Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

4 June 2015*

(Access to documents — Decision 2004/258/EC — Exchange Agreement of 15 February 2012 between Greece and the ECB and the national central banks in the Eurosystem — Annexes A and B — Partial refusal to grant access — Public interest — Monetary policy of the European Union and of a Member State — Internal finances of the ECB and the national central banks in the Eurosystem — Stability of the financial system in the European Union)

In Case T-376/13,

Versorgungswerk der Zahnärztekammer Schleswig-Holstein, established in Kiel (Germany), represented by O. Hoepner and D. Unrau, lawyers,

applicant,

v

European Central Bank (ECB), represented by A. Sáinz de Vicuña Barroso, S. Lambrinoc and K. Laurinavičius, acting as Agents, assisted by H.-G. Kamann and P. Gey, lawyers,

defendant,

ACTION for annulment of the decision of the ECB of 22 May 2013, communicated to the applicant by letter of the ECB President, partially refusing to grant an application for access to Annexes A and B to the 'Exchange agreement dated 15 February 2012 among the Hellenic Republic and the European Central Bank and the Eurosystem NCBs listed herein',

THE GENERAL COURT (Ninth Chamber),

composed of G. Berardis, President, O. Czúcz (Rapporteur) and A. Popescu, Judges,

Registrar: J. Weychert, Administrator,

having regard to the written procedure and further to the hearing on 10 December 2014,

gives the following

* Language of the case: German.

Judgment

Background to the dispute and the contested decision

1 Following tensions in certain segments of the financial markets, in particular certain State debt securities markets in the euro area, on 10 May 2010 the European Central Bank (ECB) decided and publicly announced that it was necessary to put in place a temporary securities markets programme aimed at restoring an appropriate functioning of the monetary policy transmission mechanism, which is the process by which monetary policy decisions have an impact on the economy in general and price levels in particular.

2 On 14 May 2010, the ECB adopted Decision 2010/281/EU of 14 May 2010 establishing a securities markets programme (ECB/2010/5) (OJ 2010 L 124, p. 8). The Securities Markets Programme ('the SMP') allowed the ECB and the Eurosystem national central banks ('NCBs') to intervene directly in both public and private debt securities markets in the euro area.

3 The SMP was implemented by the Eurosystem portfolio managers through interventions in the form of purchases of euro-denominated sovereign debt instruments on secondary markets. Under the SMP, the ECB purchased sovereign debt instruments, including Greek ones, between May 2010 and March 2011, and also between August 2011 and February 2012.

4 Under the Exchange agreement dated 15 February 2012 among the Hellenic Republic and the European Central Bank and the Eurosystem NCBs listed herein ('the Exchange Agreement'), the ECB and the Eurosystem NCBs exchanged Greek Government bonds held by them in return for new Greek Government bonds. The new bonds had the same features in terms of monetary value, interest payment dates and redemption dates as the original Greek Government bonds.

5 In March 2012, in the context of the initiative of private-sector involvement in the restructuring of the Greek national debt, some Greek Government bonds were restructured. That restructuring did not affect the new Greek Government bonds held by the ECB and the NCBs referred to in paragraph 4 above. The applicant, the Versorgungswerk der Zahnärztekammer Schleswig-Holstein (pension fund of the order of dentists of Schleswig-Holstein), a holder of Greek Government bonds, did not consent to the private-sector involvement initiative and instituted proceedings against the Hellenic Republic to safeguard its rights. It takes the view that the question of the extent of the ECB's and the Eurosystem NCBs' holding of Greek Government bonds at the time of restructuring of the Greek national debt in the context of the private-sector involvement initiative is of particular import for its action.

6 On 6 September 2012, the ECB decided to terminate the SMP. It announced that the liquidity injected through the SMP would continue to be absorbed as in the past and that the existing securities in the SMP portfolio would be held to maturity. It also announced the technical features of the Outright Monetary Transactions (OMT) in secondary sovereign bond markets, which were potential future monetary policy measures.

7 By letter of 15 March 2013, the applicant applied to the ECB for access to 'the Annex' to the Exchange Agreement.

8 The ECB replied to that application by letter of 16 April 2013. It stated that the Exchange Agreement comprised inter alia Annexes A and B and gave a description of their content. First of all, with respect to Annex A, the ECB explained that it set out in table form the Greek Government bonds acquired by it and the Eurosystem NCBs under the SMP. That table included four columns, showing the securities description, their identification number (ISIN), the SMP aggregated holdings and the location. The ECB also stated that the aggregate value of the Greek Government bonds listed in Annex A totalled EUR 42 732 860 000.00. Next, it stated that Annex B comprised two parts. Part I laid down the

financial terms for the new Greek Government bonds and comprised five columns, four of which gave the same information as in Annex A and the fifth of which stated the nominal value in euros. The nominal value of the new Greek Government bonds listed in Annex B also totalled EUR 42 732 860 000.00. Part II laid down the other terms for the new Greek Government bonds, such as the interest accrual basis, the interest payment dates, the paying agent, the listing, trading, etc. The ECB further explained that the new Greek Government bonds had the same features as the original Greek Government bonds in terms of nominal value, coupon rates, interest payment dates and redemption dates and were not included in the list of eligible securities which had been restructured under the private-sector involvement initiative. The ECB refused the applicant's application as to the remainder in so far as it sought access to detailed, broken down information contained in Annexes A and B.

