



## EUROPEAN CENTRAL BANK

SEC/GovC/04/2/05

15 January 2004

THE EXECUTIVE BOARD

### PUBLIC ACCESS TO ECB DOCUMENTS

#### 1. INTRODUCTION

The public access to the ECB documentation and archives, including documents previously held by the EMI and the Committee of Governors, is governed by Article 23 of the ECB Rules of Procedure and the implementing Decision ECB/1998/12. Documents drawn or held by the ECB remain for a period of thirty years, as a rule, confidential with the following exceptions: (i) 'administrative' documents can be disclosed upon decision by the Executive Board in line with regime of Article 4 Decision ECB/1998/12; and (ii) documents held in the archives of the Committee of Governors, the EMI, the ECB and the euro area NCBs can be disclosed upon decision of the Governing Council prior to the thirty years period.

Since 1998, increasing emphasis is being put on the openness principle in the Community legal framework, in particular after the entry into force in December 2001 of the *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*<sup>1</sup> The latter establishes public access to documentation as the general rule to be followed by all EU institutions.

In order to ensure that the ECB legal framework respects similar objectives and standards as the other EU institutions and bodies, it is suggested to review the ECB public access policy as defined in the Decision ECB/1998/12.

The enclosed new draft ECB Decision *on public access to ECB documents* (SEC/GovC/04/02/05a) has been discussed by LEGCO and an agreement was reached on its content.

#### 2. REVIEW OF THE ECB PUBLIC ACCESS POLICY

The new elements included in the draft ECB Decision can be summarised as follows:

##### **Updated legal basis**

The new draft ECB Decision refers to the openness principle formalised in Article 1 of the Treaty; and the right of public access to documents held by public authorities contained in Article 255 of the Treaty and its implementing Regulation 1049/2001. A joint Declaration of the Council and Parliament explicitly invited the ECB to subscribe to the latter's principles and limits.

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<sup>1</sup> *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 L 145, pp. 43-48.

### **Wider definition of ‘documents’**

Decision ECB/1998/12 limits public access to ‘administrative’ documents defined as relating to *‘the actual organisation and functioning of the ECB’*. The new draft ECB Decision extends the scope to:

- *‘any content whatever its medium’*, thereby also reflecting developments in information technology;
- documents relating to the *‘policies, activities and decisions falling within the institution's sphere of responsibility’*, i.e. beyond the current definition of ‘administrative’ documents because the ECJ treats all documents in the same manner, regardless of how they are called or defined;
- documents in the possession of the ECB, i.e. drawn up or received by the ECB from third parties.

### **Stronger exceptions**

The wider definition of documents is counter-balanced by a stricter protection of sensitive information.

Exceptions relate to:

- protection of public interest (including monetary and economic policy, as well as additional sensitive issues);
- preservation of the ECB’s and NCBs’ independence, the effectiveness of the ECB decision-making process, and protection of ECB internal consultations and deliberations including the integrity/confidentiality of ECB decision-making bodies proceedings;
- protection of the confidentiality of certain documents deemed of a highly sensitive nature and classified as such;
- protection of private interest (e.g. personal data).

### **Co-operation with third parties, including NCBs**

The new draft ECB Decision ensures that (sensitive) documents from third parties’ in the ECB’s possession are treated in a similar way, as is expected for ECB documents being in the possession of third parties. Third parties would be consulted before the disclosure of their documents in the ECB’s possession unless it is clear that documents shall or shall not be disclosed. NCBs are invited to consult, or refer to, the ECB whenever they receive requests for ECB or ESCB-related documents in their possession.

### **Beneficiaries**

Decision ECB/1998/12 grants access to ECB documents to ‘the public’ in general. The new draft ECB Decision makes a distinction between, on the one hand, *‘EU citizens and any natural or legal person residing or having its registered office in a Member State’* which have a right of access to documents and, on the other hand, any other applicant of whom the ECB may consider the applications.

### **Other issues of relevance**

The new draft ECB Decision as agreed by LEGCO has foreseen a timing of only 15 working days for the processing of both initial applications and confirmatory applications. The Executive Board considers that such a time frame may prove too tight. Since it has proven insufficient in the past for other procedures (e.g. regarding sanctions), it recommends to maintain the already existing standard one-month time frame (i.e. refer to 20 working days).

Article 11 provides for an annual report on applications for access to documents received. The Executive Board considers that the drafting of such a report may, over time, become quite burdensome and, given that the ECB Decision is publicly available, may trigger requests to also make public such an annual report<sup>2</sup>. It is therefore suggested not to include Article 11 in the new draft ECB Decision. The Governing and General Council will, however, on an annual basis be informed about requests for public access to ECB documents.

The two-stage internal administrative procedure to process applications foreseen in Decision ECB/1998/12 remains unchanged. It should be noted, however, that the internal administrative procedure has been enhanced in line with EU standards in the European Code of Good Administrative Behaviour. Moreover, contrary to the new EU practice developed throughout Community Institutions and bodies in implementation of Regulation 1049/2001, no direct public access to documents via an on-line public register is foreseen in the new draft ECB Decision. In view of the internal transfer of responsibilities for the ECB's Archives, which entered into effect on 1 September 2002, the Director General Secretariat and Language Services will henceforth take the decisions on the original applications (i.e. first assessment).

### **3. PROCEDURAL FOLLOW-UP**

The adoption of the new Decision on public access will require a prior amendment to Article 23 of the ECB's Rules of Procedure (which form its legal basis) along the following lines: (i) deletion of an explicit reference to the specific Decision ECB/1998/12, in order to avoid unnecessary amendment of the Rules of Procedure in case of amendments to implementing legal acts; and (ii) extension of the applicability of the new ECB Decision to documents of the Committee of Governors. These amendments shall be undertaken in the context of the review of the ECB Rules of Procedure, which is envisaged to be submitted to the Governing Council in February 2004. Accordingly, the Governing Council is at the current juncture only in a position to endorse the content the new draft ECB Decision. Formal adoption of the Decision will occur once the appropriate legal basis is in place.

Article 5 of the new draft ECB Decision provides that: "*ECB documents that are in the possession of an NCB 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.*" In order to ensure that the new legal framework is applicable in a harmonised and uniform way by euro area and non euro area NCBs, it is suggested to bring the new draft ECB Decision to the attention of the General Council. In addition, the respective legal basis in the Rules of Procedure of the General Council (Article 8) will require amendment along the same lines as the one described above for the ECB Rules of Procedure.

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<sup>2</sup> It should be noted that similar reports issued by other EU institutions are publicly available.

**The *Governing Council* is invited to:**

- (a) endorse, in principle, the draft ECB Decision on public access to ECB documents (SEC/GovC/04/02/05a);**
- (b) take note that its formal adoption by the Governing Council could take place following the adoption of the revised ECB Rules of Procedure;**
- (c) agree to address the issue at the level of the General Council in order to ensure an ESCB-wide application of the draft ECB Decision on public access to ECB documents.**