

Jean-Claude TRICHET

President

Personal & confidential

[]

LS/JCT/08/1167

18 July 2008

Public access request for ECB documents

Dear [],

On 2 July the ECB received your confirmatory application for public access to (i) the decisions taken by the ECB in relation to the recruitment of a staff member as adviser in the Oversight Division of the Directorate General Payment Systems and Market Infrastructure (DG-P) with effect from 1 April 2008 along with the reasons for which such decisions were taken (including the promotion to the I: band level); (ii) the Executive Board and Governing Council meetings' minutes and decisions (where appropriate) as to the appointments of the staff members mentioned in TABLES A and B *infra*, together with the relevant documents produced by DG-P and details of the relevant selection panels so as to justify/request those appointments; (iii) the statistics on the upgrades, *ad personam* advancement, appointments and promotions which were implemented without respecting the procedure laid down by the Administrative Circular 02/2001 (rev.) on "Promotion and Additional Salary Advancement" (since the start of the ECB). In addition, these data should be given per gender and per nationality. They should also be further refined by business area. However, in order to protect personal data, this information could be anonymised; (iv) the Executive Board and Governing Council meetings' minutes and decisions (where appropriate) on the ECB Social Dialogue since 1998 and, *inter alia*, on the press release published in October 2000; and (v) the Executive Board and Governing Council meetings' minutes and decisions (where appropriate) as to the Staff Committee time dispensation, Staff Committee budget and Staff Committee relevant requests, which have been addressed to DG-H and/or the Executive Board member(s) since 1998.

I should like to inform you that the Executive Board has thoroughly considered your request as well as the assessment which has been made and the decisions which have been taken in response to your original application and concluded as follows:

(1) the Executive Board hereby confirms the assessment and the decisions of the Director General Secretariat and Language Services (DG/SL) (laid down in his letter of 5 June 2008) that:

- your requests under points (i), (ii), (iii) and (v) above cannot be regarded as governed by the legal framework applicable to public access requests in line with ECB Decision ECB/2004/3, since this Decision governs the access of the public to ECB documents and has been adopted to enhance the administration's legitimacy, effectiveness and accountability towards the citizens. Moreover, these requests relate to documents that could not be deemed as having a direct bearing on the citizens in general, but rather as being of a specific interest to your client(s) since they relate to the employment relationship between the staff member and the ECB or to general ECB employment law topics as concern the Staff Committee; and
- your request under point (iv) above is dealt with as a public access request. It should be clarified that the reply of the DG/SL was based on a thorough assessment concluding that the ESCB Social Dialogue is an issue on which the ECB acts in its capacity as legislator and administrator of public affairs which could be deemed as having a direct bearing on citizens in general (i.e. being an issue of general interest).

Moreover, the Executive Board notes that the regime covering access to decisions which relate directly to the employment relationship between the staff member and the ECB or, as concerns the Staff Committee, to general ECB employment law topics would provide for access to documents beyond the scope of the public access regime under Decision ECB/2004/3 and, as a result, is favourable towards your client(s).

(2) the Executive Board hereby confirms the assessment and the decisions of the DG/SL (laid down in his letter of 5 June 2008) with regard to the request for access to decisions on the ESCB Social Dialogue. In this context the Executive Board wishes to provide the following clarifications in reply to the new/additional arguments provided in your confirmatory application:

- with regard to your arguments that *“the Director General (SL) does not indicate in which way and to what extent the disclosure of Executive Board and Governing Council meetings' minutes would undermine the protection of the confidentiality of the proceedings within these bodies. According to settled case-law, public access to documents is the principle, whereas refusal is the exception. The ECB must examine in concreto if a document undermines one of the public interests protected by the exceptions allowing for the refusal of access. For these exceptions to be applicable, the risk to undermine a public interest must be reasonably foreseeable and not only merely hypothetical. In light of the above, the motivation is clearly insufficient”* and that *“according to the Statute of the ESCB, only the Governing Council proceedings are confidential. There is therefore no reason to refuse, without any further motivation, access to the minutes of the Executive Board meetings”*, the Executive Board confirms the assessment of the DG/SL and would like to clarify that in order to address your/your client(s) interest in obtaining the relevant information, the DG/SL in his reply conveyed to you the faithful content (i.e. complete textual quotations) of the relevant decisions taken by the Governing Council and the Executive Board since 1998 recorded in the relevant minutes/summary proceedings, as applicable. The Executive Board's considerations as regards the procedural preparation and submission

