

4 May 2022

Reference: LS/PS/2022/23

Request for public access to ECB documents

On 28 February 2022 the European Central Bank (ECB) received your application for access to “*All documents (e.g. reports, communications, plans) regarding contingency and preparedness measures related to the Ukraine conflict*”.

On 22 March 2022, in line with Article 7(3) of Decision ECB/2004/3 on public access to ECB documents¹ and owing to an increased workload, the ECB extended the stipulated time limit for reply by 20 working days.

1. Identification of the requested documents

After having carefully examined your request in line with Decision ECB/2004/3, two ECB documents were identified which were drawn up between 24 (start of the war) and 28 February (date of your application) and can be deemed of relevance to your application: (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 on 9-10 March 2022 on issues related to Eurosystem counterparties (document 2).

2. Assessment of disclosure

Following a thorough assessment in line with Decision ECB/2004/3, we regret to inform you that the identified documents cannot be disclosed, in full or in part, since disclosure over and beyond the reference to their content would undermine the interests protected under the first indent of Article 4(1)(a) (*confidentiality of the proceedings of the ECB's decision-making bodies*), the second indent of Article 4(1)(a) (*the protection of public interest as regards the financial, monetary or economic policy of the Union or a Member State*) and the first sub-paragraph of Article 4(3) (*internal deliberations*) of Decision ECB/2004/3.

¹ Decision ECB/2004/3 of 4 March 2004 on public access to European Central Bank documents (OJ L 80, 18.3.2004, p. 42)

2.1 Confidentiality of the outcome of deliberations of decision-making bodies

Article 10.4 of the Protocol on the Statute of the ESCB and of the ECB, ranking as primary law, provides that “*The proceedings of the meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public*”. In addition, Article 23.1 of the ECB’s Rules of Procedure² provides that “*The proceedings of the decision-making bodies of the ECB, or any committee or group established by them, [...] shall be confidential unless the Governing Council authorises the President to make the outcome of their deliberations public.*”.

In the present case, document 2 is an excerpt from the proceedings of the 535th Governing Council meeting, reflecting their outcome and containing information on Eurosystem monetary policy measures aimed at ensuring the effectiveness of the EU restrictive measures on Russian financial institutions (incl. sanctions).

It is settled case law that the abovementioned provisions safeguard the confidentiality of the outcome of the deliberations of the Governing Council, without it being necessary that the refusal to grant access to documents containing that outcome be subject to the condition that the disclosure thereof undermines the protection of the public interest. Consequently, pursuant to the first indent of Article 4(1)(a) and to Article 7(1) of Decision ECB/2004/3, access to the outcome of deliberations of the Governing Council is to be refused, since the Governing Council has not decided to make that outcome public in whole or in part.

Additional reasons preventing disclosure of document 2 are explained under paragraph 2.2.

2.2. Protection of the public interest as regards the monetary policy of the Union

Under the second indent of Article 4(1)(a) of Decision ECB/2004/3, the ECB must refuse access to a document where disclosure would undermine the protection of the monetary policy of the Union. The outcome of the Governing Council deliberations on issues related to Eurosystem counterparties (document 2) is also covered by that provision.

The ECB considers that, at the current juncture, releasing the Governing Council decisions related to Eurosystem counterparties could reduce its ability to react to continuously evolving economic scenarios. Moreover, disclosure could influence the expectations of market participants and thus influence their behaviour and decisions, ultimately hindering the ECB’s ability to make decisions and the effectiveness of Eurosystem monetary policy measures in crisis situations.

Protection is needed because such decisions provide measures to ensure that the EU sanctions imposed on by Eurosystem counterparties can take effect. Wider disclosure of the details of such measures could potentially constrain the ECB’s ability to (i) design the policy tools that are best suited to the fulfilment of its mandate and (ii) preserve a certain degree of discretion, given that the circumstances surrounding such measures are difficult to pin down ex ante. In order for these measures to be effective, their content and operational aspects at the current juncture, and as long as the situation remains critical, should remain confidential.

² Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.3.2004, p. 33), as last amended by Decision ECB/2016/27 (OJ L 258, 24.9.2016, p. 17).

Thus, full disclosure of the confidential information contained in this document would specifically and effectively undermine the protection of the public interest as regards the ECB's monetary policy pursuant to the second indent of Article 4(1)(a) of Decision ECB/2004/3.

