



EUROPEAN CENTRAL BANK

EUROSYSTEM

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The ECB's accountability and transparency in practice

* The views expressed are those of the author and do not necessarily reflect those of the ECB.



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- 1 Accountability and Transparency after the Financial Crisis
- 2 European Union legal framework on public access to documents
- 3 The ECB's public access regime
- 4 Public access requests: trends and experiences
- 5 Court cases on public access to ECB documents
- 6 Inquiries by the European Ombudsman on ECB public access decisions

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Accountability and transparency of monetary and financial policies: main components

- 1. Roles, responsibilities and objectives of institutions**
- 2. Formulation and reporting of policy decisions**
- 3. Public access to information and documents**
- 4. Assurance of the integrity of the institutions and staff**

Drivers for accountability and transparency of monetary and financial policies since the crisis (1)

- 1. Powers of the ESAs** (regulatory standards, emergency decisions, mediation)
- 2. Macro-prudential oversight of the ESRB** (recommendations and warnings)
- 3. Role of the ECB** (involvement in country programmes, provision of ELA by NCBs, forward-guidance, non-standard measures)

Drivers for accountability and transparency of monetary and financial policies since the crisis (2)

- 4. Transfer of banking supervision and resolution powers to the SSM and SRM**
- 5. Granting of independence to the SSM and SRM**
- 6. Management of European funds (supervisory fees, SRF)**

Drivers for accountability and transparency of monetary and financial policies since the crisis (3)

7. Increased judicial litigation at European and national levels

8. European Ombudsman

Developments in accountability and transparency frameworks:

- **Establishment of the ESAs and the ESRB in 2010:**
 1. *Accountability to the Parliament and Council;*
 2. *Reporting obligations, confidential discussions with the Parliament;*
 3. *Due process requirements (impact assessment, public consultations)*
- **Establishment of the Banking Union (SSM and SRM) in 2013:**
 1. *Enhanced accountability to the Parliament and the Council (Inter-Institutional Agreements with the Parliament; MoU with the Council);*
 2. *Reporting to national parliaments;*
 3. *Due process requirements (right to be heard, access to file)*

Accountability and transparency initiatives of the ECB:

1. Publication of monetary policy accounts (since January 2015):

- Provide detailed explanation of the rationale of policy decisions, discussion, and main arguments;
- Acknowledgement that judgement plays a greater role in decision-making than before;
- Complex and more consequential trade-offs in crisis conditions (Draghi, 2014);

Accountability and transparency initiatives of the ECB:

- 2. Publication of calendars of the Members of the Executive Board and the Chair of the Supervisory Board (since February 2016)**
 - Following public access requests, provide a regular and systematic disclosure of appointments with external parties

- 3. Setting-up of a Compliance and Governance Office responsible for public access requests for documents (since 2015)**

Public access regime to ECB documents

In March 2004 the ECB adopted its own legal framework on public access to ECB documents, Decision ECB/2004/3:

- based on Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents
- providing rules, deadlines and possibilities of appeal against a decision in case of partial or non-disclosure.
- protecting sensitive documents related to the ECB's specific tasks and competences (e.g., monetary policy, financial stability, banknotes and banking supervision)
- **amended in 2011** (ESRB - stability of the financial system in the Union or in a Member State) **and 2015** (ECB's role in financial crisis and prudential supervision)

ECB Public access regime

As a rule, full access to ECB documents should be granted. Partial or non disclosure should be the exception and **duly justified**.

Article 4 of the ECB's Decision on public access lists the possible **exceptions** on the basis of which the ECB can refuse disclosure to protect public or private interest.

Exceptions can be **absolute** or **qualified** (i.e. non disclosure unless there is an overriding public interest in disclosure).

e.g. **absolute**: confidentiality of the proceedings of the ECB's decision-making bodies;
financial, monetary or economic policy of the Union or a Member State;
integrity of euro banknotes

e.g. **qualified**: commercial interests of a natural or legal person;
purpose of inspections, investigations and audits

ECB Public access regime

Two-stage procedure to ensure good administrative practice

Within 20 working days from the receipt of the application the **Director-General Secretariat** of the ECB shall either grant access to the document requested or, in a written reply, state the reasons for total or partial refusal

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.

