

Decision in case 1742/2015/OV on the European Central Bank's refusal to grant access to documents containing detailed information on two Asset Purchase Programmes

Decision

Case 1742/2015/OV - Opened on 25/01/2016 - Decision on 18/07/2016 - Institution concerned European Central Bank (No maladministration found) |

The complainant, a London based financial journalist, requested public access to documents containing detailed information on the European Central Bank's two Asset Purchase Programmes which run until March 2017. The purpose of these Programmes is to bring inflation rates to levels close to 2%. More particularly, the complainant was interested in a country by country, bank by bank, and product by product breakdown of the Purchase Programmes, including the prices paid for securities, the quantities purchased, as well as the fees paid to brokers.

The ECB replied that, whereas aggregated information on the Purchase Programmes was available on its website, no access could be granted to the requested detailed and disaggregated information on the Purchase Programmes. The ECB argued that this information was covered by the exceptions relating to i) protection of the public interest as regards financial, monetary or economic policy of the Union and ii) the protection of the commercial interests of a natural or legal person. The complainant turned to the Ombudsman alleging that the ECB had wrongly refused access to the data.

In a meeting with the ECB, the Ombudsman requested additional explanations and clarifications concerning the ECB's refusal to grant access. The ECB stated that it has a dedicated internal database on the Purchase Programmes and that, on the basis of the information extracted from it, the ECB produces weekly internal confidential reports to allow the Executive Board to monitor the purchases made and to decide on possible future purchases. The ECB also provided the Ombudsman with an example of a weekly internal report. The report contained spreadsheets with details of purchases broken down by country.

On the basis of the additional information obtained during the meeting, the Ombudsman concluded that the ECB's refusal to grant access to the detailed data requested by the complainant was in accordance with the relevant case-law and thus justified. She concluded that there was no maladministration by the ECB and closed the case.



The background to the complaint

1. On 4 September 2014, the European Central Bank (ECB) launched the Asset-Backed Securities Purchase Programme (**ABSPP**) and the third Covered Bond Purchase Programme (**CBPP3**). The purpose of both these Purchase Programmes was to " *further enhance the transmission of monetary policy [1] , facilitate credit provision to the euro area economy, generate positive spill-overs to other markets and, as a result, ease the ECB's monetary policy stance, and contribute to a return of inflation rates to levels closer to 2% [2]* ". The programmes are intended to be carried out until the end of March 2017 and in any case until the Governing Council of the ECB sees a sustained adjustment in the path of inflation that is consistent with its aim of achieving inflation rates below, but close to, 2% over the medium term [3] .

2. On 12 December 2014, the complainant, a London based financial journalist, made a request for public access to the ECB in relation to the two Purchase Programmes. He asked in particular for access to a " *country by country, bank by bank, and product by product breakdown of all ECB purchase programme expenditure to date, including prices paid for securities, quantities purchased, brokerage and/or clearing house arrangements including fees, and the relevant ISIN [4] codes* ".

3. On 30 January 2015, the ECB replied that such data are " *available in an **internal database** used for the production of **confidential internal reports*** " (emphasis added). The ECB refused access on the basis of Article 4(1)(a), second indent (the protection of the public interest as regards financial, monetary or economic policy of the Union or a Member State) and Article 4(2), first indent (the protection of the commercial interests of a natural or legal person) of its Decision ECB/2004/3 on public access to ECB documents [5] :

i) The protection of the public interest as regards financial, monetary or economic policy of the Union or a Member State:

4. The ECB explained that the aim of the two Purchase Programmes was to further enhance the transmission of monetary policy (see paragraph 1 above). As such, these two Programmes are part of the non-standard monetary policy measures the ECB has taken in recent years.

5. Regarding the securities purchased to date (including the country by country, bank by bank, and product by product breakdown of the purchases made, ISIN codes, brokerage or clearing house arrangements, including fees paid to brokers), the ECB explained that the disclosure of detailed information on individual holdings would reveal which financial instruments have been bought, as well as the issuers involved. It stated that releasing information on the distribution of purchases across issuers may lead to market fragmentation and undermine the level playing field among issuers and originators. This would undermine the ECB's intention of supporting the functioning of the relevant markets. For example, the disclosure of the names of issuers of covered bonds and originators of asset-backed securities effectively bought is very likely to



increase differentiation in spreads in favour of those issuers/originators whose financial instruments have been purchased. This, in turn, would undermine the financing efforts of the issuers whose financial instruments have not been purchased. Furthermore, the disclosure of these names may be perceived by the market as indicating a differentiation between financially sound and financially weak issuers and originators. This would undermine the Eurosystem's efforts to restore confidence in the financial markets.

