

Beslut i ärende 2016/2011/AN - Tillgång till skrivelser som sänts till en medlemsstats regering

Beslut

Ärende 2016/2011/AN - **Undersökning inledd** den 11/11/2011 - **Beslut** den 19/07/2012 -

Berörda institutioner Europeiska centralbanken (Löst av institutionen) |

En kort tid innan den spanska konstitutionen ändrades genom en bestämmelse som begränsar statsskuldens storlek begärde den klagande, en spansk advokat, att få tillgång till en skrivelse som Europeiska centralbanken (ECB) hade sänt till den spanska regeringen. ECB tillbakavisade såväl den ursprungliga som den bekräftande ansökan med hänvisning till att detta skulle skada allmänintresset när det gäller EU:s eller en medlemsstats ekonomiska och monetära politik.

Ombudsmannen ansåg att ECB hade gett den klagande en tillfredsställande förklaring med en detaljerad beskrivning av skrivelsens innehåll och syfte. Ombudsmannen granskade också ECB-dokumentet i fråga och bekräftade i sitt beslut att ett offentliggörande av skrivelsen verkligen skulle skada allmänintresset. Efter att ha inhämtat ett godkännande från ECB:s ordförande bekräftade ombudsmannen för den klagande att skrivelsen i fråga inte innehöll något förslag till ändring av den spanska konstitutionen. Mot bakgrund av denna information ansåg den klagande att hans klagomål hade färdigbehandlats.

Ombudsmannen framhöll för ECB att banken bör fortsätta att betrakta öppenhet inte bara som ett rättsligt krav utan som en möjlighet att skaffa sig större legitimitet i medborgarnas ögon.

.The background to the complaint

1. On 5 September 2011, the complainant submitted a request for access to documents to the European Central Bank ('ECB'). The complainant requested access to a letter allegedly sent by the ECB to Spanish authorities and " *containing indications, recommendations, guidelines* " on budgetary matters (the 'Letter').

2. On 12 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 it would jeopardise 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 adversely affect the effectiveness of ECB's



messages to Member States as instruments to re-establish investor confidence in the financial markets. The ECB pointed out that this issue is of utmost importance for the proper development of monetary policy. It also informed the complainant of the possibility open to him to submit a confirmatory application to its Executive Board.

3. On 12 September 2011, the complainant submitted a confirmatory application to the ECB's Executive Board. He stated that, if the Letter had " *pushed* "Spanish authorities to bring about constitutional reform limiting public debt [2] , then the said body had interfered with national sovereignty. Spanish citizens are entitled to know whether the constitutional reform was requested by an EU institution. Moreover, the complainant considered that the exception invoked by the ECB was not applicable, since disclosure of the Letter could in no way jeopardise Spanish monetary and economic policy. If the ECB were right, then, for instance, the Commission could not publish its reports on the economic situation of Member States and the corresponding recommendations. Nevertheless, such reports are publicly available.

4. Alternatively, the complainant requested " *partial access to the document* ", namely, that the ECB should inform him whether it has issued any instruction or made a recommendation to the Spanish Government leading to the constitutional reform.

5. On 22 September 2011, the ECB rejected the confirmatory application, considering that the exception invoked was applicable. The ECB considered that the disclosure of the Letter, even partially, " *could affect the efficiency of the messages that the ECB may address* " to Member States in order to promote favourable conditions for restoring investor confidence in the financial markets. The ECB informed the complainant of the means of redress available to him pursuant to Articles 228 and 263 TFEU.

6. The complainant turned to the European Ombudsman on 4 October 2011.

The subject matter of the inquiry

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

Allegation:

The European Central Bank failed to provide the complainant with an appropriate statement of reasons for rejecting, on the basis of the exception contained in Article 4(1)(a), second indent of Decision ECB/2004/3, his confirmatory application for public access to a letter the ECB sent to the Spanish authorities allegedly containing indications, recommendations and guidelines on budgetary matters.

Claim:



The European Central Bank should provide the complainant with an adequate statement of reasons for its position, or grant him access to the requested document, at least to the extent necessary to determine whether its letter pushed for an amendment to the Spanish Constitution limiting public debt.