of documentation to the Governing Council have not been disclosed since they relate to internal deliberations/discussions within the ECB and as such they are considered “preparatory documents”. Their aim is to provide to the ECB the necessary background information and to enable the decision-making bodies to have the necessary “thinking space” to reflect on preparing their decisions. The ECB has looked into the issue of whether there is an “overriding public interest” in their disclosure and could not identify any such overriding public interest. Even considering that some time has passed since these internal deliberations, there is still a need to protect these internal deliberations owing to their ongoing sensitive nature (in view of, in particular, the need to safeguard the continuation of open and unprejudiced relations between the parties of the ESCB Social Dialogue). Accordingly these documents are not to be disclosed.

- with regard to your arguments that *“as to the requested decisions of the Executive Board and the Governing Council, we would like to underline that the documents provided are incomplete. The Annex to Mr. van der Haegen' s letter only contains summaries of decisions and does not, therefore, satisfy our request. In addition, the data provided does not seem to cover all possible occasions where the issue of social dialogue was discussed by the Board and the Council. I note that ESCB social dialogue takes normally place twice a year, while there are years for which no extract is provided. It seems difficult to believe that the issue was not discussed at all during these years. In particular, the general meeting of 14 September 2000 is mentioned while there is no specific data reported for that meeting”*, the Executive Board confirms the assessment of the DG/SL and would like to clarify that the DG/SL in his reply has informed you that *“in addition to the decisions referred to above, the Governing Council has also “taken note” of agendas and reports or closing statements of all meetings of the ESCB Social Dialogue that have taken place so far”*. Accordingly, since no decisions were taken on these occasions, the faithful content of the relevant decision part of the minutes/summary proceedings has not been provided.

In view of the fact that you now indicate that you also wish to receive the relevant “decisions” of the cases where the Governing Council has also “taken note” of agendas and reports or closing statements of the ESCB Social Dialogue, the Executive Board decided to convey to you the faithful content (i.e. complete textual quotations) of these considerations by the Governing Council as recorded in the relevant minutes (please refer to the enclosed Annex). Furthermore, I should like to inform you that (i) the agenda and report of the 1st ESCB Social Dialogue meeting have not been submitted to the Governing Council (they have been considered by the General Council) and (ii) the agendas and reports or closing statements of the ESCB Social Dialogue for the 3rd, 4th and 9th meetings have only been circulated to the Governing Council for information, hence there is no reference in the Governing Council minutes. A copy of the agenda and the closing statements of the 17th meeting of the ESCB Social Dialogue (considered by the Governing Council on 19 June 2008, i.e. following the reply to your original application) is also enclosed for reasons of completeness.

- with regard to your arguments that *“the Director General finally refused to disclose other ECB documents related to the ESCB Social Dialogue on the basis of Article 4(3) of Decision ECB/2004/3 for the reason that “The ECB has also thoroughly assessed all other ECB documents related to the ESCB Social Dialogue and came to the conclusion that they relate to internal deliberations/discussions within the ECB and as such they are considered ‘preparatory documents’. Their aim is to provide to the ECB the necessary background information and to enable the decision-making bodies to have the necessary ‘thinking space’ to reflect on prepare their decisions”*. The motivation is again clearly insufficient. According to settled case-law, the

