



EUROPEAN CENTRAL BANK

EUROSYSTEM

Jean-Claude TRICHET

President

[ ]

Personal & confidential

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LS/JCT/11/653

### Public access to ECB documents

Dear [ ],

On 18 July 2011 the ECB received your confirmatory application, on behalf of [ ] for public access to: a) all the Executive Board Decisions – and the documents submitted to the Board – related to the Tribunal rulings of 28 October 2010 in case F-[ ] and case F- [ ] including any related internal documents, memo and/or minutes; b) the Executive Board Decisions – and the documents submitted to the Board – of allocating to your client a new ASBR for the years 2005 and 2006, including any related internal documents, memo and minutes; c) all the Executive Board Decisions – and the documents submitted to the Board – related to the Tribunal cases F-[ ], F-[ ] and the case F-[ ] prior to the Tribunal rulings of including any related internal documents, memo and/or minutes.

I should like to inform you that the Executive Board has thoroughly considered your confirmatory application as well as the assessment which has been made and the decisions which have been taken in response to your client's original application.

Following this thorough consideration, the Executive Board decided to confirm the assessment and the decision of the Director General Secretariat and Language Services (DG/SL) (laid down in his letter of 21 June 2011) that your request is governed by the legal framework applicable to public access requests in line with Decision ECB/2004/3 only as far as it concerns the Executive Board decision on the additional salary advancements (ASA) general orientations for 2008, as this issue could be deemed of overriding interest to the public since it relates to general employment policies with an impact on all staff members. Decision ECB/2004/3 governs the access of the public to ECB documents and has been adopted to enhance the administration's legitimacy, effectiveness and accountability towards the citizens. The other part of your request and the related requested documents cannot be considered as having a direct bearing on citizens in

general, but rather as being of a specific interest to your client since they relate to the employment relationship between your client, as an individual member of staff, and the ECB. As these documents are directly related to your client's relationship with the ECB, this part of the request is therefore covered by the legal framework applicable to employment-related documentation.

In this regard, I should like to inform you that the Executive Board has decided in 2008 that requests by individual staff members for access to documentation and decisions which relate directly to their employment relationship with the ECB follow a different objective and therefore are subject to a special regime. The rationale for establishing such special regime was to provide ECB staff with privileged access to documents relating to their employment relationship compared to the regime under Decision ECB/2004/3 which applies to the general public. In that sense, the regime goes beyond the scope of the public access regime under Decision ECB/2004/3 and, as a result, is favourable towards your client. This Executive Board's decision has been communicated to all ECB staff members. For reasons of clarity and transparency, we would like to disclose the following documents for your information: (i) the content of the relevant decisions taken by the Executive Board with regard to the applicability of the Decision ECB/2004/03 to ECB staff members requests; (ii) the relevant excerpts of a note, entitled "Access to HR policy/employment related documentation and decisions"; (iii) the relevant excerpts of a further note, entitled "Review of procedure for granting access to HR policy / employment related documentation and decisions". Moreover, such a distinction was confirmed by the case-law of the European Union Civil Service Tribunal which specified that a different regime may apply to employment- related documentation<sup>1</sup>.

Fully in line with the above-mentioned regime, your letter of 18 July has been assessed by the Director General HR, Budget and Organisation (who is competent to decide whether or not to grant access to the requested decisions and documents) and his decision will be conveyed to you under a separate cover in the next few days.

Furthermore, the Executive Board confirms that, as regards your request for the disclosure of documents submitted to the Executive Board in preparation of the adoption of Decision ECB/2011/NP8 "on additional salary advancements: General Orientation for 2008", according to Article 4(3) of the Decision ECB/2004/3, the ECB shall refuse access to a document where disclosure would undermine the protection of documents containing opinions for internal use as part of deliberations and preliminary consultations within the ECB or with the NCBs (Article 4(3) of the Decision ECB/2004/3) even after the decision has been taken, unless there is an overriding public interest in disclosure. Your client has already been provided with (i) the opinion of the Staff Committee (annex 2 to SEC/EB/11/732/32) which constitutes the necessary element of the legislative process (and is thus referred to in the "having regard" part of the legislative act), and (ii) the correspondence between IPSO and DG/H (annex 3 to SEC/EB/11/732/32). The reasons for drafting these documents are to be found in the ruling communicated to you by the Tribunal in case F- [ ] which was decided in favour of your client. The elements which are put together in each of these documents have the objective of enabling the ECB Executive Board to have a free reflection on the outcome and impact of the Tribunal's ruling in case F-and to provide space to think prior to taking any final decisions on these issues. The Executive Board considers that releasing these documents

