



EUROPEAN CENTRAL BANK
EUROSYSTEM

ECB-UNRESTRICTED

DIRECTORATE GENERAL SECRETARIAT

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Request for public access to ECB documents on the not materialised sale of the Portuguese bank Efisa S.A. to Pivot S.G.P.S S.A

Dear Mr Völker,

On 30 October 2023 the European Central Bank (ECB) received your application for public access to *ECB documents on the not materialised sale of the Portuguese bank Efisa S.A. to Pivot S.G.P.S.*

On 27 November 2023, due to an exceptionally high workload resulting from a large number of concurrent requests, the ECB extended the time limit for its reply by an additional 20 working days in accordance with Article 7(3) of [Decision ECB/2004/3](#).¹

In your request you make reference to Regulation 1049/2001, please be informed that this framework is only applicable to the European Commission, the Council of the European Union and the European Parliament. Public access to ECB documents is governed by a dedicated framework laid down in Decision ECB/2004/3 mentioned above.

Procedural clarifications

As a preliminary remark, for all useful purposes, please note that in accordance with the Capital Requirements Directive (CRD), and in particular Article 22(1) thereof, Member States shall require any proposed acquirers of a qualifying holding to notify the relevant competent authorities for the credit institution in which they are seeking to acquire or increase a qualifying holding in writing in advance of the acquisition.

According to Article 4(1)(c) of the SSM Regulation, the ECB shall be exclusively competent to carry out, for prudential purposes, the assessment of notifications of the acquisition and disposal of qualifying holdings in credit institutions. In particular, approving the proposed acquisitions of

¹ Decision ECB/2004/3 of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (OJ L 80, 18.3.2004, p. 42).

qualifying holdings is one of what are known as “common procedures”² and the ECB and the national competent authorities (NCAs) are involved in different stages of these procedures.³

Identification of the requested documents

Having assessed the matter thoroughly, the ECB has identified in total 81 ECB supervisory documents of relevance for your request. They are categorised as follows:

- (1) Entire/excerpts of ECB-internal documents and communication with Banco de Portugal in the context of the supervisory assessment of the proposed transaction;
- (2) Documents authored by Banco de Portugal and addressed to Pivot S.G.P.S; and
- (3) Documents authored and sent by Pivot S.G.P.S S.A to the NCA.

The Annex to this letter describes the identified ECB documents per category and the exceptions used in accordance with Decision ECB/2004/3.

Assessment of the requested documents for disclosure

Following a thorough assessment of the ECB documents identified in accordance with Decision ECB/2004/3, we regret to inform you that access to them cannot be granted, neither in full nor in part, since disclosure would undermine the interests 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 Regulation⁴ and Article 53 of the Capital Requirements Directive (CRD)⁵; (ii) Article 4(3) (*“exchanges of views between the ECB and national competent authorities and national central banks”*) and (iii) first indent of Article 4(2) (*“commercial interest”*) of Decision ECB/2004/3.

The explanations provided below clarify the ECB’s decision not to disclose the documents in question category by category.

1. Confidentiality of information under Union law - Article 4(1)(c) Decision ECB/2004/3

Pursuant to Article 4(1)(c) of Decision ECB/2004/3, the ECB must refuse access to documents where disclosure would undermine the protection of the confidentiality of information that is protected as such under Union law. Such provision is linked to the professional secrecy

² See Article 2(3) of the SSM Regulation. For detailed information on the common procedures, see Articles 14 and 15 of the SSM Regulation, as well as Part V of Regulation (EU) No 468/2014 of the European Central Bank of 15 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), (OJ L 141, 14.5.2014, p. 1).

³ Additional information on ECB supervisory practices for qualifying holding assessments can be found in ECB ‘Guide to qualifying holding procedures’, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisory_guides230523_qualifyingholdingprocedure.en.pdf

⁴ 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).

⁵ 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).

requirements set out in Article 27 of the SSM Regulation⁶ and Article 53 et seq. of the Capital Requirements Directive (CRD) establishing a general rule prohibiting disclosure of confidential supervisory information.