6. The ECB concluded that disclosure of the requested data pertaining to active Purchase Programmes would challenge their efficiency and the effectiveness of the non-standard monetary policy operations of its Governing Council.

ii) The protection of the commercial interests of a natural or legal person

7. The ECB explained that disclosure of the requested data would undermine the protection of the commercial interests of the ECB's counterparties, including those of the four executing asset managers (hereinafter "Managers") appointed contractually under the ABSPP. The Eurosystem needs to protect the confidentiality of individual transaction data with and relating to its counterparties. Disclosure of such information may be harmful to their commercial interests. Furthermore, the disclosure of the contractual arrangements with the Managers (or the clearing company itself), including their respective fees, would undermine the protection of their commercial interests. The ECB then argued that there was also no overriding public interest in disclosure.

8. The ECB however stated that, with a view to further increasing the level of transparency regarding the Purchase Programmes, it provides on a weekly basis details on securities holdings at amortised cost. This information is published in the consolidated weekly financial statement of the Eurosystem and on the open market operations dedicated webpage of the ECB. In addition, information on the weighted average remaining maturity by issuer is released on a monthly basis. The ECB provided the complainant with four hyperlinks of its website containing the above information (open market operations page, liquidity analysis page, weekly financial statements page, and a press release on the Managers).

9. On 27 February 2015, the complainant applied for a review of the decision (a "confirmatory application"). He argued that he had asked for a full list of Eurozone countries and banks that have been favoured by the ECB and how much money each had received. He stated that the ECB's refusal to disclose the requested data made it appear guilty of a "cover-up". He argued that commercial confidentiality over the use of public money is seen by many as a sign of corruption and abuse of power. The complainant addressed to the ECB around 30 detailed questions and requests for more information.

10. On 25 March 2015, the ECB rejected the complainant's confirmatory application. It added the following additional arguments to refuse access:

i) The protection of the public interest as regards financial, monetary or economic policy of the Union or a Member State:



11. The ECB first stated that details on the financial instruments, including the eligibility criteria of the ABSPP and the CBPP3, are publicly available on the ECB's website.

12. The ECB confirmed that releasing the requested data could undermine the explicit purpose of the two Purchase Programmes. More particularly, while the ECB with its purchases strives for market neutrality, the disclosure of information on such distribution carries the risk of misinterpretation by market participants. The latter may assume that the data reflect structural features of the Purchase Programmes, rather than the mere temporary distribution of the purchases in view of the existing market conditions at that given moment in time. They may even mistakenly assume that the ECB's asset managers hold privileged information on specific issuers or originators. The ECB reiterated that disclosure of the names of issuers and originators could be perceived by the market as indicating a differentiation between financially sound and financially weak issuers and originators. This could ultimately introduce unnecessary volatility and distortions in the market, which could in turn undermine the protection of the public interest as regards the EU monetary policy. The ECB concluded that it would not grant full or even partial access to the requested data, as this would undermine the Eurosystem's explicit aim of restoring confidence in the financial markets and enhancing the transmission of monetary policy impulses. The ECB also underlined that the exception of Article 4(1)(a) concerning the financial, monetary or economic policy was not limited by an overriding public interest test.

ii) The protection of the commercial interests of a natural or legal person

13. The ECB reiterated its earlier arguments and added that the complainant had not substantiated the existence of an overriding public interest. Nor had the ECB identified a public interest that would override the above protected interest. Thus, it was not possible to grant partial access to the requested data without undermining the commercial interests at stake.

14. In further replies to the complainant of 2 April and 6 November 2015, the ECB again pointed out that, whereas aggregated information on the Purchase Programmes was available on its website, detailed and disaggregated information on the Programmes could not be provided.

