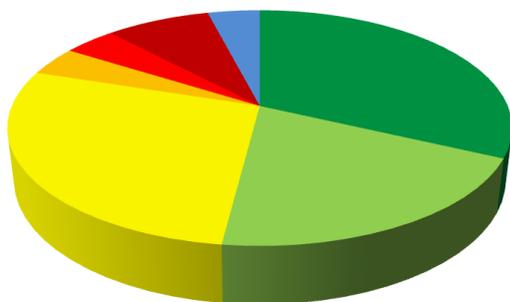


Report on the European Central Bank and the right of access to EU documents

Requests to the European Central Bank

AskTheEU.org 2011-2013



DATA SUMMARY

Of the 25 access to documents requests made by citizens to the European Central Bank via AsktheEU.org between September 2011 and August 2013, just eight were successful in obtaining all or some of the information requested.

In three instances there was full disclosure of the documents requested. The other five requests were successful even though no documents were provided because the requested correspondence did not exist or the meetings enquired about had never taken place.

Five requests concerned documents that the ECB did not hold, and requesters were generally referred to another institution which was likely to possess those documents.

There were seven partial refusals to provide information based on the exceptions found in the ECB's access to documents rules, and two refusals to provide any information at all.

The incomplete response avoided answering questions about a former staff member with the evasive answer "we are not in the position to provide you with this information."

Just once was the outcome of a request "administrative silence" as the ECB did not send the requester any acknowledgement of receipt and no response has been provided to date. At the time of publishing this report, there was still one request awaiting response.

WHAT DO EUROPEAN CITIZENS ASK ABOUT?

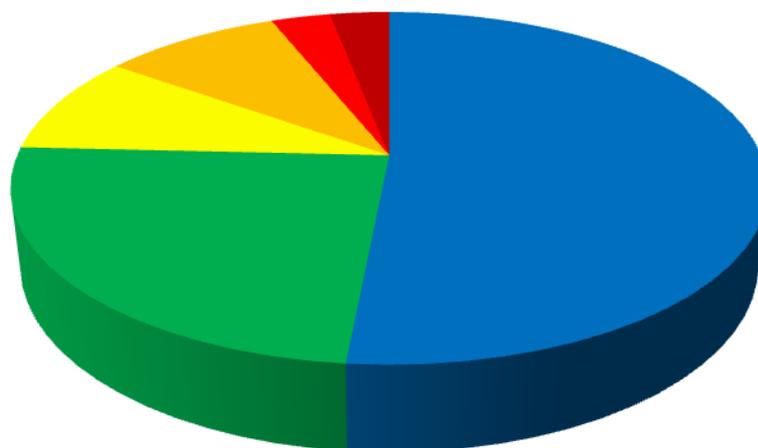
A majority (17 out of 25) of the requests submitted to the ECB between 2011-2013 sought access to information between Member States (in most cases, the national Ministry of Finance) and the European Central Bank. Requests concerned, for example, the Anglo Irish Promissory note, the Spanish bail-out, the Portuguese memorandum of understanding, and the Spanish and Irish budgets for 2013.

It appears from these requests that either the information was not easily accessible at the national level or that the requester was trying to verify facts that had been reported in the local press. Eight of these 17 requests specifically asked for correspondence between the ECB (in some cases the ECB's President) and national Ministries of Finance or heads of government on a particular national issue.

Three requests concerned internal policy or decision-making processes. One of these requests asked for access to documents about the meetings held between the ECB's representatives and industrial lobby groups.

One request asked about information on a previous access to documents request whilst another asked for information about the statistics held by the ECB on access to documents requests. A further two requests were for documents containing information on the job movements and training of ECB employees and on the use of agent-based modelling.

What are citizens asking the European Central Bank about?



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|---|---|
|  Contact and information exchanged between Member States and the ECB (9) |  Information on ECB employees and training (3) |
|  Correspondence between the ECB and National Ministries of Finance (8) |  Information on previous requests (1) |
|  ECB policy and decision making processes including meeting with lobbyists (3) |  Information on request statistics (1) |

REQUESTOR EXPERIENCES

The first two requests submitted to the ECB via AsktheEU.org received a response asking them to use an online form. The requesters defended their right to submit requests by email (which is how AsktheEU.org sends requests), and the ECB now makes good use of the platform. Indeed, in a number of recent cases the ECB referred the requester to a previous answer given to a similar request via the website, demonstrating the utility of having the request responses publically available.

ACKNOWLEDGEMENTS OF RECEIPT OF REQUEST

The ECB usually acknowledges receipt of the requests with an acknowledgement, which restates the request, and points the requester to the ECB's own Access to Documents rules, an unofficial consolidated version of two decisions, and states that the time frames are set by that Decision, although they do not state in the acknowledgement what the time frames are. Providing acknowledgements with explanatory information is good practice, although stating the time frame would be helpful for the requester.

In two cases however, the requests did not receive a response and when the requester followed up, the ECB stated that it had not received the initial request although all go to the same email address. As access to documents is a fundamental right in the treaties, it is important that the ECB ensure that all requests are processed and that none are overlooked.

TIMELINES: PUSHING TO THE LIMIT

Unlike most EU bodies, which under Regulation 1049/2001 have 15 working days for responding to requests, the ECB has its own rules for accessing its documents, in the form of Decision ECB/2004/3 which stipulates that the ECB has a 20 working day limit.