2.3 Confidentiality of documents drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB

Pursuant to the first sub-paragraph of Article 4(3) of Decision ECB/2004/3, the ECB must refuse access to documents drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and NCBs, even after the decision has been taken, unless there is an overriding public interest in disclosure.

Document 1 is covered by this exception since it was drafted for the purpose of updating and informing the decision-making bodies about relevant developments in an unprecedented situation and contains an analysis of potential operational options available under the current framework while highlighting possible measures which might be adopted in the future. It is of crucial importance that analysis, options and future measures are presented to the ECB decision-making bodies in the most effective manner and are kept confidential, particularly in the light of the urgency and severity of the war in Ukraine. It should be avoided at all costs that their authors are taking into account the risk of disclosure, to the point where they could potentially practise self-censorship or their analysis and operation advice would be expressed in a less than clear and direct manner thereby undermining the possibility for the ECB decision-making bodies to receive frank advice from staff and ECB committees, and limiting the ECB's "space to think".

The result would be that the ECB would no longer be able to benefit from an exchange of uncensored opinions and internal advice, given free of any potential external constraints linked to the risk of being misinterpreted or giving the wrong signal on a matter which from today's perspective is still topical. Furthermore, since such analysis and options will potentially translate in operational measures, their disclosure at this point in time might undermine their effectiveness.

3. Overriding public interest in disclosure

The exception to the right of access contained in Article 4(3) applicable to document 1 may be waived if there is an overriding public interest in disclosing the requested documents. In order for an overriding public interest in disclosure to exist, this interest must, first, be public and, second, outweigh the harm caused by disclosure. For this purpose, specific and detailed reasons based on the nature of the documents must be provided by the applicant assuring the protection of the invoked public interest³. However, we could not identify in your application any elaborated arguments establishing the existence of an overriding public interest in the disclosure of document no 1. Consequently, the prevailing interest in this case lies in protecting the 'space to think' granted to the ECB.

³ See *Association Justice & Environment v European Commission*, T-727/15, paragraph 56.

4. Other remarks

For the sake of clarity, it is noted that appropriate measures can be adopted by the ECB, within its remit, to ensure that sanctions imposed by the European Union as a consequence of the war in Ukraine can take effect⁴. In the field of banking supervision, and apart from the sanctioning powers conferred on the ECB under the Council Regulation (EU) No 1024/2013⁵, the ECB neither imposes any sanctions of a different nature on credit institutions⁶, nor it is entrusted to monitor credit institutions' compliance with them. Credit institutions are responsible for implementing and monitoring compliance with the different sanction regimes. However, sanctions can have implications for banking supervision. For this reason, the ECB, as banking supervisor, monitors the impact sanctions can have on credit institutions from a prudential perspective.

Please note that, as clarified by the ECB on its website⁷, the ECB's assessment declaring Sberbank Europe AG (Austria) and its two subsidiaries in Croatia and Slovenia as failing or likely to fail (FOLTF) which was announced on 28 February 2022⁸, was neither a political decision nor a sanction. It was not a response either to the war itself or to the sanctions. The assessment was based solely on prudential concerns about liquidity. Following the Russian invasion of Ukraine and the first round of sanctions, Sberbank Europe AG and its subsidiaries in Croatia and Slovenia experienced substantial liquidity outflows. And as the banks were not going to have enough liquidity to cover requests for payment, the ECB assessed them as failing or likely to fail. For this reason, the FOLTF assessments adopted by the ECB within the relevant timeframe have been considered as not relevant to your request.

5. Final remarks

For the sake of good order, we would like to inform you that, under Article 7(2) of Decision ECB/2004/3, "*In the event of total or partial refusal, the applicant may, within 20 working days of receiving the ECB's reply, make a confirmatory application asking the ECB's Executive Board to reconsider its position.*"

Yours sincerely,

[signed]

Petra Senkovic
Director General Secretariat

[signed]

Margarita-Louiza Karydi
Head of the Compliance and Governance Division

⁴ See [ECB website](#) for more information.

⁵ Council Regulation (EU) No 1024/2013, of 15 October 2013, conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

⁶ See [FAQs on Russia-Ukraine war and ECB Banking Supervision](#) ..

⁷ See Q6 of [FAQs on Russia-Ukraine war and ECB Banking Supervision](#).

⁸ See [Press release ECB assesses that Sberbank Europe AG and its subsidiaries in Croatia and Slovenia are failing or likely to fail](#)