These provisions, read in conjunction with the principles enshrined in the judgement issued by the Court of Justice of the European Union in the *Baumeister* case⁷, lead to the application of this prohibition to any document drawn up or held within the Single Supervisory Mechanism (SSM) which (i) is not public; and (ii) the disclosure of which is likely to have an adverse effect on the interests of the natural or legal person who provided that information or the interests of third parties, or on the proper functioning of the system of banking supervision in the European Union.

The documents contain specific confidential information on the proposed acquirer of a qualifying holding such as, reputation information, information on the intended acquisition, information regarding the financing of the intended acquisition as well as information that goes beyond what has been made public concerning supervisory methodologies, assessments, findings, strategies and practices of competent authorities (including the ECB).

Such Information constitutes confidential supervisory information within the meaning of Article 53 of the CRD, the confidentiality of which is “protected as such under Union law”, under Article 4(1)(c) of Decision ECB/2004/3.

In this regard, the ECB confirms that: (i) the information contained in the identified documents (categories 1 to 3) is not public; and (ii) its disclosure would not only adversely affect the interests of the natural or legal person who provided that information or the interests of third parties, and/or the interests of the credit institutions concerned, but would also adversely affect the public interest in the smooth functioning of the system of prudential supervision as a whole.⁸

The identified documents are therefore covered by the professional secrecy obligation.

On this last point, the ECB notes that professional secrecy requirements have been established to protect not only individual credit institutions and, as in this case, potential qualifying shareholders, but also the proper functioning of the supervisory system as a whole. In this respect, on general terms, disclosure of information relating to a supervised entity’s compliance with upcoming supervisory requirements with any related supervisory assessment and findings is likely to adversely affect the supervised entities’ trust that their information will not be disclosed by the supervisor. On the one hand, reliance on non-disclosure of this type of information is essential for guaranteeing the effective exchange of information between supervised entities and the supervisory authority, which, in turn, is crucial for effective supervision. On the other hand, disclosure of information underlying the supervisory assessment and the findings related to the

⁶ 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).

⁷ See *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, C-15/16, ECLI:EU:C:2018:464, paragraph 35.

⁸ 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*, C-110/84, ECLI:EU:C:1985:495, paragraph 27.

concerned entity could reveal and, therefore, undermine supervisory methodologies and strategies developed and deployed by competent authorities.

This confidentiality regime continues to apply in the case of banks that have been resolved or liquidated.

It is clear that granting public access to any additional information about the content of the documents identified as being relevant to your request (over and above the descriptions provided in the Annex) could lead to unwarranted speculation among market participants regarding the parties of the intended transaction.

Accordingly, providing more specific reasons justifying the refusal of public access to each individual document (over and above the descriptions provided also in the Annex) 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.⁹

Consequently, for the reasons stated above, the ECB considers that disclosure of the confidential supervisory information contained in the identified documents across categories (1) to (3) would specifically and effectively undermine the protection of the confidentiality of information pursuant to Article 4(1)(c) of Decision ECB/2004/3.

2. Exchanges of views between the ECB and NCAs - Article 4(3) Decision ECB/2004/3

Pursuant to Article 4(3) of Decision ECB/2004/3, the ECB must refuse access to documents reflecting exchanges of views between the ECB and other relevant authorities and bodies, even after the decision has been taken, unless there is an overriding public interest in disclosure.

The documents pertaining to category (1) contain exchanges between the NCAs and the ECB regarding common procedures. The disclosure of the documentation exchanged between the ECB and NCAs may undermine NCAs' willingness to communicate their assessment in a frank and uncensored manner to the ECB. If documents reflecting confidential exchanges of views were to be disclosed, the ECB would no longer be able to benefit from the free and candid exchange of opinions with NCAs.

Disclosing those views – even after the adoption of a decision – would seriously undermine the space for the opinion-building process in formulating and adopting similar decisions in the future. In this respect, it is vitally important that ECB staff are able to convey pertinent and candid views in the manner that is judged to be most effective for serving the public interest. If documents reflecting internal deliberations or exchanges of views were to be disclosed, their authors would take the risk of disclosure into account in the future, to the point where they could potentially practice self-censorship and cease to put forward candid views or comprehensively

⁹ 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).

describe possible scenarios.¹⁰ As a result, the ECB's effectiveness in carrying out its oversight function could be seriously undermined.

