Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 2 October 2019 [1]

Case C-442/18 P

European Central Bank (ECB)
v

Espírito Santo Financial (Portugal), SGPS, SA

(Appeal — Access to documents — Access to the ECB's decision of 1 August 2014 suspending the access of Banco Espírito Santo SA as an eligible counterparty of the euro area and ordering that bank to repay a debt of several billion euros, and to any documents relating to that decision — Refusal to grant full access)

I. Introduction

1. By its appeal, the European Central Bank (ECB) applies to the Court of Justice to set aside the judgment of the General Court of the European Union of 26 April 2018, *Espírito Santo Financial (Portugal)* v *ECB*,[2] by which that Court annulled the ECB's decision of 1 April 2015 ('the decision at issue'), partially refusing to allow access to certain documents relating to the ECB's decision of 1 August 2014, in so far as it related to the amount of credit indicated in the extracts of the minutes recording the decision of the Governing Council of the ECB ('the Governing Council') of 28 July 2014 and the information redacted from the proposals of the Executive Board of the ECB of 28 July and 1 August 2014.

2. In support of its appeal, the ECB advances a single ground of appeal contending that the General Court erred in finding that, when it refuses access to information relating to the conduct of monetary policy, the ECB is obliged to provide a statement of reasons from which it is possible to understand and verify how access to that information would specifically and actually undermine the public interest as regards the confidentiality of proceedings of the ECB's decision-making bodies.

3. This case therefore gives the Court an opportunity to rule on the fundamental question of which principle — the principle of confidentiality or the principle of transparency — applies to the deliberations of an ECB decision-making body, a dilemma that must be resolved on the basis both of Decision 2004/258/EC [3] and of primary law.

1 Original language: French.

2 T-251/15, not published, ('the judgment under appeal') EU:T:2018:234.

3 Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (OJ 2004 L 80, p. 42).

II. Legal context

A. The ESCB and ECB Statute

4. Article 10.4 of Protocol No 4 on the Statute of the European System of Central Banks (ESCB) and of the ECB[4] ('the Statute of the ESCB and of the ECB') provides that:

'The proceedings of the meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public.'

B. Rules of procedure of the ECB

5. Article 23.1 of Decision ECB/2004/2,[5] entitled 'Confidentiality of and access to ECB documents', provides, in essence, that the proceedings of the decision-making bodies of the ECB and of any committee or group established by them shall be confidential unless the Governing Council authorises the President to make the outcome of their deliberations public.

C. Decision 2004/258

6. According to Article 1 thereof, the purpose of Decision 2004/258 is 'to define the conditions and limits according to which the ECB shall give public access to ECB documents …'

7. According to Article 2(1) of Decision 2004/258, 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to ECB documents, subject to the conditions and limits defined in this Decision.'

8. Article 4 of Decision 2004/258, entitled 'Exceptions', provides in paragraph 1(a) and in paragraphs 3 and 6:

'1. The ECB shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

– the confidentiality of the proceedings of the ECB's decision-making bodies,

…

3. Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the ECB or with NCBs [national central banks] shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.

…

6. The exceptions as laid down in this Article shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years unless specifically provided otherwise by the ECB's Governing Council. In the case of documents covered by the exceptions relating to privacy or commercial interests, the exceptions may continue to apply after this period.'

4 OJ 2012 C 326, p. 230.

5 ECB Decision of 19 February 2004 adopting the Rules of Procedure of the ECB (OJ 2004 L 80, p. 33), as amended by Decision ECB/2014/1 of 22 January 2014 (OJ 2014 L 95, p. 56) ('the Rules of Procedure of the ECB').

III. Background to the dispute and the decision at issue

9. Espírito Santo Financial (Portugal), SGPS, SA ('ESF'), is a holding company incorporated under Portuguese law that is currently the subject of insolvency proceedings. It was one of the main shareholders in Banco Espírito Santo SA ('BES').

10. Under financial pressure and with its liquidity position deteriorating, from May 2014 BES had recourse to Eurosystem credit operations and, from July 2014, started to receive emergency liquidity provided by Banco de Portugal, the Portuguese central bank.

11. On 23 July 2014, the ECB's Governing Council first decided not to oppose the granting of emergency liquidity to BES up to a certain limit, until the next ordinary meeting of the Governing Council.

12. Then, acting on a proposal from the Executive Board of the ECB of 28 July 2014, the ECB Governing Council decided on the same day to maintain BES's access to 'monetary policy credit instruments', while 'freezing' the existing credit provided to BES, its branches and its subsidiaries through such instruments 'at the current level'. As a consequence, the amount of credit provided to those entities through Eurosystem credit operations was capped at the level prevailing on 28 July 2014.