Remedies:

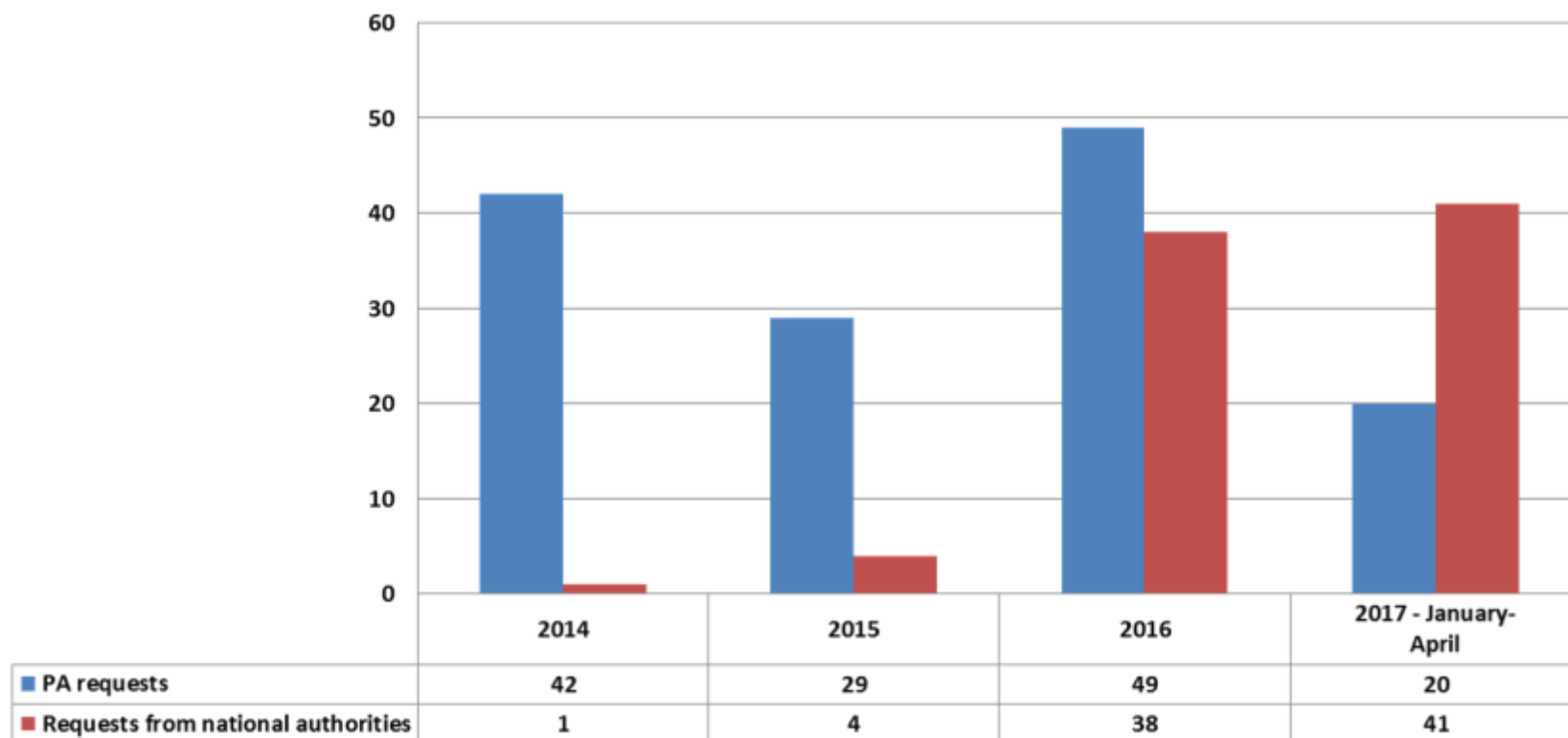
In case of a negative reply to a confirmatory application the applicants are entitled to institute **court proceedings** and/or submit a complaint to the **European Ombudsman**, under Articles 263 and 228 of the Treaty, respectively