9 On 19 April 2013, the applicant lodged a confirmatory application with the ECB, in which it restricted itself to seeking access to Annexes A and B to the Exchange Agreement.

10 By letter of 22 May 2013, the ECB provided extracts from Annexes A and B to the Exchange Agreement, confirming the description of those annexes given in its letter of 16 April 2013. It refused the confirmatory application as to the remainder. In its letter it stated that the refusal to disclose detailed, broken down information about the Greek Government bonds held by it and the Eurosystem NCBs was based on the second, third and seventh indents of Article 4(1)(a) 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 amending Decision ECB/2004/3 (ECB/2011/6) (OJ 2011 L 158, p. 37) ('Decision 2004/258, as amended'). The grounds given for that refusal were the protection of the public interest as regards the monetary policy of the European Union and of a Member State, in this case the Hellenic Republic, the internal finances of the ECB and the Eurosystem NCBs and the stability of the financial system in the European Union.

Procedure before the General Court and forms of order sought

11 By application lodged at the Registry of the General Court on 18 July 2013, the applicant brought the present action.

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

13 In the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, on 28 October 2014 the Court put written questions to the applicant and to the ECB. The applicant and the ECB provided answers to those questions within the prescribed time-limit.

14 In the context of the measures of inquiry provided for in Article 65 of the Rules of Procedure, by order of 3 November 2014 the Court ordered the ECB to produce Annexes A and B to the Exchange Agreement. The ECB complied with that measure of inquiry within the prescribed time-limit. In accordance with the third subparagraph of Article 67(3) of the Rules of Procedure, those documents were not communicated to the applicant.

15 The parties presented oral argument and gave their replies to the questions asked by the Court at the hearing on 10 December 2014.

16 The applicant claims that the Court should:

— annul 'the decision of the [ECB] of 16 April 2013, in the version of the decision of 22 May 2013 …, in so far as the request for access to Annexes A and B to [the Exchange Agreement] was not granted';

— order the ECB to pay the costs.

17 The ECB contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

1. *Admissibility of the action as a whole*

18 Without formally raising any objection of inadmissibility, the ECB challenges the admissibility of the present application. It states that, before submitting the applications for access to the Annexes to the Exchange Agreement in the applicant's name, the applicant's lawyer had previously submitted those applications in his own name. Those applications, which were practically identical to the applications submitted in the applicant's name, were refused. Since the applicant's lawyer withdrew the action against that refusal (Case T-70/13) on 15 March 2013, thus on the same date on which the application for access in the applicant's name was lodged, the action for annulment should be dismissed as inadmissible.

19 It should be noted in that regard that, when faced with the applications submitted by the applicant's lawyer in the name of the applicant, the ECB did not allege that they were excessive or vexatious, or refer to the aspect of *res judicata*. On the contrary, in its decisions of 16 April and 22 May 2013, it refused the applicant's applications on their merits.

20 As the addressee of those decisions, the applicant is therefore entitled to bring an action against them. Contrary to the ECB's assertions, the applicant's right to bring an action against those decisions is not affected by its applications potentially being inadmissible before the ECB or by the withdrawal of an action by another applicant in another case before the General Court.

21 The objection of inadmissibility must therefore be dismissed.

2. *The application for annulment of the ECB's letter of 22 May 2013*

Admissibility

22 The ECB submits that the first head of claim seeking annulment of 'the ECB's decision of 16 April 2013, as modified by the ECB's decision of 22 May 2013' is inadmissible. The applicant did not state sufficiently clearly which decision of the ECB it wishes to have annulled. The arguments put forward in support of that application refer both to its response of 16 April 2013 and that of 22 May 2013.

23 It should be noted that, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, which applies to the procedure before the General Court by virtue of the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure, all

applications must indicate the subject-matter of the dispute and be sufficiently precise in order to enable the defendant to prepare his defence and the Court to exercise its power of review (judgment of 20 March 2013 in *Nexans France* v *Entreprise commune Fusion for Energy*, T-415/10, ECR, EU:T:2013:141, paragraph 49).