For the 25 requests evaluated here, the ECB pushed that time frame to the limit, taking an average of 19 working days to respond to requests. For the five requests which received a response telling the requester that no such document or correspondence existed, the ECB took between 12 and 18 working days to reply.

Maximum timelines are supposed to be just that: the maximum permissible period for responding to a request. The ECB should make greater effort to deliver responses within a shorter time frame, thus ensuring that information on important matters of ongoing public debate is available without undue delay.

REFUSALS

The ECB refused to provide full access in response to ten of the 25 requests analysed, in two cases refusing any access to documents and in eight cases providing partial access.

All the refusals contained a detailed analysis of the request and a reasoned explanation for why exceptions apply to the documents requested, which means they are compliant with the right of access to documents. The excluded information was either blacked out or, where several documents fell under the scope of the request, some documents were not provided.

CONFIRMATORY APPLICATIONS

So far, only one requester has filed a confirmatory application to the ECB following a partially successful answer to his request, despite the fact that the ECB always informs the requester of his or her right to appeal its decisions. In this case, the ECB confirmed its decision to refuse access, although it did acknowledge that its original response contained one error concerning the issue-date of a document.

EXCEPTIONS

In its nine refusals to provide any or full access to documents, the ECB invokes multiple exceptions, relying in particular on exceptions which relate to the monetary policy and the financial stability of the Union and its Member States.

Another commonly used exception was that "documents containing opinions for internal use as part of deliberations and preliminary consultations within the ECB or with NCBs shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure." The ECB has removed the harm test when adapting this exception from Regulation 1049/2001, which requires that the decision-making process be "seriously undermined" before the exception can be invoked. In a democratic system it is important that any exception to protect the decision-making process of a public body be applied strictly and narrowly so as to permit public scrutiny. However, the ECB has applied this exception in 20% of its refusals.

ECB TRANSPARENCY REPORT

EXCEPTIONS	
– the confidentiality of the proceedings of the ECB's decision-making bodies,	2
– the financial, monetary or economic policy of the Union or a Member State,	7
– the stability of the financial system in the Union or in a Member State;	7
– the privacy and the integrity of the individual, in particular in accordance with Union legislation regarding the protection of personal data;	1
– the commercial interests of a natural or legal person, including intellectual property,	1
– court proceedings and legal advice,	1
– documents containing opinions for internal use as part of deliberations and preliminary consultations within the ECB or with NCBs	5
Total number of times exceptions are used in response to 9 requests	24

NEW AND ILLEGITIMATE EXCEPTIONS

The exception which protects “the stability of the financial system in the Union or in a Member State” is a new exception which was added by the ECB in 2011 when it revised its 2004 Decision on public access to ECB documents. This appears to have been added in response to the financial crisis and possibly to requests filed with the ECB seeking to find out what it knew in the run up to the grave financial problems in a number of Member States.

Access Info questions the legality of these new and revised exceptions. The Treaty on the Functioning of the European Union makes clear at Article 15 that limits to the right of access to documents are only permitted “on grounds of public or private interest” and requires that these “be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.”

It is a serious cause for concern that the ECB has introduced exceptions to what is now recognised by the treaties as a fundamental right without going through the democratic legislative process of the Union. Particularly problematic is the addition of an exception to protect “the confidentiality of the proceedings of the ECB’s decision-making bodies”. This is not an exception contained in Regulation 1049/2001, nor is it an exception permitted in comparative international law such as the Council of Europe Convention on Access to Official Documents. International standards require that all exceptions must protect a legitimate interest whereas “confidentiality” is not in and of itself an interest. Confidentiality is the outcome of the lack of transparency, making this an empty and tautologous exception.

Another concern with the presumption of “confidentiality” is that it directly contradicts the principle, enshrined in Article 10 of the Treaty on European Union, that “every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.” The ECB approach, which is to assume that some information shall be reserved, is not permitted by the treaties.

RECOMMENDATIONS

1

Ensure prompt responses and review timeframes: The ECB's Decision on Access to Documents states that requests shall be handled "promptly". The ECB is not upholding that as it has a 20 working day time limit and is answering requests in timeframes which run close to that limit. Access Info recommends that the ECB endeavours progressively to reduce the time it takes to respond to requests and that it reviews the maximum time limit in its regulation, and considers bringing it back to the 15 working day limit which is the EU standard and the average across Europe.

2

Introduce duty to assist requestors and act on it: The ECB should include in its Decision on Access to Documents a clause similar to that in Regulation 1049/2001 Article 6.2 which requires institutions to assist requestors and to guide them on how and where applications can be made.

3

Review exceptions for consistency with EU Treaties: The ECB should urgently review its Decision on public access to ECB documents to ensure that any exceptions are in line with the exceptions adopted by the Council and the Parliament in Regulation 1049/2001.

4

Release documents which have been withheld based on illegitimate exceptions: Once the review of the ECB exceptions has been completed, the ECB should reassess the application of these exceptions to requests previously filed with it, and disclose requested documents which were had not been made public on the basis of illegitimate exceptions.

5

Taking decisions as openly and as closely as possible to the citizen: The ECB should review its overall transparency policy, including responses to requests and proactive publication, to ensure that it meets the requirements set by the Treaties of the European Union that in order "to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible" (Article 15). The ECB should also uphold the "right of citizens to participate in the democratic life of the Union" (Article 10). To this end, the European Central Bank should proactively publish minutes of its meetings, including who voted for what, and the reasoning behind decisions taken.