

DIRECTORATE GENERAL SECRETARIAT

Justin Cash

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Reference: LS/PS/2022/44

Request for public access to ECB documents

Dear Mr Cash,

On 31 May 2022 the European Central Bank (ECB) received your application for access to documents which contain the following information regarding the ECB's desks-mapping review:

- (1) The estimated cost of the review in terms of staff hours, salaries, and other resources dedicated to the project;
- (2) Any templates of data requests sent to entities subject to the review;
- (3) The number and dates of any in-person visits conducted as part of the review;
- (4) Any and all modelling on the estimated number of new staff in the EU or staff needing to be transferred to the EU as per the review's findings;
- (5) The number of entities in the review told to appoint an EU desk head;
- (6) Copies of any and all communications with the FCA, Bank of England and PRA as part of the review, and the date those organisations were informed of its findings.

On 30 June 2022, in line with Article 7(3) of Decision ECB/2004/3¹ on public access to ECB documents and owing to the increased workload, the ECB extended the stipulated time limit for reply by 20 working days.

Background information

The desks-mapping review (DMR), which entails the review of booking and risk management practices across trading desks active in market-making activities, treasury and derivative valuation adjustments, is part of the supervisory work aimed at ensuring that SSM subsidiaries of third country banking groups have adequate governance and risk management capabilities and do not operate as empty shells. The DMR was launched as ECB Banking Supervision assessed (i) that banks had not made sufficient progress in ensuring adequate local

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)

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trading presence and risk management capabilities in their newly established entities in the euro area, and (ii) that banks need clear instructions to appropriately implement the target operating models previously agreed upon with their Joint Supervisory Teams (JSTs). In this exercise, the ECB engages with its European, UK and international counterparts to make sure that the rationale behind its supervisory policies is duly understood by all parties involved.

The ECB, in its capacity as prudential supervisor, has the duty to ensure the safety and soundness of credit institutions within participating Member States (including SSM subsidiaries of third country banking groups), thereby also ensuring the protection of depositors and improving the functioning of the internal market.²

In this context, empty shell structures – legal entities located in the euro area that book exposures remotely with their parent company or book them locally but rely fully on risk management hubs and financial infrastructures located in third countries, often by means of back-to-back mirror transactions and hedges transferring the risk to their parent entity – are a very real concern.³

The first phase of the DMR, which was launched in spring 2020 and focused on 264 trading desks across seven institutions and affiliated investment firms,⁴ found that the incoming banks do not yet retain full control of their balance sheets as anticipated by the ECB's 2018 supervisory expectations on banking models. Some 70% of the desks assessed still implemented a back-to-back booking model and around 20% were organised as split desks. This involves establishing a duplicate version of the primary trading desk located offshore within the euro area legal entity to manage the part of the risk originated there.⁵

Identification of the requested documents

The ECB, after having carefully examined your request in line with Decision ECB/2004/3, would like to inform you that no documents containing the information referred to in your request were identified for **points (1)** *“The estimated cost of the review in terms of staff hours, salaries, and other resources dedicated to the project”*, **(3)** *“The number and dates of any in-person visits conducted as part of the review”*, **(4)** *“Any and all modelling on the estimated number of new staff in the EU or staff needing to be transferred to the EU as per the review's findings.”*, and **(5)** *“the number of entities in the review told to appoint an EU desk head”*. However, the ECB is pleased to provide information regarding these points (see the next section).

In relation to **point (2)** of the request, *“any templates of data requests sent to entities subject to the review”*, **seven documents** have been identified. These documents are the **DMR Quantitative templates** sent to the relevant entities. They were tailor-made for each entity, which means that they contain bank-specific information such as their internal organisation, business services and product offering. These templates also give indications of the methodology used.

² See recital 30, 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.

³ See [“The desks mapping review – integrating Brexit banks into European banking supervision”](#), blog post by Andrea Enria, Chair of the Supervisory Board of the ECB, Frankfurt am Main, 19 May 2022.

⁴ The booking models of another significant incoming institution were reviewed beforehand and requirements issued in 2020, prior to the launch of the DMR.

⁵ See footnote 3 of the blog post by Andrea Enria dated 19 May 2022.

In relation to **point (6)** of the request, we understand that you are interested in communications with which the ECB informed UK counterparties of the final findings of this review. In this respect, we could identify **two exchanges between the ECB and the PRA informing the latter about the final findings of this exercise** i.e. the materiality assessment results.