13. Thereafter, acting on a proposal from the Executive Board of the ECB of 1 August 2014, the ECB Governing Council decided, on the same day, inter alia, to suspend access by BES and its branches to monetary policy credit instruments, on grounds of prudence, and ordered that BES repay, no later than 4 August 2014, all of the credit granted to it within the framework of the Eurosystem. That decision was recorded in minutes, which also indicated the ceiling for the provision of emergency liquidity that Banco de Portugal could grant to BES.

14. In those circumstances, the Portuguese authorities decided to place BES into resolution. Insolvency proceedings were subsequently initiated against ESF.

15. By letter of 5 November 2014, ESF requested that the ECB grant access to the Governing Council decision of 1 August 2014 and to all documents in the ECB's possession that were 'in any way' related to that decision.

16. In response to that letter the ECB in particular granted ESF partial access to the proposals of the ECB Executive Board of 28 July and 1 August 2014 and to extracts of the minutes recording the decisions of 28 July and 1 August 2014.

17. By letter of 4 February 2015, ESF sent a confirmatory application to the ECB, in which it stated that the reasons given by the ECB to justify the refusal to grant full access to some of the documents requested were too vague and general. Moreover, ESF requested disclosure of, first, the amounts which had been redacted from the extracts of the minutes recording the Governing Council decisions of 28 July and 1 August 2014 that had been provided to it, namely the amount of credit granted to BES and its branches and subsidiaries and the amount of the ceiling for the provision of emergency liquidity that could be granted to BES and, secondly, certain information that had been redacted from the proposals of the Executive Board of 28 July and 1 August 2014.

18. By letter of 1 April 2015, after extending the time limit for replying to the confirmatory application, the ECB disclosed to ESF additional information contained in the proposals of the Executive Board of 28 July and 1 August 2014. As to the remainder, the ECB confirmed its refusal, under Article 4 of Decision 2004/258, to disclose the amounts redacted from the extracts of the minutes recording the Governing Council decisions of 28 July and 1 August 2014 and certain passages deleted from the proposals of the Executive Board of 28 July and 1 August 2014.

IV. The procedure before the General Court and the judgment under appeal

19. By its action, ESF sought annulment of the ECB's implied decision of 4 March 2015, annulment of the decision at issue and an order that the ECB pay the costs.

20. The ECB applied for that action to be dismissed and that ESF be ordered to pay the costs.

21. The General Court annulled the decision at issue, in so far as the ECB had refused to disclose the amount of credit indicated in the extracts of the minutes recording the decision of the Governing Council of the ECB of 28 July 2014, and the information redacted from the proposals of the ECB Executive Board of 28 July and 1 August 2014. The General Court dismissed the action as to the remainder.

V. Procedure before the Court of Justice and forms of order sought

22. By application lodged at the Registry of the Court of Justice on 5 July 2018, the ECB brought the present appeal.

23. First of all, the ECB requests the Court to set aside point 1 of the operative part of the judgment under appeal. It then requests the Court also to dismiss the application as concerns its refusal to disclose the amount of credit in the extracts of the minutes recording the decision of the Governing Council of the ECB of 28 July 2014 or, in the alternative, to refer the case back to the General Court for it to give judgment on the application. Lastly, it requested that ESF be ordered to pay two thirds of the costs and the ECB be ordered to pay one third of the costs.

24. In support of its appeal, the ECB advances a single ground of appeal alleging that the General Court committed an error of law in its interpretation of Article 10.4 of the ESCB and ECB Statute and the first indent of Article 4(1)(a) of Decision 2004/258. By that ground of appeal, the ECB criticises paragraphs 124 and 161 of the judgment under appeal, read in conjunction with paragraphs 54 to 56 and 75 to 81 of that judgment. To be precise, the ECB contends that the General Court erred in finding that, when it refused to disclose the information in the extracts of the minutes recording the decision of 28 July 2014, the ECB was obliged to provide a statement of reasons from which it was possible to understand and verify how access to that information would specifically and actually have undermined the public interest as regards the confidentiality of the proceedings of its decision-making bodies.

25. The ECB argues, in its appeal, that the principle that the proceedings of meetings of the Governing Council are confidential, enshrined, as regards primary law, in Article 10.4 of the ESCB and ECB Statute, is confirmed in the first indent of Article 4(1)(a) of Decision 2004/258. It submits that the first indent of Article 4(1)(a) must be interpreted in line with that principle.

26. At the hearing, the ECB did in fact concede that there is a degree of tension between Article 4(1)(a) of Decision 2004/258 and the relevant provisions of primary law. According to the ECB, that tension should be remedied by interpreting Decision 2004/258 in the light of primary law and of the principle that the deliberations of the ECB's decision-making bodies are confidential.

