EUROPEAN CENTRAL BANK

EUROSYSTEM

EN **ECB-PUBLIC**

OPINION OF THE EUROPEAN CENTRAL BANK

of 4 September 2019

on freedom of information

(CON/2019/31)

Introduction and legal basis

On 5 July 2019 the European Central Bank (ECB) received a request from the Dutch Minister for the Interior and Kingdom Relations for an opinion on a draft law on open government (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third indent of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to De Nederlandsche Bank (DNB) and the tasks concerning the prudential supervision of credit institutions conferred upon the ECB pursuant to Article 127(6) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1 The draft law aims at ensuring a transparent and publicly accountable government. To achieve this, public bodies must publish certain information on their own initiative. Any member of the public may request certain information to be made public. In addition, public bodies must take certain measures to improve their digital information management systems to make them more accessible. DNB is deemed to be a public body under the draft law.

1.2 The draft law exempts certain information from the requirement to publish or to provide access to members of the public (hereinafter the 'exempt records'). The exempt records that might be relevant from the perspective of DNB include records relating to international relations, the financial and economic interests of the State or public bodies, investigative functions of public bodies, privacy related data and deliberations of public bodies. Many of these records would only be partially exempt as information can only be withheld subject to an overall assessment that the disclosure would not be in the public interest.

1.3 Lastly, the draft law does not supersede specific, existing legal provisions dealing with confidentiality. The annex to the draft law lists the relevant legal provisions dealing with confidentiality which prevail over provisions of the draft law. The annex refers, inter alia, to Article 1:42 and paragraph 1.5.1 of the Law on financial supervision[2] and Article 20 of the Law of 1998 on

1 Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

2 *Wet op het financieel toezicht*

banking[3].

Article 1:42 and paragraph 1.5.1 of the Law on financial supervision prohibit the use or disclosure of confidential information obtained under that Law for purposes other than those described in the Law. Exemptions to that restriction are listed in those same provisions. The term 'confidential information' is not defined in the Law on financial supervision itself, but the explanatory note to that Law states that this term has the same meaning as in Directive 2013/36/EU of the European Parliament and of the Council (CRD IV)[4].

Article 20 of the Law on banking, as amended by the draft law, provides that to the extent that this Law provides for the performance of the acts aiming to achieve the objectives and tasks referred to in Article 2(1), (2) and (3) and Article 3 of this Law, which cover generally the objectives and tasks of DNB within the framework of the European System of Central Banks (ESCB), those who perform any task by virtue of the application of this Law or decrees based on it must refrain from using or disclosing data or information received in the performance of that task in any way that goes beyond or is other than what is required for the performance of their task or required by this Law.

2. General observations

2.1 The ECB generally welcomes the draft law, which is aimed at enhancing the legitimacy and accountability of, amongst others, DNB by providing for access to certain information[5].

2.2 The ECB also welcomes that certain records kept by DNB are exempt, including all confidential information that DNB holds in its capacity both as a national central bank (NCB) within the ESCB and as a national competent authority (NCA) within the framework of the Single Supervisory Mechanism for the prudential supervision of credit institutions. This approach aims to protect certain public and private interests. The categories of exempt records are intended to ensure a balance between the right of access for the general public to DNB's records and the need for the confidentiality of certain DNB records[6]. In this respect, the provisions of the draft law establish a regime that is compatible with the Union legal framework on transparency, without contravening professional secrecy obligations under Union law. It is recommended however, in view of the desirable balance between transparency and professional secrecy, to have an explicit provision in the Law on banking providing for the primacy of professional secrecy in certain cases.

3. Specific observations

ECB public access regime

3.1 Article 37 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') establishes rules on professional secrecy for the ESCB and ECB. In addition, the ECB has established a public access regime. Due to the primacy

3 *Bankwet*

4 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activitiy 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). The European Court of Justice has since then further interpreted the meaning of the term 'confidential information' in its judgment of 19 June 2018, *Baumeister* C-15/16, ECLI:EU:C:2018:464.

5 See paragraph 2.1 of Opinion CON/2012/76. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

6 See paragraph 2.2 of Opinion CON/2012/76.

of Union law, those provisions prevail over any provisions on professional secrecy or public access adopted at the level of the Member States. In particular, Article 5 of Decision ECB/2004/3 of the European Central Bank[7] provides that documents that are in the possession of an NCB and have been drawn up by the ECB as well as documents originating from the European Monetary Institute or the Committee of Governors may be disclosed by the NCB only subject to prior consultation of the ECB concerning the scope of access, unless it is clear that the document will or will not be disclosed. Alternatively, the NCB may refer the request to the ECB[8]. Furthermore, Article 2 of Decision (EU) 2015/811 of the European Central Bank (ECB/2015/16)[9] provides that where an NCA receives a request for an ECB document in its possession, the NCA shall consult the ECB on the scope of access to be granted, prior to taking a decision on disclosure, unless it is clear that the document will or will not be disclosed[10]. Against this background, the ECB suggests to ensure the explicit compatibility of the draft law with Article 37 of the Statute of the ESCB and the public access regime of the ECB[11]. In this respect it could be usefully clarified in the text of the draft law that any obligation to provide information is without prejudice to professional secrecy obligations under the Statute of the ESCB and the public access regime of the ECB.

Legal certainty

3.2 The draft law does not contain any transitional arrangement, meaning that the draft law has retroactive effect. DNB may therefore be faced with public access requests which require DNB to provide information that DNB received long before the draft law enters into force. Such information may include information that was provided to DNB specifically relying on the general exemption for public access which DNB has under the current regime (and not under the draft law). The obligation under the draft law to provide such information to the general public could undermine the principle of legal certainty and the justified confidence of, for instance, market participants, which may have provided that information to DNB relying on the information remaining confidential. For the sake of legal certainty it could be usefully clarified that the draft law would only relate to information that DNB obtains after the draft law comes into force and effect.

This opinion will be published on the ECB's website.

Done at Frankfurt am Main, 4 September 2019.

[signed]

The President of the ECB

Mario DRAGHI

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7 Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (OJ L 80, 18.3.2004, p. 42).

8 See Article 5 of Decision (ECB/2004/3).

9 Decision (EU) 2015/811 of the European Central Bank of 27 March 2015 on public access to European Central Bank documents in the possession of the national competent authorities (ECB/2015/16) (OJ L 128, 23.5.2015, p. 27).

10 See Decision (EU) 2015/16 of the European Central Bank of 27 March 2015 on public access to European Central Bank documents in the possession of the national competent authorities (ECB/2015/16) (OJ L 128, 23.5.2015, p. 27).

11 See paragraph 3.1 of Opinion CON/2012/76.