



Emily O'Reilly
European Ombudsman

Mr Mario Draghi
President
European Central Bank
Eurotower
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60311 Frankfurt am Main
ALLEMAGNE

Confidential

Strasbourg, 16/12/2013

Proposal of the European Ombudsman for a friendly solution to complaint
1703/2012/(VIK)CK against the European Central Bank (ECB)

Dear Mr President,

My inquiry into the above complaint has found no maladministration by the ECB.

In my view, at the time of the complainant's request for access, the ECB was entitled to refuse access to the document concerned on the basis of the exceptions laid down in Article 4(1)(a) of the ECB Decision on public access to documents.

However, in line with the Ombudsman's mission to seek fair outcomes to complaints and to seek a positive-sum outcome that satisfies both the complainant and the institution concerned, please find enclosed a proposal for a friendly solution in the above case. This proposal aims to give the ECB an opportunity to further demonstrate its commitment to the principles of transparency and accountability.

The proposal is as follows:

At the time of the complainant's request for access, the ECB was entitled to refuse access to the Letter it sent to the Irish Finance Minister on 19 November 2010. The Ombudsman therefore finds no maladministration by the ECB. However, in view of the passage of time since the Letter was sent and the request for access was made, the Ombudsman invites the ECB now to consider disclosing the Letter, taking into account its specific content and prevailing monetary and economic conditions.



I would be grateful to receive your reply by 31 January 2014.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Emily O'Reilly', with a long horizontal flourish extending to the right.

Emily O'Reilly

Enclosures: (sent by e-mail)

- Proposal for a friendly solution



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Proposal

of the European Ombudsman for a friendly solution in the inquiry into complaint 1703/2012/(VIK)CK against the European Central Bank (ECB)

The background to the complaint

1. The present case concerns the European Central Bank's ('ECB') refusal to grant the complainant, a journalist, public access to a letter sent by the ECB's then President, Jean-Claude Trichet¹, to the Irish Finance Minister on 19 November 2010 (the 'Letter').
2. On 9 January 2012, the ECB rejected the complainant's application of 9 December 2011². On 12 January 2012, the complainant submitted a confirmatory application.
3. On 8 February 2012, the ECB rejected the confirmatory application. It argued that even a partial disclosure of the letter would undermine (i) the protection of the public interest as regards the monetary policy of the Union and (ii) the stability of the financial system in a Member State³. In its reply, the ECB noted in particular that the letter in question was *"a strictly confidential communication (...) expressing the ECB's Governing Council's concerns about the then extraordinarily severe and difficult situation of the Irish financial sector and their repercussions on the stability of the Irish financial sector and inviting the Irish government to take swift and bold action in order to address those concerns. With this letter, the ECB aimed at protecting the integrity of its monetary policy and the stability of the Irish financial*

¹ Mr Trichet was succeeded by Mr Mario Draghi as President of the ECB on 1 November 2011.

² Requests for access to documents to the ECB are governed by the Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents 2004/258/EC, OJ 2004 L 80, p. 42, as amended by Decision ECB/2011/6 of 9 May 2011, OJ 2011, L 158, p. 37.

³ Article 4(1)(a) of the ECB Decision on public access reads as follows:

Exceptions

1. The ECB shall refuse access to a document where disclosure would undermine the protection of:
(a) the public interest as regards:

...
— the financial, monetary or economic policy of the Community or a Member State ;

...
— the stability of the financial system in the Union or in a Member State.



system in the interest of the euro area citizen". According to the ECB, the Letter "was sent in the context of significant market pressure and extreme uncertainty on the prospect of the Irish economy, with substantial spillovers for the financial stability in the euro area as a whole. The confidential communication was aimed at discussing measures conducive to protecting the effectiveness and integrity of the ECB's monetary policy and fostering an environment that ultimately contributes to restoring confidence among investors in the overall solvency and sustainability of the Irish financial sector and markets, which, in turn, is of overriding importance for the smooth conduct of monetary policy. The ECB must be in a position to convey pertinent and candid messages to European and national authorities of the euro area in the manner judged to be the most effective to serve the public interest as regards the fulfilment of its mandate. If required and in the best interest of the public also effective informal and confidential communication must be possible and should not be undermined by the prospect of disclosure".

4. The complainant turned to the European Ombudsman on 20 August 2012.

The subject matter of the inquiry

5. The Ombudsman opened an inquiry into the following allegation and claim.

The ECB wrongly refused access to its letter dated 18 November 2010, addressed to the Irish Finance Minister, Mr Brian Lenihan.

The ECB should grant access to the relevant letter.

The inquiry

6. On 3 October 2012, the Ombudsman invited the ECB to submit an opinion on the complaint. On 12 December 2012, the Ombudsman's services inspected the ECB's files concerning the complaint. The ECB submitted its opinion on the complaint on 18 December 2012. The Ombudsman forwarded the opinion to the complainant for possible observations, which he sent on 28 February 2013.