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<sup>1</sup> See judgments in Case F-121/07 Guido Strack/European Commission., paragraphs 65 and 66, T-367/03 Hendrickx/Council, paragraph 55, T-371/03 Le Voci/Council, paragraph 122.

would undermine the possibility of the ECB's staff to freely submit uncensored advice to the ECB's decision-making bodies based on their views and assumptions concerning the implications and alternatives in relation to these particular issues and that they would limit the ECB's 'space to think'. The Executive Board has also considered the issue of whether there is an 'overriding public interest' in the disclosure of these documents and could not identify such overriding public interest. The need of your client to access these documents does not counter-balance the public interest to protect the internal consultations and deliberations within the ECB.

Furthermore, as regards your request for access to the Executive Board minutes (i.e. proceedings) of the meeting held on 24 May 2011 when the Decision ECB/2011/NP8 was adopted, I should like to indicate that, according to the first indent of Article 4(1)(a) of the Decision ECB/2004/3 the ECB shall refuse access to a document where disclosure would undermine "the protection of public interest as regards the confidentiality of the proceedings of the ECB's decision-making bodies". Taking into account the foregoing and in order to address your client's specific interest in obtaining the relevant information, we should like to convey to you the content of the relevant decisions taken by Executive Board on 24 May 2011, thereby noting that it faithfully reflects what is recorded in the relevant summary proceedings.

Having once again reviewed all documents possibly related to your request, the Executive Board has identified the following documents as related to the case F-[ ]: (i) the relevant excerpts of the "Administrative Circular 02/2001 (rev.) on promotion and additional salary advancements" and (ii) the Orientation Guidelines circulated to ECB Business Area Heads on the preparation of individual cases for additional salary advancements in 2008 including the template to be used by Area Heads for the submission of individual proposals to the Directorate General HR, Budget and Organisation. These documents are therefore herewith disclosed to you as the procedure and the legal framework for *ad personam* promotions are issues on which the ECB acts in its capacity as legislator and administrator of public affairs which could be deemed as having a direct bearing on citizens in general (i.e. being an issue of general interest).

The Executive Board wishes to provide the following clarifications in reply to the arguments presented in your confirmatory application that the legality of the ECB Decision is questionable as the Decision does not respect the principles and limits set out in Regulation No 1049/2001. You refer in particular to Article 4(3) of the ECB Decision, which does not reproduce the condition set in Article 4(3) of Regulation 1049/2001 that a refusal to access an internal document is linked to the condition that the "disclosure would seriously undermine the institution's decision-making process". In this regard, the Executive Board notes that public access to ECB documents is governed by Decision ECB/2004/3 and not by Regulation No 1049/2001<sup>2</sup> which applies to the right of access to documents of the European Parliament, the Council and the Commission. The latter was adopted on the basis of former Article 255 TEC which does not apply to the ECB<sup>3</sup>. The ECB is entitled to establish its own regime for public access to ECB documents provided that the right of access is not generally denied and the principle of openness enshrined in the Treaties is respected.

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<sup>2</sup> For the sake of completeness, it is noted that an amendment to Regulation No 1049/2001 has been proposed by the European Commission to extend its application to the ECB, ECJ and EIB (Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 1049/2001, COM/2011/0137 final).

<sup>3</sup> You may see also Joined Cases T-3/00 and T-337/04 Pitsiorlas v Council and ECB [2007] ECR II-04779, paragraph 213.

The legal basis for the regime on public access to ECB documents is Article 12.3 of the Statute of the ESCB and ECB, which provides that the Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies, and Article 23.2 of the Rules of Procedure of the European Central Bank, which provides that public access to documents drawn up or held by the ECB is governed by a decision of the Governing Council. Article 4(3) of the ECB Decision on public access differs from Article 4(3) of the Regulation No 1049/2001 in that it requires that 'access shall be refused' even after the decision has been taken unless there is an overriding public interest in disclosure.

In line with Article 8.1 of the Decision ECB/2004/3 in the event of total or partial refusal, the applicant may have recourse to the remedies open to him/her in accordance with Articles 263 and 228 of the Treaty on the Functioning of the European Union.

With kind regards,

Jean-Claude Trichet

Enclosures