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Confidentiality behind transparent doors: The European Central Bank and the EU law principle of openness

Pieter Van Cleynenbreugel*

Abstract

This paper questions to what extent the confidential decision-making structure maintained at the European Central Bank is still compatible with the EU principle of openness recognized in Article 15 TFEU. To that extent, it analyses the different confidentiality regimes in place as well as the openness features adopted in both monetary policy and prudential supervision. It subsequently questions how those features comply with the letter and spirit of Article 15 TFEU. Aiming better to integrate existing confidentiality features with EU constitutional transparency obligations, this paper finally proposes some minor modifications to the European Central Bank decision-making framework to align it more directly to the spirit of openness reflected in Article 15.

Keywords

European Central Bank, transparency, access to documents, openness, confidentiality

1. Introduction

The era of central banking behind closed doors and detached from democratic oversight clearly lies behind us.[1] National central banks are more than ever in the public eye and increasingly held to

1. On central bank transparency, see also P.M. Geraats, 'Trends in Monetary Policy Transparency', 12 *International Finance* (2009), p. 235–268. For an analysis and critique of closed door central banking in its historical context, see L. Ahamed, *Lords of Finance. The Bankers Who Broke the World* (Penguin, 2009).

* Faculty of Law, Political Science and Criminology, Université de Liège, Liège, Belgium

Corresponding author:
Pieter Van Cleynenbreugel, Institut d'Etudes Juridiques Européennes, Université de Liège, Place des Orateurs 1-B33/9, Liège 4000, Belgium.
Email: pieter.vancleynenbreugel@uliege.be

account for their actions.[2] Within the Eurozone, the European Central Bank (ECB or 'the Bank') is no exception in this regard. An independent supranational institution[3] accountable to the European Parliament,[4] the ECB additionally also has to function in accordance with the principle of openness outlined in Article 15 TFEU.[5] According to that provision, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.[6]

Although the ECB has put in place legal frameworks to facilitate such openness, its decision-making procedures still operate on the basis of confidentiality of information. It therefore deserves to be analysed how the confidential decision-making starting point and openness features co-exist throughout the ECB institutional framework and whether their current setup would still be compatible with the letter and spirit of Article 15 TFEU. An analysis of this kind would subsequently allow one to touch upon the question of to what extent would EU law require fine-tuning in order to make the ECB more Article 15 TFEU-compatible.[7]

Tackling these questions, this paper proceeds to uncover the co-existence of confidentiality and openness features in ECB decision making and to question the legality of their co-existence in light of Article 15 TFEU. In that respect, section two will offer an overview of confidentiality and openness features currently in place within the ECB decision-making framework, as well as of the ways in which both features refrain from interacting in a coherent way with each other. Building on that overview, section three assesses the compatibility of these features with the letter and spirit of Article 15 TFEU. Identifying specific compatibility concerns, it subsequently proposes two tailored adaptations to the ECB's decision-making framework. These propositions, it will be argued, would allow for a better and more explicit embedding of ECB decision making within the requirements of the EU law principle of openness, whereas, at present, openness can be construed as an exception to confidentiality. Whilst not advocating full-fledged openness at the ECB or for a regression into more closed-door decision making, this paper submits that a more focused attention

