



EUROPEAN CENTRAL BANK
EUROSYSTEM

ECB-UNRESTRICTED

DIRECTORATE GENERAL SECRETARIAT

Mr Simon Guntrum
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Dear Mr Guntrum,

Request for public access to ECB documents

Thank you for your message of 2 March 2017 in which you ask the European Central Bank (ECB) whether it has "*commissioned legal opinions concerning the Emergency Liquidity Assistance (ELA) to Greek Banks in 2015*" and requested, "*If this is the case, [...] the full release of all legal opinions concerning ELA aspects in 2015*".

On 29 March 2017, due to a combination of heavy workload and unforeseen absences of staff, the ECB extended the time limit for reply by an additional 20 working days in line with Article 7(3) of Decision ECB/2004/3 on public access to ECB documents¹.

With regard to your first question, we would like to clarify that, in line with the ECB's commitment to openness and good administration, we have interpreted your request in the widest possible sense and identified the following internal and external legal opinions, which were commissioned by the ECB's decision-making bodies² in 2015:

- Four legal opinions prepared by the Eurosystem Legal Committee (LEGCO), namely: (1) on "*Criteria for assessing monetary financing concerns with regard to central bank operations in Greece*", dated 16 February 2015; (2) on "*The review of haircuts applied to Greek government-linked collateral in ELA operations and related decisions*", dated 31 March 2015; (3) on "*Prohibition of monetary financing in the context of the provision of ELA to Greek banks and the roll-over of T-bills in Greece*", dated 13 April 2015; and (4) on "*Scope of discretion for a Governing Council intervention in case of obvious monetary financing concerns in the Greek case*", dated 19 May 2015. As the titles of these internal opinions suggest, they discuss various legal aspects related to the provision of ELA to Greek banks, explore the legal implications of the fact that the assets posted by Greek banks as collateral with the Bank of Greece for ELA operations were, to a

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), as last amended by Decision ECB/2015/1 (OJ L 84, 28.3.2015, p. 64).

² The ECB decision-making bodies are the Governing Council and the Executive Board (see Article 129 TFEU).

significant extent, government-linked assets, and provide concrete assessments on the basis of the applicable legal framework.

- Two legal opinions prepared by external legal counsels, namely (1) "*Competences of the ECB under Article 14.4 of the Statute of the ESCB and the ECB with respect to national tasks performed by National Central Banks*", dated 22 April 2015; and (2) "*Responses to questions concerning the interpretation of Article 14.4 of the Statute of the ESCB and of the ECB*", dated 23 April 2015. As the titles suggest, these opinions do not address the specific case of the provision of ELA to Greek banks, but rather deal with the interpretation and application of Article 14.4 of the Statute of the European System of Central Banks and of the European Central Bank (ESCB Statute). They provide an assessment of the powers of the Governing Council under this Article and elaborate on how the Governing Council could restrict non-ESCB functions performed by a national central bank (NCB), including any relationship with the prohibition on monetary financing (Article 123 of the Treaty on the Functioning of the EU (TFEU)³).

In addition, with the aim of providing you with an overall picture, we would like to clarify the following.

First, these legal opinions were not used to support the preparation of a legal act for which the European Court of Justice has acknowledged the existence of a wider openness obligation⁴.

Second, when deliberating on complex policy or technical matters, it is common practice for the ECB's decision-making bodies to seek advice on the interpretation of the relevant legal framework and/or possible legal implications resulting from their implementation. This legal advice is meant to assist the decision-making bodies in their deliberations and allow them to take informed decisions. This was also the case for various ELA-related aspects in 2015.

Third, we would like to recall a few aspects of the ELA procedures⁵.