27. ESF requests the Court to dismiss the appeal and order the ECB to pay the costs.

VI. Analysis

28. As indicated above, in its appeal, the ECB advances a single ground of appeal alleging that the General Court committed an error of law in its interpretation of Article 10.4 of the ESCB and ECB Statute and the first indent of Article 4(1)(a) of Decision 2004/258.

29. It should be noted that the arguments that the ECB advances in support of that ground of appeal do not question the validity of Decision 2004/258, and relate in essence to the fact that, according to the ECB, that decision cannot be understood as establishing arrangements for access to documents that conflict with primary law.

30. Having regard to the arguments put forward by the ECB, I will set out, first of all, the relevant provisions of primary law relating to access to ECB documents and, specifically, the outcome of the deliberations of its decision-making bodies. In doing so, I will outline the principle governing access to documents of that nature (section A). I will then examine, in the light of that principle, the implications of the fact that the Governing Council is entitled to decide to disclose the outcome of its deliberations (section B). Lastly, in the light of all the foregoing, I will determine the extent of the obligation to state reasons where access to documents is refused on the basis of the first indent of Article 4(1)(a) of Decision 2004/258 (section C).

A. The principle applicable to access to ECB documents under the Treaties

31. I would note at the outset that the principle of transparency is enshrined in Articles 1 and 10 TEU and in Article 15 TFEU,[6] and that those articles are the basis, as regards primary law, of the legal framework governing access to documents held by EU institutions. When it assumed the role of Article 255 EC, Article 15 TFEU, introduced as a result of the entry into force of the Treaty of Lisbon, in fact extended the scope of the principle of transparency in EU law.[7]

32. Specifically, Article 15(3), first subparagraph, TFEU sets out the right of access to the documents of the EU institutions enjoyed by any citizen of the Union and any natural or legal person residing or having its registered office in a Member State, and that right is confirmed in Article 42 of the Charter of Fundamental Rights of the European Union. The corollary of the right of access to documents is that those institutions have transparency obligations. As Article 15(3), second subparagraph, TFEU provides, limits on the right of access to documents and transparency obligations are determined by means of regulations.

33. However, under Article 15(3), fourth subparagraph, TFEU, the Court of Justice of the European Union, the European Investment Bank and the ECB are only subject to Article 15(3), first subparagraph, TFEU when exercising their administrative tasks. Against that background, the Court of Justice has already held that the conditions governing access to documents held by one of the institutions referred to in Article 15(3), fourth subparagraph, TFEU that relate to that institution's non-administrative activity cannot be laid down by regulations adopted on the basis of the second subparagraph of Article 15(3) TFEU.[8]

34. I infer from the foregoing that the ECB's transparency obligations in situations in which the ECB exercises non-administrative functions must be distinguished from its obligations in situations in which it exercises administrative functions.

6 See judgment of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 68).

7 See judgments of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 81), and of 18 July 2017, *Commission* v *Breyer* (C-213/15 P, EU:C:2017:563, paragraph 50).

8 See judgment of 18 July 2017, *Commission* v *Breyer* (C-213/15 P, EU:C:2017:563, paragraph 48).

35. The fact that the ECB, when it performs non-administrative activities under Article 282 TFEU, in particular in relation to the conduct of monetary policy, is not subject to transparency obligations such as those that apply in the situations under Article 15(3), first and second subparagraphs, TFEU, is justified precisely by the nature of those activities.[9] Indeed, it should be borne in mind that, when conducting that policy, the ECB plays a significant role in maintaining the stability of prices and of the financial system.

36. As regards specifically the Governing Council, it is this body that has been given the central task of formulating monetary policy.[10] Furthermore, as this case illustrates, the Governing Council participates, inter alia, in processes to grant funds, through Eurosystem credit operations, to entities in financial difficulty. Making certain data held by the ECB available during those processes only to those who request them could, in certain cases, create too great a risk of economic speculation. That risk could jeopardise the objectives pursued by the ECB.[11]

37. Under those circumstances, if the ECB is to be able to perform its tasks autonomously and effectively, the decision-making process of its bodies must also be safeguarded from any external pressure, which can be done by ensuring that process is confidential.[12] For the same reason, EU law also lays down other provisions that seek, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose.[13]

38. Moreover, recognising the distinctive features of the role played by the ECB decision-making bodies, the Member States adopted the ESCB and ECB Statute, Article 10.4 of which provides that proceedings of the Governing Council are confidential and that it is that Council itself that may decide to make the outcome of its deliberations public.

