Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

12 March 2019*

(Access to documents – Decision 2004/258/EC – Document entitled 'Responses to questions concerning the interpretation of Article 14.4 of the Protocol on the Statute of the ESCB and of the ECB' – Refusal to grant access – Exception relating to the protection of legal advice – Exception relating to the protection of documents for internal use – Overriding public interest)

In Case T-798/17,

Fabio De Masi, residing in Hamburg (Germany),

Yanis Varoufakis, residing in Athens (Greece),

represented by A. Fischer-Lescano, professor,

applicants,

v

European Central Bank (ECB), represented by T. Filipova and F. von Lindeiner, acting as Agents, and by H.-G. Kamann, lawyer,

defendant,

APPLICATION under Article 263 TFEU for annulment of the decision of the ECB of 16 October 2017 refusing to grant the applicants access to the document of 23 April 2015 entitled 'Responses to questions concerning the interpretation of Article 14.4 of the Protocol on the Statute of the ESCB and of the ECB'.

THE GENERAL COURT (Second Chamber),

composed of M. Prek, President, F. Schalin and M.J. Costeira (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 By letter of 24 April 2017, the applicants, Fabio De Masi and Yanis Varoufakis, asked the European Central Bank (ECB), on the basis of Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (OJ 2004 L 80, p. 42), as amended by Decision 2011/342/EU of the European Central Bank of 9 May 2011 (ECB/2011/6) (OJ 2011 L 158, p. 37) and Decision (EU) 2015/529 of the European Central Bank of 21 January 2015 (ECB/2015/1) (OJ 2015 L 84, p. 64), to grant them access to all the external legal advice which the ECB supposedly requested in order to review its decisions of 4 February and 28 June 2015 concerning the emergency liquidity assistance granted by the Greek Central Bank to Greek banks.

2 By letter of 31 May 2017, the ECB informed the applicants that it had not sought legal advice for those decisions. Moreover, it informed the applicants of the existence of external legal advice of 23 April 2015 entitled 'Responses to questions concerning the interpretation of Article 14.4 of the Protocol on the Statute of the ESCB and of the ECB' ('the document at issue').

3 By letter of 7 July 2017, the applicants asked the ECB, on the basis of Decision 2004/258, to grant them access to the document at issue.

4 By letter of 3 August 2017, the ECB refused to grant access to the document at issue on the basis of, first, the exception provided for in the second indent of Article 4(2) of Decision 2004/258, concerning the protection of legal advice and, secondly, the exception provided for in the first subparagraph of Article 4(3) of the same decision, concerning the protection of documents for internal use.

5 By letter of 30 August 2017, the applicants submitted a confirmatory application for access to the document at issue, under Article 7(2) of Decision 2004/258.

6 By letter of 16 October 2017, the ECB confirmed the decision of 3 August 2017 refusing access to the document at issue ('the contested decision'). That refusal was based on the same exceptions as those set out in the decision of 3 August 2017.

Procedure and forms of order sought

7 By application lodged at the Court Registry on 8 December 2017, the applicants brought the present action.

8 The ECB's defence was lodged at the Court Registry on 22 February 2018.

9 The reply and the rejoinder were lodged at the Court Registry, respectively, on 22 March 2018 and 2 May 2018.

10 By order of 27 September 2018, the Court ordered the ECB, on the basis of Article 91(c) of the Rules of Procedure of the General Court, to produce the document at issue. The ECB complied with that request within the prescribed period. In accordance with Article 104 of the Rules of Procedure, that document was not communicated to the applicants.

11 The General Court (Second Chamber) decided, under Article 106(3) of the Rules of Procedure, to rule on the action without an oral part of the procedure.

12 The applicants claim that the Court should:

– annul the contested decision;

– order the ECB to pay the costs.

13 The ECB contends that the Court should:

– dismiss the action as unfounded;

– order the applicants to pay the costs.

Law

14 In support of the action, the applicants rely, in essence, on two pleas in law alleging, first, infringement of the second indent of Article 4(2) of Decision 2004/258 and, secondly, infringement of the first subparagraph of Article 4(3) of that decision.

15 As a preliminary point, in respect of the legal framework applicable to the right of access to ECB documents, it must be observed that the second paragraph of Article 1 TEU enshrines the principle that the European Union's decision-making process must be open. In that regard, Article 15(1) TFEU states that, in order to promote good governance and ensure the participation of civil society, the European 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 European Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. Moreover, according to the second subparagraph of Article 15(3) TFEU, 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, 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 thereof. According to the fourth subparagraph of Article 15(3) TFEU, the Court of Justice of the European Union, the European Central Bank and the European Investment Bank are to be subject to this paragraph only when exercising their administrative tasks.

