

Besluit in zaak 2161/2011/ER - Toegang tot brieven die naar een regering van een lidstaat zijn gestuurd

Besluiten

Zaak 2161/2011/ER - Geopend op 30/11/2011 - Besluit over 19/12/2012 - Betrokken instelling Europese Centrale Bank (Geen verder onderzoek gerechtvaardigd) |

Klager, een Italiaans staatsburger, diende een verzoek in om inzage in een brief die de Europese Centrale Bank ('ECB') in de zomer van 2011 had gestuurd aan de Italiaanse regering in het kader van de staatsschuldencrisis die enkele landen in de eurozone getroffen heeft. De ECB wees het verzoek van klager af en gaf daarvoor als reden op dat het openbaar maken van de brief het voeren van monetair en economisch beleid zou ondermijnen, omdat het mogelijk moet zijn dat de ECB vertrouwelijke informatie uitwisselt met de lidstaten. De ECB bleef bij zijn standpunt, ondanks het feit dat een belangrijke Italiaanse krant de brief in de tussentijd had gepubliceerd.

In zijn klacht aan de Ombudsman beweerde klager dat de ECB hem ten onrechte de toegang tot het opgevraagde document had geweigerd en stelde dat de ECB hem toegang moest verlenen tot de brief of een toereikende opgave van redenen voor zijn beslissing moest verstrekken.

De ECB beschreef in zijn standpunt de inhoud van de brief. De ECB deelde verder mee dat het feit dat de brief in een belangrijke Italiaanse krant was gepubliceerd niet relevant was, omdat de bank zelf de brief niet openbaar had gemaakt, en ook geen toestemming had gegeven voor de publicatie ervan.

De Ombudsman stelde in zijn standpunt dat de ECB klager had voorzien van een passende opgave van redenen. Op basis van een inspectie van de brief was de Ombudsman van oordeel dat openbaarmaking van de brief inderdaad het algemeen belang van het monetaire en economische beleid zou schaden. Met betrekking tot het feit dat de brief was gepubliceerd in een belangrijke Italiaanse krant was de Ombudsman van mening dat het standpunt van de ECB aanvaardbaar was. In het licht van de redenen die de ECB opgaf ter onderbouwing van zijn beslissing concludeerde de Ombudsman dat er geen redenen waren voor verder onderzoek. De Ombudsman maakte ook echter nog een opmerking aan het adres van de ECB om de bank aan te sporen transparantie te blijven beschouwen als niet alleen een wettelijke verplichting, maar ook als een kans om zijn legitimiteit in de ogen van de burgers te vergroten.



The background to the complaint

1. On 12 August 2011, the complainant submitted an application for access to documents to the European Central Bank ('ECB'). The complainant requested access to a letter, which the ECB sent in early August 2011 to the Italian Government in the framework of the sovereign debt crisis affecting certain euro area countries (the 'Letter').

2. On 7 September 2011, the ECB rejected the complainant's application. It stated that, in accordance with Article 4(1)(a), second indent, of the Decision of the ECB concerning public access to documents [1], access to the Letter had to be denied, since disclosure would undermine the protection of the public interest as regards the monetary and economic policy of the EU or a Member State. In particular, the disclosure of the Letter would undermine the effectiveness of the messages of the ECB to Member States as a tool for fostering an environment conducive to restoring confidence among investors in the financial markets. The ECB pointed out that this issue is of utmost importance for the smooth conduct of monetary policy. It also informed the complainant that he could submit a confirmatory application to its Executive Board.

3. On 28 September 2011, the complainant submitted a confirmatory application to the ECB's Executive Board. The following day, he contacted the ECB again, observing that the Letter had been published in a major Italian newspaper.

4. On 20 October 2011, the ECB rejected the confirmatory application, considering that the exception previously invoked was applicable. The ECB considered that the disclosure of the Letter " *could affect the efficiency of the messages that the ECB may address* " to Member States in order to promote favourable conditions for the smooth conduct of monetary policy. The ECB further stressed that it must be in a position to convey pertinent and candid messages to national and European authorities in the manner it deems most effective in order to serve the public interest as regards monetary policy. In particular, the circumstances may require informal and confidential communications. In the present case, the confidential communication was aimed at fostering an environment conducive to restoring confidence among investors in the financial markets. The ECB informed the complainant of the means of redress available to him, pursuant to Articles 228 and 263 TFEU [2].

