

Decision on the European Central Bank's (ECB) refusal to grant public access to documents concerning contingency and preparedness measures related to Russia's invasion of Ukraine (case 1327/2022/SF)

Decision

Case 1327/2022/SF - Opened on 18/07/2022 - Decision on 12/09/2022 - Institution concerned European Central Bank (No maladministration found) |

The complainant requested public access to documents concerning contingency and preparedness measures related to Russia's invasion of Ukraine. The European Central Bank (ECB) refused public access to the two documents it identified, relying on a provision in the Treaties which requires that the proceedings of its Governing Council not be made public. The ECB also invoked several exceptions under its rules on public access to documents, including that full disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Union and international financial relations.

The Ombudsman inquiry team inspected the documents at issue. Based on this inspection and considering the wide margin of discretion that the ECB enjoys where it considers that the public interest as regards the Union's international financial relations is at risk, the Ombudsman found that the ECB's decision to refuse access to one of the requested documents was not manifestly wrong. As regards the other document, the Ombudsman considered that the ECB's reliance on the confidentiality of the proceedings of the Governing Council meetings, as laid down in the Treaties, was justified.

The Ombudsman closed the inquiry finding no maladministration.

Background to the complaint

1. In February 2022, the complainant requested public access [1] to documents concerning contingency and preparedness measures related to Russia's invasion of Ukraine.

2. The ECB identified two documents as falling within the scope of the complainant's request: (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* '); and (2) an excerpt from the annex to the minutes of the Governing Council meeting of 9 and 10 March 2022 on



issues related to Eurosystem counterparties (*'Document 2'*) .

3. The ECB refused public access to the two documents, arguing that their disclosure would have a negative impact on its ability to effectively implement sanctions and other restrictive measures imposed by the EU, limit the effectiveness of the ECB's monetary policy, and hamper its international financial relations.

4. The complainant asked the ECB to review its decision (by making what is referred to as a 'confirmatory application'). In reply, the ECB maintained its initial decision. It argued that disclosure would infringe primary law. [2] The ECB further argued that disclosure would undermine the protection of the public interest as regards the confidentiality of the proceedings of its decision-making bodies [3] , the Union's monetary policy [4] and international financial relations [5] . It also invoked the exception under its rules on public access to documents pertaining to ECB documents containing opinions for internal use [6] .

5. Dissatisfied with the outcome, the complainant turned to the Ombudsman in July 2022.

The inquiry

6. The Ombudsman opened an inquiry into the ECB's refusal to grant public access to the requested documents.

7. In the course of the inquiry, the Ombudsman inquiry team inspected the two documents at issue.

Arguments presented to the Ombudsman

By the complainant

8. In his confirmatory application, the complainant argued that the exceptions set out in Article 4(1)(a) of the ECB's rules on public access could no longer apply, as the decision on the contingency measures had already been taken.

9. Moreover, the complainant considered that the public interest in the implementation of the measures outweighs the ECB's interest in protecting the confidentiality of documents intended for internal use.

10. The complainant also contends that the ECB did not consider partial access to the documents.

By the ECB



Document 1

11. The ECB stated that 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 contained analyses of potential operational options available under the current framework.

12. Disclosure of Document 1 would, it said, specifically and effectively undermine the protection of the public interest as regards international financial relations. [7] It would reveal the EU's strategic considerations and the tools needed for an effective implementation of the EU's sanctions, thereby affecting the ECB's relations with EU institutions and other international actors, who could potentially adjust their behaviour in anticipation of the ECB's strategic decisions. Moreover, the ECB considered that disclosure would undermine the participants' trust in its ability to safeguard the confidentiality of discussions concerning the EU's relations to other countries.

13. The ECB further argued that it cannot disclose Document 1, as its rules on public access require that access be refused to documents drafted or received by the ECB for internal use as part of deliberations and preliminary consultations. [8] The ECB considered it of crucial importance that analyses and details of possible options and future measures are presented to the decision-making bodies in an effective manner and that they are kept confidential, particularly in view of the constantly evolving and increasingly serious situation in Ukraine. The ECB would no longer benefit from an exchange of uncensored opinion and would no longer be able to receive frank advice, if authors of internal documents were to consider the risk of giving the wrong signal on a topical matter or of a possible misinterpretation by the public following the disclosure of a document.

14. The ECB considered that there was no overriding public interest in disclosure.

15. Lastly, the ECB considered that partial access to Document 1 was not possible at this time. It stated that the aim pursued by refusing access could not be achieved by redacting passages that would harm the public interest. A more detailed description would risk disclosing its actual content, thereby defeating the purpose of the exception invoked. [9]

Document 2

16. The ECB stated that Document 2 is an excerpt from the minutes of the 535th Governing Council [10] meeting indicating the outcome of those proceedings and containing information on Eurosystem monetary policy measures aimed at ensuring the effectiveness of the restrictions and sanctions imposed on Russian financial institutions.

17. The ECB argued that disclosure of Document 2 would undermine the protection of the public interest as regards the confidentiality of the proceedings of its decision-making bodies.



