

Decision in case 1874/2020/MAS on the European Central Bank's refusal to grant public access to documents containing detailed information regarding two asset purchase programmes

Decision

Case 1874/2020/MAS - Opened on 05/11/2020 - Decision on 09/03/2021 - Institution concerned European Central Bank (No maladministration found) |

The case concerned a request for public access to documents containing detailed information regarding two asset purchase programmes of the European Central Bank (ECB). In refusing access, the ECB argued that disclosure could undermine the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State, which is an interest protected by law. The complainant considered that the ECB had not presented sufficient evidence for how disclosure of the information requested would negatively affect the public interest invoked and that the information should therefore be disclosed.

The ECB enjoys wide discretion when assessing how best to protect the public interest invoked, namely the protection of the financial, monetary or economic policy of the Union or a Member State. It can, for example, base its considerations on how disclosure might affect the behaviour of markets and market participants. The ECB has in this case provided a reasonable explanation on how markets and market participants could use the requested information to undermine the financial, monetary or economic policy of the Union or a Member State. The ECB's decision to refuse public access was therefore justified.

The Ombudsman notes the ECB's statement that it already publishes as much information as possible on the PEPP and CSPP on its website. She encourages the ECB to evaluate regularly whether further information on these programmes can be published. This is likely to become of even greater importance as the public looks to the ECB for proof that it is living up to the ambitious statements of its President as regards the Bank's efforts to make monetary policy "greener".

The Ombudsman closed the inquiry finding no maladministration.

Background to the complaint



1. Following the 2007-2008 financial crisis, the European Central Bank (ECB) introduced several 'non-standard monetary policy measures' to achieve its objective of ensuring 'price stability'. One such measure was 'quantitative easing' [1] through its asset purchase programmes. In 2016, the European Central Bank (ECB) established the so-called 'corporate sector purchase programme' (CSPP) [2]. The CSPP involves the purchase by Eurosystem central banks [3] of bonds issued by non-bank corporations. [4]
2. In 2020, in response to the monetary risks posed by the COVID-19 pandemic, the ECB established an additional bond purchasing programme: the temporary 'pandemic emergency purchase programme' (PEPP). [5]
3. The complainant, a representative of a civil society organisation, asked the ECB under its rules on public access to documents [6] to disclose details of these two bond purchase programmes. In particular, it requested access to '*documents which contain the separate bond value of CSPP and PEPP assets held by the ECB and the Eurosystem.*' The complainant wanted to use this information to examine the climate impact of the ECB's bond purchases.
4. The ECB confirmed that it has a database containing the requested data. It refused access to this database, relying on the need to protect the public interest as regards the financial, monetary or economic policy of the Union or a Member State, as provided for under the ECB rules on public access to documents. [7]
5. The complainant asked the ECB to review its decision (by making a so-called 'confirmatory application'). The ECB maintained its initial decision to refuse public access.
6. Dissatisfied with the ECB's decision, the complainant turned to the European Ombudsman in October 2020.

The inquiry

7. The Ombudsman opened an inquiry into the ECB's refusal to provide public access to the requested data on the separate bond values of CSPP and PEPP assets held by the ECB and the Eurosystem.
8. In the course of the inquiry, the Ombudsman's inquiry team held a meeting with representatives of the ECB during which the Ombudsman's inquiry team saw the database in question. [8] Following that meeting, the ECB sent the Ombudsman a more detailed explanation setting out how disclosure would undermine the financial, monetary or economic policy of the Union or a Member State. This explanatory note and the meeting report were then shared with the complainant, who provided his comments on these documents.

Arguments presented to the Ombudsman



Arguments presented by the ECB

9. The ECB set out in its explanatory note that the implementation of the CSPP and the PEPP was underpinned by the principle of 'market neutrality' [9] . Purchases under these programmes are meant to reflect the market value of all eligible bonds with a view to avoiding, as much as possible, pricing distortions in the market.

10. The ECB stressed that it publishes as much information as possible on the PEPP and CSPP on its website, while allowing for an effective implementation of these programmes. Among other things, the ECB regularly publishes aggregate values of all assets held in the programmes, as well as purchases broken down by asset category, country and market type for the PEPP and by rating, country and sector for the CSPP.

11. The ECB argued that the disclosure of more detailed information regarding the CSPP and PEPP portfolios, such as the specific amount of holdings of bonds and their value, per bond, could lead to market distortions. Specifically, market participants could, if they had access to such detailed information, anticipate what assets the ECB would purchase, and adjust their own behaviour accordingly. This could ultimately harm the effectiveness of the programmes in question.

12. In particular, market participants could calculate the remaining purchasable amount for each security, by combining information on holdings per security, with the publicly available information on the programmes' purchase limits [10] . This information would allow the market participants to estimate the likely amounts specific securities that the Eurosystem banks intend to purchase in the future, which in turn could be used to manipulate prices of these securities at the Eurosystem's expense. Ultimately, this would lead to distortions and make the purchase programmes less effective.