2. On the (need for) democratic accountability of the ECB as a monetary policy watchdog, see F. Amtenbrink, *The Democratic Accountability of Central Banks – A Comparative Study of the European Central Bank* (Hart Publishing, 1999). See also G. Ter Kuile, L. Wissink and W. Bovenschen, 'Tailor-Made Accountability Within the Single Supervisory Mechanism', 52 *Common Market Law Review* (2015), p. 155–189.
3. Articles 130 and 282(3) TFEU. In the realm of the ECB's prudential supervision powers see Article 19 of Council Regulation No. 1024/2013/EU of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, [2013] OJ L 287/63 (Regulation No. 1024/2013/EU). The ECB's independence is only limited to the exercise of the tasks for which it has been given a mandate, see Case C-11/00 *Commission v. European Central Bank*, EU:C:2003:395, para. 134.
4. Article 283(1) TFEU and Article 9 of Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, [2012] OJ C 326/230.
5. That provision actually contextualizes this open decision making in a broader democracy and rule of law context. As such, it is clear that openness is just one feature of more general decision-making principles. In full, Article 1 TEU, second indent, states that this treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.
6. On the principle in general, often also considered as a principle of transparency, see A. Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy', 32 *European Law Review* (2014), p. 72–90; and A. Buijze, *The Principle of Transparency in EU Law* (Utrecht University, 2013). For more on this perspective, see also J. Mendes, *Participation in EU Rule-making: A Rights-based Approach* (Oxford University Press, 2011), p. 292–293.
7. For a similar analysis on the need for fine-tuning in the light of openness at the Court of Justice, see A. Alemanno and O. Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo', 51 *Common Market Law Review* (2014), p. 97–139.

to openness in compliance with Article 15 TFEU is necessary in order for the ECB to continue functioning within the EU legal order. This would be necessary for the ECB to avoid its current practices being challenged by the Ombudsman or individuals in time-consuming and costly lawsuits.

2. Confidential ECB decision making and compensatory openness features

In principle, confidentiality remains at the heart of ECB institutional functioning, both in relation to its monetary policy[8] and prudential supervision activities.[9] As a result, different confidentiality regimes have been scattered throughout the Bank's decision-making frameworks (see Section A below). Dedicated attention to confidentiality does not mean, however, that the Bank operates exclusively behind closed doors. From an EU (soft) law perspective, open communications strategies (see Section B below) as well as a specific access to documents regime set up by Decision 2004/258/EC[10] (see Section C below) can be considered as two complementary remedies aimed at countering the basic confidential decision-making features inherent in ECB institutional functioning.[11] At the same time, however, the ECB Rules of Procedure indicate clearly that confidentiality remains the starting point in ECB decision making, openness constituting an exception to that principle.

A. Confidential decision making as a starting point

The ECB legal framework clearly establishes confidentiality to be a premise of its decision-making process. Article 132(2) TFEU states that the European Central Bank may decide to publish its decisions, recommendations and opinions.[12] That provision already hints at the ECB's discretion

8. On the legal limits of ECB monetary policy, see C. Zillioli, 'The ECB's Powers and Institutional Role in the Financial Crisis. A Confirmation from the Court of Justice of the European Union', 23 *Maastricht Journal of European and Comparative Law* (2016), p. 171–184.
9. Prudential supervision, i.e. the supervision of the solvency and liquidity of individual credit institutions, has been conferred on the ECB in relation to significant Eurozone banks by virtue of Regulation No. 1024/2013/EU. On the scope of the powers of the ECB in prudential supervision, as well as on the interaction with monetary policy, see G.L. Schiavo, 'From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe? The Stability Function of the Single Supervisory Mechanism', 21 *Maastricht Journal of European and Comparative Law* (2014), p. 110–140; and B. Wolfers and T. Voland, 'Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank', 51 *Common Market Law Review* (2014), p. 1463–1495.
10. Decision 2004/258/EC of 4 March 2004 on public access to European Central Bank documents, [2004] OJ L 80/42 (Decision 2004/258/EC).
11. In economics literature, a distinction is made between policy transparency and procedural transparency to highlight the openness features identified here. Policy transparency refers to situations where an institution communicates its policies to interested members of civil society. Procedural transparency rather refers to the right granted to individuals to solicit and obtain certain documents from the institution concerned. Given the lack of use of those concepts in the design and setup of the EU openness framework, this paper will refrain from using those terms. For a recent elaboration of those notions, see J. Best, 'Rethinking Central Bank Accountability in Uncertain Times', 30 *Ethics & International Affairs* (2016), p. 215–232. On the distinction between both elements as examples of active and passive approaches to transparency, see A. Peters, *Elemente einer Theorie der Verfassung europas* (Duncker & Humboldt, 2001), p. 694.
12. For an example of this see Decision of the ECB of 10 November 2000 on the publication of certain legal acts and instruments of the ECB (ECB/2000/12), [2001] OJ L 55/68.

