



5 August 2022

Reference: LS/PS/22/45

Request for public access to the ECB's instruction prohibiting Sberbank Europe AG from continuing business operations



On 28 April 2022 the European Central Bank (ECB) received your request for public access to the ECB's instruction prohibiting Sberbank Europe AG from continuing business operations, as reported by the Austrian Financial Market Authority (FMA).¹

On 2 May 2022 you were informed that this request had been put on hold until your previous public access requests had been addressed. On 23 May 2022, in response to your enquiry regarding the status of pending requests, the ECB asked you to indicate which of these requests should be prioritised. In the absence of any reply, on 9 June 2022 the ECB informed you that it had begun its assessment of your request for public access to the ECB's instruction prohibiting Sberbank Europe AG from continuing business operations.

On 7 July 2022, due to an exceptionally high workload, the ECB extended the time limit for its reply by an additional 20 working days, in accordance with Article 7(3) of Decision ECB/2004/3.²

Identification and assessment of the document for which disclosure is requested

The ECB has identified one ECB document (entitled "Specific Instruction") of relevance to your application. Having assessed this document thoroughly, we can inform you that partial access may be granted, but the remainder of the document is protected under Article 4(1)(c) of Decision ECB/2004/3 (*the confidentiality of information protected under Union law*) in conjunction with Article 27 of the SSM Regulation³ and Article 53 of the Capital Requirements Directive (CRD IV)⁴.

¹ Available at <https://www.fma.gv.at/en/occurrence-of-a-deposit-guarantee-pay-out-event-in-relation-to-sberbank-europe-ag/>.

² 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).

³ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

⁴ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

Furthermore, the ECB also considers the contents of the document to be protected under the eighth indent of Article 4(1)(a) of Decision ECB/2004/3 (*the Union's policy relating to the prudential supervision of credit institutions*) as well as the first indent of Article 4(2) (*the commercial interests of a natural or legal person*) of Decision ECB/2004/3.

The confidentiality of information protected under Union law

Paragraphs 7, 10, 12, 13, 14, 15 and 20 of the Annex to the Specific Instruction have been partially redacted since they contain confidential supervisory information protected under Union law.

Article 53(1) of the CRD IV provides for a general rule prohibiting the disclosure of confidential information (except for specific derogations also set out in the CRD IV), which is applicable to the ECB. The first sub-paragraph of Article 53(1) states that “*...all persons working for or who have worked for the competent authorities and auditors or experts acting on behalf of the competent authorities shall be bound by the obligation of professional secrecy.*” The second sub-paragraph of the same Article states that “*Confidential information which such persons, auditors or experts receive in the course of their duties may be disclosed only in summary or aggregate form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law.*” These provisions, read in conjunction with the principles enshrined in the judgment issued by the Court of Justice of the European Union in the Baumeister case,⁵ lead to the application of this prohibition to any document drawn up or held within ECB Banking Supervision (i) which is not public; and (ii) the disclosure of which is likely to have an adverse effect on the interests of the natural or legal person who provided that information or on the interests of third parties, or on the proper functioning of the system of banking supervision in the European Union.

Following its assessment, the ECB confirms that: (i) the information contained in the identified document may be considered to be only partially in the public domain; and (ii) its full disclosure would have an adverse effect not only on the credit institution concerned but also, and most importantly, on the smooth functioning of the system of prudential supervision as a whole.⁶ This holds true for the redacted parts containing information of a supervisory nature (such as the capital position and the liquidity position) regarding the credit institution concerned, as well as the ECB's analyses and prognoses for that institution which are not in the public domain. Disclosure of the redacted parts could undermine the supervisory methodologies, analytical methods and strategies employed by the supervisory authorities.

⁵ See *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, C-15/16, ECLI:EU:C:2018:464, paragraph 35.