16 Decision 2004/258 seeks, as stated in recitals 2 and 3 thereof, to authorise wider access to ECB documents than that which existed under the regime 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 national central banks, and the confidentiality of certain matters specific to the performance of the ECB's tasks. Article 2(1) of Decision 2004/258 thus gives any citizen of the European 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.

17 That right is subject to certain limits based on reasons of public or private interest. More specifically, and in accordance with recital 4 thereof, Decision 2004/258 provides, in Article 4 thereof, 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 is for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and the national central banks, the national competent

authorities or the national designated authorities, or where it reflects exchanges of views between the ECB and other relevant authorities and bodies. 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 (see, to that effect, judgment of 29 November 2012, *Thesing and Bloomberg Finance* v *ECB*, T-590/10, not published, EU:T:2012:635, paragraph 41).

18 It is in the light of those principles that the pleas raised by the applicants in support of the action must be examined. The Court considers it appropriate to begin by examining the second plea.

19 In the context of the second plea, the applicants submit, in essence, that, in the contested decision the ECB misapplied the exception relating to the protection of documents for internal use, provided for in the first subparagraph of Article 4(3) of Decision 2004/258. Consequently, the ECB also infringed their right of access to documents under the fourth subparagraph of Article 15(3) TFEU, in conjunction with Article 2(1) of Decision 2004/258.

20 This plea is divided into two parts. The first part alleges misapplication of the exception relating to the protection of documents for internal use. The second part claims that there is an overriding public interest in disclosure of the document at issue.

The first part of the second plea, alleging misapplication of the exception relating to the protection of documents for internal use

21 In the first place, the applicants submit that the exception relating to the protection of documents for internal use is not applicable in this case. They claim that it is clear from the wording of the first subparagraph of Article 4(3) of Decision 2004/258 that that article applies only to documents for internal use other than legal advice. They argue that legal advice is covered by another exception, namely the exception relating to the protection of legal advice, provided for in the second indent of Article 4(2) of Decision 2004/258. Accordingly, in their view, the exception relating to the protection of legal advice constitutes a special provision in relation to the exception relating to the protection of documents for internal use.

22 In the second place, the applicants submit that, in any event, the conditions for the application of the exception relating to the protection of documents for internal use are not satisfied in this case. First, they claim that the document at issue is not an internal document. Secondly, they submit that it does not relate to an administrative, judicial or legislative procedure in the context of which it is intended for internal use as a document preparatory to the final decision.

23 In the third place, the applicants submit that the contested decision lacks an adequate statement of reasons in support of the claim that the interest protected by the exception relating to the protection of documents for internal use would be undermined. According to the applicants, first, the hypothetical line of argument set out in the contested decision does not comply with the requirements of the case-law, since the contested decision does not explain how the disclosure of the document at issue could reduce the ECB's space for reflection. Secondly, the arguments relating to the future importance of the document at issue are irrelevant, in their view, since the wording of Article 14.4 of the Protocol on the Statute of the European System of Central Banks (ESCB) and of the ECB ('the Protocol on the ESCB and the ECB') has remained unchanged.

24 The ECB disputes those arguments.

25 As a preliminary point, it should be noted that, according to the first subparagraph of Article 4(3) of Decision 2004/258, access to a document drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and national central banks, is to be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.

26 Moreover, it should be noted that the wording of the first subparagraph of Article 4(3) of Decision 2004/258 is significantly different from that of Article 4(3) 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).

27 As is clear from the case-law, the application of the exception provided for in the first and second subparagraphs of Article 4(3) of Regulation No 1049/2001 requires it to be established that access to the document for internal use is likely, specifically and actually, to undermine the protection of the decision-making process of the institution and that the decision-making process must be seriously undermined (see, to that effect, judgments of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraphs 80 and 81, and of 13 January 2017, *Deza* v *ECHA*, T-189/14, EU:T:2017:4, paragraphs 172 and 173 and the case-law cited).

28 Furthermore, Article 4(3) of Regulation No 1049/2001 draws a clear distinction by reference to whether a procedure has been closed or not. Thus, according to the first subparagraph of that provision, any document drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, falls within the scope of the exception for protecting the decision-making process. The second subparagraph of that provision provides that, after the decision has been taken, the exception at issue covers only documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned (judgment of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 78).