39. I infer from the foregoing that the Member States have deliberately chosen not to make the decision-making process of the Governing Council subject to transparency obligations such as those that apply in the situations under Article 15(3), first subparagraph, TFEU. This does not mean that the process was left outside the EU rules on access to documents.[14] However, in line with the provisions referred to in points 33 to 35 of this Opinion, in that context the principle of transparency gives way to the principle of confidentiality.

40. The judgment under appeal suggests that, as regards the outcome of the decision-making process of the Governing Council, the precedence of the principle of confidentiality over the principle of transparency is disapplied on the basis of the second sentence of Article 10.4 of the ESCB and ECB Statute, read in conjunction with Article 4(1)(a) of Decision 2004/258. The General Court in fact interprets the fact that the Governing Council may decide to disclose the outcome of its deliberations as meaning that the Council must use the discretion it has, to refuse to grant access to the documents requested, in accordance with the conditions and limits laid down in Decision 2004/258. Accordingly, according to that Court, when it refuses to disclose such an outcome under Article 4(1)(a) of Decision 2004/258, the Governing Council must provide a detailed statement of reasons enabling the person requesting that information to understand and verify how access to that information would

9 See, to that effect, Siekmann, H., 'The Legality of Outright Monetary Transactions of the European System of Central Banks', in Rövekamp, F., Bälz, M., Hilpert, H.G. (eds.), *Central Banking and Financial Stability in East Asia*, Springer International Publishing, Cham — Heidelberg — New York — Dordrecht — London, 2015, p. 114.

10 Hofmann, H.C.H., 'Monetary Policy and Euro Area Governance in the EMU', in Hofmann, H.C.H., Rowe, G.C., Türk, A.H. (eds.), *Specialized Administrative Law of the European Union: A Sectoral Review*, Oxford University Press, Oxford, 2018, p. 250.

11 See, in that respect, Dawson, M., Maricut-Akbik, A., Bobić, A., 'Reconciling Independence and accountability at the European Central Bank: The false promise of Proceduralism', *European Law Journal*, vol. 25(1), 2019, pp. 82 to 85.

12 See, in that respect, Curtin, D., 'Accountable Independence of the European Central Bank: Seeing the Logics of Transparency', *European Law Journal*, 2017, vol. 23(1-2), p. 35.

13 See judgment of 10 July 2003, *Commission* v *ECB* (C-11/00, EU:C:2003:395, paragraph 134).

14 See Rossi, L., Vinagre e Silva, P., *Public Access to Documents in the EU*, Hart Publishing, Oxford, 2017, p. 78.

specifically and actually have undermined the public interest as regards the confidentiality of the deliberations of its decision-making bodies. It is necessary to examine whether the General Court was well-founded when it found that, first, the Governing Council's discretion in respect of the disclosure of the outcome of its deliberations is dictated by the provisions of Decision 2004/258, with the effect that non-disclosure of such an outcome is merely an exception and that, secondly, a refusal to give access to such an outcome must be accompanied by a detailed statement of reasons.

B. Disclosure of the outcome of deliberations of the Governing Council

41. In paragraphs 76 to 80 of the judgment under appeal, to which paragraph 124 of that judgment refers, the General Court found that decisions of the Governing Council — and, in turn, also the minutes recording those decisions — do not enjoy absolute protection in so far as concerns their disclosure, with the effect that their non-disclosure is merely an exception. The General Court pointed out that, under the second sentence of Article 10.4 of the ESCB and ECB Statute, the Governing Council may decide to make the outcome of its deliberations public. The Governing Council's discretion in that respect must therefore, according to the General Court, be exercised in accordance with the conditions and limits laid down in Decision 2004/258, the aim of which, the General Court added, is to make ECB documents as widely available to the public as possible.

42. I am, however, not convinced by that interpretation of the provisions of the ESCB and ECB Statute and Decision 2004/258.

43. It should be noted that, in the first place, in contrast to the findings of the General Court, recital 3 of Decision 2004/258 makes it clear, not that access *to ECB documents* must be *as wide as possible*, but rather that *wider access should be granted to those documents*. That recital also acknowledges that access to ECB documents should be granted while at the same time protecting, on the one hand, the independence of the ECB and, on the other, the confidentiality of certain matters specific to the performance of its tasks. It can therefore be argued that the General Court did not base itself on the same premiss as Decision 2004/258.

44. In the second place, according to the same recital, *the proceedings of the meetings of the ECB's decision-making bodies are confidential, unless the relevant body decides to make the outcome of its deliberations public*, echoing Article 132(2) TFEU according to which the ECB *may decide* to publish its decisions, recommendations and opinions. That article already hints at the ECB's discretion in making its decisions public.[15] In the same vein, the second paragraph of Article 10.4 of the ESCB and ECB Statute and the last part of Article 23(1) of the Rules of Procedure of the ECB confirm that the ECB has discretion as regards the disclosure of its decisions. Indeed, according to those provisions, the Governing Council *may decide* to make the outcome of its deliberations public.