Public access: trends and experience

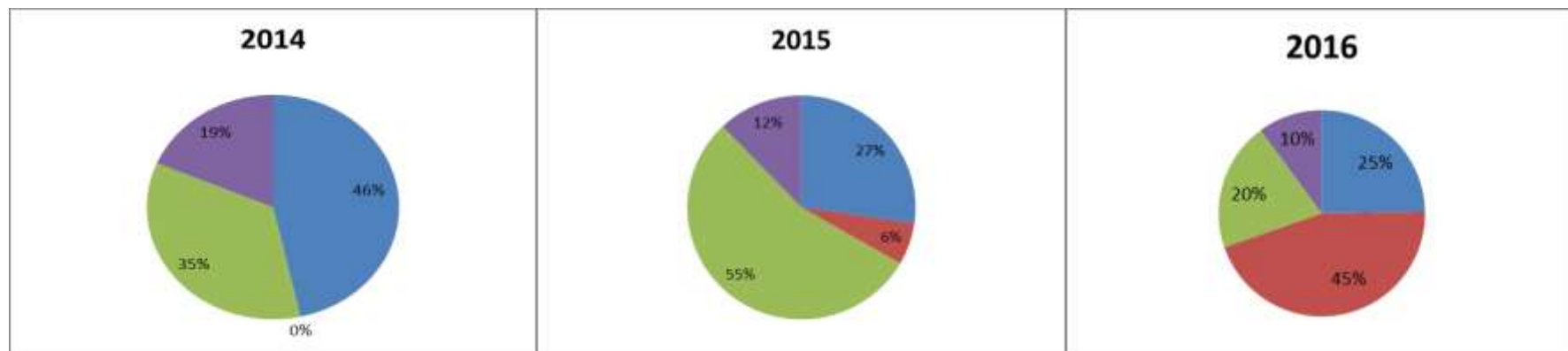
Requests are often linked to changing role of ECB in view of financial crisis and SSM related activities:

- **highly complex, sensitive and wide** in scope
- **shift in origin** of requestors (increased use of NGO platforms; public access regime used as means of public scrutiny or as alternative to access to files e.g. shareholders of supervised credit institutions)
- increasing number of requests for disclosure from **national authorities** (parliamentary investigation committees, prosecutors, courts, state auditors)
- increasing demand for transparency in “legislative” activities (also actively supported by the European Ombudsman and MEPs)
- need for recourse to **general presumption of non accessibility for SSM supervisory files** (not yet tested before EU Court of Justice)

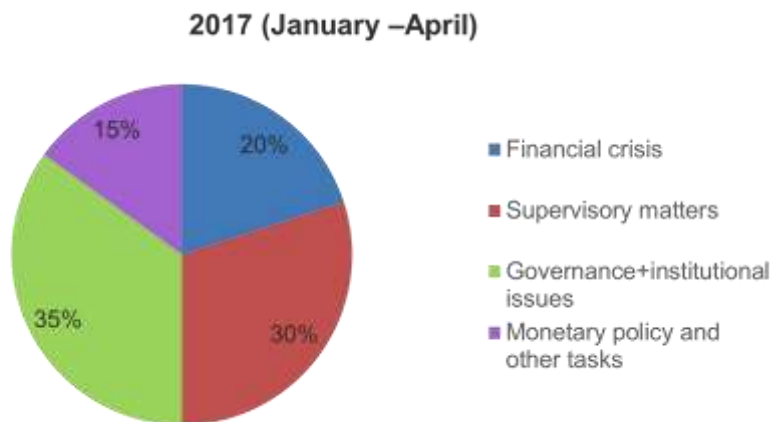
Public access requests and consultations by national authorities on disclosure of ECB/ESCB documents (2014 - April 2017)