29 However, application of the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 does not require it to be established that the decision-making process could be seriously undermined. Similarly, that article makes no distinction between documents for internal use concerning an ongoing procedure and those concerning a procedure which has been closed.

30 Thus, refusal to grant access to a document under the first subparagraph of Article 4(3) of Decision 2004/258 requires only that it be established, first, that that document is for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and national central banks and, secondly, that there is no overriding public interest in disclosure.

31 The exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 is thus intended to protect, first, a space for reflection within the ECB, in which the institution's decision-making bodies may have a confidential exchange of views as part of their deliberations and preliminary consultations and, secondly, a space for a confidential exchange of views between the ECB and the national authorities concerned.

32 In the present case, the document at issue was requested by the ECB from external legal counsel and that document is entitled 'Responses to questions concerning the interpretation of Article 14.4 of the [Protocol on the ESCB and the ECB]'.

33 Moreover, it is clear from the contested decision that the document at issue examines the powers held by the Governing Council under Article 14.4 of the Protocol on the ESCB and the ECB, in particular the prohibitions, restrictions or conditions that the Council can place upon the performance of functions outside the ESCB by the national central banks in so far as there is a risk that those functions may interfere with the objectives and tasks of the ESCB.

34 The above is not contradicted by the content of the document sent to the Court by way of the measure of inquiry referred to in paragraph 10 above.

35 It is also common ground that, as noted in paragraphs 4 and 6 above, in the contested decision the ECB refused to grant access to the document at issue on the basis of, first, the exception provided for in the second indent of Article 4(2) of Decision 2004/258, relating to the protection of legal advice, and secondly, the exception provided for in the first subparagraph of Article 4(3) of that decision, relating to the protection of documents for internal use.

36 As regards the exception relating to the protection of documents for internal use, the reasons given by the ECB, in the contested decision, to justify its refusal to grant access were as follows:

'The Executive Board wishes to clarify that the subject matter of the present application is the legal opinion commissioned to provide the ECB's decision-making bodies with further legal insight for their internal deliberations and reflections and, as such, is also protected under Article 4(3), first subparagraph, of Decision [2004/258] …

The legal opinion was intended to provide legal expertise to clarify the legal framework, enrich the internal considerations of the decision-making bodies and support their [emergency liquidity assistance]-related deliberations and discussions not only in 2015, but also on future occasions. As such, it serves any ongoing or future considerations of cases within the scope of Article 14.4 of the [Protocol on the ESCB and the ECB] …

The Executive Board agrees with the assessment of the Director-General Secretariat that disclosure of the document would undermine the possibility of an effective, informal and confidential exchange of views taking place among the members of the decision-making bodies and, as a consequence, would limit the ECB's "space to think". Taken out of context or seen in isolation, it could potentially affect the independence of Governing Council members, a fundamental principle of the ESCB protected by Article 130 TFEU, especially in respect of [national central banks] that are providing, or intend to provide, [emergency liquidity assistance] or are performing other national functions.'

37 It follows that the document at issue contained the response from external counsel to a request for legal advice from the ECB and that the ECB took the view that that document was intended to provide its decision-making bodes with 'further legal insight' and 'support' for their internal and preliminary discussions and reflections relating to the decisions which the Governing Council would be expected to take, in accordance with Article 14.4 of the Protocol on the ESCB and the ECB, in 2015 and beyond.

38 In that regard, first, it should be noted that Article 14.4 of the Protocol on the ESCB and the ECB provides:

'National central banks may perform functions other than those specified in [the Protocol on the ESCB and the ECB] unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.'

39 Thus, it is clear from Article 14.4 of the Protocol on the ESCB and the ECB that the ECB's Governing Council is the body which is competent, inter alia, for restricting the provision of emergency liquidity assistance by a national central bank, in so far as it is considered that that provision interferes with the objectives and tasks of the ESCB.

40 Secondly, it should be noted that, according to Article 10.4 of the Protocol on the ESCB and the ECB, the proceedings of the meetings of the Governing Council are confidential and only the Governing Council may decide to make the outcome of its deliberations public.

41 In the light of the foregoing, it must be held that the ECB was entitled to consider that the document at issue was a document for internal use within the meaning of the first subparagraph of Article 4(3) of Decision 2004/258, in so far as it considered that that document was intended to provide information and support to the deliberations of the Governing Council within the scope of the competences conferred on it by Article 14.4 of the Protocol on the ESCB and the ECB.