5. The complainant turned to the European Ombudsman on 26 October 2011.

The subject matter of the inquiry

6. The Ombudsman opened an inquiry into the following allegation and claim.

Allegation:



The ECB unlawfully refused the complainant access to the requested document.

Claim:

The ECB should grant access to the requested document and/or provide the complainant with an adequate statement of reasons for its decision.

The inquiry

7. On 30 November 2011, the Ombudsman forwarded the complaint to the President of the ECB, with an invitation to submit an opinion on the above allegation and claim. On this occasion, the Ombudsman also informed the President of the ECB that he wished to inspect the Bank's file concerning the complaint.

8. On 1 February 2012, the Ombudsman's services inspected the ECB's files concerning the complaint. The inspection report was forwarded to the complainant for possible observations. No observations on the report were received from the complainant.

9. The ECB submitted its opinion on the complaint on 28 February 2012. The Ombudsman forwarded the opinion to the complainant for possible observations, which he sent on 10 May 2012.

The Ombudsman's analysis and conclusions

A. Allegation that the ECB unlawfully refused the complainant access to the requested document and related claim

Arguments presented to the Ombudsman

10. In his complaint, the complainant referred to the case-law of the Court of Justice and the General Court on access to documents to argue that the ECB did not validly justify its decision to refuse access to the Letter. The complainant also stressed that, following the publication of the Letter by a newspaper, the grounds invoked by the ECB to refuse access, and, in particular, the protection of the effectiveness of its messages to the Member States, were no longer applicable.

11. In its opinion, the ECB explained that the Letter was sent to the Italian Government in August 2011. It is a strictly confidential communication from the ECB President to the Italian Prime Minister expressing the " *ECB's concerns about the then extraordinarily severe and*



difficult situation of the Italian economy and the repercussions on the stability of the euro area and inviting the Italian government to decisively and swiftly undertake the necessary measures to enhance the growth potential and ensure fiscal consolidation ". These measures should enhance potential growth, ensure the sustainability of public finance, and improve the efficiency of the administration. The ECB's aim was to protect "*the integrity and effectiveness of its monetary policy in the best interest of the euro area citizens "*.

12. The ECB considered that disclosure of the Letter would undermine the protection of the public interest as regards the monetary policy of the Union. Moreover, the ECB stated that, for itself, it is "*of crucial importance to be in a position to convey pertinent and candid messages to European and national authorities of the euro area in the manner judged to be most effective to serve the public interest as regards the fulfilment of its mandate "*. This includes, if necessary, the possibility of sending informal or confidential messages.

13. The ECB further stated that the fact that the Letter was published in a major Italian newspaper was irrelevant, since the Bank itself had neither made publicly available nor authorised the publication of the Letter, which had been obtained without the authorisation of the ECB. The ECB pointed out that if it were obliged to grant public access to a confidential document which was unlawfully disclosed by a third party, it would be forced to endorse *ex-post* the unlawful disclosure of the document; this would have the result of encouraging third parties to publish confidential documents without authorisation and then to seek approval via the rules on access to documents. The ECB also recalled that its position on this point is in line with the case-law of the General Court [3] .

14. As regards the reasons set out in its statement rejecting the complainant's initial and confirmatory applications, the ECB considered that these were adequate. It referred to the case-law of the Court of Justice and of the General Court, according to which a statement of reasons should be assessed on a case-by-case basis "*with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question "* [4] . The reasoning need not delve into all the relevant facts and points of law. In its letters to the complainant, the ECB could not have given more reasons why disclosure would have undermined the protected interest, since this would have entailed "*the (partial) disclosure "* of the Letter's contents.

15. Finally, the ECB referred to the case-law of the Court of Justice concerning the wide margin of discretion EU institutions enjoy when assessing whether disclosure of documents would jeopardise the interests protected by Article 4(1)(a) of Regulation 1049/2001 [5] . The same should apply to the ECB in its assessment of the exceptions laid down in Article 4(1)(a) of Decision ECB/2004/3. The ECB considered that it "*complied with the applicable procedural rules including the duty to state reasons and that its assessment of the public interest is neither tainted with a manifest error of assessment nor with misuse of powers. "*

16. In his observations, the complainant stated that he had already put forward his arguments and had trust in the Ombudsman's decision.



The Ombudsman's assessment

17. Article 4(1)(a), second indent, of the Decision concerning public access to ECB documents sets out: "[t] he ECB shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: ... - the financial, monetary or economic policy of the Community or a Member State ". This exception to the general rule of public access to documents is identical to the one enshrined in Article 4(1)(a), fourth indent, of Regulation 1049/2001.

