EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 19 October 2012

on the freedom of information

(CON/2012/76)

Introduction and legal basis

On 6 September 2012, the European Central Bank (ECB) received a request from the Irish Minister for Public Expenditure and Reform for an opinion on the General Scheme of the Freedom of Information Bill 2012.

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 of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[1], as the General Scheme relates to the Central Bank of Ireland (CBI). 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 General Scheme

1.1 The General Scheme consolidates and restates the freedom of information legislation in Ireland. The General Scheme provides members of the public with the right to obtain access to information in the possession of public bodies, to have personal information relating to them in the possession of public bodies corrected where it is incomplete, incorrect or misleading, and to be given reasons for decisions taken by public bodies which affect them.

1.2 The General Scheme exempts certain records from the requirement to provide access to members of the public (hereinafter the 'exempt records'). The exempt records that might be relevant from the perspective of the CBI include records relating to deliberations of public bodies, investigative functions of public bodies and negotiations by public bodies, international relations, confidential or commercially sensitive information, and the financial and economic interests of public bodies. Many of these records are only partially exempt as information can only be withheld if it can be shown that specific harm or injury would arise from disclosure. Many of the exempt records are also subject to an overall test of whether disclosure would be in the public interest.

1 OJ L 189, 3.7.1998, p. 42.

1.3 The General Scheme sets out details of the office of Information Commissioner. The Information Commissioner is to be independent in the performance of his or her functions. The Information Commissioner is to be appointed by the President of Ireland on the advice of the Irish Government following a resolution of the Irish Parliament recommending his or her appointment. Under the General Scheme, the powers of the Information Commissioner include the power to review decisions of public bodies in relation to freedom of information requests and, where necessary, to make binding decisions in relation thereto. The General Scheme provides that a requester who is refused access to records may appeal to the Office of the Information Commissioner, who may affirm, vary or annul the decision.

1.4 The General Scheme proposes that the Minister will, by way of an order (hereinafter the 'Order'), declare that the CBI is a public body for the purposes of the Freedom of Information Act 2012 (hereinafter the 'Act'), once it is enacted. This means that the Act will apply to the CBI. The Order is to provide that there will be no access to records which are subject to professional secrecy obligations under the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'ESCB Statute') or EU Financial Services Directives.

1.5 The ECB understands that an amendment to section 33AK of the Central Bank Act 1942 may be required. Section 33AK currently prohibits the disclosure by the CBI of information that is subject to professional secrecy obligations under the Treaty, the ESCB Statute or the Supervisory Directives. However, section 33AK allows disclosure by the CBI of such information to certain bodies on the basis that those bodies comply with these professional secrecy obligations. It may be necessary to add the Information Commissioner as a body to whom this information can be disclosed.

2. General observations

2.1 The ECB generally welcomes the General Scheme which is aimed at enhancing the legitimacy and accountability of the CBI by providing for access to certain records.

2.2 The ECB also welcomes that certain records are exempt. This aims to protect certain public and private interests. The categories of exempt records are intended to ensure balance between the right of access for the general public to CBI records and the need for the confidentiality of certain CBI records.

2.3 Once the General Scheme has been adapted into the Freedom of Information Bill 2012, the ECB looks forward to a consulted in the event it deviates substantially from the General Scheme.

3. Professional secrecy obligations

3.1 The obligation of professional secrecy for ECB and NCB staff under Article 37 of the ESCB Statute may give rise to similar provisions in the NCBs' statutes or national legislation. The

primacy of EU law and rules adopted thereunder also means that national laws on access by third parties to documents may not lead to infringements of the European System of Central Bank's confidentiality regime[2], and on the legal provisions on access to documents of the ECB. In this regard, the ECB refers to Decision ECB/2004/3 of 4 March 2004 on public access to European Central Bank documents[3] and in particular to Article 5 thereof which 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 EMI 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 shall or shall not be disclosed. Alternatively the NCB may refer the request to the ECB.' The General Scheme should ensure consistency with the Treaties[4], the ESCB Statute and secondary EU legislation.

3.2 In this respect, the Order will be limited to access to records, subject to professional secrecy obligations under the ESCB Statute or EU Financial Services Directives. The ECB understands that this is an absolute exemption for which the restrictions referred to in 1.2 of this Opinion are not applicable. In this context, the ECB would welcome an opportunity to review the Order so as to determine whether it will sufficiently protect the professional secrecy obligations in the ESCB Statute. Article 37.2 of the ESCB Statute provides that persons having access to data covered by Union legislation imposing an obligation of secrecy shall be subject to this Union legislation. The Order should therefore be wide enough to cover all Union legislation imposing an obligation of secrecy.

3.3 The ECB expects that there will be no legal inconsistency or uncertainty as regards the relation between the Order and the amended section 33AK. The amended section 33AK and the Order must be without prejudice to the ESCB's confidentiality regime.

3.4 The ECB understands that if a requester asks the Information Commissioner for a review of the CBI's refusal of access to documents, the Information Commissioner is entitled to request documents from the CBI. In this regard, the ECB expects that this procedure is without prejudice to the ESCB's confidentiality regime and the applicable public access legislation. The ECB notes that the CBI may appeal to the Irish High Court on a point of law only if the Information Commissioner decides that it is appropriate to grant access to CBI records. The ECB would welcome clarification in the Order that, given the protection that professional secrecy obligations are afforded in the ESCB Statute, the CBI will have an absolute right of appeal to a court or another body (and not just an appeal on a point of law) where the Information Commissioner determines that a refusal to grant access to records in reliance on the exemption for professional secrecy obligations is not justified. Access to the records should also be prohibited until the relevant court or body has ruled on the case.

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2 See the ECB's Convergence Report, May 2012, p. 28.

3 OJ L 80, 18.3.2004, p. 42.

4 See also Article 15(3) of the Treaty according to which the ECB shall be subject to the public access regime of the Union only when exercising its administrative tasks.

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

Done at Frankfurt am Main, 19 October 2012.

[signed]

The President of the ECB

Mario DRAGHI