- **The first exchange** contains detailed information on the results of phase 2 and a preview of phase 3 of the DMR, including the names of the banks in scope, the confidential supervisory methodology used, the outcome of the materiality analysis and the plans for the implementation of supervisory measures.⁶
- **The second exchange** contains a complete list of material desks which will be subject to supervisory requirements for all firms in scope of the DMR.

A comprehensive list of the documents identified is provided in the annex to this letter.

Information in relation to points 1, 3, 4 and 5 of your request

In relation to **point (1)** of your request, we would like to clarify that the DMR was launched after the JSTs had gained a deeper understanding of the booking models and flagged shortcomings in the implementation of the target operating models. In this regard, affected JSTs raised material concerns typical of “empty shells” due to observed significant dependencies towards parent affiliates which are separate legal entities operating in foreign jurisdictions.

The project represents a major internal work stream in the supervisory plans of all JSTs involved and does not rely on external consultants.

In terms of **point (3)**, from the starting date of the DMR until the receipt of your request, there have not been any in-person visits conducted as part of the review; however, such visits might take place in the next stages of the review.

Regarding **point (4)**, the ECB would like to highlight that the mandate of this exercise is a microprudential one, focusing on individual banks’ risk management, which includes but is not limited to staff recruitment. As emphasised by the Chair of the Supervisory Board “[f]or the desks identified as material, we will issue individual binding decisions to the incoming banks. These decisions may require the bank to (i) appoint a head of desk within the euro area legal entity with clearly defined reporting lines and a compensation structure linked to the performance of that entity; (ii) ensure the desk has the adequate infrastructure and number and seniority of traders to manage risk locally; (iii) establish a solid governance and internal control framework of remote booking practices with parent affiliates; and (iv) ensure limited reliance on intragroup hedging.” Hence, “the ECB is not setting specific targets for the relocation of banking business to the euro area. Instead, we want to ensure that incoming legal entities have onshore governance and risk management arrangements that are commensurate, from a prudential perspective, with the risk they originate. The extent of the actual relocation and specific booking configuration will depend on the current set-up of each bank and how it decides to implement the supervisory expectations.”⁷

⁶ You can find some general findings in footnote 3 of the blog post by Andrea Enria dated 19 May 2022.

⁷ See footnote 3 of the blog post by Andrea Enria dated 19 May 2022.

Finally, in relation to **point (5)**, the ECB would like to inform you that, as already announced by the Chair,⁸ seven banking groups in scope of the DMR will have similar requirements imposed, including the appointment of a head of desk employed and located in an SSM entity for each of the 56 material desks flagged for phase 3.

Assessment of the identified documents in relation to points 2 and 6 of your request

Following a thorough assessment of the nine ECB documents identified in accordance with Decision ECB/2004/3, we regret to inform you that access to them cannot be granted, either in full or in part. This is because their contents are protected under Article 4(1)(c) of Decision ECB/2004/3 (*“the confidentiality of information that is protected as such under Union law”*), in conjunction with Article 27 of the SSM Regulation⁹ and Article 53 of the Capital Requirements Directive (CRD)¹⁰ and, for some documents or parts of the documents, also in conjunction with the eighth indent of Article 4(1)(a) *“the Union’s or a Member State’s policy relating to the prudential supervision of credit institutions”*, the ninth indent of Article 4(1)(a) *“the purpose of supervisory inspections”*, the first indent of Article 4(2) *“the protection of the commercial interests of a natural or legal person”* and the second subparagraph of Article 4(3) *“Access to documents reflecting exchanges of views between the ECB and other relevant authorities and bodies shall be refused even after the decision has been taken, if disclosure of the document would seriously undermine the ECB’s effectiveness in carrying out its tasks, unless there is an overriding public interest in disclosure”* of Decision ECB/2004/3.

The following explanations clarify the ECB’s decision not to disclose the requested documents.

Confidentiality of information that is protected as such under EU law

Under Article 4(1)(c) of Decision ECB/2004/3, the ECB is required to refuse access to documents where disclosure would undermine the confidentiality of information that is protected as such under EU law.

The professional secrecy requirements that are set out in Article 27 of the SSM Regulation and Article 53 et seq. of the CRD establish a general rule prohibiting the disclosure of confidential supervisory information (with the exception of the specific derogations contained in the CRD) that is applicable to the ECB. Those provisions, read in conjunction with the principles enshrined in the judgment of the Court of Justice of the European Union in the *Baumeister* case¹¹, result in a general prohibition preventing the ECB from disclosing confidential supervisory information – i.e. information (i) which is not public; and (ii) the disclosure of which is likely to adversely affect the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system of banking supervision in the European Union.