The Ombudsman's analysis and provisional conclusions

Preliminary remarks

7. In his observations on the ECB's opinion, the complainant referred for the first time to two other letters to which he had requested access from the ECB in the context of another request submitted in August 2012. He argued that the ECB had refused to acknowledge the existence of these two letters, also sent to the Irish Minister and dated 4 and 12 November 2010, respectively. He considered that the ECB should acknowledge the existence of these letters and release them or, alternatively, provide reasons why it is unable to acknowledge their existence.

8. The Ombudsman recalls that her inquiry into the present case concerns the complainant's request for access to the Letter, and the ECB's refusal to grant



access to it. Any other requests for access to documents - however relevant they may be in helping the Ombudsman to have a clearer view of the situation- are not within the scope of the present inquiry. The Ombudsman will not, therefore, examine the complainant's arguments regarding the existence of the two further letters. If the complainant wishes to pursue further that issue, he could consider submitting a new complaint.

A. Alleged failure to provide access and related claim

Arguments presented to the Ombudsman

9. The complainant argued that the ECB's refusal was without merit and disagreed with its reasoning.

10. In its opinion, the ECB stated that, following the Ombudsman's opening of the present inquiry, it reexamined the complainant's request and confirmed its initial assessment. It reiterated the reasons already explained in detail in its previous letters to the complainant. The ECB pointed out that it is of crucial importance that it is in a position to convey pertinent and candid messages to European and national authorities in the manner judged to be the most effective to serve the public interest as regards the fulfillment of its mandate. In its view, effective informal and confidential communication with Member States must also be possible and should not be undermined by the prospect of disclosure.

11. The ECB argued that it had provided the complainant with sufficient reasons and complied with its duty to state reasons in full compliance with the principles of good administration. To enable the complainant to ascertain the reasons why it could not disclose the Letter it described its contents and its purpose in both its replies to the initial and confirmatory application. In addition, in a letter dated 21 November 2012, sent in the context of a further public access request, it provided the complainant with a more detailed account of the contents of the Letter.

12. In his observations, the complainant reiterated that there is a public interest in knowing if and in what form the ECB threatened the Irish government in order to persuade it to enter the bailout programme. He added that his request is the third in a series of related requests for disclosure of letters relating to the ECB's bailout negotiations with Eurozone member states. In his view, the language used by the ECB to describe the contents of the documents and the reasons for refusing access is identical in all cases. The complainant also argued that the ECB's wide discretion in applying Article 4(1)(a) of Decision ECB/2004/3 should comply with Article 10 of the European Convention on Human Rights ('the Convention') and the relevant case-law of the European Court of Human Rights ('ECHR'). The complainant further noted that, when he submitted his request, Ireland had already been in its bailout programme for more than 12 months and, that, therefore, there was no apparent threat to the Irish economy from speculative attack nor was there any risk of spillover to other Member States.

The Ombudsman's assessment leading to a friendly solution proposal

13. At the outset, the Ombudsman notes that Article 2(1) of Decision 2004/258 gives any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, a right of access to ECB



documents. That right is subject to certain limits based on reasons of public or private interest. Article 4(1)(a), second indent, of the Decision sets out that : *"[t]he ECB shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: ... - the financial, monetary or economic policy of the Community or a Member State"*.

14. With regard to the application of the exception relating to the public interest provided for in the second indent of Article 4(1)(a) of Decision 2004/258, the General Court has ruled that the ECB *"must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by that exception could undermine the public interest"*⁴.

15. The Ombudsman has indeed recognised in previous decisions the important public interest in candid communication between the ECB and the Government of a Member State. Although this interest is not, in itself, sufficient to exclude, on a general basis and in any circumstances, such communications from public knowledge, it is, nevertheless, a factor to be taken into account when performing the concrete assessment of a communication in order to ascertain whether its disclosure would actually jeopardise the legitimate interests protected by the ECB decision on public access to documents⁵.

16. Having inspected the Letter, the Ombudsman confirms that the ECB accurately described its content. She also considers that it was reasonable for the ECB to take the view that disclosing the Letter at the relevant time (i.e., at the time of the request for access) would have jeopardised the interests of Ireland and its financial sector by exposing it to speculative threats on the financial markets, thereby undermining its efforts to recover.

17. The complainant argued that there is a public interest in disclosure. Indeed, this public interest is inherent in the principle of transparency and the right of access to documents. However, the principle of transparency and the right of access are subject to defined exceptions. Article 4(1)(a) of Decision 2004/258 contains such exceptions. Furthermore, in contrast with the exceptions referred to in Article 4(2) and (3) of that decision, Article 4 (1) (a) makes no provision for an overriding public interest in disclosure⁶.