- One of the specific tools available to central banks in a crisis situation is the provision of ELA to individual credit institutions against adequate collateral. ELA is the provision by an NCB of central bank money and/or any other assistance that may lead to an increase in central bank money to a solvent financial institution, or group of solvent financial institutions, that is facing temporary liquidity problems, without such operation being part of the single monetary policy of the Union. We would like to refer you to Section 3.3 of the article entitled "*The EU arrangements for financial crisis management*" in the February 2007 issue of the ECB's Monthly Bulletin⁶ for details.
- As a central banking function, the provision of ELA is a national task, i.e. the *decision to provide ELA is taken by the competent NCB*, which considers the relevant factors that may justify granting exceptional liquidity support to a temporarily illiquid but solvent institution operating in its jurisdiction.

³ Under Article 123(1) TFEU, mirrored in Article 21.1 of the ESCB Statute, overdraft facilities or any other type of credit facility with the ECB or with the NCBs in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, or other bodies governed by public law, or public undertakings of Member States, are prohibited.

⁴ Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraph 60.

⁵ <https://www.ecb.europa.eu/pub/pdf/other/elaprocedures.en.pdf>

⁶ https://www.ecb.europa.eu/pub/pdf/other/pp73-84_mb200702en.pdf

Therefore, any costs and risks arising from the provision of ELA are to be incurred by the relevant NCB.

- The Governing Council's related competence is based on Article 14.4 of Protocol (No 4) on the ESCB Statute, which stipulates that "*National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB*". Therefore, the Governing Council does not take a decision on granting ELA to a specific credit institution. Instead, it is asked by the competent NCB to "not object" to this NCB's decision to provide ELA. To enable the Governing Council to adequately assess that the proposed provision of ELA would not interfere with the objectives and tasks of the Eurosystem, the NCBs have to provide information to the ECB in a timely manner about the nature of the problem, the features of the transactions and their liquidity effects⁷.
- In addition, in their ELA operations (as in any other central banking operations), NCBs must comply with the prohibition on monetary financing laid down in Article 123 TFEU. This Article prohibits the ECB and the NCBs from providing overdraft facilities or any other type of credit facility to governments and EU institutions or bodies, as well as from purchasing debt instruments issued by these institutions in the primary market.

With regard to the second point of your request, in which you seek the full release of "*all legal opinions [commissioned by the ECB] concerning ELA aspects in 2015*", following a thorough assessment of your application in line with the requirements established by Decision ECB/2004/3, we regret to inform you that the ECB cannot disclose, at the current juncture, the aforementioned legal opinions, not even partially, since they are protected under Article 4(2), second indent (*protection of legal advice*) and Article 4(3), first sub-paragraph (*documents for internal use as part of deliberations and preliminary consultations within the ECB*) of Decision ECB/2004/3. The following explanations further clarify the reasons for the ECB's decision not to disclose these documents.

Protection of legal advice

The legal opinions are protected under Article 4(2), second indent, of Decision ECB/2004/3 ("*The ECB shall refuse access to a document where disclosure would undermine the protection of: [...] legal advice [...] unless there is an overriding public interest in disclosure*").

Releasing the documents under Decision ECB/2004/3 would have an "erga omnes" effect (that is, the documents would enter into the public domain). Legal aspects are part of the underlying elements to be weighed in policy considerations by decision-makers. This is particularly relevant for the complex issue of the provision of ELA, which also has to take into account a statutory perspective, as explained above. In the case at hand, public release of the legal opinions – which were sought by the

⁷ Ibid.

ECB's decision-making bodies and intended exclusively for their consideration – would undermine the ECB's legitimate interest in receiving frank, objective and comprehensive legal advice. Especially since this legal advice was not only essential for the decision-making bodies to prepare ELA-related deliberations and discussions in 2015 – it remains valid for any future deliberations.

In addition, disclosure with “erga omnes” effect of the legal opinions delivered by external legal counsel subject to confidentiality rules (agreed in a bilateral contract between them and the ECB) may harm the ECB's ability to obtain frank and uncensored legal advice in the future.

