



Vitor Constâncio  
Vice-President

Mr Fabio De Masi  
Mr Yanis Varoufakis  
and co-signatories

Frankfurt, 16 October 2017  
LS/VC/2017/22

Honourable Member of the European Parliament, dear Mr De Masi,  
dear Mr Varoufakis, dear signatories,

#### **Request for public access to ECB documents**

Thank you for your letter of 30 August 2017 in which you ask the Executive Board to review the position of the ECB and to grant access to the legal opinion of April 2015, prepared by external legal counsels, entitled *"Responses to questions concerning the interpretation of Article 14.4 of the Statute of the ESCB and of the ECB"*.

The Executive Board has given careful consideration to your confirmatory application, as well as the assessment made and the decision taken in response to your initial request, in line with the requirements of Decision ECB/2004/3<sup>1</sup>. The Executive Board wishes to underline that the letter of the Director General Secretariat of 3 August 2017 elaborates on the assessment of the content of the requested document.

The Executive Board would like to recall that the Governing Council sought legal advice in order to inform its understanding, in a general manner, of matters relating to the application and interpretation of Article 14.4 of the ESCB Statute. The legal opinion prepared by external legal counsel assesses the Governing Council's powers under this article and elaborates on how the Governing Council should act when non-ESCB functions performed by national central banks (NCBs) are at risk of interfering with the ESCB tasks and objectives. In particular, the legal opinion considers the nature and timing of decisions under Article 14.4 of the ESCB Statute, including ex ante prohibitions, limitations or conditions which may be imposed by the Governing Council with respect to the NCBs' exercise of national tasks, and the relationship with the prohibition on monetary financing (Article 123 Treaty on the Functioning of the European Union (TFEU)). As the legal opinion deals with general issues relating to the application and interpretation of Article 14.4

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<sup>1</sup> 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).

of the ESCB Statute it does not address the specific case of the provision of emergency liquidity assistance (ELA) to Greek banks nor does it assess the lawfulness of any other specific ECB Governing Council decision taken in application of Article 14.4 of the ESCB/ECB Statute, including decisions whether or not to object to an NCB proposal regarding the provision of ELA.

Following its review, the Executive Board upholds the assessment of the Director General Secretariat. The Executive Board has decided that access cannot be granted (in full or partially) since the requested document is 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.

This present letter gives a further thorough analysis and assessment of the reasons why, having considered the ECB's initial assessment and the arguments submitted in your confirmatory application, upon decision of the Executive Board, the requested document cannot be disclosed.

a. Protection of legal advice

In your confirmatory application you argue that arguments put forward by the ECB in its letter of 3 August are the "*opposite of a specific and reasonable foreseeable threat to any of the protections laid down in Art. 4 (1),(2) ECB/2004/3*". The Executive Board would *first* like to clarify that, in its view, the legal opinion in question is 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*") and not – as you seem to suggest – under any of the exceptions provided for in Article 4(1) of Decision ECB/2004/3.

*Second*, the Executive Board wishes to note that – contrary to your claims – the letter of the Director General Secretariat on page 2 clearly stated the reasons for the assessment of the legal opinion and how its disclosure could specifically and effectively undermine the interests protected by the Article 4(2), second indent (*protection of legal advice*). In addition to the assessment of the Director General Secretariat and in the interest of clarity, the Executive Board would like to briefly recall the main reasons behind the ECB's decision to refuse access to the legal opinion.

Decision-makers need to include the legal aspects in their policy considerations. Indeed, this is particularly relevant for highly complex issues such as the provision of ELA, which also has to take into account aspects of primary law, particularly the restrictions of Article 123 TFEU and the perspective of Article 14.4 of the Statute. In the case at hand, public release of the legal opinion – which was commissioned by the ECB's decision-making bodies and intended exclusively for their information and consideration – would undermine the ECB's legitimate interest in seeking and receiving frank, objective and comprehensive legal advice. This is especially so since this legal advice was not only relevant for the decision-making bodies' ELA-related deliberations and

discussions in 2015, but also remains valid for their future deliberations on ELA and on other non-ESCB tasks exercised by NCBs.

The legal opinions relate to an ECB decision-making process that does not concern the development of legislation. The validity of specific actions or procedures in the context of an intervention by the ECB with respect to the provision of ELA by NCBs is a matter which is of particular concern during times of heightened sensitivity. As such, it is crucial that the ECB is in a position to ask questions of a legal nature in an open and unrestricted manner. The opinion will remain a relevant element in future deliberations for the foreseeable future and its sensitivity will not necessarily lapse or diminish once the concerns associated with any specific situation have become less acute. Furthermore, it is important to note that the legal opinion exists within the greater body of advice and doctrine which contributes to the decision-making process in this area. It is reasonable to expect that this advice may be supplemented over time if new issues or aspects need to be considered.