Following a thorough assessment, the ECB confirms that (i) the information contained in the identified documents is not public; and (ii) its disclosure would have an adverse effect not only on the credit institutions concerned, but

⁸ See footnote 3 of the blog post by Andrea Enria dated 19 May 2022.

⁹ 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 (OJ L 287, 29.10.2013, p. 63).

¹⁰ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

¹¹ See *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, C-15/16, ECLI:EU:C:2018:464, paragraph 35.

also on the public interest in the smooth functioning of the system of prudential supervision as a whole¹² (please see the description of the identified documents above).

It should be emphasised that professional secrecy requirements not only protect individual credit institutions and sensitive information obtained from them, they also safeguard the functioning of the supervisory system as a whole.

Disclosure of the identified documents would reveal confidential bank-specific supervisory information concerning the internal organisation, business services and product offering of the credit institutions subject to the DMR and the ECB's assessment on phase 2 and a preview of phase 3 of the DMR. This would include the names of the banks in scope, the confidential supervisory methodology used, the outcome of the materiality analysis, the plans for the implementation of supervisory measures and the complete list of material desks which will be subject to supervisory requirements for all firms in scope of the DMR, to the detriment of the credit institutions concerned.

It is clear that the disclosure of any additional information about the contents of the identified documents (over and above the descriptions provided) could lead to unwarranted speculation among market participants that might affect the banks taking part in this review. For these reasons, as provided for in Article 53 of the CRD, confidential information concerning credit institutions may only be disclosed in summary or aggregate form, such that individual credit institutions cannot be identified, and the disclosure of confidential supervisory documents referring to individual supervised entities would be in breach of this provision. Accordingly, providing more specific reasons justifying the refusal to grant authorisation for each individual document (over and above the descriptions provided above) would jeopardise their confidential nature, and the exception under Article 4(1)(c) of Decision ECB/2004/3 would be deprived of its very purpose.¹³

Moreover, disclosure of such information is likely to have an adverse effect on supervised entities' trust that the supervisor will treat information pertaining to credit institutions, supervisory assessments and findings in a confidential manner. Such trust is vital in order to ensure that supervised entities are prepared to share supervisory information with the relevant supervisory authority. Confidentiality is also key to ensuring a smooth and cooperative bidirectional flow of supervisory information between the PRA and the ECB, which is, in turn, crucial for effective supervision.

Moreover, disclosure of the seven DMR Quantitative templates and the first exchange between the ECB and the PRA informing the latter about the materiality assessment results could reveal information about the supervisory assessments, findings, strategies, methodologies and practices of the ECB that goes beyond what has been made public. This would risk depriving the ECB of its ability to continue applying (and developing) such supervisory methodologies and strategies.

In the light of the above, an authorisation to disclose the identified documents cannot be granted (either in full or in part), since their disclosure would cause concrete and foreseeable harm to interests protected by Article 4(1)(c) of Decision ECB/2004/3.

¹² See *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, C-15/16, ECLI:EU:C:2018:464, paragraph 33; *Annett Altmann and Others v Bundesanstalt für Finanzdienstleistungsaufsicht*, C-140/13, ECLI:EU:C:2014:2362, paragraphs 31 to 33; and *Gemeente Hillegom v Cornelis Hillenius*, Case 110/84, ECLI:EU:C:1985:495, paragraph 27.

¹³ See *Sison v Council*, T-110/03, T-150/03 and T-405/03, ECLI:EU:T:2005:143, paragraph 84. See also *Aeris Invest Sàrl v European Central Bank*, T-827/17, ECLI:EU:T:2021:660, paragraph 264 (under appeal).

The Union's or a Member State's policy relating to the prudential supervision of credit institutions

Pursuant to the eighth indent of Article 4(1)(a) of Decision ECB/2004/3, the ECB must refuse access to documents where disclosure would undermine the public interest as regards *"the Union's or a Member State's policy relating to the prudential supervision of credit institutions"*.

As already mentioned, the identified documents include bank-specific supervisory information relating to the specific banks covered by the DMR, such as their internal organisations, business services and product offering, and provide indications of the methodology used (the seven DMR Quantitative templates) and the materiality assessment results (the first exchange between the ECB and the PRA informing the latter about the final findings of this exercise).

In this context, the ECB considers that the disclosure of these confidential documents could adversely affect the proper functioning of the system of prudential supervision and would allow market participants to analyse the supervisory strategy and procedures of European banking supervision, especially regarding the DMR. This would reduce the effectiveness of similar present and future ECB exercises by enabling market participants to reverse-engineer their results, possibly in an instrumental manner, generating unwarranted supervisory expectations among them and thus constraining the ECB's ability to consider and implement a wide range of applicable supervisory measures.