45. All the foregoing provisions, admittedly, qualify the principle of confidentiality in relation to the outcome of deliberations of the Governing Council. Indeed, according to the first sentence of Article 10.4 of the ESCB and ECB Statute and Article 23(1) of the Rules of Procedure of the ECB, the principle of confidentiality applies to the proceedings of the meetings of the Governing Council, whereas, under the second sentence of Article 10.4 of the ESCB and ECB Statute and the last part of Article 23(1) of the Rules of Procedure of the ECB, the confidentiality of the outcome of the

15 See Van Cleynenbreugel, P., 'Confidentiality behind transparent doors: The European Central Bank and the EU law principle of openness', *Maastricht Journal of European and Comparative Law*, 2018, vol. 25(1), p. 54. Incidentally, it should be noted that the present case does not raise the issue of how Article 132(2) TFEU fits alongside Article 297(2) TFEU according to which decisions which do not specify to whom they are addressed are to be published in the *Official Journal of the European Union*. Indeed, the 28 July 2014 decision concerned BES and therefore cannot be regarded as a decision which does not specify to whom it is addressed.

Governing Council's deliberations is relative. Nevertheless, in contrast to the General Court's finding in paragraph 80 of the judgment under appeal, this does not mean that the outcome of the deliberations has, by default, a lower level of protection than that given to the deliberations themselves or that its non-disclosure is merely an exception.

46. Indeed, there is nothing to suggest that, by the second sentence of Article 10.4 and the last part of Article 23(1), the EU legislature intended to derogate from the confidentiality of deliberations of the Governing Council. The provisions of the TFEU and of the ESCB and ECB Statute give the Governing Council power to *decide* whether to disclose the outcome of deliberations, but it is not obliged to do so.

47. The ambiguous wording of Article 4(1)(a) of Decision 2004/258 is not such as to cast doubt on that finding.

48. It is undoubtedly true that, in linguistic terms, the wording of Decision 2004/258 might suggest that a refusal to allow access to the proceedings of the Governing Council under the first indent of Article 4(1)(a) of that decision is possible only exceptionally. Indeed, Article 4 of Decision 2004/258 is entitled 'Exceptions'. The wording of the first indent of Article 4(1)(a) of that decision also seems to suggest that, in principle, access must be granted to the documents recording those proceedings. According to that provision, the ECB is to refuse access to a document where its disclosure would undermine the protection of the public interest, as regards the confidentiality of the proceedings of its decision-making bodies. Furthermore, Article 4(5) and (6) of Decision 2004/258 uses the term 'exception' in relation to all situations where access can be refused, including the situation under the first indent of Article 4(1)(a) of that decision.

49. I would note, first, that secondary law rules on access to documents cannot have the effect of, largely, frustrating the effectiveness of the exclusion of the ECB from the institutions to which the principle of transparency applies, under Article 15(3) TFEU. Nor can those rules preclude the ECB's discretion under Article 132(2) TFEU. Decision 2004/258 cannot therefore reverse the logic of all the foregoing provisions and replace the principle of confidentiality with the principle of transparency, with the effect that disclosure of the outcome of the deliberations of the Governing Council would be the rule and the confidentiality of that outcome would be merely the exception.

50. That view is supported by recitals 3 and 4 of Decision 2004/258, from which it emerges that, by adopting that decision, the legislature did not intend to derogate from the primary law provisions cited in the preceding point of this Opinion.

51. Recital 4 of Decision 2004/258 might admittedly suggest that a refusal to allow access under Article 4(1)(a) of that decision is merely an exception. Referring to the notion, set out in the first part of recital 3 of that decision, that wider access should be granted to ECB documents, recital 4 specifies that certain public and private interests should, however, be protected by means of a system of exceptions. As can be seen from the second part of recital 3 thereof, that wider access to which exceptions can be made in order to protect certain public and private interests cannot undermine the independence of the ECB or the confidentiality of certain matters specific to the performance of its tasks and it is in that context that the proceedings of the meetings of the ECB's decision-making bodies are confidential. Those two recitals read in conjunction show that, even taken in isolation, Decision 2004/258 does not seek to equate the exception established for the proceedings of those bodies with the other exceptions laid down in that decision.

52. For the sake of completeness, I would say that, to my mind, Article 4(6) of Decision 2004/258 likewise does not support the interpretation that the General Court upheld in the judgment under appeal. According to that article, the exceptions laid down in Article 4 of Decision 2004/258 only apply for the period during which protection is justified on the basis of the content of the document. However, that article cannot preclude the discretion in respect of disclosing the outcome of its

deliberations that the Governing Council enjoys under primary law. Moreover, as can be seen from point 51 of this Opinion, the framework established by Decision 2004/258 does not equate the exception for the proceedings of the ECB decision-making bodies with the other exceptions laid down in that decision.