Documents for internal use as part of deliberations and preliminary consultations within the ECB

As stated above, the legal opinions were not used to support the preparation of a legal act. They were, instead, commissioned to provide the ECB decision-making bodies with legal insight for their internal deliberations and reflections. As such, they are protected under Article 4(3), first subparagraph, of Decision ECB/2004/3 (“*access to a document drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and NCBs, N[ational] C[ompetent] A[uthoritie]s or N[ational] D[esignated] A[uthoritie]s, shall be refused even after the decision has been taken,...*”).

The legal opinions were intended to provide legal expertise to enrich the internal considerations of the decision-making bodies and support their ELA-related deliberations and discussions not only in 2015, but also on future occasions. As such, they serve any ongoing or future considerations of cases within the scope of Article 14.4 of the ESCB Statute (regarding the national tasks of NCBs (e.g. the provision of ELA) and the legal rules and conditions that the ECB is entitled to impose on NCBs in this context⁸). As explained above, these continue to be topics of a sensitive nature from today's perspective, in particular considering the ongoing third economic adjustment programme for Greece). The ECB considers that the disclosure of these documents would undermine the possibility of an effective, informal and confidential exchange of views taking place among the members of the decision-making bodies and, as a consequence, would limit the ECB's “space to think”. Taken out of context or seen in isolation they can potentially impact the independence of Governing Council members, a fundamental principle of the ESCB protected by Article 130 TFEU, especially in respect of NCBs that are performing, or intend to perform, ELA or other national functions.

In addition, the legal opinions prepared by LEGCO outline the Eurosystem staff members' views on the legal aspects of a specific matter. They do not reflect the full picture of a given topic and only present segmented legal parts of a complex issue that LEGCO was specifically mandated to assess. If they were publicly released, the ECB would no longer be able to benefit from uncensored advice, without any potential external constraints linked to the risk of misinterpretation, and without the risk of giving wrong signals on a matter which from today's perspective is still topical.

⁸ For example, the subject of the two external legal opinions.

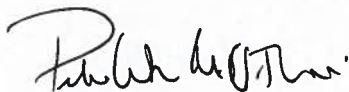
Overriding public interest and partial access

The exceptions laid down in Article 4(2), second indent and Article 4(3), first sub-paragraph of Decision ECB/2004/3 must be waived if there is an overriding public interest in disclosure. Such an interest must, first, be public and, second, outweigh the harm caused by disclosure. In your application, you do not mention that there is such an overriding public interest. While we acknowledge the interest in understanding the underlying reasons for granting ELA to Greek banks in 2015, such general considerations cannot provide, pursuant to settled case law, an appropriate basis for substantiating the existence of an overriding public interest in disclosure which would prevail over the reasons justifying the refusal to disclose the documents in question at the current juncture. Nor has the ECB identified any public interest that overrides the interests protected by Article 4(2), second indent and Article 4(3), first sub-paragraph of Decision ECB/2004/3. The fact that the requested documents do not relate to any legislative act for which the European Court of Justice has acknowledged the existence of wider openness provides further support to this conclusion.

In accordance with Article 4(5) of Decision ECB/2004/3, we have considered the possibility of granting partial access to the documents requested. However, as shown by the above clarifications, no meaningful partial access can be granted without undermining the reasons for confidentiality outlined in this letter. The ECB would also like to stress that a more detailed elaboration on the reasons for confidentiality runs the risk of disclosing the actual content of the documents and, thereby, depriving the exceptions of Article 4(2), second indent and Article 4(3), first sub-paragraph of Decision ECB/2004/3 of their very purpose⁹.

Please be informed that, in line with Article 7(2) of the above-mentioned Decision, "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,



Pedro Gustavo Teixeira
Director General



Roman Schremser
Chief Compliance and Governance Officer

⁹ Judgment of the General Court (Eighth Chamber) of 13 January 2011, *IFAW Internationaler Tierschutz-Fonds gGmbH v European Commission*, T-362/08, ECLI:EU:T:2011:6, paragraph 111.