

Mr Declan O'Farrell

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27 March 2018

Reference: LS/PT/2018/21

Dear Mr O'Farrell,

Request for public access to ECB documents

Thank you for your application received by the European Central Bank (ECB) on 22 January 2018 requesting access to "all records held by the ECB including representations made by third parties and internal assessments related to proposed legislation in the Irish parliament to empower the Irish Central Bank to set caps on mortgage interest rates".

On 14 February 2018, in line with Article 7(3) of Decision ECB/2004/3¹ on public access to ECB documents and owing to a heavy workload, the ECB extended the stipulated time limit for reply by an additional 20 working days.

As you may be aware, the ECB published an opinion on the "Central Bank (Variable Rate Mortgages) Bill 2016" (Opinion CON/2016/54) on 17 November 2016.² The bill would confer powers on the Central Bank of Ireland to issue directions to lenders not to charge a variable interest rate which exceeds a certain threshold, as specified by the Central Bank of Ireland. The ECB opinion was issued in response to a consultation request from the Chairman of the Oireachtas Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach, which was received by the ECB on 6 October 2016. It is obligatory for national authorities to consult the ECB on national draft legislative provisions in the ECB's fields of competence or in the areas falling within its responsibilities.³

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 Opinion CON/2016/54 of 17 November 2016 on the conferral of powers on the Central Bank of Ireland to assess competition in the market for mortgage loans and to issue lenders with directions on variable interest rates: https://www.ecb.europa.eu/ecb/legal/date/2016/html/act_14124_amend.en.html.

³ Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union.

This is for instance the case when the national draft legislation relates to national central banks or to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets.⁴ Both of these cases applied to the aforementioned Irish bill, which is why the Joint Committee consulted the ECB.⁵ Consequently, we have understood your request as relating to this consultation procedure covering the period from 6 October to 17 November 2016.

Having carefully examined your request in line with Decision ECB/2004/3, we have identified 12 ECB documents of relevance to your application for public access, i.e. the request of the aforementioned Joint Committee, Opinion CON/2016/54 itself, internal notes, correspondence and a briefing note from a member of the public. A comprehensive list is provided in the annex to this letter.

Given the large number of documents identified as falling within the scope of your request, in line with Article 6(3) of Decision ECB/2004/3, the ECB has divided your request into two parts to ensure, in line with the principle of good administration, a timely response. The present letter concerns documents 1-3 and 7-12, as indicated in the annex. The follow-up letter will address documents 4-6.

The possible disclosure, full or partial, of the identified documents 1-3 and 7-12 has been thoroughly assessed in line with the requirements established by Decision ECB/2004/3, in consultation with the relevant third parties, and the outcome of the assessment is included in the annexed table. Some further explanation of this assessment is provided below.

Assessment of the identified documents

Following a thorough assessment in line with the requirements set out in Decision ECB/2004/3 and in consultation with the relevant third parties⁶ – the aforementioned Joint Committee, the Central Bank of Ireland, and the member of the public concerned, as applicable – the ECB considers that:

Five documents (see enclosures) can be disclosed in full since none of the exceptions listed in Article 4 of the Decision apply: (i) a letter from the Joint Committee (with which it formally started the consultation procedure with the ECB on the “Central Bank (Variable Rate Mortgages) Bill 2016”, as

⁴ Article 2, third and sixth indents, of Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (98/415/EC) (OJ L 189, 3.7.1998, p. 42).

⁵ For further information on such consultation procedures, please refer to the ECB’s “Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions” of October 2015, <https://www.ecb.europa.eu/pub/pdf/other/consultationguide201510.en.pdf>. For a description of the purpose of this consultation function, please refer to Case C-11/00, Commission of the European Communities v European Central Bank, 10 July 2003, ECLI:EU:C:2003:395, par. 110.