53. In the third place, there is indeed reason to enquire whether Article 4(1)(a) of Decision 2004/258 can be regarded as an *ex ante* blanket authorisation to disclose the outcome of all deliberations of the Governing Council. Indeed, Decision 2004/258 was adopted by that Council and, according to Article 132(2) TFEU and the second sentence of Article 10.4 of the ESCB and ECB Statute and the last part of Article 23(1) of the Rules of procedure of the ECB, the Governing Council can decide to make the outcome of its deliberations public. In that context, Article 4(1)(a) of Decision 2004/258 appears to be a general authorisation to make the outcome of all deliberations public, by default.

54. However, as the ECB observed at the hearing, the second sentence of Article 10.4 of the ESCB and ECB Statute does not give the Governing Council such a wide discretion. That provision should be regarded as laying down a power, which the Governing Council may exercise, *ex post* and in specific actual situations. Any other interpretation would allow the Governing Council to circumvent what the Member States have elected in respect of access to ECB documents, expressed in Article 15(3), fourth subparagraph, and Article 132(2) TFEU and in Article 10.4 of the ESCB and ECB Statute.

55. It can be seen from my analysis that, in so far as concerns the deliberations of the Governing Council, those deliberations are covered by the principle of confidentiality. The reservation relating to the fact that the Governing Council can decide to make the outcome of its deliberations public, contained in several provisions of EU law, does not undermine that finding. The Governing Council purely and simply has a discretion to decide whether to disclose such an outcome, but is not bound to do so.

56. It is appropriate at this stage to examine one last question, that is to say, the effect of the foregoing considerations on the scope of the obligation to state reasons where access to documents is refused on the basis of Article 4(1)(a) of Decision 2004/258, implying as they do, first, that in relation to the decision-making process of the Governing Council, the principle of transparency gives way to the principle of confidentiality (see point 39 of this Opinion) and, secondly, that the Governing Council has discretion as regards disclosing the outcome of that process (see point 55 of this Opinion).

C. The statement of reasons for a refusal under Article 4(1)(a) of Decision 2004/258

57. It is significant that, when it held in paragraph 124 of the judgment under appeal that the ECB must state reasons for any decision on a request for access to documents made under the exceptions set out in Article 4 of Decision 2004/258, the General Court based itself on the case-law cited in paragraphs 54 to 56 of that judgment and found it to be applicable by analogy in relation to the first indent of Article 4(1)(a) of Decision 2004/258.

58. However, I harbour doubts in respect of that analogy.

59. It should be noted, first, that the passages of the judgment in *Sweden and Turco* v *Council*,[16] which the General Court mentions in paragraphs 54 and 55 of the judgment under appeal, concern only Regulation (EC) No 1049/2001.[17] Thereafter, the majority of the judgments of the General Court cited in paragraphs 54 to 56 of the judgment under appeal likewise relate to that regulation.[18] Lastly, although the General Court's judgment in *Thesing and Bloomberg Finance* v *ECB*,[19] referred to in paragraph 55 of the judgment under appeal, did indeed concern Decision 2004/258, in that judgment the General Court was, however, interpreting the second indent of Article 4(1)(a) of that decision rather than the first indent of Article 4(1)(a). There too, moreover, the General Court referred, by analogy, to the Court of Justice case-law on Regulation No 1049/2001.

60. It should be noted in that respect, first, that according to settled case-law, the aim of Regulation No 1049/2001 is to give the public a right of access to documents of the institutions of the European Union which is as wide as possible.[20] Using virtually identical wording, in paragraph 80 of the judgment under appeal, to which paragraph 124 of that judgment refers, the General Court stated that Decision 2004/258 aims *to make ECB documents as widely available to the public as possible*. However, as I stated in point 43 of this Opinion, that decision is *intended only to widen* access to ECB documents as compared with the earlier rules.

61. Secondly, it can be inferred from the judgment in *Baumeister*[21] that care must be taken when drawing analogies between, on the one hand, the regime for access to documents established by Regulation No 1049/2001 and, on the other, the regimes laid down in other EU legal instruments.

62. In that judgment, the Court of Justice held that, in the light of its objective of giving the public a right of access to documents of the institutions of the European Union which is as wide as possible, Regulation No 1049/2001 requires an EU institution that proposes to refuse access to a document, as a general rule, to explain how access to that document could specifically undermine the interest protected by one of the exceptions that are provided for to the right of access at issue.[22] The General Court reproduced that passage in almost identical terms in paragraph 124 of the judgment under appeal, applying it to the ECB's refusal based on the first indent of Article 4(1)(a) of Decision 2004/258.