24 In the present case, it is appropriate to bear in mind the legal context of which the application for annulment forms a part. Under the procedure provided for in Articles 6 and 7 of Decision 2004/258, as amended, once an initial application for access to documents has been refused, the applicant may make a confirmatory application asking the ECB's Executive Board to reconsider its position. It is apparent from those provisions that it is sufficiently clear from the application for annulment of 'the ECB's decision of 16 April 2013, as modified by the ECB's decision of 22 May 2013' that the applicant seeks annulment of the revision of the initial decision and therefore of the letter of 22 May 2013 from the ECB's Executive Board. At the hearing the applicant confirmed that interpretation of its application for annulment.

25 Contrary to the ECB's assertions, that confirmation by the applicant cannot be regarded as being an adjustment to its forms of order sought. It is already sufficiently clear from the application that the head of claim seeking annulment refers to the ECB's decision of 22 May 2013.

26 Accordingly, the objection of inadmissibility of the application for annulment of the ECB's decision of 22 May 2013 must be dismissed.

The merits

27 The applicant puts forward three pleas in law in support of its application for annulment: (i) unlawfulness of the seventh indent of Article 4(1)(a) of Decision 2004/258, as amended; (ii) infringement of the obligation to state reasons provided for by Article 296(2) TFEU and by Article 41(2)(c) of the Charter of Fundamental Rights of the European Union; (iii) incorrectness of the ECB's reasons.

28 The Court considers it expedient to examine the second and third pleas in law before turning to the first plea.

The second plea: infringement of the obligation to state reasons

29 The applicant submits that the ECB infringed the obligation to state reasons laid down in Article 296(2) TFEU and in Article 41(2)(c) of the Charter of Fundamental Rights. It states, in support of that plea, that the exceptions to the public's right of access to documents must be interpreted and applied strictly. The institution refusing access to a document must explain how access to that document could specifically and actually undermine the interest protected by an exception listed in the provision on which it relies. In the present case, the requirements arising from the obligation to state reasons are particularly stringent, due to the ECB's discretionary powers and the limited scope of the judicial review of its decisions. In the applicant's submission, the ECB's letter of 22 May 2013 does not meet those requirements.

30 The ECB disputes those arguments.

31 In that context it must be borne in mind that, under Article 296(2) TFEU, legal acts must state the reasons on which they are based.

32 The obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. The statement of reasons must be appropriate to the act at issue and must reflect the reasoning

followed by the EU 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 European Union judicature to exercise its power of review (judgment of 22 March 2001 in *France* v *Commission*, C-17/99, ECR, EU:C:2001:178, paragraph 35).

33 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the necessary requirements must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgment of 11 September 2003 in *Austria* v *Council*, C-445/00, ECR, EU:C:2003:445, paragraph 49).

34 The ECB's letter of 22 May 2013 must be examined in the light of the case-law referred to above.

35 First of all, in that letter the ECB stated that disclosure of the information contained in Annexes A and B to the Exchange Agreement would undermine, firstly, the protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State; secondly, the internal finances of the ECB and the Eurosystem NCBs; and, thirdly, the stability of the financial system in the European Union and in a Member State, and that the partial refusal to grant access to those documents was therefore justified under the second and third indents of Article 4(1)(a) of Decision 2004/258, as amended.

36 Next, the ECB set out in greater detail the reasons why it considered that disclosure of that information would undermine the public interest.

37 Firstly, it stated that it was not disclosing detailed, broken down information on its interventions on the markets, as that could undermine the effectiveness of EU monetary policy. That consideration holds true inter alia for purchases of securities under the SMP, which are forms of intervention operations. Disclosure of the precise composition of the SMP portfolio in terms of Greek Government bonds would reveal information about the strategy and tactics pursued through the intervention measures, which could undermine the effectiveness of potential future intervention operations by the ECB and, ultimately, the effectiveness of the monetary policy. In that context the ECB stated that the purchase of the Greek Government bonds by it and the Eurosystem NCBs under the SMP did not pursue an investment objective but rather a public objective, namely that of addressing the malfunctioning of relevant segments of the securities markets in order to restore an appropriate monetary policy transmission mechanism, an essential component for financial stability and a fundamental prerequisite for effectiveness of a monetary policy. An absence of effective monetary policy transmission throughout the euro area will threaten financial stability and indeed the very existence of the single monetary area.

38 Secondly, the ECB drew the applicant's attention to the fact that it is not common for the participants on financial markets to disclose the precise composition of their financial portfolio when that would be disadvantageous for their financial interests. It is a generally recognised principle that total transparency in respect of certain requirements will tend to weaken the holder's market position for future transactions, because it will enable third parties to use that holder's portfolio strategy as pursued in the past to predict its future investment needs and preferences. As the Eurosystem NCBs are public investors, the public interest in the internal finances of the ECB and the Eurosystem NCBs should be protected and the disclosure of certain detailed information on operations and amounts on their balance sheets should be limited.

