

Decisão no processo 1871/2020/OAM sobre a forma como o Banco Central Europeu (BCE) tratou um pedido de acesso público a documentos relacionados com a decisão do Tribunal Constitucional alemão sobre o Programa de Compras do Setor Público do BCE

Decisão

Caso 1871/2020/OAM - **Aberto em** 06/11/2020 - **Decisão de** 22/03/2021 - **Instituição em causa** Banco Central Europeu (Não se verificou má administração) |

O processo dizia respeito à decisão do BCE de recusar o acesso do público a documentos relativos ao seu Programa de Compras do Setor Público (PSPP). Os documentos foram partilhados com o Governo Federal alemão, de modo a permitir-lhe apreciar a proporcionalidade do PSPP na sequência de uma decisão do Tribunal Constitucional alemão.

Ao recusar o acesso, o BCE baseou-se numa regra do Tratado que exige que os trabalhos do Conselho do BCE não sejam tornados públicos. Invocou igualmente a necessidade de proteger o interesse público no que respeita à confidencialidade dos trabalhos dos seus órgãos de decisão, à necessidade de proteger a política monetária da União e à confidencialidade dos documentos destinados a uso interno.

A Provedora de Justiça considerou que a recusa do BCE de conceder acesso público se justificava. Ao tirar esta conclusão, a Provedora de Justiça observou que um documento estava abrangido pelas regras do Tratado que exigem que os procedimentos do Conselho do BCE não sejam tornados públicos. O BCE tinha explicado de forma adequada por que razão a divulgação dos outros documentos prejudicaria o interesse público no que diz respeito à política monetária. Embora registando o interesse público significativo nesta matéria, a Provedora de Justiça teve em conta os esforços do BCE para fornecer ao queixoso e ao público toda a informação possível sobre o assunto e encerrou o processo.

Background to the complaint

1. Following the 2007-2008 financial crisis, the European Central Bank (ECB) took several 'non-standard monetary policy measures' to achieve its objective of ensuring 'price stability'. One such measure was setting up asset purchase programmes [1] , such as the Public Sector Purchase Programme (PSPP). Under the PSPP, launched in 2015, the Eurosystem [2] central



banks purchase bonds issued by recognised agencies, regional and local governments, international organisations and multilateral development banks located in the euro area. [3]

2. Several cases were brought before the German federal constitutional court concerning decisions of the ECB on the PSPP and their implementation in Germany. In this context, the German constitutional court submitted questions to the Court of Justice of the EU (Court of Justice) concerning the validity, under EU law, of the PSPP. In December 2018, the Court of Justice found that the PSPP does not infringe EU law. [4]

3. The German constitutional court then, on 5 May 2020, [5] ruled on the cases before it, declaring the judgment of the Court of Justice, and the PSPP, as unlawful and having no binding effect in Germany. The German authorities were given a transitional period of three months to further assess and make sure the ECB justifies the programme's proportionality, which would allow for its continuation in Germany.

4. In that context, the ECB authorised the German Central Bank (Bundesbank) to disclose to the German Federal Government several non-public documents related to the ECB's assessment of the proportionality of the PSPP. The disclosure was made under strict confidentiality requirements and, according to the ECB, in line with the principle of sincere cooperation between the EU institutions and Member States authorities. [6]

5. In June 2020, the complainant asked the ECB to provide public access [7] to documents delivered by the ECB to the German authorities following the judgment of the German constitutional court, as well as the transmission letter of the respective documents.

6. The ECB identified eight documents as falling within the scope of the complainant's request. One document was the transmission letter sent by the ECB President to the President of the Bundesbank, while the remaining seven were the documents attached to that letter. The ECB provided public access to the transmission letter (document 1), and refused the disclosure of the remaining seven documents (documents 2-8), namely:

2. *Background note, entitled "Expand Euro Area Asset Purchase Programme: Monetary Policy Considerations", dated 21 November 2014*

3. *Presentation entitled "Second Interim Report on Complementing the June-October Policy Package", 7 January 2015*

4. *Antworten zum dem Fragenkatalog gemäß §§ 27, 27a BVerfGG on the Expanded Asset Purchase Programme, 15 November 2016 [8]*

5. *Schriftliche Erklärung in der Rechtssache C-493/17, 30 November 2017 [9]*

6. *Excerpt from the ECB policy briefing note of June 2020*

7. *Trial account of the monetary policy meeting on 4 December 2014*



8. Excerpt from the minutes of the 506 th Governing Council meeting on 3-4 June 2020 - Agenda item "Monetary policy decisions", 23 June 2020

7. In August 2020, the complainant requested a review of the ECB's decision not to disclose the seven documents (he made a so-called 'confirmatory application').