63. However, Regulation No 1049/2001 applies in the situations referred to in Article 15(3), first subparagraph, TFEU which, in accordance with the principle of transparency, requires the widest possible access to documents held by EU institutions.[23] However, the request for access to documents in the present case falls within the scope of application of Article 15(3), fourth subparagraph, TFEU.

64. Furthermore, in *Baumeister*[24] the Court of Justice drew a clear distinction between the treatment of requests for access to documents relating to Regulation No 1049/2001 and the treatment of requests relating to paragraph 1 of Article 54 of Directive 2004/39/EC,[25] entitled 'Professional secrecy'. That Court held that Regulation No 1049/2001 requires, as a general rule, an EU institution that

16 Judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 48).

17 Regulation of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

18 Judgments of 11 March 2009, *Borax Europe* v *Commission* (T-121/05, not published, EU:T:2009:64, paragraph 37); of 12 September 2013, *Besselink* v *Council* (T-331/11, not published, EU:T:2013:419, paragraphs 96 and 99), and of 29 October 2015, *Lithuania* v *Commission* (T-110/13, not published, EU:T:2015:818, paragraph 61).

19 Judgment of 29 November 2012, *Thesing and Bloomberg Finance* v *ECB* (T-590/10, not published, EU:T:2012:635, paragraph 42).

20 See judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486, paragraph 57).

21 Judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464, paragraphs 41 and 42).

22 See judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464, paragraphs 41 and 42).

23 See, to that effect, judgment of 18 July 2017, *Commission* v *Breyer* (C-213/15 P, EU:C:2017:563, paragraph 49).

24 Judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464, paragraphs 42 and 43).

25 Directive of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

proposes to refuse access to a document to explain how access to that document could specifically undermine the interest protected by one of the exceptions that are provided for to the right of access at issue. However, the Court held that, where they consider that the information requested is confidential within the meaning of Article 54(1) of Directive 2004/39, the competent authorities can grant such a request only in the situations that are listed exhaustively in Article 54. [26]

65. It can therefore be argued that, whereas the regime under Regulation No 1049/2001 gives precedence to the principle of transparency, the starting point for Article 54(1) of Directive 2004/39 is that information that falls within its scope of application is covered by the principle of confidentiality. The effects of that distinction continue to be felt as regards the scope of the obligation to state reasons where access to the requested documents is refused.

66. That being so, it should be noted that Article 4(1)(a) of Decision 2004/258, read in conjunction with Article 15(3), fourth subparagraph, TFEU, Article 10.4 of the ESCB and ECB Statute and Article 23(1) of the Rules of Procedure of the ECB, likewise starts from the premiss that deliberations of the Governing Council are covered by the principle of confidentiality. Accordingly, the differences that exist, as regards the scope of the obligation to state reasons in the event of a refusal, between the situations covered by Regulation No 1049/2001 and those covered by Article 54(1) of Directive 2004/39 should also exist between, on the one hand, all the provisions relating to the disclosure of the outcome of deliberations of the Governing Council and, on the other, Regulation No 1049/2001. The analogy that the General Court draws between the case-law cited in paragraphs 54 to 56 of the judgment under appeal and the first indent of Article 4(1)(a) of Decision 2004/258 must therefore be rejected.

67. Thirdly and lastly, the case-law on Regulation No 1049/2001 shows that, even under the regime for access to documents established by that regulation, it is possible to acknowledge the existence of general presumptions that the disclosure of the documents requested in principle undermines the protection of interests or objectives that, under that regulation, can justify refusing access. [27] In such a situation it is for the person requesting access to demonstrate that the document of which disclosure is requested is not covered by that presumption. [28] Accordingly, even if it is found that the relevant provisions of primary and secondary law, including the first indent of Article 4(1)(a) of Decision 2004/258, establish such a presumption only for the outcome of deliberations of the Governing Council, the General Court was not entitled to find, in the absence of evidence capable of rebutting that general presumption, that the ECB had not stated sufficient reasons for its refusal.

68. The judgment under appeal must therefore be set aside as vitiated by an error of law consisting of a misinterpretation of Article 10.4 of the ESCB and ECB Statute and of the first indent of Article 4(1)(a) of Decision 2004/258, on the grounds that the General Court disregarded the provisions of primary law which establish principles relating to access to ECB documents. In those circumstances, the single ground of appeal should be upheld and point 1 of the operative part of the judgment under appeal should be set aside, in so far as it annulled the decision at issue to the extent that it refused to disclose the amount of credit in the extracts of the minutes recording the decision of the Governing Council of the ECB of 28 July 2014. In that context, it should be noted that the forms of order sought by the ECB do not relate to the refusal to disclose the information redacted from the proposals of the ECB Executive Board of 28 July and 1 August 2014. It should therefore be found that the ECB is not disputing the judgment under appeal in so far as it annulled the decision at issue in relation to those proposals or, in other words, that the ECB accepts the judgment under appeal to the extent that it relates to those proposals.