39 That statement of reasons satisfies the requirements of the obligation to state reasons.

40 The ECB's reasons set out in paragraphs 35 to 38 above enabled the applicant to understand the legal basis on which it had founded its refusal to grant the application for access to Annexes A and B to the Exchange Agreement, that being the second, third and seventh indents of Article 4(1)(a) of Decision 2004/258, as amended, and the reasons why it had taken the view that disclosure of the content of those annexes would have undermined the monetary policy of the European Union and the Member States, its internal finances and those of the Eurosystem NCBs and the stability of the financial system. They also enable the Court to review the correctness of the ECB's reasons.

41 None of the arguments put forward by the applicant is of such a kind as to call that finding into question.

42 The applicant puts forward, by way of first argument, that since all of the ECB's activities serve a public objective, it could not merely refer to the malfunctioning of relevant market segments and the public objective served by its interventions to justify its refusal to grant access to Annexes A and B to the Exchange Agreement.

43 This complaint must be rejected.

44 As is apparent from paragraphs 35 to 38 above, in its letter of 22 May 2013, the ECB did not merely refer to the public objectives served by its interventions; it also set out the specific reasons why disclosure of the information contained in Annexes A and B involved a risk of impact on the effectiveness of potential future intervention measures and its internal finances and those of the Eurosystem NCBs.

45 As a second argument, the applicant submits that the ECB did not provide a sufficient statement of the reasons why the information contained in Annexes A and B to the Exchange Agreement could jeopardise the effectiveness of future intervention measures when the SMP had already been terminated and, moreover, it was not seeking access to information concerning directly the SMP, but only information contained in the Exchange Agreement.

46 This complaint must be rejected.

47 As evidenced by paragraphs 35 to 38 above, in its decision of 22 May 2013, the ECB stated that the information contained in Annexes A and B to the Exchange Agreement encourages market participants not only to analyse the tactics and strategy underlying the interventions carried out under the SMP, but also to predict the tactics and strategy pursued through potential future interventions, which could impact on their effectiveness.

48 As a third argument, the applicant submits that the references to the 'malfunctioning of relevant market segments' and to the 'transmission mechanism' in relation to monetary policy, as used by the ECB in its statement of reasons, were not sufficiently clear.

49 This complaint must be rejected.

50 In fact, contrary to the applicant's assertions, the ECB was under no obligation to provide any further explanation of the expressions 'malfunctioning of relevant market segments' and 'transmission mechanism', as used in its letter of 22 May 2013. First of all, as regards the expression 'malfunctioning of relevant market segments', it must be borne in mind that it was public knowledge that, since the beginning of 2010, the European Union had been in a sovereign debt crisis and tensions had emerged on certain sovereign debt markets in the euro area, inter alia due to increasing unease about the viability of public finances given the very high budget deficits, particularly in Greece. It was also well known that those tensions had spread to other segments of the financial markets and that the ECB had announced the SMP in order to increase the effectiveness of the transmission mechanism of the monetary policy. Next, as regards the ECB's use of the expression 'transmission mechanism', suffice it

to note that the applicant, which purchased Greek Government bonds in its capacity as an institutional investor, must be assumed to understand the meaning of that term or to be capable of finding it out easily through a search on the ECB's website, for example.

51 As a fourth argument, the applicant submits that the decision of 22 May 2013 does not contain any facts and that the ECB based itself on mere speculation that the effectiveness of potential future intervention operations would be undermined. In the present case, moreover, the requirements arising from the obligation to state reasons are stringent, as the ECB has considerable discretion for determining whether disclosure of the documents in question is liable to undermine the public interest.

52 This complaint must be rejected in so far as it alleges infringement of the obligation to state reasons as an essential procedural requirement.

53 It is true that the ECB does enjoy a wide discretion for the purpose of determining whether the public interest as regards the financial, monetary or economic policy of the European Union or a Member State or the internal finances of the ECB or the Eurosystem NCBs and the stability of the financial system in the European Union or in a Member State might be undermined by the disclosure of the information contained in Annexes A and B. 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 (judgment of 29 November 2012 in *Thesing and Bloomberg Finance* v *ECB*, T-590/10, EU:T:2012:635, paragraph 43).

54 It must also be remembered that, given the limited scope of the review conducted by the European Union 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 European Union judicature verify whether the factual and legal elements upon which the exercise of the power of assessment depends were present (see, to that effect, judgment of 21 November 1991 in *Technische Universität München*, C-269/90, ECR, EU:C:1991:438, paragraph 14).

55 However, contrary to the applicant's assertions, in the present case the obligation to state reasons did not preclude the ECB from basing itself on considerations which took account of hypothetical behaviour in which market participants might engage following disclosure of the information contained in Annexes A and B to the Exchange Agreement and the effects such behaviour might have on future interventions. Not only are those reasons sufficiently specific to enable the applicant to challenge their correctness and the Court to conduct its review, the general nature of the ECB's statement of reasons is justified by the concern not to reveal information which is sought to be protected under the exception relied upon.