18. The complainant also referred to Article 10 of the European Convention on Human Rights ('the Convention') to support the argument that the Letter should be disclosed⁷. The Ombudsman notes that the case law of the European Court of Human Rights (ECtHR) has advanced towards a broader interpretation of the notion of the "freedom to receive information" and thereby

⁴ Case T-590/10 *Gabi Thesing and Bloomberg Finance LP v European Central Bank* [2012] not yet reported, paragraph 43.

⁵ Decision of the European Ombudsman closing his inquiry into complaint 2016/2011/AN against the European Central Bank, paragraph 24; Decision of the European Ombudsman closing his inquiry into complaint 2161/2011/ER against the European Central Bank, paragraph 22.

⁶ See also, Case T-590/10 *Gabi Thesing and Bloomberg Finance LP v European Central Bank*, cited above, paragraph 45.

⁷ *"Everyone has the right to freedom of expression and that this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence"*.



towards the recognition of a right of access to information⁸. However, the right guaranteed by Article 10 is not unconditional. Restrictions are permitted as long as (i) they are prescribed by law, (ii) pursue a legitimate aim, and (iii) are necessary in a democratic society. The Ombudsman considers that ECB's refusal in the present case complied with these requirements as explained in the case law of the ECtHR: (i) the refusal was based on a legal provision, that is Article 4(1)(a) of the ECB Decision, (ii) it pursued the aim of protecting the financial policy of Ireland and the stability of its financial system, and (iii) it was necessary in a democratic society.

19. In light of the above, the Ombudsman considers that the ECB was entitled to refuse even partial access to the Letter on the basis of the exceptions laid down in Article 4(1)(a) of the ECB Decision on public access to documents at the time of the complainant's request for access. **The Ombudsman therefore finds no maladministration by the ECB.**

20. That being said, the Ombudsman is conscious of the ECB's commitment to the principle of transparency and to demonstrating its accountability to European citizens⁹. Furthermore, in its opinion to the Ombudsman, the ECB stated that in cases where it concludes that a document cannot be disclosed, it will systematically reassess the level of information it can provide without undermining the public interest protected. In fact, the Ombudsman notes that, in relation to the present case, the ECB has already proceeded to such re-evaluation. In its letter of 21 November 2012, the ECB provided the complainant with further information regarding the content of the Letter¹⁰.

21. Although, in the present case, the Ombudsman has found no maladministration in the ECB's handling of the complainant's request, that request was made nearly two years ago. More than three years have passed since the Letter was sent. The Ombudsman is also aware, from inspection of the Letter, that the ECB has already disclosed its substance to the complainant. In these circumstances, the Ombudsman believes that it would be appropriate, in line with the Ombudsman's mission to seek fair outcomes to complaints and to seek a positive-sum outcome that satisfies both the complainant and the institution concerned, to invite the ECB now to consider disclosing the Letter itself on the basis of the specific content of the document and prevailing monetary and economic conditions. This proposal aims to give the ECB an opportunity to further demonstrate its commitment to the principles of transparency and accountability.

⁸ See most recently the judgment of 28 November 2013 in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines Wirtschaftlich Gesunden Land- und Forst-wirtschaftlichen Grundbesitzes v. Austria* (Application no. 39534/07).

⁹ See especially the follow-up given by the ECB to the Ombudsman's further remark in Case 2016/2011/AN.

¹⁰ "In line with the messages which it has consistently delivered to the public, the ECB encouraged the Irish government to commit to taking decisive action in the areas of fiscal consolidation, structural reform and financial sector restructuring, including the recapitalisation of banks where necessary. Similarly, the ECB also asked for reassurance that the Irish government would take the necessary action to ensure that the balance sheet of the Central Bank of Ireland remained protected, in line with the principle that liquidity could only be provided against adequate collateral."



B. The proposal for a friendly solution

At the time of the complainant's request for access, the ECB was entitled to refuse access to the Letter it sent to the Irish Finance Minister on 19 November 2010. The Ombudsman therefore finds no maladministration by the ECB. However, in view of the passage of time since the Letter was sent and the request for access was made, the Ombudsman invites the ECB now to consider disclosing the Letter, taking into account its specific content and prevailing monetary and economic conditions.

Emily O'Reilly
Done in Strasbourg on 16/12/2013

MALLEA JIMENEZ Juan Manuel

From: EORegistry
Sent: 16 December 2013 11:00
To: 'info@ecb.europa.eu'
Subject: Complaint 1703/2012/(VIK)CK - CONFIDENTIAL
Attachments: 1703-2012-(VIK)CK-S2013-185014-CONF.pdf

Dear Madam, Dear Sir,

In relation to the above mentioned complaint, please find enclosed :

- a copy of the European Ombudsman's letter to Mr Mario Draghi.
- a copy of the annexes mentioned in the letter addressed to Mr Mario Draghi.

Yours faithfully,

Juan Mallea

The Registry