42 The applicant's arguments do not call that finding into question.

43 In the first place, it is necessary to reject at the outset the applicants' argument that the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 is not applicable to the document at issue because that document consisted of legal advice which fell within the scope of the exception relating to the protection of legal advice, provided for in the second indent of Article 4(2) of that decision. That assertion is not supported by either the wording or the purpose of the provisions at issue.

44 First, it must be noted that, when assessing a request for access to documents held by it, the ECB may take into account more than one of the grounds for refusal set out in Article 4 of Decision 2004/258 (see, by analogy, judgments of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 113, and of 3 July 2014, *Council* v *in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 100 and the case-law cited).

45 Accordingly, in the present case, it should be noted that the exceptions on which the refusal to grant access to the document at issue was based, namely the exception relating to the protection of legal advice and the exception relating to the protection of documents for internal use, are both autonomous grounds for refusal, since the first does not constitute a *lex specialis* in relation to the second.

46 Secondly, it is clear from the wording of the first subparagraph of Article 4(3) of Decision 2004/258 that the exception provided for covers documents drafted or received by the ECB for internal use or for exchanges of views between the ECB and national authorities, regardless of whether or not they contain legal advice.

47 Consequently, it is immaterial, for the purpose of applying the exception referred to in the first subparagraph of Article 4(3) of Decision 2004/258, that the document at issue may also be characterised as legal advice. Moreover, it is important to note that the applicants contradict themselves on this point, since, in their application, even they submit that the document at issue cannot be regarded as legal advice for the purpose of applying the exception referred to in the second indent of Article 4(2) of Decision 2004/258.

48 In the second place, it is necessary to reject the applicants' argument that the document at issue does not satisfy the conditions laid down in the first subparagraph of Article 4(3) of Decision 2004/258 given that, first, it is not an internal document and, secondly, it does not relate to a specific procedure.

49 As contended by the ECB, it is not stated in the contested decision that the document at issue is an internal document, but rather that that document is for internal use. Indeed, it is clear from the contested decision that the document at issue was requested from external counsel in order to provide legal expertise to enrich the internal considerations of the ECB's decision-making bodies and support their deliberations and discussions (see paragraph 36 above).

50 Moreover, it is true that the document at issue does not relate to a specific procedure and, therefore, does not constitute a document which led the ECB to take a final position in a specific case. However, as is also clear from the contested decision, that document is intended, in general, to support the deliberations in which the Governing Council would be expected to participate in accordance with Article 14.4 of the Protocol on the ESCB and the ECB, in 2015 and beyond. That document is therefore a preparatory document for the adoption of future decisions by ECB bodies.

51 Furthermore, it must be recalled, as is apparent from paragraphs 25 to 31 above, that the application of the exception laid down in the first subparagraph of Article 4(3) of Decision 2004/258 does not require the ECB to show that disclosure of the document would seriously undermine its decision-making process. Accordingly, the fact that the document at issue does not relate to a specific procedure is not sufficient to preclude the application of that exception.

52 In those circumstances, it cannot be held that the contested document was not for internal use as part of deliberations and preliminary consultations within the ECB, within the meaning of the first subparagraph of Article 4(3) of Decision 2004/258.

53 In the third place, as regards the alleged infringement of the obligation to state reasons, it should be recalled that, according to settled case-law, the statement of reasons required by the second paragraph of Article 296 TFEU must be appropriate to the act at issue and must disclose, in a clear and unequivocal fashion, the reasoning followed by the institution which adopted the measure in question, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (see judgments of 22 March 2001, *France* v *Commission*, C-17/99, EU:C:2001:178, paragraph 35 and the case-law cited, and of 28 March 2017, *Deutsche Telekom* v *Commission*, T-210/15, EU:T:2017:224, paragraph 87).

54 Moreover, it must be acknowledged that the ECB enjoys broad discretion for the purpose of determining whether the public interest concerning the protection of documents for internal use might be undermined by the disclosure of the information contained in the document at issue. Thus the EU judicature's review of the legality of such a decision must be limited to verifying whether the procedural rules and the obligation 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, judgment of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v *ECB*, T-376/13, EU:T:2015:361, paragraph 53 and the case-law cited). Therefore, given the limited scope of the review conducted by the EU judicature, the ECB's compliance with its obligation to provide a statement of reasons takes on even more fundamental importance. Indeed, only in this way can the EU judicature verify whether the factual and legal elements upon which the exercise of the power of assessment depends were present (see, by analogy, judgment of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v *ECB*, T-376/13, EU:T:2015:361, paragraph 54 and the case-law cited).