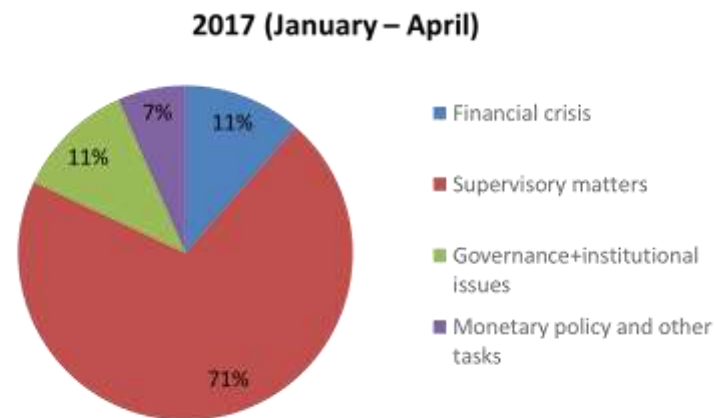
1. Topics of public access requests/consultations by national authorities on disclosure of documents 2014-2016



2. Topics of public access requests in 2017



3. Topics of public access requests and national consultations in 2017



Court cases (1): use of discretion

T-590/10 P- Thesing and Bloomberg Finance vs ECB – 29 November 2014

Issue: ECB's refusal to grant access to documents relating to the Greek government's debt management

Reason for non disclosure: protection of the public interest as concerns the economic policy of the Union and the Hellenic Republic.

Judgment: “[...]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. The European Union judicature's review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers ”

Court cases (2): definition of document

T-436/09 – Dufour v ECB - 26 November 2009

Issue: ECB's refusal to grant access to databases needed for compilation of reports on staff recruitment and mobility

Reason for non/partial disclosure: no existing document - information would have to be systematised and analysed and a new document would have to be created.

Judgment: “[...] **the ECB and the Commission are mistaken** in their implicit yet clear assertion that the data contained within a database, taken as a whole, are no more than a meaningless mass. Those data are stored, not haphazardly or without order, but in accordance with a precise classification system, which, by its complexity, makes the creation of multiple relationships between the data items possible. [...] conclusion that **the entirety of the data contained in an ECB database constitutes a document** within the meaning of Article 3(a) of Decision 2004/258 and may consequently form the object of an application for access made pursuant to that decision.”

Court cases (3): use of discretion

T-376/13 – Pension fund of Schleswig-Holstein Dental Association v ECB - 4 June 2015

Issue: ECB's refusal to grant access to Annexes to 'Exchange Agreement of 15 February 2012 among the Hellenic Republic, the ECB and the Eurosystem NCBs

Reasons for non disclosure: protection of the public interest as regards
1) financial, monetary or economic policy of the EU or a Member State; 2) internal finances of the ECB and the Eurosystem NCBs; and, 3) stability of the financial system in the EU and in a Member State

Judgment: application dismissed in its entirety.

ECB enjoys a wide discretion in determining whether the public interest would be undermined by granting the access to documents **where the financial, monetary or economic policy of the EU (or the Member State) is concerned.**

Judicature's review of the legality is limited to verifying whether
(1) the procedural rules and the duty to state reasons have been complied with,
(2) the facts have been accurately stated and, (3) there has been a manifest error of assessment or a misuse of power

Pending court cases (1)

T-116/17 Spiegel vs ECB

Issue: Request for access to same documents as in 2014 case T-590/10 P-Thesing and Bloomberg Finance (ECB asked to review its disclosure policy in view of the lapse of time).

ECB's refusal to grant access to documents relating to the Greek government's debt management : breach of duty to state reasons for the non-disclosure and that and misinterpretation of exceptions applied to justify non-disclosure

Reasons for non disclosure: protection of the public interest as regards
1) monetary or economic policy of the Union or a Member State; 2) stability of the financial system in the Union or a Member State, 3) protection of internal deliberations and preliminary consultations within the ECB.