18. It is thus necessary to assess whether, at the time it rejected the confirmatory application, the ECB (i) was entitled to consider that the exception concerning the protection of the economic and monetary policy laid down in Article 4(1)(a), second indent, of its Decision, was applicable; and (ii) duly conveyed its point of view to the complainant by means of an appropriate statement of reasons.

19. As regards the applicability of the exception invoked by the ECB, the Ombudsman recalls the established case-law of the Court of Justice concerning the application of the substantive exceptions relating to the public interest, provided for in Article 4(1)(a) of Regulation 1049/2001: "[the] institution must be recognised as enjoying a broad discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest ", given that " such a refusal decision is of a complex and delicate nature which calls for the exercise of particular care and that the criteria set out in Article 4(1)(a) of Regulation No 1049/2001 are very general " [6] .

20. Having inspected the Letter, the Ombudsman can confirm that the ECB accurately described its content in its opinion. He is, moreover, of the view that the Letter contained information that appeared to be of a highly sensitive nature, pointing out several serious weaknesses of the Italian economy and of their potential consequences; identifying its most vulnerable areas; and suggesting measures that could be envisaged in order to eradicate those weaknesses.

21. The difficult economic and market situation which prevailed in Italy at the relevant time (i.e., the date of the refusal of the confirmatory application) is a matter of public knowledge. On the basis of his inspection of the Letter, the Ombudsman takes the view that disclosing the ECB's detailed analysis of the difficulties in the Italian economy at the relevant time could have jeopardised the interests of that country (and of its citizens), by exposing it to speculative threats on the financial markets, thereby undermining its economic policy.

22. Furthermore, the Ombudsman recognises the importance of candid communication between the ECB and the Government of a Member State, which Bank itself has emphasised. Although this interest is not, in itself, sufficient to exclude, on a **general** basis and under **any** circumstances, such communications from public knowledge, it is, nevertheless, a factor to be taken into account when performing the **concrete** assessment of a communication in order to ascertain whether its disclosure would actually jeopardise the legitimate interests protected by



the ECB Decision on public access to documents [7] .

23. In these circumstances, the Ombudsman accepts that it was not unreasonable to consider, as the ECB did at the time it rejected the complainant's confirmatory application, that disclosing the Letter, even partially, might have seriously harmed the interests protected by the exceptions laid down in Article 4(1)(a) of the ECB Decision on public access to documents.

24. The Ombudsman points out that this conclusion cannot be affected by the fact that the Letter was published in a major Italian newspaper shortly after the complainant submitted his request for access. He considers that the case-law cited by the ECB in its opinion (paragraph 13 above) would not appear to be directly relevant to the present case, since it deals with the interest of individuals to bring an action for annulment against a decision to refuse access to documents, and, in particular, excludes the possibility that the publication of the requested document by a third party could affect such an interest. However, the ECB also argued that, if it were obliged to grant public access to a confidential document which was unlawfully disclosed by a third party, it would be forced to endorse the unlawful disclosure *ex-post* . This would result in encouraging third parties to publish confidential documents without authorisation. The Ombudsman considers this position to be reasonable.

25. In contrast to Article 4(2) of Regulation 1049/2001, Article 4(1) does not provide for the possibility of an overriding public interest in disclosure. In the words of the Court of Justice [8] , "*it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that ... **refusal of access by the institution is mandatory** where disclosure of a document to the public would undermine the interests which that provision protects, **without the need** , in such a case ... **to balance** the requirements connected to the protection of those interests against those which stem from **other interests*** " (emphasis added). This case-law is fully applicable, by analogy, to Article 4(1)(a) of the ECB Decision on public access to documents, the content of which is identical to that of Article 4(1)(a) of the Regulation. Therefore, neither Regulation 1049/2001 nor the ECB Decision on access to documents provides for the legitimate democratic interest of citizens to be informed of the measures the ECB suggested to Italy, with an eye to overriding the necessity of protecting the interests laid down in Article 4(1)(a), second indent, of that Decision.

26. As regards the statement of reasons that the ECB provided to the complainant when rejecting both his initial and confirmatory applications, the ECB is right in stating that "[t] he requirements to be satisfied by the statement of reasons depend on the circumstances of each case " and that the statement of reasons must avoid undermining the sensitive interests protected by the very exception applied. However, in the present case, the Ombudsman takes the view that a mere reference to the interests that would be jeopardised, with no explanation linking possible damage to those interests with the specific content of the document, was not sufficient to meet the requisite standard of the statement of reasons.