56 As a fifth argument, the applicant submits that the reason given to the effect that the strategy and tactics pursued through the investment operations risk being revealed is not relevant and that the ECB was incorrect in stating that it has investment needs and preferences.

57 Those complaints must also be rejected.

58 They are in fact directed at the correctness of the statement of reasons and are therefore not liable to establish infringement of the obligation to state reasons as an essential procedural requirement.

59 This plea must accordingly be rejected in so far as it alleges infringement of Article 296(2) TFEU.

60 Moreover, in so far as this plea also alleges infringement of Article 41(2)(c) of the Charter of Fundamental Rights, under which the right to good administration entails inter alia the obligation for the administration to give reasons for its decisions, for the reasons given above this argument cannot be upheld either, without its being necessary to rule on the question whether that provision applies to the ECB in the circumstances of the present case.

61 The second plea in law must therefore be rejected in its entirety.

Third plea in law: incorrectness of the ECB's reasons

62 The applicant submits that the reasons on which the ECB based itself in refusing to grant the application for access to Annexes A and B to the Exchange Agreement are vitiated by errors. Should the arguments put forward by the ECB be found to be sufficient for refusing access to those annexes, this will constitute interference with the right to information enshrined in Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights in a manner which is disproportionate and renders that right nugatory.

63 The ECB disputes those arguments.

64 It should be borne in mind, as a preliminary point, that some of the arguments put forward by the applicant under this plea may give the impression that it is relying on a plea of illegality calling into question whether the second and third indents of Article 4(1)(a) of Decision 2004/258, as amended, comply with Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights.

65 Yet in its reply of 10 November 2014 to questions put by the Court (see paragraph 13 above), the applicant stated that, should the Court find in the present case that the conditions for the exceptions provided for in the second and third indents of Article 4(1)(a) of Decision 2004/258, as amended, are met, it would not maintain the plea of illegality directed at the second and third indents of Article 4(1)(a) of Decision 2004/258, as amended.

66 It must therefore be ascertained whether the arguments put forward by the applicant reveal an error affecting the correctness of the ECB's conclusion to the effect that a partial refusal to grant the application for access to Annexes A and B to the Exchange Agreement is justified under the second and third indents of Article 4(1)(a) of Decision 2004/258, as amended.

67 As is apparent from paragraphs 35 to 38 above, in support of its conclusion the ECB stated, in essence, that disclosure of detailed, broken down information about government bonds which it and the Eurosystem NCBs purchased under the SMP could lead market participants to draw inferences about the strategy, tactics and method applied under the SMP and to predict the strategy, tactics or method which might be employed in future interventions. This could undermine the effectiveness of those interventions and, ultimately, the monetary policy of the European Union and the internal finances of the ECB and the Eurosystem NCBs.

68 The applicant submits that those reasons are incorrect. It does not develop separate arguments under this plea, but merely refers to the arguments put forward under the second plea, alleging infringement of the obligation to state reasons. It is therefore appropriate to examine the arguments put forward by the applicant under the second plea, in so far as they are not — at least not solely — directed at an infringement of the obligation to state reasons as an essential procedural requirement, but also the correctness of the ECB's reasons.

– Complaints about the hypothetical nature of the ECB's reasons

69 The applicant submits that the ECB's reasons are based on mere speculation, not on any facts. Those reasons cannot justify a refusal to grant access to the documents under the second and third indents of Article 4(1)(a) of Decision 2004/258, as amended. The applicant further submits that its application was not directed at intervention measures but only the Exchange Agreement and that, in any event, the SMP had already been terminated when it lodged its application.

70 It should be observed as a preliminary point that, as evidenced by recitals 2 and 3 in the preamble thereto, Decision 2004/258, as amended, is aimed at authorising broader access to ECB documents than was the case under the scheme provided for in Decision 1999/284/EC of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank (ECB/1998/12) (OJ 1999 L 110, p. 30), whilst safeguarding the independence of the ECB and the Eurosystem NCBs and the confidentiality of certain matters relating to the accomplishment of the ECB's missions.

71 Article 2(1) of Decision 2004/258, as amended, 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.

72 That right is subject to certain limits based on reasons of public or private interest. More specifically, the second and third indents of Article 4(1)(a) of Decision 2004/258, as amended, provide for exceptions to access to a document where its disclosure would undermine protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State or the internal finances of the ECB or the Eurosystem NCBs.

