



EUROPEAN CENTRAL BANK

EUROSYSTEM

Jean-Claude TRICHET

President

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L /JCT/10/1308

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Public access request for ECB documents

Dear [],

On 28 September 2010, the ECB received your confirmatory application for access to the following documents: 1) a first note entitled “*The impact on government deficit and debt from off-market swaps. The Greek case*” (SEC/GovC/X/10/88a) and 2) a second note entitled “*The Titlos transaction and possible existence of similar transactions impacting on the euro area government debt or deficit levels*” (SEC/GovC/X/10/88b).

I should like to inform you that the Executive Board has thoroughly considered your request as well as the assessment which has been made and the decision which has been taken in response to your original application of 20 August 2010.

Following this thorough consideration, the Executive Board decided to confirm the assessment and the decisions of the Director General Secretariat and Language Services (DG/SL) (laid down in his letter of 17 September 2010). In this context the Executive Board wishes to provide the following clarifications in reply to the arguments provided in your confirmatory application:

- With regard to your arguments that: ‘*the decision to refuse disclosure on the grounds that the release of historical information would lead to a misrepresentation of facts presumes that the public cannot understand or interpret information presented in an historical context*’, ‘*openness regarding the terms of financial bailout packages offered to Greece and the ways it may have manipulated its debt figures only increases the legitimacy of the process in the eyes of European citizens and strengthens their democratic rights and ability to participate in debate about EU economic policy-making*’ and that ‘*the ECB has erred in finding that disclosure of the information would undermine protection of the public interest as regards the economic policy of the EU or a member state. To the contrary, there is immense public interest in favour of disclosure: in improving transparency and accountability in financial decision making and reporting and increasing the confidence of EU citizens, taxpayers and the markets in EU economic policy-making and to ensure that such financial disasters are not permitted to reoccur*’, the Executive Board wishes to confirm that the disclosure of the information contained in the two documents would undermine

the public confidence as regards the effective conduct of economic policy in the EU and in Greece (second indent of Article 4(1)(a) of Decision ECB/2004/3). Unlike you assume, the two documents do not describe the terms of the financial bailout packages offered to Greece. The two notes express the ECB's staff internal views and assumptions made on the basis of the partial elements available at the time and not ex-post information that is supposed to fully and accurately reflect past actions. The Executive Board is of the view that the disclosure of partial and potentially inaccurate information bears, in the current very vulnerable market environment, the substantial and acute risk of adding to volatility and instability instead of adding to transparency. The Executive Board furthermore notes that complete and accurate information on the deficit and debt levels of the Member State concerned is expected to be published in due time by Eurostat in accordance with well-established procedures.

- With regard to your statement that *'the original decision maker erred in considering the public interest in favour of disclosure'* and that *'there is a clear overriding public interest in disclosure of the documents notwithstanding the asserted exemptions'*, the Executive Board notices that both requested documents were submitted together by the ECB's relevant business areas to the Executive Board and thereafter to the Governing Council for internal use as part of deliberations and preliminary consultations within the Eurosystem (Article 4(3) of Decision ECB/2004/3) and as such they are considered *'preparatory documents'* which reflect the ECB's staff views and assumptions regarding (a) the impact of off-market swaps on the government deficit and on the government debt with a particular view to the case of Greece (the first note) and (b) the Titlos transaction and the possible existence of similar transactions impacting on the euro area government debt or deficit levels, and its relevance for the Eurosystem collateral framework, and associated risk control measures, and possible revisions of those (the second note). The elements which are put together in the two documents have the objective of enabling the two ECB decision-making bodies to have a free reflection on the relevant issues and to provide space to think prior to taking any final decisions. The Executive Board considers that releasing the two documents would undermine the possibility of ECB's staff to freely submit uncensored advice to the ECB's decision-making bodies and that they would be subject to external pressure thus limiting 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 the two documents and could not identify such overriding public interest. The need *'in improving transparency and accountability in financial decision-making and reporting [...]'* does not counter-balance the public interest to protect the internal consultations and deliberations of the ECB. The Executive Board took note of your reference to the recent judgement of the European Court of Justice according to which *"it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts of citizens, not only as regards the lawfulness of an isolated act, but also regards the legitimacy of the decision-making process as a whole"*¹. The Executive Board considers that this judgement is not relevant for your request since the two requested documents are not related to ECB legislative activity.

¹ See Sweden and Turco v Council, Joined Cases C-39/05P and C-52/05, para. 59.

- Furthermore, in relation to the second note, the Executive Board would like to confirm that its disclosure would undermine the protection of the commercial interests of the ECB's counterparties (first indent of Article 4(2) of Decision ECB/2004/3). As outlined in the initial reply, the second note contains information on the Titlos transactions and covers specific and not publicly available information of commercial parties which have been involved in the Titlos transactions and the underlying structure and have used Titlos in Eurosystem credit operations. Consistently with the standard practice in use for conducting monetary policy operations, the Eurosystem protects the confidentiality of individual transaction data with its counterparties, as the disclosure would be harmful to their commercial interests. Again, the Executive Board considers that there is also no overriding public interest in the disclosure.
- Finally, the Executive Board considered the issue whether at least part of the elements contained in the two documents could be disclosed based on the facts that such pieces of information are already known to the public. Considering that disclosure of those elements would in fact imply compromising the need to protect the public interest as regards the economic policy of the EU and a Member State (second indent of Article 4(1)(a) of Decision ECB/2004/3) and the need to protect documents containing opinions for internal use as part of ECB/Eurosystem internal deliberations and preliminary consultations (Article 4(3) of Decision ECB/2004/3), the Executive Board decided not to grant partial access.

I should like to draw your attention to the fact that in line with Article 8.1 of the said ECB 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 (ex Article 230 TEC) and 228 (ex Article 195 TEC) of the Treaty.

With kind regards,

Jean-Claude Trichet