The protection of the purpose of supervisory inspections

Under the ninth indent of Article 4(1)(a) of Decision ECB/2004/3, the ECB is required to refuse access to documents where disclosure would undermine the protection of the public interest as regards the purpose of supervisory inspections.

In general, during supervisory inspections such as the DMR, identified supervised entities are obliged to provide information, submit documents and answer questions. In order for the ECB to obtain as much information and as many materials as possible, and in order for the supervisory dialogue to be open and effective, supervised entities must have faith in the fact that their information will remain confidential and will not be publicly disclosed by the ECB. Moreover, the seven DMR Quantitative templates, and the materiality assessment results presented to the PRA contain information on not only the relevant supervised entity and the result of the inspections but also the supervision methodology and strategy deployed by the ECB, the disclosure of which would undermine the public interest as regards the purpose of supervisory inspections.

In the present case, to ensure a successful outcome of the review and the effectiveness of the measures envisaged for supervised credit institutions, the ECB must rely on the continuing cooperation of the supervised entities. These results would be jeopardised by the disclosure of confidential supervisory information, and for this reason disclosure cannot be authorised.

Confidentiality of exchanges of views between the ECB and other relevant authorities and bodies

Under the second subparagraph of Article 4(3) of Decision ECB/2004/3, the ECB is required to refuse access to documents reflecting exchanges of views between the ECB and other relevant authorities and bodies, even

after the decision has been taken, if disclosure of the document would seriously undermine the ECB's effectiveness in carrying out its tasks, unless there is an overriding public interest in disclosure.

The two documents identified in point (6) consist of exchanges between the ECB and the PRA informing the latter about the final findings of this exercise, including the materiality assessment results and the list of material desks. As such, they represent exchanges of views and information between the ECB and the PRA in the context of the ECB's supervisory work regarding the DMR.

It is vitally important that the relevant authorities and bodies and the ECB are able to have an open dialogue with one another and share pertinent views in a manner that is judged to be the most effective for serving the public interest. If documents reflecting confidential exchanges of views were to be disclosed, the ECB would no longer be able to enjoy free and constructive exchanges of views and information with relevant authorities and bodies, which are essential to the ECB's ability to effectively carry out tasks entrusted to it by the SSM Regulation. This would seriously undermine the effectiveness of the ECB's supervisory work regarding the DMR.

Unhindered exchanges of information are a cornerstone of supervision and, in particular, the ECB's supervisory work regarding the DMR. They require that the relevant authorities and bodies trust the ECB to demonstrate strict compliance with professional secrecy requirements in handling the information provided. The disclosure of documentation exchanged between the ECB and relevant authorities and bodies could adversely affect their willingness to share information freely with the ECB, which could, in turn, undermine supervised credit institutions' confidence that information and assessments concerning them will be treated as confidential.

In addition, if documents reflecting internal views were to be disclosed, their authors would take the risk of disclosure into account in the future, given the risk of being misinterpreted or sending the wrong signals, to the point where they could practise self-censorship and cease to express candid views or comprehensively describe possible scenarios.¹⁴ As a result, the effectiveness of the ECB's supervisory work regarding the DMR could be seriously undermined.

In order for an overriding public interest in disclosure to exist, that interest has to be (i) public (as opposed to the private interests of the applicant), and (ii) overriding (i.e. it must, in this case, outweigh the interests protected under Article 4(3) of Decision ECB/2004/3). To this end, specific and detailed reasoning based on the nature of the documents in question must also be provided as justification for the claimed public interest.¹⁵ In its assessment, the ECB was unable to identify an overriding public interest in the disclosure of the identified documents. Consequently, the prevailing interest in this case lies in protecting the confidentiality of the deliberations and preliminary consultations within the ECB and the exchanges of views between the ECB and the relevant authorities and bodies, so authorisation to disclose the documents in question must be refused.

In the light of the above, authorisation to disclose the identified documents cannot be granted (either in full or in part), since their disclosure would cause concrete and foreseeable harm to interests protected by the second subparagraph of Article 4(3) of Decision ECB/2004/3.

¹⁴ See *MyTravel v European Commission*, Case T-403/05, ECLI:EU:T:2008:316, paragraph 52.

¹⁵ See *Association Justice & Environment v European Commission*, Case T-727/15, ECLI:EU:T:2017:18, paragraph 56.

