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President

ECB-UNRESTRICTED



Frankfurt, 13 July 2022
Reference: LS/CL/2022/189

RE: Confirmatory application for public access to ECB documents



We refer to your confirmatory application of 18 May 2022 asking the Executive Board of the European Central Bank (ECB) to review the ECB's position and grant full access to: *"All documents (e.g. reports, communications, plans) regarding contingency and preparedness measures related to the Ukraine conflict"*. On 17 June 2022, in accordance with [Article 8\(2\) of Decision ECB/2004/3 of the European Central Bank](#)¹, the ECB extended the stipulated time limit for a reply by 20 working days owing to the increased workload created by a large number of simultaneous requests.

In line with the requirements imposed by Decision ECB/2004/3, the Executive Board has considered your confirmatory application, as well as the assessment made and the decision taken in response to your initial request. It has decided to uphold the Director General Secretariat's decision of 4 May 2022, which denied you access to the following two documents:

- (1) an internal memo addressed to the Executive Board on the cash demand situation and measures on banknote circulation dated 28 February 2022 (document 1);
- (2) an excerpt from the annex to the minutes of the Governing Council meeting on 9-10 March 2022 on issues related to Eurosystem counterparties (document 2).

The Executive Board would like to emphasise that the right of access to documents of the Union's institutions, bodies, offices and agencies that is conferred upon citizens of the Union by Article 15(3) of the Treaty on the Functioning of the European Union is not unfettered and has to be exercised in accordance

¹ Decision ECB/2004/3 of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (OJ L 80, 18.3.2004, p. 42).

with the rules and limits that are provided for by secondary legislation. Specific rules governing access to ECB documents (and limits thereto) are laid down in Decision ECB/2004/3, which, while ensuring a broad degree of public access to ECB documents, also specifies exceptions imposing limits on that right of access (see Article 4 thereof).

The Executive Board has decided that access to the two documents in question cannot be granted (in full or in part), since any disclosure over and above a simple reference to their content would undermine interests protected under (i) Article 10.4 of the Protocol on the Statute of the ESCB and of the ECB, (ii) the first indent (*confidentiality of the proceedings of the ECB's decision-making bodies*), the second indent (*the financial, monetary or economic policy of the Union or a Member State*) and the sixth indent (*international financial relations*) of Article 4(1)(a) of Decision ECB/2004/3, and (iii) the first sub-paragraph (*internal deliberations*) of Article 4(3) of Decision ECB/2004/3.

The Executive Board wishes to emphasise that the letter from the Director General Secretariat dated 4 May 2022 (LS/PS/2022/23) provided comprehensive background information and a detailed explanation of the reasons why the two documents could not be disclosed.

The Executive Board notes that the documents in question concern the implementation and monitoring of economic sanctions and other restrictive measures imposed by the EU in response to Russia's invasion of Ukraine. Disclosing the confidential and sensitive information that is contained in those documents would (i) have a negative impact on the ECB's ability to effectively implement the sanctions and other restrictive measures that the EU has imposed on Russia, (ii) limit the effectiveness of the ECB's monetary policy and (iii) hamper its international financial, monetary or economic relations. The following sections explain in more detail the protected public interests that preclude the disclosure of the documents in question:

(i) Confidentiality of the outcome of deliberations by decision-making bodies

Under the first indent of Article 4(1)(a) of Decision ECB/2004/3, the ECB is required to refuse access to documents where disclosure would undermine the protection of the public interest as regards "the confidentiality of the proceedings of the ECB's decision-making bodies, the Supervisory Board or other bodies established pursuant to Regulation (EU) No 1024/2013".

Article 10.4 of the Protocol on the Statute of the ESCB and of the ECB, which constitutes primary law, provides: "*The proceedings of the meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public.*" The confidentiality of such meetings, which is necessary to safeguard the independence of the bodies' members and the effectiveness of their decision-making, is enshrined in Article 23.1 of the ECB's Rules of Procedure², which provides: "*The proceedings of the*

² Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.3.2004, p. 33), as last amended by Decision ECB/2016/27 (OJ L 258, 24.9.2016, p. 17).

decision-making bodies of the ECB, or any committee or group established by them, [...] shall be confidential unless the Governing Council authorises the President to make the outcome of their deliberations public."