The inquiry

8. On 11 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. The Ombudsman further informed the President of the ECB that he wished to inspect the Bank's file concerning the complaint. On 11 December 2011, the complainant sent further correspondence concerning the complaint to the Ombudsman, who forwarded it to the ECB on 15 November 2011.

9. On 1 February 2012, the Ombudsman's services inspected the ECB's files concerning the complaint.

10. 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 6 March 2012.

The Ombudsman's analysis and conclusions

A. Allegation of failure to provide an appropriate statement of reasons

Arguments presented to the Ombudsman

11. In his complaint, the complainant put forward that there could be no legitimate exception to the citizens' right to ascertain the origins of a constitutional reform, since the Constitution is the "*fundamental provision*" at national level.

12. In the further correspondence sent to the Ombudsman on 11 December 2011, the complainant added that, during a meeting in Brussels on 9 December 2011, the European Council had, in full transparency, agreed upon a fiscal pact which stated, among other things, that the national administrations' obligation to have balanced budgets should be enshrined in national Constitutions or equivalent legislation. European citizens whose national Constitutions would be amended in this regard thus know that the agreement reached on 9 December 2011 prompted such a reform. Spanish citizens should have the same right to ascertain the origins of the amendment to their Constitution [which took place before 9 December 2011].

13. In its opinion, the ECB explained that the Letter was sent to the Spanish Government in



August 2011. It is a strictly confidential communication from the ECB President to the Spanish Prime Minister expressing " *ECB's concerns about the then extraordinarily severe and difficult situation of the Spanish economy and the repercussions on the stability of the euro area and inviting the Spanish government to decisively and swiftly undertake the necessary measures to enhance the growth potential and ensure fiscal consolidation* ". The measures in question should improve the functioning of the labour market, ensure the sustainability of the public finances and further reform the product market. The ECB stated that the Letter did not call on the Spanish Government to amend the Constitution in order to limit public debt. The ECB's aim was to protect " *the integrity and effectiveness of its monetary policy in the best interest of the euro area citizens* ".

14. 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 to send informal or confidential messages.

15. As regards its statement of reasons for 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* " [3] . 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 its contents.

16. Finally, the ECB referred to the case-law of the Court of Justice concerning the wide margin of discretion EU institutions possess when assessing whether disclosure of documents would jeopardise the interests protected by Article 4(1)(a) of Regulation 1049/2001 [4] . 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.* "

17. In his observations, the complainant stated that the ECB did not reply to the claim included in the Ombudsman's inquiry, namely, whether the Letter " *pushed for a modification of the Spanish Constitution* ". The ECB stated that it had not called upon the Spanish authorities to undertake such a reform, but did not clarify whether its Letter suggested or proposed that outcome. The complainant stated that he relied on the Ombudsman's knowledge of the content of the Letter to clarify this issue.

18. The complainant stated that, in a system based on democratic legitimacy, public authorities, at both EU and national level, must be accountable to the public for their acts. For the citizens, this implies the possibility of following the decision-making process in detail and of having



access to the relevant information. No other interest can prevail over the interest of citizens to control their governments and the EU institutions as regards a constitutional reform. In any event, the ECB has not proved that disclosure of the Letter would seriously jeopardise the allegedly protected public interest. Moreover, it could have provided the explanations contained in its opinion at the time when it replied to the complainant's initial and confirmatory applications.

The Ombudsman's assessment

19. Article 4(1)(a), second indent of the Decision concerning public access to ECB documents establishes that "[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.

20. 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.

21. As regards the applicability of the exception invoked by the ECB, the Ombudsman recalls the established case-law of the Court of Justice of the EU 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 " [5] .

22. 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 Spanish economy and their potential consequences; identifying its most vulnerable areas; and suggesting measures that could be envisaged in order to eradicate them.

23. The difficult economic and market situation in Spain 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 Spanish 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.