Pending court cases (2)

T-251/15 Massa Insolvente da Espirito Santo Financial (Portugal), SGPS, SA (Lisbon, Portugal) ;

T-730/16 Espírito Santo Financial Group SA (Luxembourg, Luxembourg)

Issue: ECB's refusal to grant **full** access to the Governing Council Decision of 1 August 2014 on the suspension of Banco Espirito Santo (BES) from access to monetary policy credit instruments and to any documents related to this Decision: **breach of duty to state reasons** for the non-disclosure and **misinterpretation of exceptions** applied to justify non-disclosure.

Reasons for non disclosure: protection of 1) public interest as regards financial stability and monetary or economic policy; 2) the confidentiality of the proceedings of the Governing Council; and 3) commercial interests)

European Ombudsman inquiries

Complaint 1703/2012/(VIC)CK

Issue: ECB's refusal to grant access to letter sent from the ECB President to the Irish Finance Minister in 2010

Reasons for non disclosure: protection of the public interest as regards 1) financial, monetary or economic policy of the EU or a Member State and 2) the stability of the financial system in the EU and in a Member State)

EO findings: **No maladministration:** disclosing the letter at the time (2011) would have jeopardised the interests of Ireland and its financial sector **but** **proposal for a friendly solution:** more than three years later, the ECB should reconsider disclosing the letter in the light of changes in the monetary and economic conditions of the eurozone.

Following the Governing Council's commitment in March 2014 to re-evaluate disclosure of the letter at a more advanced stage of the post-programme surveillance, the Ombudsman issued a press release entitled "the Governing Council wasted an opportunity for openness and transparency".

The ECB published the letter and related documentation on 6 November 2014.

European Ombudsman inquiries

Complaint 1742/2015/OV

Issue: ECB's refusal to grant access to documents relating to the Asset-Backed Securities Purchase Programme and the Third Covered Bond Purchase Programme

Reasons for non disclosure: protection of 1) financial, monetary or economic policy of the Union or a Member State and 2) commercial interests of a natural or legal person, including intellectual property

EO findings: **No maladministration.** On the basis of the additional information during a meeting with the ECB, the European Ombudsman concluded that the the ECB's refusal to grant access to detailed data was justified.

Conclusion:

1. [...]

Thank you very much for your attention

Accountability framework

The Treaty provides that the ECB is primarily accountable to the European Parliament as the representation of EU citizens, but also has to report regularly to the Council of the EU, which represents Member State governments. This is also reflected in the Statute of the ESCB

Reporting requirements (Art. 284 of TFEU and Art.15 of the ECB Statute)

- quarterly activity report
- weekly consolidated financial statement of the ESCB, annual accounts,
- annual report, which must be presented to the Council, the Commission, the Parliament, and the European Council

Accountability framework

The ECB has developed a **strong and comprehensive** accountability framework over the years, which **goes beyond** the Treaty requirements:

Hearings and exchanges of views on quarterly basis with Committee on Economic and Monetary Affairs of the European Parliament (ECON)

Written questions from MEPs

Annual Report presented to the European Parliament in a dedicated session of ECON and on the occasion of a plenary debate.

Specific regime for banking supervision tasks set down in SSM Regulation: (i) Interinstitutional Agreement with the European Parliament
And (ii) Memorandum of Understanding with the Council of the EU

European Union legal framework on public access

Article 15.3 of the Treaty on the Functioning of the European Union

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a **right of access to documents** of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

The Court of Justice of the European Union, the **European Central Bank** and the European Investment Bank shall be subject to this paragraph **only when exercising their administrative tasks**.

European Union legal framework on public access

Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents

- defines the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission documents [...] in such a way as to ensure the widest possible access to documents,
- establishes rules ensuring the easiest possible exercise of this right, and
- promotes good administrative practice on access to documents

2001 Joint Declaration of the European Parliament, the Council and the Commission to other EU institutions and bodies regarding adoption of internal rules on public access to documents which take account of the principles and limits in Regulation No 1049/2001