



## EUROPEAN CENTRAL BANK

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DIRECTORATE GENERAL LEGAL SERVICES

### **PUBLIC ACCESS TO ECB DOCUMENTS LEGAL ASSESSMENT OF QUESTIONS RAISED**

At its meeting on 22 January 2004 the Governing Council endorsed in principle the draft decision on public access to ECB documents and took note that the points raised by the members of the Governing Council during the meeting would be checked and followed up. The ECB Legal Services have prepared the below assessment of the points raised by the members of the Governing Council.

**1. What could be the implications of the adoption of the draft decision for the *Pitsiorlas vs Council and ECB* case that is currently before the European Court of Justice regarding access to a document of the Committee of Governors kept by the ECB?**

The case *Pitsiorlas vs the Council and the ECB* will be decided by the Court on the basis of the legal acts in force at the time of the relevant facts. Thus, the new draft decision on public access will not form the legal basis for the judgement. Nevertheless, the Court's knowledge of the new decision will most probably influence its ruling. As under the new regime, public access to the archives of the Committee of Governors would be subject to the same parameters as the access to ECB documents, Mr. Pitsiorlas has the opportunity to reapply for the document on that basis. If he does so, the relevant exceptions for denying access as laid down in the new decision would have to be assessed and the new request will be decided on the basis of this assessment. Finally, it should be noted that up to now the Court has annulled the vast majority of the decisions of EC institutions refusing access to documents which have been challenged at the Court.

**2. How does the wording of the draft decision relate to the articles on public access in the draft Constitution?**

The current draft of the Constitution includes provisions on public access rights which explicitly mention their applicability to the ECB: "*the European Central Bank shall be subject to the provisions of Article I-49 (3) when exercising [its] administrative tasks*" (Article III-305.1).

The intention of the drafters of the Constitutional Treaty, by limiting access to the administrative tasks, was to protect the ECB from public access requests that would render the fulfilment of its core tasks impossible. The draft ECB decision complements the draft Constitutional Treaty by deliberately abstaining from defining the term "administrative tasks" and by listing all relevant exceptions to the right of public access to ECB documents. Referring to those "potentially" available ECB documents as "administrative documents" might cause confusion since the term "administrative" has a very wide generic meaning and might therefore mislead the public.

### **3. Public access requests as opposed to “OLAF investigations”**

It should be emphasised that there is a very clear distinction between, on the one hand, the pool of ECB documents potentially available to the general public and the criteria for such access (dealt with in the new draft ECB decision) and, on the other hand, the wider pool of ECB documents which has to be made accessible to OLAF for the purpose of the investigation only and subject to a confidentiality regime (dealt with in the “draft OLAF decision”). Clearly, the access rights for the general public are more limited than the access right granted to OLAF officials, who are allowed to accede even confidential documents. However, even OLAF faces certain restrictions when it comes to so-called “sensitive documents”: access to these documents may only be granted on the basis of very restrictive criteria, determined in the OLAF decision.

### **4. Do NCB documents qualify as ‘third-party documents’? If yes, is the envisaged time-limit of 20 working days not too short for such cases?**

NCB documents fall under the definition of third-party documents. The timetable of 20 working days is indeed ambitious in case a third-party consultation is required<sup>1</sup>. On 30 January 2004, the Commission published a report on the EC Regulation No 1049 (“Commission report”) in which the problem of the tight time limits for consultations of a third party is addressed. The report suggests that when third party consultations are required the time-limit for a reply should be extended. This is a very valuable assessment for the ECB since we can still fine-tune our draft decision accordingly. If considered appropriate, Article 7 (3) could be revised as follows (see new text in bold):

“In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, **or if the consultation of a third party is required**, the ECB may extend the time limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.”

### **5. Is it problematic that national legislation on public access differs among EU countries?**

It should be pointed out that the draft ECB decision only regulates access to ECB documents<sup>2</sup> and enters the national sphere of NCBs only insofar as it subjects NCBs disclosure of ECB documents to a previous consultation with the ECB. This procedure which is referred to as “third-party consultation” is common standard in all EU jurisdictions. Requests for purely national NCB documents are outside the scope of the draft decision and might therefore be handled differently across Member States.

### **6. It was queried whether the appellate mechanism had been sufficiently clarified**

Total or partial refusal of documents or the failure of the ECB to reply within the prescribed time limit entitles the applicant to start Court proceedings and/or submit a complaint to the European Ombudsman. These rights are assigned to European citizens by the Treaty. Mentioning these rights in the draft decision serves merely an informative purpose: the applicant is to be made aware that the European Ombudsman provides a citizen-

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<sup>1</sup> It should be noted that the ECB has established an efficient procedure for public access requests which should make it possible to handle such requests and the necessary consultation of the third party within the proposed timeframe. It should also be pointed out that in practice, the ECB so far rarely received requests for such third-party documents so that timing issues in this regard hardly ever materialise.

<sup>2</sup> Including EMI and Committee of Governors documents.

orientated alternative to a lengthy and costly Court procedure. It is therefore suggested to keep the appellate mechanism as foreseen in the draft decision.

#### **7. Need for a clarification of ‘documents’ in Article 5 in light of the wider definition in Article 3(a)**

In order to ensure that only those documents that are drawn up by the ECB fall under the provision of Article 5 of the draft ECB decision, this Article might be revised as follows (see new text in bold):

“Documents at the NCBs

Documents that are in the possession of an NCB **and have been drawn up by the ECB as well as documents originating from the EMI or the Committee of Governors** may be disclosed by the NCB only subject to prior consultation of the ECB concerning the scope of access, unless it is clear that the document shall or shall not be disclosed.

Alternatively the NCB may refer the request to the ECB.”

#### **8. Could the definition of ‘ECB document’ be considered as too wide?**

The general framework on public access for EU institutions is based on the principle that public access shall be provided unless valid and predetermined exceptions allow for the denial of such a request. Given the very open attitude of the Court of Justice on public access and in light of the draft Constitution (see point 3 above), the ECB can no longer justify a very restrictive public access policy as a matter of principle. The draft ECB decision seeks to bring the ECB in line with other EU institutions and bodies while at the same time providing the necessary exceptions in order to safeguard the ECB’s vital interests.

#### **9. Is the e-mail exchange between ECB and NCBs covered by one of the exemptions of the draft decision?**

The e-mail exchange within the ECB falls under the exemption of Article 4.3 of the draft ECB Decision. In order to clearly extend this exception to the e-mail correspondence with NCBs, the words “or with NCBs” could be added so that the Article 4.3 reads as follows (see new text in bold):

“Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the ECB **or with NCBs** shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.”

#### **10. What are the logistical implications of a large number of access requests?**

As outlined in the above-mentioned Commission report, the number of applications received by the other EU institutions **doubled** following the entry into force of the EC Regulation 1049/2001.

The ECB is currently working on the establishment of a consistent disclosure policy in order to ensure a fair and timely assessment of all incoming public access requests. So far the number of requests for public access has risen constantly over the years. The administrative workload involved is expected to increase after the publication of the new draft decision.