55 In the present case, the contested decision states that the document at issue was a document for internal use as part of the deliberations and preliminary consultations of the Governing Council. In that regard, it is clear from the contested decision that the document at issue was requested from external legal counsel in order to enrich the considerations and support the deliberations that the Governing Council would be expected to take, in accordance with Article 14.4 of the Protocol on the ESCB and the ECB, in 2015 and beyond. According to the ECB, disclosure of the document 'would undermine the possibility of an effective, informal and confidential exchange of views taking place among the members of the decision-making bodies and, as a consequence, would limit the ECB's "space to think"'. Moreover, in so far as the document at issue, if disclosed, would be isolated from its context, this could potentially affect the independence of Governing Council members, a fundamental principle laid down in Article 130 TFEU (see paragraph 36 above).

56 It follows that, contrary to what is claimed by the applicants, the statement of reasons for the contested decision is not lacking in specific details, since it specifies, inter alia, the nature of the document at issue, its function and purpose within the ECB and the risks that its disclosure would pose.

57 Moreover, it must be held that the obligation to state reasons in no way precluded the ECB from basing its decision on considerations which took into account the hypothetical effects that the disclosure of the document at issue might have on the ECB's space for reflection. First, the abovementioned reasons are sufficiently specific to enable the applicants to challenge their correctness and the Court to conduct its review. Secondly, as contended by the ECB, the absence of a more detailed statement of reasons was justified by the concern not to reveal information that the exception relied upon seeks to protect (see, to that effect, by analogy, judgment of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v *ECB*, T-376/13, EU:T:2015:361, paragraph 55).

58 The ECB thus discharged its obligation to state reasons. This complaint must therefore be rejected in so far as it refers to the obligation to state reasons as an essential procedural requirement.

59 Moreover, in so far as the applicants' argument seeks to challenge the merits of the contested decision, it should be noted that, as is apparent from paragraph 41 above, the reasons stated in the contested decision for finding that the document at issue was a document for internal use within the meaning of the first subparagraph of Article 4(3) of Decision 2004/258 do not appear to be vitiated by error.

60 In that regard, it should be added that, contrary to what the applicants submit, the ECB was fully entitled to take into account hypothetical effects that disclosure of the document at issue could have on the ECB's space for reflection both in 2015 and in the period after 2015, since the wording of Article 14.4 of the Protocol on the ESCB and the ECB had remained unchanged, so the document at issue remained relevant.

61 In the light of all the foregoing, the first part of the second plea must be rejected.

The second part of the second plea, alleging that there is an overriding public interest in disclosure of the document at issue

62 The applicants submit that even if the conditions for the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 were met, the fact remains that there is an overriding public interest in the disclosure of the document at issue. According to the applicants, first, that overriding public interest, broadly speaking, arises from the fact that, in principle, citizens have an interest in verifying the legality of action taken by EU institutions. Moreover, in their view, it is apparent from recital 1 of Decision 2004/258 that increased openness enables citizens to participate more closely in the decision-making process and enhances the administration's legitimacy, effectiveness and accountability. Secondly, they claim that that overriding public interest arises, inter alia, from the interest in establishing the extent to which the ECB weighed up the various objectives when it drafted the agreement on emergency liquidity assistance of 17 May 2017 and how its legal experts interpreted the corresponding legal framework. Thirdly, the applicants argue that the ECB committed an error of law when weighing up the interests at stake, because it relied on the erroneous premiss that the interest in keeping information confidential prevails. According to the applicants, it is clear in particular from Article 42 of the Charter of Fundamental Rights of the European Union and the judgment of 18 July 2017, *Commission* v *Breyer* (C-213/15 P, EU:C:2017:563), that it is necessary to weigh up the interests at stake regardless of whether the document to which access is sought concerns the institution's administrative activities or its main field of activity.

63 The ECB disputes those arguments.

64 As a preliminary point, it should be observed that, in the situations referred to in the first subparagraph of Article 4(3) of Decision 2004/258, it is for the ECB to provide explanations on the question of whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned (see, by analogy, judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 49, and of 12 September 2013, *Besselink* v *Council*, T-331/11, not published, EU:T:2013:419, paragraph 96).