⁶ See *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, C-15/16, ECLI:EU:C:2018:464, paragraph 33; *Annett Altmann and Others v Bundesanstalt für Finanzdienstleistungsaufsicht*, C-140/13, ECLI:EU:C:2014:2362, paragraphs 31 to 33; and *Gemeente Hillegom v Cornelis Hillenius*, C-110/84, ECLI:EU:C:1985:495, paragraph 27.

In the context of ECB Banking Supervision, it is essential that the supervisory authorities enjoy the confidence and trust of supervised entities if they are to perform their supervisory tasks to the best of their abilities.

Supervised entities will more readily provide reliable and honest information to the supervisory authorities if they know that the confidentiality of that information will be protected. Equally, communicating ECB analyses and prognoses to supervised entities in a confidential manner will prevent competitors from using this information to the detriment of the entity immediately concerned or from adjusting their behaviour in a way which undermines the effectiveness of banking supervision. This confidentiality regime continues to apply to banks that have been resolved or liquidated.

The Union's policy relating to the prudential supervision of credit institutions

Paragraphs 3.1, 3.2, 3.4 and 4.1 of the Specific Instruction, as well as parts of the conclusion of the Annex to the Specific Instruction, have been redacted since they relate to legal considerations underlying the Specific Instruction, procedural safeguards and the cooperation and allocation of tasks between the ECB and the FMA which are protected from disclosure under the eighth indent of Article 4(1)(a) of Decision ECB/2004/3 ("the Union's or a Member State's policy relating to the prudential supervision of credit institutions and other financial institutions").

In the case at hand, disclosure of confidential parts of the document would enable third parties to analyse ECB Banking Supervision's strategy, procedures and operational arrangements, potentially impeding the ECB from developing or adjusting them in an appropriate and case-specific manner during future crises.

Against this background, the ECB holds the view that disclosure of the redacted paragraphs could compromise the effectiveness of the ECB's supervisory actions and its responsibility to guarantee the safety and soundness of the European banking system.

The commercial interests of a natural or legal person

Pursuant to the first indent of Article 4(2) of Decision ECB/2004/3, access to these documents must be denied where disclosure would undermine the protection of the commercial interests of a natural or legal person.

The redacted paragraphs 7, 10, 12, 13, 14, 15 and 20 of the Annex to the Specific Instruction contain commercially sensitive information which is relevant for the liquidators. Should the information included in the identified document become publicly available, this could negatively affect winding-down proceedings for the entity in the process of liquidation.

The exception to the right of access laid down in Article 4(2) of Decision ECB/2004/3 may be waived if disclosing the requested documents serves an overriding public interest.

In order for there to be an overriding public interest in such a disclosure, this interest must, first, be public (in contrast to the private interests of the applicant) and, second, overriding, meaning that in this case it must outweigh the commercial interests protected under Article 4(2).

In your application you have not established arguments demonstrating that disclosing the above-mentioned parts of the requested document would serve an overriding public interest, nor has the ECB's assessment been able to identify an overriding public interest in the above-mentioned parts of the requested document being disclosed. Consequently, the prevailing interest in this case lies in protecting the commercial interests of the undertakings concerned, so access to the above-mentioned parts of the requested document must be denied.

The requested document has been made available in the ECB's Public Register of Documents, with the protected parts redacted⁷.

Final remarks

Please note that, in line with Article 10 of Decision ECB/2004/3, "*Documents released in accordance with this Decision shall not be reproduced or exploited for commercial purposes without the ECB's prior specific authorisation. The ECB may withhold such authorisation without stating reasons.*"

Additionally, with regard to the identified document, Article 7(2) of Decision ECB/2004/3 provides that "*In the event of total or partial refusal, the applicant may, within 20 working days of receiving the ECB's reply, make a confirmatory application asking the ECB's Executive Board to reconsider its position.*"

Yours sincerely,

[signed]

[signed]

Petra Senkovic
Director General Secretariat

Roman Schremser
Chief Compliance & Governance Officer

⁷ See the [ECB's Public Register of Documents](#) and [Documents released under public access regime - Banking supervision](#).