The rationale for this absolute protection is (i) to safeguard the independence of the ECB and, in particular, the personal independence of members of the Governing Council, and (ii) to allow open, frank and lively discussions, exchanges of views and deliberations to take place among members of the Governing Council. When deciding whether to publish a document, the Governing Council takes account of the overriding public interest in ensuring good governance, integrity and transparency, while at the same time respecting the need for decision-making bodies to be independent and be able to have a candid exchange of views.

Finally, it is settled case law that the above-mentioned provisions safeguard the confidentiality of the outcome of deliberations by the Governing Council, without it being necessary to demonstrate that the disclosure of documents indicating such outcomes would undermine the protection of the relevant public interest.³

In the present case, document 2 is an excerpt from the minutes of the 535th meeting of the Governing Council, indicating the outcome of those proceedings and containing information on Eurosystem monetary policy measures aimed at ensuring the effectiveness of the restrictions (including sanctions) that the EU has imposed on Russian financial institutions. Since the Governing Council has decided not to make the outcome of those deliberations public, neither in full nor in part, access to details of that outcome must be refused pursuant to the first indent of Article 4(1)(a) of Decision ECB/2004/3 and Article 7(1) of Decision ECB/2004/3.

Moreover, it should also be noted that disclosure of that excerpt, without further contextualisation, could give rise to misinterpretation and thus negatively impact the perception and understanding that the public and other institutions have of the ECB's official stance on potential future measures, especially in view of the ongoing situation and the fact that the ECB has already publicly communicated its position in a clear, contextualised and transparent manner.

Additional reasons preventing the disclosure of document 2 are explained in the next section.

(ii) Protection of the public interest as regards the monetary policy of the Union

Under the second indent of Article 4(1)(a) of Decision ECB/2004/3, the ECB is required to refuse access to a document where disclosure would undermine the protection of the monetary policy of the Union.

Since it indicates the outcome of Governing Council deliberations on issues relating to Eurosystem counterparties, document 2 is also covered by that provision.

³ See Case C-442/18 P, *European Central Bank v Espírito Santo Financial (Portugal)*, ECLI:EU:C:2019:1117.

The ECB considers that, at the current juncture, releasing details of Governing Council decisions relating to Eurosystem counterparties could reduce its ability to react to continuously evolving economic scenarios. Moreover, disclosure could influence the expectations of market participants and thus affect their behaviour and decisions, ultimately hindering the ECB's ability to make decisions and limiting the effectiveness of Eurosystem monetary policy measures in crisis situations.

Protection is also needed because such decisions seek to ensure that EU sanctions imposed on Eurosystem counterparties are effective. Wider disclosure of the details of such measures could potentially constrain the ECB's ability to (i) design the policy tools that are best suited to the fulfilment of its mandate and (ii) preserve a certain degree of discretion, given that the circumstances surrounding such measures are difficult to pin down ex ante. In order for these measures to be effective, their content and operational aspects should remain confidential for the time being, and for as long as the situation in Ukraine remains critical.

Thus, full disclosure of the confidential information contained in document 2 would specifically and effectively undermine the ECB's ability to fulfil its monetary policy mandate in the future, thereby undermining the protection of the public interest as regards the ECB's monetary policy within the meaning of the second indent of Article 4(1)(a) of Decision ECB/2004/3.

(iii) Protection of the public interest as regards international financial relations

Under the sixth indent of Article 4(1)(a) of Decision ECB/2004/3, the ECB is required to refuse access to documents where disclosure would undermine international financial, monetary or economic relations.

As previously explained, document 1 was drafted for the purpose of updating and informing the ECB's decision-making bodies about relevant developments in an unprecedented situation and contains analysis of potential operational options available under the current framework.

Disclosing that information and details of potential measures that have been or could be discussed would reveal the EU's strategic considerations and the tools that are required for effective implementation of the EU's sanctions. As such, this disclosure could affect the ECB's relations with other EU institutions and international actors, it could potentially prompt international actors to adjust their behaviour in anticipation of strategic decisions by the ECB, and it could eventually provoke hostile reactions to the ECB. Thus, disclosure of this information would be harmful to the ECB's relations with other EU institutions and international actors, particularly given the ongoing conflict in Ukraine and the continuous discussions at EU level regarding the appropriate response.