73 Since the exceptions to the right of access provided for in Article 4 of Decision 2004/258, as amended, are a departure from the right of access to documents provided for in Article 2(1), they must be interpreted and applied narrowly. Thus, if the ECB decides to refuse access to a document which it has been asked to disclose under Article 4(1) of that decision, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception provided for in that provision and upon which it is relying (judgment in *Thesing and Bloomberg Finance* v *ECB*, cited in paragraph 53 above, EU:T:2012:635, paragraphs 41 and 42).

74 In the light of those principles, it must be determined whether the ECB's reasons were sufficient to justify the partial refusal to grant the application for access to Annexes A and B to the Exchange Agreement.

75 As a first observation, in so far as the applicant complains that the ECB based itself on hypotheses, it should be remembered that, under the rules laid down in Article 4 of Decision 2004/258, as amended, the ECB is required to compare the existing situation, in which access to the documents has not (yet) been granted, with a hypothetical situation, in which access to the documents has been granted. Therefore, the mere fact that, in its decision to refuse in part to grant access, the ECB took account of the hypothetical situation in which it would grant access to Annexes A and B is not in itself liable to cast doubt on the correctness of its reasoning.

76 As a second point, it is appropriate to consider whether the arguments put forward by the applicant are such as to establish that, in its decision of 22 May 2013, the ECB did not explain the risk of undermining the interest being protected in a sufficiently specific manner or that its reasons in that regard are vitiated by a manifest error of assessment.

77 In that context, it should be observed, first of all, that the applicant has not put forward any argument liable to cast doubt on the correctness of the ECB's reasons to the effect that disclosure of the information contained in Annexes A and B to the Exchange Agreement would reveal the precise

composition of the SMP portfolio and therefore enable market participants to know inter alia the nominal values, coupon rates, interest payment dates and redemption dates of the government bonds purchased under the SMP. The applicant merely argues that it is not seeking access to documents coming directly within the scope of the ECB's intervention. Yet as the ECB points out, it is possible, on the basis of the information contained in Annexes A and B to the Exchange Agreement, to identify the Greek Government bonds purchased by the ECB and the Eurosystem NCBs under the SMP.

78 Next, contrary to the applicant's assertions, the fact that the SMP had already been terminated does not make those reasons manifestly incorrect or entirely irrelevant. In fact, according to the ECB's reasoning, disclosure of the information contained in Annexes A and B to the Exchange Agreement could have led market participants to predict the strategy, tactics and method which might be employed by it and by the Eurosystem NCBs as part of future interventions. Yet as the Court has held previously, it is common for market participants to use the information disclosed by central banks, since their analyses and decisions are considered a particularly important and reliable source to assess current and prospective financial market developments (judgment in *Thesing and Bloomberg Finance* v *ECB*, cited in paragraph 53 above, EU:T:2012:635, paragraphs 52, 57 and 63).

79 The applicant further questions the ECB's reasons to the effect that the effectiveness of future interventions and its internal finances and those of the Eurosystem NCBs could be affected if certain market participants act according to prognoses established on the basis of the information contained in Annexes A and B to the Exchange Agreement.

80 In that part of the reasons contained in the letter of 22 May 2013, the ECB stated that disclosure of information about the method used under the SMP could undermine intervention measures having an objective which is identical or similar to the one pursued through the SMP. These types of programmes are aimed at encouraging market participants to invest in a category of government bonds, possibly even before the ECB and the Eurosystem NCBs purchase any, in order to take advantage of the price trends triggered by those purchases. They are liable to have a positive effect on all of the bonds in the category targeted. Since the market participants are not familiar with the bonds preferred by the ECB and the Eurosystem NCBs, they will tend to want to invest broadly in the entire category targeted. By contrast, if the market participants were to be granted access to the detailed, broken down information contained in Annexes A and B to the Exchange Agreement, the effectiveness of the intervention measures and, ultimately, the monetary policy, would risk being affected, as would the internal finances of the ECB and the Eurosystem NCBs. In that scenario, the market participants would tend to want to establish prognoses in order to determine more specifically the type of government bonds purchased by the ECB and the Eurosystem NCBs and to concentrate their acquisitions on those types of bonds. On the one hand, there is a risk that it would lead to higher prices for the types of bonds identified by the market participants as liable to be purchased by the ECB and the Eurosystem NCBs. Since those bonds would in fact fit in with the preferences of the ECB and the Eurosystem NCBs, both might be led either to purchase those types of bonds at higher prices or to purchase other bonds not fitting in with their preferences. On the other hand, the ECB and the Eurosystem NCBs could be led to purchase bonds of a type other than the category targeted, in order to encourage market participants to invest in all of the bonds in that category, instead of concentrating on certain types of bonds.

81 The applicant argues first in that regard that the ECB's reasons are based on an improbable hypothesis. It is true that, in its press release of 6 September 2012, the ECB did announce the technical features relating to the purchase of government bonds under the programme for OMTs ('the OMT Programme') (see paragraph 6 above). However, it was foreseeable that the ECB and the Eurosystem NCBs would not purchase government bonds under that programme.