The inquiry

15. On 3 November 2015, the complainant turned to the Ombudsman and made the following allegation and claim:

Allegation:

The ECB wrongly refused to grant public access to detailed data of the ECB's Asset-Backed Securities Purchase Programme (ABSPP) and the Third Covered Bond Purchase Programme (CBPP3), including a country by country, bank by bank, and product by product breakdown as well as the prices paid for securities, quantities purchased, brokerage and/or clearing house arrangements, including fees, and the relevant International Securities Identification Number



(ISIN).

Claim:

The ECB should grant public access to the requested data.

16. On 25 January 2016, the Ombudsman's Office held a video conference meeting with the ECB in which it requested additional explanations and clarifications concerning the ECB's position that no public access to the requested documents could be granted. By e-mail of 22 February 2016, the Ombudsman's Office informed the complainant of the additional information and explanations provided by the ECB. The complainant did not submit any further observations in reply to that e-mail. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

The allegedly wrong refusal to grant access to the requested documents

Arguments presented to the Ombudsman

17. The **complainant** argued that the ECB should be transparent about the identity of the securities and covered bonds it has bought and how much it has paid for each of them. Also, the ECB should publish the identities of the brokers and the fees paid to them as a matter of public record.

18. In the video conference meeting of 25 January 2016, the **ECB** representatives explained that the ECB has set up a dedicated internal database on the Purchase Programmes and that, on the basis of the information extracted from it, the ECB produces weekly internal confidential reports to allow the Executive Board to monitor the purchases made and to decide on possible future purchases.

19. In the meeting, the ECB representatives provided the Ombudsman with an example of a weekly internal report. The report contained spreadsheets with details of purchases broken down by country. The ECB representatives explained that whereas the total amount of the Purchase Programmes is publicly available information, the detailed information, broken down per Member State, is confidential. The reasons for classifying this information as confidential were, the ECB representatives stated, explained in the ECB's replies to the request for public access (see paragraphs 3 to 14 above).

20. The ECB representatives also explained that the fact that a Purchase Programme would one day be terminated does not mean that automatically public access to all the reports generated could be granted. They stated that the ECB would have to proceed to a case-by-case analysis, since releasing reports on closed programmes could still reveal the ECB's monetary policy strategy and thus undermine the effectiveness of running programmes.

21. The ECB representatives also stated that a lot of general information on the Purchase Programmes has been made public on the ECB's website, and that the ECB had not received



other similar public access requests as the complainant's one.

The Ombudsman's assessment

22. On the basis of the information in the file and the additional information obtained during the meeting of 25 January 2016, the Ombudsman considers the ECB's decision to refuse to grant access to the requested documents to be correct and in accordance with the relevant case-law on public access to documents held by the ECB.

Relevant case law:

23. Regarding the exception concerning the **protection by the ECB of the public interest as regards the financial, monetary or economic policy of the Union or a Member State** (Article 4(1)(a), second indent, of Decision ECB/2004/3), the General Court already held, in its judgment of 4 June 2015 in **Case T-376/13 Versorgungswerk v ECB** [6] (not yet published), 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 ... might be undermined by the disclosure of the [requested] information ... " and that "[t] he European Union judiciary'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 (...). However, ..., 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 [requested] information (...) and the effects such behaviour might have on future interventions (paragraphs 53-55) .*

24. The General Court further found that:

" 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 " (paragraph 80).

25. For the Court, when an intervention involves the purchase of government bonds by the ECB, there is a clear risk that the market participants will base themselves on information about those types of purchases in the past to identify preferences of the ECB for certain types of government bonds (paragraph 96) .



26. Regarding **the present case** , the ECB made available information about the two Purchase Programmes. In fact, the ECB's website contains **general** (aggregated quantitative) information on the two Purchase Programmes, including the eligibility criteria of the ABSPP and the CBPP3, details (on a weekly basis) on securities holdings at amortised costs (published in the weekly financial statement of the Eurosystem) and information on the weighted average maturity by issuer (released on monthly basis).

27. Apart from this general information, the ECB considers that further detailed, disaggregated (broken down) data on the Purchase Programmes cannot be disclosed, fully or partially.