Consequently, the prevailing interest in this case lies in protecting the confidentiality of the internal consultations concerned.

In view of the foregoing, the ECB considers that disclosure of the confidential supervisory information contained in documents pertaining to category (1) would specifically and effectively undermine the protection of the public interest as regards the confidentiality of internal consultations within the ECB pursuant to Article 4(3) of Decision ECB/2004/3.

3. Commercial interests - first indent of Article 4(2) Decision ECB/2004/3

Pursuant to the first indent of Article 4(2) of Decision ECB/2004/3, the ECB must refuse access to documents where disclosure would undermine the protection of the commercial interests of a natural or legal person, unless there is an overriding public interest in disclosure. The documents pertaining to category (3) contain commercially sensitive information of the different entities involved in the assessment of the acquisition of qualifying holdings and, in particular, information on their business plans, assessments of shareholders, governance structures, outsourcing and/or plans to raise capital. Should the information included in these documents become available in the public domain, this could negatively affect the standing, commercial interests and position of Pivot S.G.P.S S.A.

In view of the foregoing, the ECB considers that disclosure of the confidential supervisory information contained in the identified documents pertaining to category (3) would specifically and effectively undermine the protection of the public interest as regards the commercial interests of a natural or legal person pursuant to the first indent of Article 4(2) of Decision ECB/2004/3.

4. Overriding public interest in disclosure

The exception to the right of access contained in Article 4(2) or 4(3) of Decision ECB/2004/3 may be waived if there is an overriding public interest in disclosing the requested documents. Such an interest must (i) be public and (ii) outweigh the harm caused by disclosure. In that case, specific and detailed reasoning based on the nature of the relevant documents must be provided in order to explain why disclosure is necessary to ensure the protection of the public interest that is being invoked.¹¹

¹⁰ See *MyTravel Group plc v Commission of the European Communities*, Case T-403/05, ECLI:EU:T:2008:316, paragraph 52.

¹¹ See Case T-727/15, *Association Justice & Environment v European Commission*, paragraph 56.

However, we could not identify in your application any arguments establishing the existence of an overriding public interest in the disclosure of the documents at issue.

Means of Redress

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

Margarita-Louiza Karydi

Director General Secretariat

Head of the Compliance and Governance Division

ANNEX

	Category	Description	No. of Documents	Disclosure	Justification
1	ECB-internal documents (or excerpts thereof) and communication with Banco de Portugal in the context of the supervisory assessment of the proposed transaction (2016 & 2017)	<p>The ECB internal documents and excerpts thereof, such as a confidential ECB Memo and its annex, contain confidential information on Efisa's assets, capital ratios, sale process, capital requirements.</p> <p>The direct exchanges between the ECB and Banco de Portugal include information on legal deadlines for the process, questions on the process and the notification on the withdrawal of the proposed acquisition.</p>	5	No	<p>This information is confidential and access to the identified ECB documents cannot be granted since 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 Regulation and Article 53 of the Capital Requirements Directive (CRD IV) and the second sub-paragraph of Article 4(3) Decision ECB/2004/3 ("Exchanges of views between the ECB and national competent authorities").</p> <p>Public access to such information is likely to have an adverse effect on supervised entities' trust that the NCAs and the ECB will treat information pertaining to credit institutions in a confidential manner, which is vital in order to ensure that supervised entities are prepared to exchange supervisory information with the relevant supervisory authority. In addition, the unobstructed exchange of information is a cornerstone of common procedures and requires that NCAs</p>