8. In October 2020, the ECB confirmed its refusal to grant public access to the requested documents (it issued a so-called 'confirmatory decision'). It argued that public disclosure of one document would infringe primary law. [10] The ECB further invoked various exceptions, provided for under its rules on public access to documents, to justify withholding access. It argued that disclosing the documents could risk undermining the protection of the public interest as regards the confidentiality of the proceedings of the ECB's decision-making bodies [11] , the monetary policy of the Union [12] and the confidentiality of ECB documents intended for internal use. [13]

9. Dissatisfied with the ECB's decision, the complainant turned to the Ombudsman in October 2020.

The inquiry

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

11. In the course of the inquiry, the Ombudsman's inquiry team inspected the requested documents and held a meeting with ECB representatives. [14] The complainant provided comments on the meeting report.

Arguments presented to the Ombudsman

Arguments from the institution

12. As regards the excerpt from the minutes of the 506 th Governing Council [15] meeting (document 8), the ECB said that it was protected by an absolute exception contained in the public access rules, namely the protection of the public interest as regards the confidentiality of the proceedings of the ECB's decision-making bodies. The minutes were also, it stated, confidential under primary law. [16] [17]

13. The ECB further said that all seven documents were protected by the public interest as regards the monetary policy of the Union. Disclosure would reveal information related to the strategy, preparation and implementation of the PSPP and non-standard monetary policy measures. In turn, this could lead to unintended effects on the behaviour of market participants.



It could also significantly limit the ECB's margin of manoeuvre in future, since non-standard monetary policy measures are likely to remain part of the ECB's toolbox.

14. In addition, the ECB considered that the background note, the presentation, the briefing and the internal draft (documents 2, 3, 6 and 7) were part of the decision-making process leading to the adoption of monetary policy measures. Their disclosure would undermine the protection of internal deliberations at the ECB.

15. Given the absolute character of some of the exceptions invoked, and that, in the ECB's view, the complainant's arguments were not sufficient to show the existence of an overriding public interest in disclosure, the ECB concluded that the documents could not be disclosed.

Arguments from the complainant

16. In the complainant's view, there is an overriding public interest in knowing what information was provided to the German authorities. More generally, he argues that there is an overriding public interest in granting access so that the public can examine whether the ECB has remained independent following the ruling of the German constitutional court.

17. According to the complainant, the ECB uses the principle of confidentiality of monetary policy to refuse access to documents that could in some instances be disclosed in the public interest.

18. The complainant also pointed out that some of the documents date back to 2014. It is doubtful, he states, that disclosing this information could have an impact on current monetary policy.

The Ombudsman's assessment

19. The Ombudsman has assessed whether the ECB's decision not to provide the complainant with public access was reasonable and in line with the applicable rules.

20. The ECB performs its duties in accordance with the Treaties, which include a Protocol laying down specific institutional provisions applying to the ECB. [18] Under the Protocol, 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 is guaranteed as a general principle, without the need to invoke one of the exceptions provided for in the applicable rules on access to documents. [19]

21. On this basis, the decision not to make public the excerpt from the minutes of the 506 th Governing Council meeting (document 8) is reasonable.

22. The Governing Council, however, *may decide* to make the *outcome* of its deliberations



public. The ECB has informed the complainant that the *outcome* of the deliberations of the respective meeting is public and has provided a link to where it is published online. [20]

23. That outcome is set out in a document entitled an *“Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main on Wednesday and Thursday, 3-4 June 2020”*. The account is, the Ombudsman notes, very detailed.

24. As regards the remaining six documents (documents 2-7), the ECB has argued that disclosing them could risk undermining the protection of the public interest as regards the monetary policy of the Union.