The disclosure of this opinion would have an adverse effect on the ECB's interest in seeking further legal advice, given it could reasonably impact on the ECB's ability to have an open and full discussion with its legal advisers on controversial, sensitive or ambiguous matters relating to the decision-making framework associated with Article 14.4 of the ESCB Statute.

You have stated that *"in an event of a subsequent disclosure, frank, objective and comprehensive advice can be expected in every new opinion that follows"*. However, on the contrary, the Executive Board would like to note that, as a result of the more limited requests for advice or less open dialogue, a legal adviser may be restricted in its ability to provide advice that is frank or comprehensive.

b. *Document for internal use as part of deliberations and preliminary consultations within the ECB*

In your confirmatory application, you argue that the ECB public access regime *"protects requesting and receiving legal advice, not any further actions regarding this legal advice"*. In addition, you also claim that *"future deliberations in the ECB grounded on legal advices are not protected under Article 4 (2) ECB/2004/3"*.

The Executive Board wishes to clarify that the subject matter of the present application is the legal opinion commissioned to provide the ECB's decision-making bodies with further legal insight for their internal deliberations and reflections and, as such, is also protected under Article 4(3), first sub-paragraph, 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 opinion was intended to provide legal expertise to clarify the legal framework, 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, it serves 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 context.

The Executive Board agrees with the assessment of the Director General Secretariat that disclosure of the document 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, it could potentially affect the independence of Governing Council members, a fundamental principle of the ESCB protected by Article 130 TFEU, especially in respect of NCBs that are providing, or intend to provide, ELA or are performing other national functions.

*c. Overriding public interest and partial access*

In your confirmatory application you argue that since the legal opinion pertains to the "*interpretation of a norm (...) it frames the lawfulness and unlawfulness of actions taken on the ground of this norm*" and since "*every legal advice concerning the interpretation of a norm is made for future occasions [this] is why there is an overriding public interest in publication of the legal opinion*". In addition, you claim that "*the legal assessment – and consequently the establishment of a potentially unlawful decision or measures of the ECB- is the very purpose of public interest (...) especially in the case of decisions that are made in a highly contentious environment and in the context of political battles*".

*First*, the Executive Board would like to reiterate that the subject matter of the present confirmatory application is the external legal opinion and not any decisions of the ECB in application of Article 14.4 of the ESCB Statute.

*Second*, the Executive Board considers that given the nature of the legal advice, as described in detail above, and contrary to your claims, the legal opinion does not assess the lawfulness of any specific decision taken by the Governing Council. Therefore it cannot provide any insight to the public debate you refer to in your application.

The Executive Board wishes to clarify that, in order to justify the release of the legal opinion, the interests invoked have to be public and have to override the interests protected under Decision ECB/2004/3. Whilst the interests you invoked, namely the public's right to know that the measures adopted by the ECB in application of Article 14.4 of the ESCB Statute are legal, may be public, the Executive Board considers that they do not – neither individually, nor collectively – override the interests protected by Article 4(2), second indent and Article 4(3) second subparagraph of Decision ECB/2004/3, as described above. In other words, the Executive Board concludes that the public interest is more effectively served by the protection of the ECB's internal consultations and

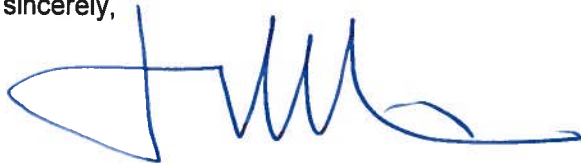
deliberations, where that is necessary in order to safeguard the ECB's ability to carry out its tasks, than it would be by the release of the requested documents. The Executive Board would also like to recall that an assessment whether the ECB's actions and measures comply with the applicable legal framework can only be made by the Court of Justice of the European Union. The Court is solely competent to rule on the legality of acts of the ECB, other than recommendations and opinions, inter alia in the context of actions for annulment brought on the basis of Article 263 TFEU.

The Executive Board does not consider it appropriate to grant partial access to the requested documents at this juncture. The aim pursued by refusing access to the legal opinion cannot be achieved by merely blanking out the passages which might harm the public interests described in detail above.<sup>2</sup> In addition, as already noted, even a more detailed elaboration on the confidentiality of the legal opinion bears the risk of disclosing the actual content of the document and, thereby, defeating the purpose of the exceptions invoked.<sup>3</sup>

For the sake of good order, I would like to inform you that, under Article 8(1) of Decision ECB/2004/3, in the event of total or partial refusal, the applicant may have recourse to the remedies provided for under Articles 263 and 228 TFEU.

We trust that you will share the present reply with the co-signatories of your application for access to documents.

Yours sincerely,

A handwritten signature in blue ink, consisting of a large, stylized initial 'J' followed by several loops and a long horizontal stroke at the end.

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<sup>2</sup> In 't Veld v Council, T-529/09, ECLI:EU:T:2012:215, paragraph 106

<sup>3</sup> 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.