65 In particular, the system of exception laid down in the first subparagraph of Article 4(3) of Decision 2004/258 is based on a balancing of the opposing interests in a given situation, that is to say, on the one hand, the interests which would be favoured by the disclosure of the documents in question and, on the other, those which would be jeopardised by such disclosure. The decision taken on a request for access to documents depends on which interest must prevail in the particular case (see, by analogy, judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 42).

66 Although it is for the institution concerned to weigh up the different interests, it is for the applicant to refer to specific circumstances that establish such an overriding public interest. A statement setting out purely general considerations is not sufficient for the purpose of establishing that an overriding public interest prevails over the reasons justifying the refusal to disclose the documents in question (see, by analogy, judgment of 15 September 2016, *Herbert Smith Freehills* v *Commission*, T-755/14, not published, EU:T:2016:482, paragraph 69 and the case-law cited).

67 In the present case, as is apparent from the contested decision, the ECB considered that there was no overriding public interest in the disclosure of the document at issue. In that regard, the ECB stated, first, that although the interest relied on by the applicants, namely the right of citizens to verify the legality of measures adopted by the ECB, may be a public interest, it does not prevail over the interests protected by the exception relating to the protection of documents for internal use. Secondly, in its view, public interest is more effectively served in this case by the protection of the ECB's internal consultations and deliberations, since that protection is necessary in order to safeguard the ECB's ability to carry out its tasks. Thirdly, according to the ECB, the document at issue does not relate to a specific decision of the ECB and is not a decision on the legality of its acts. Fourthly, the EB argues that only the EU judicature is competent to review the legality of acts of the ECB.

68 The arguments put forward by the applicants are not capable of calling in question that assessment.

69 First, it is necessary to reject the applicants' argument relating to a supposed increased openness which is said to appear clearly from recital 1 of Decision 2004/258. As is evident from a combined reading of recitals 1 to 3 of Decision 2004/258, the wider access to ECB documents and archives referred to in that decision must be reconciled with the need to protect, inter alia, the independence of the ECB and the confidentiality of certain matters specific to the performance of the ECB's tasks (see paragraph 16 above).

70 In the second place, as regards the interest of citizens in verifying the legality of acts of the EU institutions, it must be held that, in the light of the case-law cited in paragraph 66 above, such a general consideration cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying the refusal to grant access to the document at issue (see, to that effect and by analogy, judgment of 15 September 2016, *Herbert Smith Freehills* v *Commission*, T-755/14, not published, EU:T:2016:482, paragraph 74).

71 In the third place, as regards the interest in establishing the extent to which the ECB had weighed up the various objectives when it drafted the agreement on emergency liquidity assistance of 17 May 2017, and how its legal experts interpreted the corresponding legal framework, it must be held that, even assuming that it is of a public nature, that interest has not been established in this case. As contended

by the ECB, the agreement and the document at issue were adopted on dates a considerable distance apart, and the document at issue does not concern emergency liquidity assistance but general issues relating to the interpretation of Article 14.4 of the Protocol on the ESCB and the ECB. In that context, it has not been established that the document at issue had a direct link with the agreement on emergency liquidity assistance.

72 In any event, the interest in having access to the document at issue, as a document which was supposedly preparatory to the agreement on emergency liquidity assistance, cannot outweigh the public interest which underlies the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258, namely the public interest in protecting, first, a space for reflection within the ECB in which the institution's decision-making bodies may have a confidential exchange of views as part of their deliberations and preliminary consultations and, secondly, a space for a confidential exchange of views between the ECB and the national authorities concerned. Moreover, since the agreement on emergency liquidity assistance is a public document, the applicants were able to examine it in order to verify that, when the ECB drafted it, it weighed up the various objectives pursued and interpreted the corresponding legal framework as it claimed to have done.

73 In the light of the foregoing, the second part of the second plea, and therefore the second plea in its entirety, must be rejected.

74 Given that the ECB was fully entitled to base its refusal to grant access to the document at issue on the exception to the right of access provided for in the first subparagraph of Article 4(3) of Decision 2004/258, it is not necessary to examine the first plea concerning the exception to the right of access provided for in the second indent of Article 4(2) of that decision.

75 It follows that the action must be dismissed in its entirety as unfounded.

Costs

76 Under Article 134(1) 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.

77 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 (Second Chamber),

hereby:

1. Dismisses the action;

2. Orders Mr Fabio De Masi and Mr Yanis Varoufakis to bear their own costs and to pay those incurred by the European Central Bank (ECB).

Prek Schalin Costeira

Delivered in open court in Luxembourg on 12 March 2019.

[Signatures]