					<p>trust that the ECB will treat the information provided in a manner that is strictly in line with professional secrecy.</p> <p>Furthermore, disclosure of this confidential information to the public is likely to adversely affect the proper functioning of the system of supervision by revealing supervisory information exchanged between the bank and its supervisor and the exchanges between the NCAs and the ECB regarding common procedures. Accordingly, providing more specific reasons justifying the refusal of public access to the documents 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.</p>
2	Documents authored by BdP and addressed to Pivot S.G.P.S (2016 & 2017)	Banco de Portugal's letters to Pivot S.G.P.S requesting supervisory information on the financial soundness of the acquirers and the ability to support the target in the foreseeable future i.e concrete information about the entities involved, guarantees provided, clarifications on financial statements and financial projections, strategic planing, internal governance	7	No	<p>This information is confidential and access to the identified ECB documents cannot be granted since 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 Regulation and Article 53 of the Capital Requirements Directive (CRD IV).</p> <p>Public access to these documents is likely to have an adverse effect on the proposed acquirer's trust that the NCAs and the ECB will treat information pertaining to them in a confidential manner, which is vital in order to ensure that the potential</p>

		<p>structure, policies on AML and deposits, purchase price, forecasts, etc. also addressing comments from Pivot S.G.P.S.</p>		<p>qualifying shareholders are prepared to exchange supervisory information with the relevant supervisory authority. In addition, the unobstructed exchange of information is a cornerstone of common procedures and requires that NCAs trust that the ECB will treat the information provided in a manner that is strictly in line with professional secrecy.</p> <p>As mentioned in the reply, professional secrecy requirements have been established to protect not only individual credit institutions, and, as in this case, potential qualifying shareholders, but also the proper functioning of the supervisory system as a whole, which would be likely adversely affected along with the ECB's effectiveness in carrying out its tasks in relation to common procedures by revealing supervisory information requested to Pivot S.G.P.S S.A..</p> <p>Moreover, public access to some of the identified documents could reveal information going beyond what has been made public concerning supervisory methodologies, assessments, findings, strategies and practices of competent authorities. Public access could therefore (i) risk depriving the competent authorities and the ECB of their ability to continue applying supervisory methodology and strategy and (ii) adversely affect the functioning of the system for prudential supervision</p>
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					<p>by undermining the effectiveness of the competent authorities and the ECB's use of such strategy. Public access to the identified documents would, therefore, seriously undermine the ECB's effectiveness in carrying out its common procedures.</p> <p>Accordingly, providing more specific reasons justifying the refusal of public access to the documents 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.</p>
3	Documents authored and sent by Pivot S.G.P.S S.A to the NCA (2015– 2017)	<p>Direct exchanges between Pivot S.G.P.S S.A and Banco de Portugal on the acquisition of Efisa S.A. qualifying holdings.</p> <p>These documents include supervisory confidential information on Pivot S.G.P.S S.A, such as the withdrawall letter, financing, shareholder information, business invetment plan, income streams, targets, financial statements, projections, AML, notification and</p>	69	No	<p>This information is confidential and access to the identified ECB documents cannot be granted since 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 Regulation and Article 53 of the Capital Requirements Directive (CRD IV) and under the first indent of Article 4(2) of Decision ECB/2004/3 (“commercial interests of a natural or legal person”).</p> <p>The prudential assessment of acquisitions and increases of qualifying holdings in credit institutions is an essential tool to ensure effective supervision of the European financial system. Proposed acquirers are legally obliged to prepare</p>

		<p>replies to BdP on the information requested (please see category 2).</p>		<p>their notifications accurately and completely and share information openly and swiftly to support supervisors in reaching an informed judgement. Public access to the exchanges pertaining to this category is likely to have an adverse effect on the proposed acquirer's trust that the NCAs and the ECB will treat information pertaining to them in a confidential manner, which is vital in order to ensure that the potential qualifying shareholders are prepared to exchange supervisory information with the relevant supervisory authority.</p> <p>In addition, the unobstructed exchange of information is a cornerstone of common procedures and requires that NCAs trust that the ECB will treat the information provided in a manner that is strictly in line with professional secrecy. As mentioned in the reply, professional secrecy requirements have been established to protect also the proper functioning of the supervisory system as a whole, which would be likely adversely affected along with ECB's effectiveness in carrying out its common procedures, by revealing supervisory information exchanged between Pivot S.G.P.S S.A to the NCA.</p>
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				<p>Public access to the identified documents would therefore seriously undermine the ECB's effectiveness in carrying out its common procedures.</p> <p>Accordingly, providing more specific reasons justifying the refusal of public access to the documents 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.</p>
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