24. Furthermore, the Ombudsman recognises the importance, underlined by the ECB, of the



candid communication between the latter and the Government of a Member State. Although this interest is not, in itself, sufficient to exclude, on a **general** basis and in **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 [6]. In this regard, the Ombudsman notes that it is essential to distinguish clearly between, on the one hand, the ECB, which is a European Union institution carrying out in the general interest the functions of a central bank, from, on the other hand, commercial banks pursuing private interests.

25. 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.

26. 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. The ECB Decision on access to documents has also perpetuated this different regime as regards the Bank's documents. In the words of the Court of Justice [7], "*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, contrary to the complainant's view, neither Regulation 1049/2001 nor the ECB Decision on access to documents provide for the legitimate democratic interest of citizens to ascertain the origins of a constitutional reform to override the necessity to protect the interests laid down in Article 4(1) (a), second indent, of that Decision.

27. As regards the statement of reasons that the ECB provided to the complainant in order to reject 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 concrete content of the document, was not sufficient to meet the requisite standard of the statement of reasons.

28. 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 made 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 why it sent the Letter to the Spanish authorities and the intentions underlying it. This



concrete basis, combined with the assessment of the risks that disclosure would engender for the protected interests, contained in its initial replies to the complainant, objectively enables the complainant to ascertain why disclosure was denied in the case at stake.

29. In judicial proceedings against a decision to refuse access to a document, the question for the Court is whether to annul the decision in question. In this context, the General Court has held that "[if 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 [8] . 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 responding to applications for access.

30. In his observations, the complainant put forward that the ECB had not, in his view, fully addressed the claim included in the Ombudsman's inquiry, in so far as it did not explain whether the Letter had prompted the Spanish constitutional reform of 2011. He stated that this was an issue to be clarified by the Ombudsman, who had seen the Letter.

31. Pursuant to Article 14(2)(a) of his Implementing Provisions [9] , the Ombudsman cannot disclose information obtained during an inspection of documents, which has been identified to him as confidential. Therefore, in order to be able to satisfy the complainant's request, on 14 June 2012, on the occasion of a meeting with the President of the ECB, the Ombudsman asked for his consent to inform the complainant of a fact which the Ombudsman is aware of from his inspection, namely, that the Letter does not suggest changes to the Spanish Constitution. The President immediately agreed to this request and the Ombudsman's services informed the complainant accordingly on 18 June 2012. The complainant confirmed that, in light of this additional information, he considers his complaint settled.

32. The Ombudsman thanks the complainant for the trust he has shown and also welcomes the ECB's constructive and cooperative attitude throughout his inquiry.

33. In light of the above, the Ombudsman considers that the ECB has settled the complaint.

B. Conclusions

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

The European Central Bank has settled the complaint.

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 an opportunity 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 July 2012

[1] Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents, OJ L 80, 18.3.2004, p. 42.

[2] Reform of Article 135 of the Spanish Constitution, of 27 de September 2011. Spanish OJ 233/2011, Section I, p. 101931.

[3] The ECB quoted Case C-122/94 *Commission v Council* [1996] ECR I-881, par. 29; Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, par. 55; Case T-188/98 *Kujer v Council* [2000] ECR II-1959, par. 36; Joined Cases T-355/04 and T-466/04 *Co-Frutta v Commission* [2010] ECR II-1, par. 100.

[4] 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.

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

[6] 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*, judgment of 21 September 2010, not yet published in the ECR, paragraph 72; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-1429, paragraph 43; Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69; *Sison v Council*, cited in footnote 5, paragraph 75.

[7] *Sison v Council*, cited in footnote 5, paragraph 46; Joined Cases T-3/00 and 337/04 *Pitsiorlas v Council and ECB* [2007] ECR II-4779, paragraph 227.

[8] See *Pitsiorlas v Council and ECB*, cited in footnote 7, paragraph 278.

[9] Decision of the European Ombudsman adopting implementing provisions of 8 July 2002, amended by decisions of the Ombudsman of 5 April 2004 and 3 December 2008. Available at: <http://www.ombudsman.europa.eu/fr/resources/provisions.faces/en/373/html.bookmark> [Länk]