25. The inspection by the Ombudsman’s inquiry team confirmed that the documents contain details about the assessment and functioning of non-standard policy measures. The ECB’s view that disclosing these documents could undermine the public interest as regards the Union’s monetary policy is reasonable. In drawing this conclusion, the Ombudsman notes that the EU courts have recognised 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. [21]

26. The ECB also properly addressed whether documents dating back in time could have an impact on *current* monetary policy. The ECB has explained in its confirmatory decision, and during the meeting with the Ombudsman’s inquiry team, that communication of information is a monetary policy tool in itself. Releasing documents that were not drawn up for that purpose, could lead to potential unintended expectations from market participants. The ECB argued that even if some documents were drawn up in 2014, the past assessments continued to be relevant today. The purchase programmes are ongoing and the policies remain relevant into the future. Making public internal deliberations could risk reducing the margin of manoeuvre of the ECB in its decision-making and thus negatively impact on the effectiveness of the ECB in pursuing its mandate. The Ombudsman considers that, given these explanations, it is at least reasonably foreseeable that disclosure would undermine the protection of the public interest as regards monetary policy.

27. The exception relating to the protection of monetary policy is absolute, which means that it cannot be overridden by any other public interest. Therefore, the complainant’s arguments regarding an overriding public interest in disclosure cannot be taken into account as regards this exception.

28. Given that the exception for the protection of monetary policy was validly invoked for all six documents, the Ombudsman does not need to conduct an in-depth assessment as to whether disclosure would also undermine, for some of those documents, the need to protect internal deliberations at the ECB.

29. The Ombudsman further notes that the ECB informed the complainant about the types of documents identified as falling within the scope of his request and - to the extent possible -



about their content.

30. In light of all this, the Ombudsman considers that the ECB was justified in refusing public access to the requested documents. While noting the significant public interest in the matter, the Ombudsman has taken account of the ECB's efforts to provide the complainant, and the public, with as much information as possible about it and closes the case.

Conclusion

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

There was 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, 22/03/2021

[1] More information is available at:

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

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

[3] More information is available at:

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

[4] Judgment of the Court of Justice of 11 December 2018, Case C-493/17 *Weiss a.o.* , available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=208741&pageIndex=0&doclang=EN&mode=lst&dir> [Link].

Press release available at:

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180192en.pdf> [Link].

[5] Judgment of the BVerfG Second Senate of 05 May 2020 - 2 BvR 859/15, available at

http://www.bverfg.de/e/rs20200505_2bvr085915en.html [Link]. Press release available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html> [Link].



[6] More information can be found in the letter sent by the ECB President to the European Parliament of 29 June 2020, available at:

https://www.ecb.europa.eu/pub/pdf/other/ecb.mepletter200629_Simon~ece6ead766.en.pdf [Link],

or in the speech of a Member of the ECB Executive Board of 2 July 2020, available at:

<https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200702~87ce377373.en.html> [Link].

[7] 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].

[8] Answers to the questionnaire on the Expanded Asset Purchase Programme (15 November 2016) drawn up pursuant to paragraphs 27 and 27a of the German Federal Constitutional Court Act.

[9] The written statement (of the ECB) in Case C-493/17 (30 November 2017).

[10] 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/?uri=CELEX%3A12016E%2FPRO%2F04> [Link].

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

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

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

[14] The report of the meeting is available at:

<https://www.ombudsman.europa.eu/en/report/en/137337> [Link].

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

[16] 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 decide to make the outcome of its deliberations public”*

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[17] The ECB referred to the Judgment of the Court of 19 December 2019 *European Central Bank v Espírito Santo Financial (Portugal)*, C-442/18 P

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=221794&pageIndex=0&doclang=EN&mode=lst&dir> [Link].



[18] Protocol on the Statute of the European System of Central Banks and of the ECB, see footnote 10.

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

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=221794&pageIndex=0&doclang=EN&mode=lst&dir>

[Link] and Judgment of the Court of 21 October 2020 *European Central Bank v Espírito Santo Financial Group* C-396/19 P, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=232705&pageIndex=0&doclang=EN&mode=lst&dir>

[Link]

[20] Account of the monetary policy meeting of the Governing Council of the ECB of 3-4 June 2020, available at:

<https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html> [Link]

[21] 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].