Greek authorities of deficit and debt data. Moreover, in the Eurostat note entitled 'Information note on Greece – 24.02.2010', it is stated that, for the first time, the Greek authorities declared the existence of an off-market swap operation in 2001 and that Eurostat would request the Greek authorities to supply, as soon as possible, all the information necessary for a complete evaluation and recording of this operation in the next excessive deficit procedure notification. Moreover, on 22 April 2010, Eurostat issued a press release, regarding the first notification excessive deficit procedure, presenting the deficit and debt figures for the EU Member States for 2006 to 2009 and including a reservation on the Greek data citing, inter alia, uncertainties in the recording of off-market swaps.

In those circumstances, the applicants' arguments relating to the judgments in *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, *Kenedi v. Hungary*, paragraph 67 above, and *Gillberg v. Sweden*, paragraph 11 above, must be rejected.

Consequently the first plea must be rejected.

Given that the ECB was entitled to base its refusal to grant access to the documents at issue on the exception to the right of access provided for in the second indent of Article 4(1)(a) of Decision 2004/258, it is no longer necessary for the Court to examine the second and third pleas concerning the exceptions to the right of access provided for in the first indent of Article 4(2), and in Article 4(3) of that decision.

In the light of all the foregoing, the action must be dismissed in its entirety as in part inadmissible and in part unfounded.

**Costs**

Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the ECB.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

**Dismisses the action;**

**Orders Ms Gabi Thesing and Bloomberg Finance LP to bear their own costs and to pay those incurred by the European Central Bank (ECB).**

Dittrich Wiszniewska-Białecka Prek

Delivered in open court in Luxembourg on 29 November 2012.

[Signatures]

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* Language of the case: English.