



EUROPEAN CENTRAL BANK

Annex 2 to LS/PvdH/09/21

EXCERPTS OF DOCUMENT SEC/EB/06/37/34
DG-LEGAL SERVICES
DG-SECRETARIAT AND LANGUAGE SERVICES
DG-HUMAN RESOURCES, BUDGET AND ORGANISATION

CONFIDENTIAL:

To: The Executive Board

Date: 28 July 2006

Subject: ACCESS TO HR POLICY/EMPLOYMENT RELATED DOCUMENTATION AND DECISIONS

The current memo (jointly prepared by DG-H, DG-L and DG-SL) outlines a proposal for ensuring the right of access (for the Staff Committee or the staff member concerned) to reasoned decisions relating to adoption of HR policies or other employment related documentation¹.

1. Main elements of the proposal

(i) No direct access to documents

There is *no legal requirement* for the ECB to provide access to *internal documents* submitted to the decision-making bodies for consideration, since they are to be seen as “preparatory documents” and as such they are exempted from the right of access in order to grant the decision-making bodies space to think². In-house legal advice provided by DG-L is similarly covered by an attorney-client privilege³.

Access to Conditions of Employment *related decisions taken by the Governing Council* could be denied on the basis of Article 10.4 of the ESCB Statute which foresees that the proceedings of the Governing Council are confidential.

(ii) Provision of information in a separate format: two options

[...]

2. Background information

In 2004 and 2005 SEC has received requests from (i) several members of the Staff Committee acting under their personal name as EU citizens, for access to documentation (and summary proceedings) relating to Executive Board and Governing Council decisions on general HR policies and (ii) members of staff for access to Executive Board documentation and decisions taken by the Executive Board which have affected their personal employment relation with the ECB. The requests were based on the ECB Decision on public access to ECB documents (ECB/2004/3) by virtue of their Union citizenship. The ECB has rejected these requests

¹ This approach will also apply to decisions taken upon delegation by the Executive Board member to whom DG-H reports (here: option b would in any case be followed).

² This exemption is laid down in Article 4.3 of the ECB Public Access Decision and reflects a more general application.

³ See e.g. the ECJ judgment in *Turco v Council*, T-84/03, para. 62 and 74.

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and the applicants were informed that such type of requests are not to be dealt with under the regime of Decision ECB/2004/3 arguing that the Decision governs the access of the *general public* to ECB documents⁴. It is also noted that the access to such documents is not covered by the AC 07/2004 on the management and confidentiality of ECB documents (where the access rights of staff members are based on the concept of 'legitimate interest' as far as his/her assigned tasks or his/her professional knowledge and skills are concerned). As a follow-up to the above requests, the Executive Board at its 412th meeting (on 27 May 2005) invited DG-H to spell out the rules for access to documents by ECB staff members in relation to the implementation or management of their individual employment relation by the employer ECB.

3. Underlying legal framework

Article 1 of the EU Treaty stipulates that "*decisions are taken as openly as possible and as closely as possible to the citizen*" aiming at a high degree of transparency in order to enhance the administration's legitimacy, effectiveness and accountability. The principle of good administration includes the right of every affected person to (i) be heard, (ii) have access to his/her files and (iii) the obligation for an administration to publish (or notify) adopted decisions. Furthermore, it follows from consistent ECJ case law that decisions must be reasoned.⁵ In addition, the EU Charter of Fundamental Social Rights of Workers, the EU Charter of Fundamental Rights, as well as various employment law Directives contain general stipulations on employees' rights to consultation of their elected representatives regarding contracts of employment and working conditions, as well as to be informed of all employment decisions of a general nature⁶.

Application of these principles would mean that (i) the Staff Committee should have access to Executive Board decisions on all general employment law topics⁷; (ii) similarly, each member of staff should have the right of access to those Executive Board decisions which directly relate to his/her employment relation with the ECB and (iii) all such decisions should be duly motivated.

The Staff Committee's access to Conditions of Employment related decisions taken by the Governing Council could be denied on the basis of Article 10.4 of the ESCB Statute which foresees that the proceedings of the Governing Council are confidential.

The *Executive Board* is invited to:

- (a) decide which option should be followed for addressing requests for access to Executive Board "decisions" on employment related matters of general nature or matters which directly relate to staff members' employment relation with the ECB;**
- (b) take note that documents submitted to the decision-making bodies for consideration are to be seen as "preparatory documents" and as such they are exempted from the right of access in order to grant the decision-making bodies space to think.**

⁴ The ECB has argued in previous similar cases that the Decision was not applicable to requests by staff members due to its ratio legis. However, it is stressed that so far the Court has not yet had the opportunity to rule on this question. It should also be noted that even the assessment memo outlined that even in the case the Decision ECB/2004/3 were to be applicable disclosure of the requested documents would have been denied since it would undermine the protection of the public interest as regards the confidentiality of the proceedings of the ECB's decision making bodies as protected by Article 4(1) of the that Decision.

⁵ The duty to state reasons was confirmed by the ECJ and the CFI inter alia in *Unectef v Heylens et al.*, case 222/86, para. 15-17; *Commission v. Sytraval*, case 367/95, para. 67; *Suproco NV v. Netherlands*, case T-101/03, para. 19, 20; *Sunrider v. OHMI*, case T-124/02, para. 73; *Corsica Ferries v. Commission*, case T-349/03, para. 62; *TeleTech v. OHIM*, case T-288/03, para. 24, 25.

⁶ Inter alia Directive 89/391/EEC on the safety and health of employees at work and Directive 94/45/EC on European Works Councils. Directive 2002/14/EC (recital 6) assumes that decisions which affect employment and working conditions shall be made public.

⁷ Article 14 of the MoU between the ECB and the Staff Committee requires the President or his representative to inform the Staff Committee and staff about the final decision without delay.