

DECISIONS

DECISION (EU) 2016/1162 OF THE EUROPEAN CENTRAL BANK

of 30 June 2016

on disclosure of confidential information in the context of criminal investigations (ECB/2016/19)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular Article 12.3 thereof,

Having regard to Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank ⁽¹⁾, and in particular Articles 23 and 23a thereof,

Whereas:

- (1) With the establishment of the single supervisory mechanism (SSM), both the European Central Bank (ECB) and national competent authorities (NCAs) could receive requests from national criminal investigation authorities for the disclosure of confidential information created or received in the course of carrying out their supervisory tasks and responsibilities.
- (2) Pursuant to Article 136 of Regulation (EU) No 468/2014 of the European Central Bank (ECB/2014/17) ⁽²⁾, where, in carrying out its tasks under Council Regulation (EU) No 1024/2013 ⁽³⁾, the ECB has reason to suspect that a criminal offence may have been committed, it will request the relevant NCA to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law.
- (3) There is a history of cooperation between NCAs and national criminal investigation authorities in dealing with access to confidential information about supervised entities or supervised groups, within the meaning of Article 2(20) and Article 2(21), respectively, of Regulation (EU) No 468/2014 (ECB/2014/17), in accordance with national law. The conditions for such cooperation and for disclosure of confidential information to national criminal investigation authorities are largely determined by national law. However, Union law has certain implications for the conditions under which confidential information held by competent authorities, including the ECB, within the SSM may be disclosed to national criminal investigation authorities upon their request. Those Union law provisions establish, for example, the principle of sincere cooperation, the principles of cooperation in good faith and the obligation to exchange information within the SSM, the obligation to protect personal data and the obligation of professional secrecy.
- (4) In addition to applying to the disclosure of confidential information related to the tasks conferred on the ECB by Regulation (EU) No 1024/2013, including information held by an NCA when assisting the ECB in the exercise of the ECB's tasks under that Regulation, such conditions may in principle also apply to disclosure of confidential information related to monetary policy and other ESCB/Eurosystem-related tasks.
- (5) The ECB should uphold its duty of professional secrecy and its duty to safeguard its functioning and independence. In addition, the ECB should continue to respect the public interest and certain private interests, which includes refraining from disclosing certain documents or information where such disclosure would undermine those interests. However, these duties should not lead to an absolute prohibition on disclosure by the ECB to national criminal investigation authorities of confidential information covered by the obligation of professional secrecy.

⁽¹⁾ OJ L 80, 18.3.2004, p. 33.

⁽²⁾ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

⁽³⁾ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

- (6) Union law provides that confidentiality of certain information or documents must be protected, including personal data, and, subject to certain exceptions, prohibits disclosure to third parties of confidential information or documents. In particular, pursuant to the rules on professional secrecy contained in Directive 2013/36/EU of the European Parliament and of the Council⁽¹⁾, confidential information received in the course of their duties by 'persons working for or who have worked for competent authorities, and auditors or experts acting on behalf of competent authorities', may be disclosed only in summary or aggregate form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law.
- (7) Pursuant to Article 37.2 of the Statute of the European System of Central Banks and of the European Central Bank, persons having access to data covered by Union legislation imposing an obligation of secrecy should be subject to such legislation.
- (8) A procedural framework for the management of requests received by the ECB, NCAs or national central banks (NCBs) from national criminal investigation authorities for confidential information related to the tasks conferred on the ECB by Regulation (EU) No 1024/2013, including information held by an NCA or NCB when assisting the ECB in the exercise of the ECB's tasks under Regulation (EU) No 1024/2013, or related to monetary policy and other ESCB/Eurosystem-related tasks has not yet been established in Union law. However, the application of national procedural rules which apply to such requests should be consistent with the general principles of Union law, in particular the principle of sincere cooperation, and the principle of cooperation in good faith and the obligation to exchange information as provided for in Article 6 of Regulation (EU) No 1024/2013. In this regard, in accordance with Union law the ECB would welcome being consulted on or informed of, as appropriate, requests for confidential information related to the tasks conferred on the ECB by Regulation (EU) No 1024/2013, including information held by an NCA or NCB when assisting the ECB in the exercise of the ECB's tasks under Regulation (EU) No 1024/2013, or related to monetary policy and other ESCB/Eurosystem-related tasks, which are received by an NCA or NCB from national criminal investigation authorities.
- (9) This Decision should not apply to requests for access to information concerning persons who have an employment relationship with the ECB or a direct or indirect contractual relationship with the ECB for the execution of works, the supply of products or the provision of services.
- (10) This Decision should therefore set out the conditions applied by the ECB with regard to the disclosure by the NCAs and NCBs of confidential information related to the tasks conferred on the ECB by Regulation (EU) No 1024/2013 or to monetary policy and other ESCB/Eurosystem-related tasks to a national criminal investigation authority and the related procedural framework.
- (11) The ECB's Compliance and Governance Office acts as coordinator, within the ECB, of requests for access to documents falling within the scope of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