26 See judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464, paragraphs 42 and 43).

27 See, as regards the general presumption established for administrative files under the third indent of Article 4(2) of Regulation No 1049/2001, judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376, paragraph 61).

28 See judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376, paragraphs 62, 68 and 70).

69. In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the decision of the General Court is set aside the Court of Justice may give final judgment in the matter where the state of the proceedings so permits. Having regard to all the foregoing, I am of the view that the state of the proceedings is such that judgment can be given, in so far as concerns the refusal to disclose the amount of credit in the extracts of the minutes recording the decision of the Governing Council of the ECB of 28 July 2014. Contrary to what the General Court found in paragraph 124 of the judgment under appeal, the ECB was in fact not obliged to provide reasons when it refused to disclose the information in those extracts.

70. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) of the same rules, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. In contrast, according to Article 138(3) of the Rules of Procedure of the Court of Justice, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. I have formed the view that the ECB's appeal will not alter the final outcome of the proceedings as concerns its refusal to disclose the amount of credit in the extracts of the minutes recording the decision of the Governing Council of the ECB of 28 July 2014. In my view, the Court should therefore order, not that the costs of the proceedings at first instance and those of the appeal proceedings leading to the General Court's judgment under appeal being set aside should be borne as determined in point 3 of the operative part of that judgment, according to which ESF and the ECB would each bear their own costs, but that, in addition to its own costs, ESF will pay one third of the costs incurred by the ECB.

71. As a final remark, I would point out that I am aware that according to one school of academic thought the ECB should increase its level of transparency, in particular by making the deliberations of the Governing Council public.[29] However, my analysis, in this Opinion, is based on the legal framework in force. It is apparent from that legal framework that, according to the wishes (the deliberate decision) of the Member States, the ECB's decision-making process is covered by confidentiality and that power to decide whether to disclose the outcome of that process has been given to the Governing Council.

72. Nevertheless, in order to reconcile, on the one hand, the confidentiality of the deliberations of the Governing Council and their outcome and, on the other, the ECB's concern for credibility,[30] the Governing Council can, by exercising the discretion it enjoys, decide to disclose only part of the outcome of its deliberations. Indeed, if the Governing Council can decide not to disclose such an outcome, it is, with all the more reason, entitled to decide to disclose it in part. Article 4(5) of Decision 2004/258 supports that view. According to that article, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document are to be released. It should be noted that this is what the ECB in fact did in the present case.

VII. Conclusion

73. In the light of the foregoing, I am of the view that the single ground of appeal advanced by the European Central Bank (ECB) should be upheld and I propose that the Court should rule as follows:

(1) The first point of the operative part of the judgment of the General Court of the European Union of 26 April 2018, *Espírito Santo Financial (Portugal)* v *ECB* (T-251/15, not published, EU:T:2018:234), in so far as it annulled the decision of the ECB of 1 April 2015 partially refusing

29 See, inter alia, Diana, G., 'Transparence, responsabilité et légitimité de la banque centrale Européenne', *Bulletin de l'Observatoire des politiques économiques en Europe*, 2008, No 18, pp. 11 to 13. See also, to that effect, *European Added Value Unit, Towards a genuine Economic and Monetary Union*, 2012, www.europarl.europa.eu/RegData/etudes/note/join/2012/494458/IPOL-JOIN_NT(2012)494458_EN.pdf, p. 12.

30 See, on that issue, de Haan, J., Eijffinger, S.C.W., Waller, S., *The European Central Bank. Credibility, Transparency and Centralization*, MIT Press, Cambridge, Massachusetts — London, 2005, pp. 123 to 125.

access to certain documents relating to the ECB's decision of 1 August 2014 concerning Banco Espírito Santo SA, to the extent that it refused to disclose the amount of credit indicated in the extracts of the minutes recording the decision of the Governing Council of the ECB of 28 July 2014, is set aside.

(2) The application in so far as it concerns the ECB's refusal to disclose the amount of credit in the extracts of the minutes recording the decision of the Governing Council of the ECB of 28 July 2014 is dismissed.

(3) Espírito Santo Financial (Portugal), SGPS, SA is ordered to pay, in addition to its own costs, one third of the costs of the ECB at first instance and in the appeal proceedings.

(4) The ECB is ordered to bear two thirds of its own costs at first instance and in the appeal proceedings.