Protection of the commercial interests of a natural or legal person

Under the first indent of Article 4(2) of Decision ECB/2004/3, the ECB is required to refuse access to documents where disclosure would undermine the protection of the commercial interests of a natural or legal person.

In general, access to documents obtained or prepared by the ECB in the context of supervisory investigations, inspections, audits and oversight activities could compromise the commercial interests of supervised entities and their counterparties. In the present case, to the extent that the documents identified under point (2) (the seven DMR Quantitative templates) and point (6) (the ECB exchanges with the PRA) contain details of the organisation and business services of the banks covered by this review, the list of their material desks and the ECB's methodology and assessment. This includes the names of the banks in scope, the outcome of the materiality analysis and the plans for the implementation of supervisory measures. Their disclosure might affect the confidence of current and potential investors in the banks and the trust of their clients. Such disclosure could also reveal strategic information about the banks, potentially with a negative impact on their commercial standing or the risk of exploitation by their competitors to the detriment of their commercial interests.

The grounds for refusing authorisation to disclose that are laid down in the first indent of Article 4(2) of Decision ECB/2004/3 (the protection of commercial interests) are not sufficient if there is an overriding public interest in disclosure. Such an interest must (i) be public, and (ii) outweigh the harm caused by disclosure. Specific and detailed reasoning based on the nature of the documents in question must be provided to explain how disclosure would protect the claimed public interest.¹⁶ The ECB could not identify any overriding public interest with regard to the first indent of Article 4(2). Taking into account the points made above, the ECB has concluded that the identified documents cannot be disclosed.

Final remarks

For the sake of good order, we would like to inform you that, as regards the identified documents, Article 7(2) of Decision ECB/2004/3 provides that *"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]

[signed]

Petra Senkovic
Director General Secretariat

Roman Schremser
Chief Compliance and Governance Officer

¹⁶ See *Association Justice & Environment v European Commission*, T-727/15, ECLI:EU:T:2017:18, paragraph 56.

Annex: List of identified documents

Request	Identified documents	Disclosure	Exemption
Point 2 <i>“Any templates of data requests sent to entities subject to the review”</i>	7 DMR Quantitative Templates containing information on the banking groups in scope	No	Article 4(1)(c) of Decision ECB/2004/3 (“the confidentiality of information that is protected as such under Union law”), in conjunction with Article 27 of the SSM Regulation and Article 53 of the Capital Requirements Directive (CRD), and, also in conjunction with the eighth indent of Article 4(1)(a) (“the Union’s or a Member State’s policy relating to the prudential supervision of credit institutions”), the ninth indent of Article 4(1)(a) (“the purpose of supervisory inspections”) and the first indent of Article 4(2) (“the protection of the commercial interests of a natural or legal person”).
Point 6 Communications with which the ECB informed UK counterparties of the final findings of this review.	2 documents containing communications between the ECB and the PRA in which the PRA was informed about the final findings of this exercise, in February and May 2022	No	<p>- The first exchange: Article 4(1)(c) of Decision ECB/2004/3 (“the confidentiality of information that is protected as such under Union law”), in conjunction with Article 27 of the SSM Regulation and Article 53 of the Capital Requirements Directive (CRD), and, also in conjunction with the eighth indent of Article 4(1)(a) (“the Union’s or a Member State’s policy relating to the prudential supervision of credit institutions”), the ninth indent of Article 4(1)(a) (“the purpose of supervisory inspections”), for certain parts of this document the first indent of Article 4(2) (“the protection of the commercial interests of a natural or legal person”) and second subparagraph of Article 4(3) (“Access to documents reflecting exchanges of views between the ECB and other relevant authorities and bodies shall be refused even after the decision has been taken, if disclosure of the document would seriously undermine the ECB’s effectiveness in carrying out its tasks, unless there is an overriding public interest in disclosure”).</p> <p>- The second exchange: Article 4(1)(c) of Decision ECB/2004/3 (“the confidentiality of information that is protected as such under Union law”), in conjunction with Article 27 of the SSM Regulation and Article 53 of the Capital Requirements Directive (CRD), and, also in conjunction with the ninth indent of Article 4(1)(a) (“the purpose of supervisory inspections”), the first indent of Article 4(2) (“the protection of the commercial interests of a natural or legal person”) and second subparagraph of Article 4(3) (“Access to documents reflecting exchanges of views between the ECB and other relevant authorities and bodies shall be refused even after the decision has been taken, if disclosure of the document would seriously undermine the ECB’s effectiveness in carrying out its tasks, unless there is an overriding public interest in disclosure”).</p>

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