Disclosure would also undermine participants' trust in the ECB's ability to safeguard the confidentiality of discussions relating to the EU's relations with other countries. For these reasons, the ECB considers that disclosure of the confidential information contained in document 1 would specifically and effectively undermine the protection of the public interest as regards international financial relations within the meaning of the sixth indent of Article 4(1)(a) of Decision ECB/2004/3.

(iv) Confidentiality of documents drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB

Under the first sub-paragraph of Article 4(3) of Decision ECB/2004/3, the ECB is required to refuse access to documents 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, even after the relevant decision has been taken, unless there is an overriding public interest in disclosure.

Document 1 is covered by this provision, since it was drafted for the purpose of updating and informing the ECB's decision-making bodies about relevant developments in an unprecedented situation and contains analysis of potential operational options available under the current framework, while highlighting measures which could possibly be implemented in the future. It is of crucial importance that analysis and details of possible options and future measures are presented to the ECB's decision-making bodies in the most effective manner and are kept confidential, particularly in view of the constantly evolving and increasingly serious situation in Ukraine. It is essential to avoid a situation where the authors of documents take the risk of disclosure into account, such that they practise self-censorship or their analysis and operational advice is not expressed clearly and directly, thereby denying decision-making bodies the opportunity to receive frank advice from staff and ECB committees and limiting the ECB's "space to think". This would mean that the ECB was no longer able to benefit from an exchange of uncensored opinions and internal advice, given the risk of being misinterpreted or giving the wrong signal on a topical matter. Furthermore, in the present case such analysis and details of possible options could potentially translate into operational measures, so their disclosure at this point in time could undermine their effectiveness. Finally, while such analysis and potential options may not reflect the final stance adopted by the ECB's decision-making bodies on a specific matter, they form an integral part of the decision-making process, possibly leading to the adoption of concrete measures, and must therefore remain protected.

The Executive Board notes that, under Article 4(3) of Decision ECB/2004/3, access to document 1 may be granted if there is an overriding public interest in disclosure. In order for an overriding public interest in disclosure to exist, that interest must (i) be public and (ii) outweigh the harm caused by disclosure. In this situation, the applicant is required to set out specific and detailed reasoning based on the nature of the documents in question which explains why disclosure is necessary to ensure the protection of the overriding public interest invoked.⁴ However, we could not identify in your application any arguments establishing the existence of an overriding public interest in the disclosure of document 1. Consequently, the prevailing interest in this case lies in protecting the ECB's "space to think".

The Executive Board does not consider it appropriate to grant partial access to document 1 at this juncture. The aim that is pursued by refusing access to this document cannot be achieved by merely blanking out the

⁴ See the judgment of 23 January 2017 in Case T-727/15, *Association Justice & Environment v European Commission*, para. 56, ECLI:EU:T:2017:18.

passages which might harm the public interests that are described in detail above.⁵ What is more, even a more detailed description of this document would risk disclosing its actual content, thereby defeating the purpose of the exceptions invoked.⁶

The Executive Board concludes that none of the arguments put forward in your application – i.e. neither your disagreement with the application of Article 4(1)(a) of Decision ECB/2004/3 nor “*the public interest of the people of the EU in the implementation of the measures*” – call into question the reasoning set out above.

Remedies

Please note that, under Article 8(1) of Decision ECB/2004/3, an applicant may, in the event of total or partial refusal, have recourse to the remedies open to them under Articles 228 and 263 of the Treaty on the Functioning of the European Union.

We hope that this response has been helpful in clarifying the ECB's decision.

Yours sincerely,

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⁵ See the judgment of 4 May 2012 in Case T-529/09, *In 't Veld v Council of the European Union*, para. 106, ECLI:EU:T:2012:215.

⁶ See the judgment of 13 January 2011 in Case T-362/08, *IFAW Internationaler Tierschutz-Fonds GmbH v European Commission*, para. 111, ECLI:EU:T:2011:6.