motivation underlying a decision of refusal to grant access to documents must allow the applicant to understand the reasons of such refusal and whether these reasons are well founded. In this case, the ECB does not indicate which documents are meant by "all other ECB documents". Such imprecision does not therefore allow our client to check whether the justification put forward not to disclose them is accurate or not. In addition, the data on the ECB social dialogue and on the ESCB social dialogue constitutes a major public interest which overrides the interest of not disclosing preparatory documents. Thus, the ECB did not properly balance the interests at stake", the Executive Board wishes to underline that, as stated in the original application submitted to the ECB, you have requested access to ... (iv) the Executive Board and Governing Council meetings' minutes and decisions (where appropriate) on the ECB Social Dialogue since 1998 and, inter alia, on the press release published in October 2000. It should be clarified that, with the aim of addressing your/your client(s) interest in obtaining the relevant information (in line with the principle of good administration), the reply of the DG/SL was based on a thorough assessment not only of all relevant decisions (as stated in your request) but also of the documentation submitted to the decision-making bodies. It is also in line with the principle of good administration that the DG/SL (i) conveyed to you copies of the agendas and reports or closing statements of all meetings of the ESCB Social Dialogue that have taken place so far; and (ii) informed you about the existence of preparatory documentation thereby conveying his assessment for the non-disclosure of this material.

The Executive Board would like first to indicate that by "*all other ECB documents*" the DG/SL was referring to the Executive Board's internal deliberations and second to confirm the assessment of the DG/SL, thereby clarifying that in these cases the Executive Board did not take any decision on substance but simply acted in its capacity of preparing the meetings of the Governing Council in line with Article 12.2 of the ESCB Statute. In this context, I should like to note that the ECB is aware of the limits of the protection provided under Article 4(3) of Decision ECB/2004/3, but it could not identify any overriding public interest in the disclosure of these deliberations. Even considering that some time has passed since these internal deliberations, there is still a need to protect these internal deliberations owing to their ongoing sensitive nature (in view of, in particular, the need to safeguard the continuation of open and unprejudiced relations between the parties of the ESCB Social Dialogue).

- with regard to your arguments that *(e) the ECB did not envisage the possibility to grant partial access to the documents, as according to Article 4, §5, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released. Unless the refusal is duly motivated, all documents on ECB and ESCB social dialogue should therefore be disclosed*", the Executive Board wishes to underline that, as stated in the original application submitted to the ECB, you have requested access to ... (iv) the Executive Board and Governing Council meetings' minutes and decisions (where appropriate) on the ECB Social Dialogue since 1998. Accordingly, your request met with a positive response since you have been provided with the faithful content (i.e. complete textual quotations) of all decisions taken by the Governing Council and the Executive Board since 1998 recorded in the relevant minutes/summary proceedings, as applicable. Your statement that "partial disclosure of all documents relating to the ESCB Social Dialogue has not been considered" is procedurally and factually wrong since (a) you did not request these documents originally and (b) full access has been granted to the decisions you originally requested. The Executive Board wishes to note that, even if it were to be argued that your request for disclosure of all ESCB Social Dialogue documentation were to be considered as a new/original application, the reply of the DG/SL

was, in any event, based on a thorough assessment of all relevant decisions and documents and took into consideration the possibility of partial disclosure (please also refer to the assessment outlined in the previous paragraph).

Finally, I should like to inform you that the ECB uses the term “ESCB Social Dialogue” for the Social Dialogue between employee representatives of the ESCB and the ECB as established in the 1999 agreement on the Social Dialogue with regard to the ESCB. The ESCB Social Dialogue covers the exchange of information and discussion on issues which have or will have a major impact on the employment situation in the central banks and the ECB and are the consequences of the tasks and activities of the ESCB. As such, it does not cover issues relating to the conditions of employment or working conditions of the NCBs or the ECB. As you are now referring more explicitly to “documents on the ECB Social Dialogue” (in addition to documents on the ESCB Social Dialogue), you are kindly requested to clarify the precise content/scope of your request. Please note that your reply/clarification would be treated as a new/original application for access to ECB documents.

Furthermore, I should like to draw your attention to the fact that in line with Article 10 of ECB Decision ECB/2004/3 *“documents released shall not be reproduced or exploited for commercial purposes without the ECB’s prior specific authorisation. The ECB may withhold such authorisation without stating reasons.”* Moreover, in line with Article 8.1 of the said ECB Decision ECB/2004/3 in the event of total or partial refusal, the applicant may have recourse to the remedies open to him/her in accordance with Articles 230 and 195 of the Treaty.

With kind regards,

Jean-Claude Trichet

[]

ECB-PUBLIC