28. Regarding the exception concerning the protection of the public interest as regards the financial, monetary or economic policy of the EU or a Member State, the ECB explained that the two Purchase Programmes are part of the **ECB's non-standard monetary policy measures** . Disclosure of detailed information on the distribution of purchases across issuers may lead to **market fragmentation** and **undermine the level playing field among issuers and originators** . As an example, the ECB stated that the disclosure of the names of issuers of covered bonds, and originators of asset-backed securities effectively bought, is very likely to **increase differentiation in spreads in favour of those issuers/originators whose financial instruments have been purchased by the Eurosystem, which in turn would undermine the financing efforts of the issuers whose financial instruments have not been purchased** . The Ombudsman agrees that if this were to occur the public interest would be severely harmed.

29. Furthermore, the ECB stated that disclosure of the names of issuers and originators may be perceived by the market as indicating a differentiation between financially sound and financially weak issuers and originators, leading to further volatility and distortions in the market. Again, the Ombudsman agrees that if this were to occur the public interest would be severely harmed.

30. In the Ombudsman's view - based on the replies and example given by the ECB during the meeting of 25 January 2015 -, the ECB's refusal to grant the complainant access to the requested documents is convincing. Indeed, as the ECB has argued and the case-law of the EU Courts accepts, releasing this kind of data would most likely undermine the Eurosystem's efforts **to restore confidence in the financial markets** and **to enhance the transmission of monetary policy impulses** . In the above mentioned case-law, the General Court ruled that, in its reasoning for refusing access, the ECB can rely on the projected behaviour in the financial markets.

31. On the basis of the very detailed and comprehensive inspection of an example of a weekly internal report, the Ombudsman also considers that the ECB's position, that no partial access could be granted, is correct. The entirety of the information in the report fell clearly within the scope of what can be considered highly sensitive financial information.

32. In that respect, it is important to bear in mind that, as the ECB also pointed out, the exception of Article 4(1)(a) concerning the protection of the public interest as regards the



financial, monetary or economic policy is **not subject to an overriding public interest test**. In other words, when the documents are covered by the exception (which the ECB has in the Ombudsman's opinion convincingly argued), the ECB has to refuse access to them.

33. While the law does not allow for the exception invoked to be overruled by any public interest, the Ombudsman's view, on the basis of the inspection of the documents, is that the public interest would not be served by releasing the documents at issue.

34. The ECB also relied on a second exception (Article 4(2), first indent, of Decision ECB/2004/3) concerning **the protection of commercial interests** of the ECB's counterparties, including those of the four Managers appointed contractually under the ABSPP. The ECB argued that disclosure of individual transaction data relating to its counterparties (fees and commissions paid to them) would harm their commercial interests, as would the disclosure of the contractual arrangements with the Managers or the clearing company. Again, the Ombudsman considers the reasoning of the ECB to be convincing, since such information (fees paid) is commercially sensitive and confidential. In that regard, the Ombudsman also notes that the ECB appointed the four Managers in question following a competitive public tender. There are thus no reasons to call into question the ECB's position.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There has been no maladministration by the ECB.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 18/07/2016

[1] The monetary policy transmission mechanism is the process by which monetary policy decisions have an impact on the economy in general and price levels in particular.

[2] ECB Decision ECB/2014/45 of 19 November 2014 on the implementation of the asset-backed securities purchase programme, recital 2, and ECB Decision ECB/2014/40 of 15 October 2014 on the implementation of the third covered bond purchase programme, recital 2.

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



[4] "International Securities Identification Number" (ISIN).

[5] Decision of the ECB of 4 March 2004 on public access to ECB documents (ECB/2004/3), OJ 2004 L 80, p. 42, as amended by Decision ECB/2011/6 of 9 May 2011, OJ 2011 L 158, p 37, and by Decision ECB/2015/1 of 21 January 2015 OJ 2015 L 84, p. 64.

[6] This case, which is very similar to the present case, concerned the ECB's refusal to grant access to Annexes of the Exchange Agreement of 15 February 2012 between Greece, the ECB and the Eurosystem national central banks (NCBs) listed herein. This Exchange Agreement was concluded under the **Securities Markets Programme (SMP)** launched by the ECB in May 2010 in order to restore an appropriate functioning of the monetary policy transmission mechanism. In that case, the ECB invoked similar arguments to refuse access as in the present case. More particularly, the ECB argued, 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* " (see paragraph 67) .