82 In that context, the applicant argues, firstly, that it is clear from a decision of the Ministers of the euro area at the end of 2014 that the measure envisaged under the monetary policy concerning the Hellenic Republic was the opening of a line of credit. The purchase of Greek Government bonds is accordingly no longer envisaged.

83 This complaint must be rejected.

84 It must be borne in mind that, according to settled case-law, in an action for annulment under Article 263 TFEU, the lawfulness of an EU measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (judgment of 7 February 1979 in *France* v *Commission*, 15/76 and 16/76, ECR, EU:C:1979:29, paragraph 7). The circumstances referred to by the applicant are subsequent to the ECB's decision of 22 May 2013, however, and therefore have no bearing on its lawfulness.

85 Secondly, the applicant argues that, according to the ECB's press release of 6 September 2012, a purchase of government bonds under the OMT Programme presupposes that the State whose bonds are to be purchased negotiates a consolidation programme with the European Stability Mechanism ('the ESM'). In the present case, the possibility of negotiating such a programme could be ruled out. The decisions of the ESM can only be adopted unanimously and, given the doubts of the Bundesverfassungsgericht (German Federal Constitutional Court), as evidenced by its request for a preliminary ruling of 14 January 2014 in Cases 2 BvR 2728/13 to 2 BvR 2731/13 and 2 BvR 13/13 (*Gauweiler and Others*, C-62/14, pending before the Court of Justice), and those of the Bundesbank (German Central Bank) concerning the lawfulness of the OMT Programme, a member of the German government announced that such a consolidation programme would not be approved.

86 This complaint must be rejected.

87 It should be noted in that context that the applicant merely refers to the purchase of government bonds under the OMT Programme as described in the ECB's press release of 6 September 2012. Yet the ECB's reasons referred to in paragraph 80 above are not restricted to the purchase of government bonds under the OMT Programme but rather extend to all intervention measures having an objective which is identical or similar to that pursued through the SMP. It must be remembered in that context that the ECB enjoys very broad discretion as to the choice and determination of the measures it adopts in carrying out its missions. Therefore, when the ECB considered whether access to Annexes A and B was liable to affect the monetary policy of the European Union, its internal finances or those of the Eurosystem NCBs, it correctly took account of all measures it might be inclined to adopt in future; it was not required to take account only of measures stating the condition, referred to in its press release of 6 September 2012 concerning the OMTs, that the purchase of government bonds under that programme is subject to the condition that the Member State in question negotiates a consolidation programme with the ESM.

88 In any event, the arguments put forward by the applicant are not such as to demonstrate that, at the time when the ECB adopted the decision of 22 May 2013, it was evident that the conditions referred to in the press release could not be met.

89 It is not apparent from the argument relating to the request for a preliminary ruling from the Bundesverfassungsgericht in Case C-62/14 that that court considers that any purchase of government bonds by the ECB or by the Eurosystem NCBs under the OMT Programme is contrary to primary law of the European Union. Quite the opposite: it is apparent from inter alia paragraphs 99 and 100 of that request that the Bundesverfassungsgericht did not rule out the possibility that the OMT Programme, interpreted narrowly, could be held to be compatible with EU law.

90 Moreover, it should be noted in relation to the argument about the opposition to approval of a new consolidation programme announced by a member of the German Government that the ECB's press release of 6 September 2012 indicated that the OMT Programme applied to States already participating in a consolidation programme. Even if a consolidation programme cannot be negotiated for a Member State which is not yet participating in such a programme, the possibility of purchasing government bonds already participating in such a programme cannot be ruled out.

91 Accordingly, none of the arguments put forward by the applicant is liable to establish that on 22 May 2013 — when the ECB refused in part to grant the application for access at issue — it was not possible for it or the Eurosystem NCBs to purchase government bonds under the OMT Programme.

92 The conclusion is therefore that the arguments put forward by the applicant do not establish that the ECB's reasons referred to in paragraphs 37 and 38 above, to the effect that disclosure of the information contained in Annexes A and B to the Exchange Agreement could undermine the effectiveness of a future intervention measure having an objective which is identical or similar to that pursued through the SMP, are based on a hypothesis which is not sufficiently probable or are vitiated by a manifest error of assessment.

93 The applicant puts forward a second argument to the effect that the ECB's reasoning that disclosure of the information contained in Annexes A and B to the Exchange Agreement would undermine the effectiveness of future intervention measures cannot apply to measures having different objectives from those pursued through the SMP. Even if those types of measures also involve the purchase of government bonds, purchases which are comparable to those effected under the SMP are not liable to reoccur when intervention measures pursue different objectives.