⁶ Please note that the email and briefing note from the member of the organisation AskAboutMoney.com is the only third-party representation that the ECB received during the consultation process on this Irish draft legislation, other than the (requested) exchange of legal views between the ECB and the national central banks of the European System of Central Banks (ESCB).

required by the Treaty). Its annexes include a summary of the bill and the bill itself. (document 1⁷); (ii) the publicly available opinion of the ECB CON/2016/54 on the “Central Bank (Variable Rate Mortgages) Bill 2016”⁸ (document 2); (iii) email correspondence with a member of the Irish consumer platform AskAboutMoney.com, dated 7, 10, 14, and 15 November 2016; (iv) a briefing note prepared by this person and sent (unsolicited) to the ECB. After consulting the sender, pursuant to Article 4 (4) Decision ECB/2004/3, the ECB obtained permission to disclose these documents in full. (documents 9 and 10); and (v) Note, entitled “Central Bank [of Ireland] Commentary on Standard Variable Rate” - Volume 1.1, dated 13 October 2016 (document 7).

The remaining four documents, consisting of internal ECB/ESCB notes and correspondence (documents 3, 8, 11 and 12) in relation to the preparation of the draft ECB Opinion, cannot be disclosed, in full or in part, since disclosure over and above the reference to their content would undermine the interests protected under Article 4(3) of Decision ECB/2004/3 (*part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and NCBs*).

Documents 11 and 12 allowed the ECB to gather background information about the Irish legislative and regulatory framework in relation to the topics of assigning powers to NCBs to assess competition and to issue directions to lenders with regard to interest rates. They were prepared with a view to supporting and preparing deliberations and internal reflections within the ECB, and enabling the decision-making process. If these documents were to be disclosed, it would mean that their authors would take the risk of disclosure into account in the future, to the point where they might practise self-censorship and cease to put forward candid views or possible scenarios⁹. The result would be that the ECB could no longer benefit from uncensored advice, given free of all potential external constraints linked to the risk of being misinterpreted or giving the wrong signal. For these reasons, disclosing these documents would undermine the ability of the ESCB's staff to freely submit uncensored advice and exchange views.

Moreover, documents 3 and 8 aimed to clarify a certain aspect of Opinion CON/2016/54, which deals with a variety of complex issues: legal, competition, monetary, supervisory, institutional and economic issues. In the case at hand, public release of such internal correspondence – which was intended solely for the purpose of clarifying a draft of Opinion CON/2016/54 – would undermine the ECB's legitimate interest in having frank, objective and comprehensive discussions on complex matters. It would limit the ECB's “space to think” if its internal deliberations were to be disclosed to the public. As such, it would ultimately also harm the decision-making process within the ECB, for which sole purpose this correspondence was initiated.

⁷ Whereby the numbers refer to the numbering in the table annexed to this letter.

⁸ https://www.ecb.europa.eu/ecb/legal/date/2016/html/act_14124_amend.en.html

⁹ MyTravel v Commission, T-403/05, ECLI:EU:T:2008:316, paragraph 52.

The exception to the right of access contained in Article 4(3) of Decision ECB/2004/3 does not apply if there is an overriding public interest in disclosing the requested documents. In order for an overriding public interest in disclosure to exist, this interest must, first, be public (as opposed to a private interest) and, second, overriding, i.e. in this case it must outweigh the interest protected under the said Article 4(3). Only an overriding public interest, i.e. objective and general in nature, can be taken into account as far as exception listed in Article 4(3) is concerned¹⁰. On the basis of the contents of these four documents, the ECB notes that there is no overriding public interest that could justify their disclosure, and it is not possible to grant partial access without undermining the interest protected. Furthermore, because of the amount of confidential data, it would not be possible to provide any document with meaningful content after the deletion of the protected information. Consequently, the ECB has come to the conclusion that the documents are covered in their entirety by the exception invoked in Article 4(3) of Decision ECB/2004/3.

General provisions

Where applicable, parts containing personal data have been redacted. Personal data are protected by Article 4(1)(b) of Decision ECB/2004/3 in conjunction with Article 8 of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data¹¹. One of the conditions stipulated by Article 8(b) of Regulation (EC) No 45/2001 for the transfer of personal data is that the necessity of having such personal data transferred is established. Given that you have not established the necessity of transferring such data to you, access to the personal data in the documents must be refused on the basis of Article 4(1)(b) of Decision ECB/2004/3.