27. The Ombudsman notes, however, that, during his inquiry into this complaint, the ECB reviewed the position it had taken in response to the initial and confirmatory applications and aligned its initial statement of reasons with the requisite standard. Indeed, in its opinion, the



ECB carried out a concrete assessment of the content of the Letter and described it in sufficient detail so as to give an idea of the sensitivity of that content. The ECB also explained both the reasons for sending the Letter to the Italian authorities and the intentions underlying it. The ECB also explained why the fact that an alleged copy of the Letter had been already published did not mean that the Bank was obliged to release the relevant document. This information, combined with the assessment of the risks that disclosure would engender for the protected interests, contained in the Bank's initial replies to the complainant, objectively enables the complainant to ascertain why disclosure was denied in the present case.

28. In judicial proceedings against a decision to refuse access to a document, the question for the Court is whether or not to annul the decision in question. In this context, the General Court has held that "[i]f a] *decision contains a statement of reasons of some kind ... that reasoning cannot be developed and explained for the first time ex post facto* " before the Court, save in exceptional circumstances. [9] Since the Ombudsman has no power to annul a decision, Ombudsman proceedings meet different criteria from, and do not necessarily have the same objective as, judicial proceedings. In the present case, the Ombudsman does not consider that it would be useful to criticise the ECB's original reasoning for its decision to refuse the confirmatory application. However, the Ombudsman will make a further remark below, encouraging the ECB to focus on the quality of its reasoning when replying to applications for access.

29. In light of the above, the Ombudsman considers that there are no grounds for further inquiries into the case.

B. Conclusions

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

There are no grounds for further inquiries into the case.

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

Further remark

The Ombudsman encourages the European Central Bank to continue to regard the disclosure of documents to the public and the reasoning of decisions refusing disclosure, not only as legal obligations, but also as opportunities to demonstrate its commitment to the principle of transparency and thereby to enhance its legitimacy in the eyes of citizens.



P. Nikiforos Diamandouros

Done in Strasbourg on 19 December 2012

[1] Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents, OJ 2004 L 80, p. 42.

[2] Article 228 of the Treaty on the Functioning of the European Union empowers the European Ombudsman to receive complaints from European citizens concerning instances of maladministration in the activities of EU institutions, bodies, offices or agencies. Article 263 of the TFEU provides for the right of individuals to bring, under certain conditions, an action for annulment of acts of EU institutions deemed to breach EU law.

[3] The ECB referred to Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073, paragraph 36 and Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraph 69, both confirming that a request for public access is not affected by the fact that the document has been published by a third party.

[4] The ECB cited the following cases: Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29; Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 55; Case T-188/98 *Kuijter v Council* [2000] ECR II-1959, paragraph 36; and Joined Cases T-355/04 and T-466/04 *Co-Frutta v Commission* [2010] ECR II-1, paragraph 100.

[5] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L145, p. 43.

[6] Cases C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraphs 34 to 36; and T-362/08 *IFAW Internationaler Tierschutz-Fonds GmbH v Commission*, judgment of 13 January 2011, not yet published in the ECR, paragraph 104, among others.

[7] Indeed, the Court of Justice of the EU has clearly held that, when processing an application for access to documents, the institutions must carry out a specific examination of each document concerned. The mere fact that a document concerns an interest protected by an exception is not, in itself, sufficient to justify the application of that exception. On the contrary, the institution in question must, in principle, explain how disclosure of the document could specifically and effectively undermine the interest protected by the exception invoked. In addition to that, the risk of protected interests being undermined must be reasonably foreseeable and not purely hypothetical. Case C-506/08 P *Sweden v MyTravel and Commission*, judgment of 21 July 2011, not yet published in the ECR, paragraph 76; Case T-250/08 *Bachelor v Commission*, judgment of 24 May 2011, not yet published in the ECR, paragraph 78; Case T-166/05 *Borax Europe v Commission*, judgment of 11 March 2009, not yet published in the ECR, paragraph 88; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and*



Others v API and Commission , [2010] ECR I-8533, paragraph 72; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 43; Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69; *Sison v Council* , cited in footnote 6, paragraph 75.

[8] *Sison v Council* , cited in footnote 6, paragraph 46; Joined Cases T-3/00 and T-337/04 *Pitsiorlas v Council and ECB* [2007] ECR II-4779, paragraph 227.

[9] See *Pitsiorlas v Council and ECB* , cited in footnote 8, paragraph 278.