94 This complaint must be rejected.

95 Firstly, this complaint is ineffective. The ECB's reasons concerning intervention measures having an objective identical or similar to that of the SMP, as examined in paragraphs 80 to 92 above, are in themselves sufficient to justify partial refusal to grant the application for access to Annexes A and B to the Exchange Agreement.

96 Secondly and in any event, as the ECB rightly observes, when an intervention involves the purchase of government bonds by the ECB and by the Eurosystem NCBs, there is a risk that the market participants will base themselves on information about those types of purchases in the past in order to identify, rightly or wrongly, preferences of the ECB and the Eurosystem NCBs for certain types of government bonds which they believe will hold true irrespective of the objective pursued through the purchase of government bonds.

97 In such a scenario, for the reasons set out in paragraph 80 above, disclosure of the information contained in Annexes A and B to the Exchange Agreement could affect the effectiveness of the ECB's intervention measures and its internal finances or those of the Eurosystem NCBs.

98 The conclusion is therefore that none of the arguments put forward by the applicant establishes that the ECB's reasons, as set out in its letter of 22 May 2013, to the effect that disclosure of Annexes A and B to the Exchange Agreement could undermine the effectiveness of future intervention measures and, ultimately, the monetary policy and its internal finances and those of the Eurosystem NCBs, are based on a purely hypothetical situation or are vitiated by manifest errors of assessment.

– The complaint concerning the public objective pursued through the interventions

99 The applicant argues that the ECB's reasons based on its portfolio strategy and investment preferences are incorrect: the ECB's interventions pursue a public objective and so it does not have a portfolio strategy or investment preferences.

100 This complaint must also be rejected.

101 It must be observed in that regard that when an intervention involves the purchase of government bonds, the fact that it pursues a public objective does not preclude the ECB or the Eurosystem NCBs from having preferences for certain types of government bonds.

102 The conclusion is therefore that none of the complaints put forward by the applicant calls into question the correctness of the ECB's reasons to the effect that refusal to grant access to Annexes A and B to the Exchange Agreement was justified under the second and third indents of Article 4(1)(a) of Decision 2004/258, as amended.

103 In the light of the clarification provided by the applicant referred to in paragraph 65 above, it is not necessary to consider a possible plea of illegality directed at the second and third indents of Article 4(1)(a) of Decision 2004/258, as amended.

104 This plea in law must therefore be rejected in its entirety, without its being necessary to examine the complaints directed at the seventh indent of Article 4(1)(a) of Decision 2004/258, as amended, which provides that access to a document or disclosure thereof is to be refused where that would undermine protection of the public interest in stability of the financial system in the European Union or in a Member State. Those arguments must be rejected as ineffective. Under the overall scheme of Article 4 of Decision 2004/258, as amended, refusal to grant an application for access is justified where the conditions required by one of the exceptions provided for in that article are met. In the present case, that refusal may be based on the second and third indents of Article 4(1)(a) of Decision 2004/258, as amended. Therefore, even if the complaints directed against the seventh indent of Article 4(1)(a) of Decision 2004/258, as amended, are well founded, they are not such as to call into question the justification for refusing to grant the application for access.

The first plea in law: unlawful legal basis for the decision of 22 May 2013

105 Under this plea, the applicant argues that the seventh indent of Article 4(1)(a) of Decision 2004/258, as amended, is not compatible with Article 15(3) TFEU or Article 42 of the Charter of Fundamental Rights. Not only is this exception no longer covered by 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), but the recitals in the preamble to Decision 2011/342 do not refer to those broader grounds for refusal. Therefore, the ECB's decision of 22 May 2013 cannot be based on that decision.

106 The ECB disputes those arguments.

107 This plea must be rejected as ineffective for the reasons set out in paragraph 104 above.

108 Since all of the pleas must be rejected, so must the application for annulment of the ECB's decision of 22 May 2013.

3. *The ECB's letter of 16 April 2013*

109 As set out in paragraph 24 above, the application for annulment must be understood as being directed only against the ECB's decision of 22 May 2013.

110 In any event, even if the applicant did also apply for annulment of the ECB's letter of 16 April 2013, that application would have to be rejected, since all of the pleas put forward in support of the application for annulment of the ECB's letter of 22 May 2013 must be rejected and since the applicant has not put forward any separate pleas in support of a possible application for annulment of the ECB's decision of 16 April 2013.

111 There is therefore no need to rule on the plea of inadmissibility put forward by the ECB to the effect that a possible application for annulment of the ECB's letter of 22 May 2013 lacks the requisite clarity.

112 In view of all the foregoing, the application must therefore be dismissed in its entirety.

Costs

113 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the ECB.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Versorgungswerk der Zahnärztekammer Schleswig-Holstein to pay the costs.

Berardis Czúcz Popescu

Delivered in open court in Luxembourg on 4 June 2015.

[Signatures]