[11] Disclosure of the excerpt, without contextualisation, could lead to misinterpretation thereby negatively affecting the public's perception of the ECB's official stance in view of the ongoing situation in Ukraine. In addition, the ECB has already publicly communicated its position in a clear and transparent manner.

18. The ECB noted that the confidentiality of the meetings of the Governing Council is protected by primary law. [12] [13]

19. The ECB further argued that disclosure would specifically and effectively undermine its ability to fulfil its monetary policy mandate in the future. [14] It stated that disclosure of details of the Governing Council's decisions relating to Eurosystem counterparties could reduce its ability to react to continuously evolving economic scenarios. In particular, it could influence market participants' expectations thereby affecting their behaviour and decisions, which ultimately would hinder the ECB's ability to take decisions and limit the effectiveness of Eurosystem monetary policy measures in crisis situations.

The Ombudsman's assessment

Document 1

20. The ECB enjoys a wide margin of discretion when determining whether disclosing a document would undermine any of the public interests protected under Article 4(1)(a) of its rules on public access, including international financial relations. [15] As such, the Ombudsman's inquiry aimed to assess if there was a manifest error in the ECB's assessment on which it based its decision to refuse access to the document.

21. To that end, the Ombudsman inquiry team inspected the document and confirmed that it contains sensitive information throughout. Based on this inspection, the Ombudsman finds that it was not manifestly wrong for the ECB to consider that the document's (partial) disclosure could undermine the public interest as regards international financial relations of the Union.

22. Under the ECB rules on public access to documents, the exception relating to the protection of the public interest as regards international financial relations is absolute, which means that it cannot be overridden by any other public interest. Therefore, the complainant's argument regarding an overriding public interest in disclosure cannot be taken into account.

23. Given that the exception pertaining to international financial relations was validly invoked for this document, the Ombudsman does not need to conduct an in-depth assessment as to whether disclosure would also undermine the need to protect internal deliberations at the ECB.

Document 2



24. The Ombudsman notes that the ECB performs its duties in accordance with the Treaties [16] , which include a Protocol laying down specific institutional provisions applying to the ECB. Under this Protocol [17] , the proceedings of the Governing Council meetings are confidential. The Court of Justice has confirmed that the confidentiality of the proceedings of the Governing Council meetings is guaranteed as a general principle, without the need to invoke one of the exceptions provided for in the applicable rules on public access to documents. [18]

25. In light of the above, the Ombudsman considers that the ECB was justified in refusing public access to the excerpt from the minutes of the 535th Governing Council meeting.

Conclusion

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

There was no maladministration by the European Central Bank.

The complainant and the ECB will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 12/09/2022

[1] Under the Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3), as amended:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004D0003%2801%29> [Link]

[2] Under the Protocol (No 4) on the Statute of the European System of Central Banks and of the ECB, which forms part of the Treaty on the Functioning of the EU, available at
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> [Link]

[3] Article 4(1)(a) first indent of ECB Decision 2004/3.

[4] Article 4(1)(a) second indent of ECB Decision 2004/3.

[5] Article 4(1)(a) sixth indent of ECB Decision 2004/3.

[6] Article 4(3) of ECB Decision 2004/3.

[7] Article 4(1)(a) sixth indent of ECB Decision 2004/3.



[8] Article 4(3) of the ECB Decision 2004/3.

[9] The ECB referred to T-362/08, *IFAW International Tierschutz-Fonds GmbH v European Commission*, para 111:

<https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=T-362%252F08&for=&jge=>
[Link]

[10] The Governing Council is the main decision-making body of the ECB. It consist of the six members of the Executive Board, plus the governors of the national central banks of the 19 euro area countries.

[11] Article 4(1)(a) first indent of the ECB Decision 2004/3.

[12] Article 10.4 of the Protocol on the Statute of the European System of Central Banks and of the ECB states: “*The proceedings of the meetings [of the Governing Council] shall be confidential. The Governing Council may decided to make the outcome of its deliberations public.*”

[13] In this context, the ECB referred to the Judgment of the Court of 19 December 2019 *European Central Bank v Espirito Santo Financial (Portugal)*, C-442/18 P, available at <https://curia.europa.eu/juris/liste.jsf?num=C-442/18&language=EN> [Link]

[14] Article 4(1)(a) second indent of the ECB Decision 2004/3.

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

<https://curia.europa.eu/juris/document/document.jsf?jsessionid=511B7766F732579E2FB973F47E00861D?text=&do>
[Link]

[16] Treaty on European Union,

https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format
[Link], and Treaty on the Functioning of the European Union,

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> [Link]

[17] Article 10.4.

[18] See Judgment of the Court of 19 December 2019 *European Central Bank v Espirito Santo Financial (Portugal)*, C-442/18 P, available at:

<https://curia.europa.eu/juris/liste.jsf?num=C-442/18&language=EN> [Link], and Judgment of the Court of 21 October 2020 *European Central Bank v Espirito Santo Financial Group*, C-396/19 P, available at:
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=232705&pageIndex=0&doclang=EN&mode=lst&d>
[Link]