Definitions

For the purposes of this Decision, the following definitions apply:

- (a) 'confidential information' means any confidential information, including information covered by data protection rules, by the obligation of professional secrecy, by the professional secrecy rules contained in Directive 2013/36/EU or documents classified as 'ECB-CONFIDENTIAL' or 'ECB-SECRET' under the ECB's confidentiality regime, and excluding any information concerning persons who have an employment relationship with the ECB or a direct or indirect contractual relationship with the ECB for the execution of works, the supply of products or the provision of services;

⁽¹⁾ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

- (b) 'national criminal investigation authority' means a national authority with competence in criminal law matters;
- (c) 'national competent authority' (NCA) has the same meaning as defined in Article 2(2) of Regulation (EU) No 1024/2013. This meaning is without prejudice to arrangements under national law that assign certain supervisory tasks to an NCB that is not designated as an NCA. With regard to such arrangements, a reference to an NCA in this Decision shall also refer to the NCB in respect of the supervisory tasks assigned to it by national law.

Article 2

Requests received by the ECB from national criminal investigation authorities

1. At the request of a national criminal investigation authority, the ECB may provide confidential information held by it and related to the tasks conferred on the ECB by Regulation (EU) No 1024/2013, or to monetary policy or other ESCB/Eurosystem-related tasks to an NCA or NCB for disclosure to the national criminal investigation authority in question under the following conditions:
 - (a) the NCA or NCB in question commits to acting on behalf of the ECB in responding to such a request;
 - (b) either: (i) there is an express obligation to disclose such information to a national criminal investigation authority under Union or national law; or (ii) the relevant legal framework permits the disclosure of such confidential information and there are no overriding reasons for refusing to disclose such information relating to the need to safeguard the interests of the Union or to avoid any interference with the functioning and independence of the ECB, in particular by jeopardising the accomplishment of its tasks;
 - (c) the NCA or NCB in question commits to asking the requesting national criminal investigation authority to guarantee the protection from public disclosure of the confidential information provided.
2. Paragraph 1 is without prejudice to any specific provisions under Union or national law related to disclosure of such confidential information.

Article 3

Requests received by NCAs or NCBs from national criminal investigation authorities

1. The ECB shall request the NCAs and NCBs to agree that on receipt of a request from a national criminal investigation authority for disclosure of confidential information related to the tasks conferred on the ECB by Regulation (EU) No 1024/2013, or to monetary policy or other ESCB/Eurosystem-related tasks, they consult the ECB, where possible, on how to respond to the request, irrespective of whether the ECB, or the NCA or NCB concerned holds the information in question. The ECB shall advise as to whether the information in question may be disclosed, and, where applicable, whether there are overriding reasons relating to the need to safeguard the interests of the Union or to avoid any interference with the functioning and independence of the ECB for refusing to disclose the confidential information concerned. The ECB shall advise the NCA or NCB, provided that it is consulted in a timely manner before the NCA or NCB makes a final decision and provides a final response to the request.
2. The ECB shall request the NCAs to agree to inform the ECB in a timely manner and, in any event, before providing a final response, of requests for confidential information received from national criminal investigation authorities concerning less significant credit institutions directly supervised by the NCA concerned in the exercise of its supervisory responsibilities under Regulation (EU) No 1024/2013, where that NCA considers that the information requested is material, or that disclosure thereof has the potential to adversely affect the reputation of the SSM. The ECB shall use its best efforts to provide its response by the deadline set by the NCA concerned, provided the deadline is reasonable, objectively justifiable and expires before the NCA takes a final decision and provides a final response to the national criminal investigation authority.
3. The ECB shall request the NCAs and the NCBs to agree to regularly inform the ECB of all requests from national criminal investigation authorities where the ECB was not consulted, in accordance with paragraph 1 or informed in accordance with paragraph 2, for reasons beyond their control and, if possible, of any information disclosed by reason of those requests.

*Article 4***Entry into force**

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Frankfurt am Main, 30 June 2016.

The President of the ECB
Mario DRAGHI