13. The ECB said that releasing historical information could also have negative effects, because it could allow market participants to predict the ECB's future strategy, by identifying purchasing or selling patterns through the various possible phases of the purchase programme. Therefore, the ECB could not release historical information on bond values, even after the particular purchase programme was closed.

14. Finally, the ECB said that it is reflecting on the issue of climate change and the role and responsibilities of the ECB in this regard in its on-going strategy review [11] .

Arguments presented by the complainant

15. The complainant argued that the ECB did not provide convincing arguments for its assumption that disclosure of information regarding its bond purchase programmes would distort markets.



16. He noted that that the ECB describes its purchase programmes as market neutral. Therefore, he stated, it is unclear why the disclosure of additional information would have a negative effect. He said that, even without this information, market participants could already speculate on the ECB's purchases by following the market dynamic.

17. The complainant said that it would be impossible to verify whether the ECB actually acts in a market neutral manner, and to verify what the environmental effect of its purchases is, if the ECB does not disclose information on bond purchases. He considers this lack of information to be specifically problematic in view of the ECB's strategy review, in which the ECB asks experts and the general public to participate. [12]

18. He argued that, if the ECB were to disclose the requested data with a time lag, it would be very unlikely that market participants could draw inferences from the information and that price discovery would still be impacted. The alleged effects would diminish over time, and would not apply at all for short maturity bonds and phased-out programs.

The Ombudsman's assessment

19. The inspection by the Ombudsman's inquiry team of the internal ECB database confirmed that the database contains the requested information. The explanations provided by the ECB at the inspection, and in the document drafted by the ECB after the inspection, which was shared with the complainant, explain why disclosing that information would cause harm.

20. The ECB explained it believes that the disclosure of the requested information could lead to market distortion and the distortion of the price discovery mechanism, how it could hamper the proper functioning of the market, how it could negatively affect the Eurosystem's financial interests and how it could adversely affect the effectiveness of the ECB's purchase programmes.

21. EU courts have recognized that the ECB enjoys wide discretion when determining whether the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State might be undermined by the disclosure of documents. The courts have also held that the ECB, when reasoning a decision to refuse access to a document, may base itself on considerations that take account of hypothetical behaviour of market participants following the disclosure of the requested information. [13]

22. Considering the ECB's wide discretion when assessing whether disclosure would cause harm, the Ombudsman finds that the explanations provided during the inquiry were reasonable. The Ombudsman agrees that, if the negative effects resulting from disclosure were to occur, the public interest could be harmed.

23. Under the ECB rules on public access to documents, the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State cannot be overridden by any other public interest. [14]



24. The ECB was therefore justified in refusing access to the document at issue.

25. In light of the above, the Ombudsman concludes that there was no maladministration by the ECB.

26. The Ombudsman notes the ECB's statement that it already publishes as much information as possible on the PEPP and CSPP on its website. She encourages the ECB to evaluate regularly whether further information on these programmes can be published. This is likely to become of even greater importance as the public looks to the ECB for proof that it is living up to the ambitious statements of its President as regards the Bank's efforts to make monetary policy "greener".

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

There has been no maladministration by the European Central Bank.

The complainant and the European Central Bank will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 09/03/2021

[1] More information is available at:

https://www.ecb.europa.eu/explainers/show-me/html/app_infographic.en.html [Link].

[2] Decision 2016/948 of the European Central Bank on the implementation of the corporate sector purchase programme:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D0016> [Link].

[3] The Eurosystem comprises the ECB and the national central banks of those countries that have adopted the euro.

[4] More information on the CSPP can be found under

<https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html#cspp> [Link].

[5] Decision 2020/440 of 24 March 2020:

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020D0440&from=EN>



[Link], more information on the PSPP can be found at

<https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html> [Link].

[6] Decision 2004/3 of the European Central Bank on public access to European Central Bank documents, as amended:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02004D0003%2801%29-20150329> [Link].

[7] In accordance with Article 4(1)(a), second indent, of Decision 2004/3.

[8] The meeting report can be found under

<https://www.ombudsman.europa.eu/en/report/en/136828> [Link].

[9] Market neutrality in this context basically means that the purchase programs must reflect what the market offers, without discriminating against certain industries.

[10] See Article 4 (“purchase limits”) of Decision 2016/948 (footnote 1).

[11] See <https://www.ecb.europa.eu/home/search/review/html/index.en.html> [Link].

[12] Via the ECB Listens Portal:

<https://www.ecb.europa.eu/home/search/review/html/form.en.html> [Link].

[13] See judgment of the General Court of 4 June 2015, *Versorgungswerk v ECB*, T-376/13, paragraphs 53-55:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=164732&pageIndex=0&doclang=EN&mode=lst&dir> [Link]; and judgment of the General Court of 28 September 2018, *Spiegel-Verlag and Sauga v ECB*, T-116/17, paragraph 42: <http://curia.europa.eu/juris/document/document.jsf;jsessionid=5B2F3CF1E5CC01633DAEDAE9FBF76E14?text=&docid=164732&pageIndex=0&doclang=EN&mode=lst&dir> [Link].

[14] Article 4(1) of Decision 2004/3.