Please note that, in line with Article 10 of Decision ECB/2004/3, documents released in accordance with this Decision must not be reproduced or exploited for commercial purposes without the ECB's prior specific authorisation. The ECB may withhold such authorisation without stating reasons.

For the sake of good order, we would like to inform you that, as regards documents 3, 8, 11 and 12, 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"*.

¹⁰ See *Unión de Almacenistas de Hierros de España v European Commission*, T-623/13, ECLI:EU:T:2015:268, paragraph 89.

¹¹ Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

Finally, please be informed that the ECB will now start assessing documents 4-6 as identified in the annex.

Yours sincerely,



Pedro Gustavo Teixeira
Director General



Roman Schremser
Chief Compliance and Governance Officer

Encl.



EUROPEAN CENTRAL BANK

EUROSYSTEM

ANNEX

ECB-UNRESTRICTED

	Description of document	Disclosure	Exception (Decision ECB/2004/3)	
1	Letter from Chairman of the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach, entitled "Consultation on draft legislative provisions under Article 2(1) of Council Decision 98/415/EC on proposed legislation Central Bank (Variable Rate Mortgages) Bill 2016 – Private Members Bill" Incl. Appendix 1-2, dated 3 October 2016	Full (without personal data)	N/A	
2	OPINION OF THE EUROPEAN CENTRAL BANK of 17 November 2016 on the conferral of powers on the Central Bank of Ireland to assess competition in the market for mortgage loans and to issue lenders with directions on variable interest rates (CON/2016/54)	Full	N/A	
3	Internal ESCB correspondence for clarification of the draft Opinion, dated 10 November 2016	No	Art. 4(3) (internal deliberations ECB and exchanges of views ECB and NCBs - no overriding public interest)	
4	Letter from the Chair of LEGCO to the members of LEGCO (extended composition), entitled "Questionnaire on assigning powers to the NCB to assess competition and issue directions to lenders with regard to interest rates", dated 12 October 2016	--	To be assessed in the follow-up letter	
5	Email from ECB to CBI entitled "Questions for the Central Bank of Ireland regarding the Central Bank (Variable Rate Mortgages) Bill 2016", 13 October 2016	--	To be assessed in the follow-up letter	
6	Note from CBI, entitled "Central Bank (Variable Rate Mortgages) Bill 2016 ("the Bill")", 14 October 2016	--	To be assessed in the follow-up letter	
7	Note entitled "Central Bank Commentary on Standard Variable Rate" - Volume 1.1, 13 October 2016	Full (without personal data)	N/A	
8	Internal ECB correspondence for clarification of the draft Opinion, dated 14 November 2016	No	Art. 4(3) (internal deliberations ECB and exchanges of views ECB and NCBs - no overriding public interest)	
9	Email from: [redacted]@askaboutmoney.com, entitled "briefing on mortgage rates relating to the Irish Central Bank Bill 2016", dated 10 November 2016	Full (without personal data)	N/A	
10	Email to [redacted]@askaboutmoney.com, "Re: to whom would I send a question on Irish banking legislation?", dated 15 November 2016	Full (without personal data)	N/A	
11	Email correspondence from ECB and CBI, entitled "Re: request from Joint Oireachtas Committee for ECB opinion on proposed Central Bank (Variable Rate Mortgages) Bill 2016", dated 14 October 2016	No	Art. 4(3) (internal deliberations ECB and exchanges of views ECB and NCBs - no overriding public interest)	
12	Email correspondence from ECB and CBI, entitled Re: For your consideration: Draft Opinion CON-2016-XX IE on the Central Bank (Variable Rate Mortgages) Bill 2016" dated 26 October 2016	No	Art. 4(3) (internal deliberations ECB and exchanges of views ECB and NCBs - no overriding public interest)	