in making its decisions public, which could be interpreted as reflecting a preference for confidential decision making, as was, and is still, common in monetary policy activities. Article 10.4 of the ECB Statute confirms even more explicitly that the proceedings of the Governing Council meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public. Again, this provision clearly indicates that the actual minutes of the deliberations will not be deemed publicly available: only the outcome of decisions *may* be made public; publicity thus constitutes the exception rather than the rule.

The confidentiality posture has been confirmed in the ECB Rules of Procedure as well. According to Article 23.1 of these rules, the proceedings of decision-making bodies shall be confidential unless the Governing Council authorizes the President to make the outcome of their deliberations public. The same rules state that not only the proceedings are confidential; any document drawn up or held by the ECB shall be classified and handled in accordance with the organizational rules regarding professional secrecy and the management and confidentiality of information. Only after 30 years will the documents become publicly available.[13] In the exercise of its mandate conferred by the TFEU, the ECB clearly favours confidential decision making. At the same time, however, the legal framework in place does not contain all-encompassing criteria determining which documents – according to which criteria – will always be deemed confidential. Quite to the contrary, specific and varied confidentiality regimes can be detected, both in the realm of monetary policy (see Section 1 below) and of ECB prudential supervision competences (see Section 2 below).

1. Confidentiality in monetary policy

In the realm of ECB monetary policy, specific confidentiality rules have been adopted in relation to the collection and transfer of statistical information,[14] in relation to Target 2 securities settlement transactions managed by the ECB, and aimed at settling transactions directly in central bank money[15] and in relation to the exchange of information between monetary and prudential

13. Article 23(3) of the ECB Rules of Procedure. The Rules of Procedure are available at European Central Bank, 'Rules of Procedure', *European Central Bank* (2018), https://www.ecb.europa.eu/ecb/legal/1001/1009/html/index.en.html. See also Article 10(3) of ECB Decision ECB/2004/12 of 17 June 2004 adopting the Rules of Procedure of the General Council of the European Central Bank, [2004] OJ L 360/61.
14. See Article 8 of Council Regulation No. 2533/98/EC of 23 November 1998 concerning the collection of statistical information by the European Central Bank, [1998] OJ L 318/8 and Article 4 of the Guideline of the ECB of 22 December 1998 concerning the common rules and minimum standards to protect the confidentiality of the individual statistical information collected by the ECB assisted by the national central banks (ECB/1998/NP28), [2001] OJ L 55/72. In relation to non-Eurozone Member States, similar guarantees have been recommended as well, see Recommendation of the ECB of 27 March 2014 concerning the common rules and minimum standards to protect the confidentiality of the statistical information collected by the ECB assisted by the national central banks (ECB/2014/14), [2014] OJ C 186/1; Regulation No. 177/2008/EC of the European Parliament and of the Council of 20 February 2008 establishing a common framework for business registers for statistical purposes and repealing Council Regulation (EEC) No. 2186/93, [2008] OJ L 61/6; and Commission Regulation No. 1097/2010 of 26 November 2010 implementing Regulation (EC) No. 177/2008 of the European Parliament and of the Council establishing a common framework for business registers for statistical purposes, as regards the exchange of confidential data between the Commission (Eurostat) and central banks, [2010] OJ L 312/1.
15. See Decision of the ECB of 24 July 2007 concerning the terms and conditions of TARGET2-ECB (ECB/2007/7), [2007] OJ L 237/71, Article 1(c) Code of Conduct attached as Annex III to Decision 2012/235/EU of the European Central Bank of 29 March 2012 on the establishment of the TARGET2-Securities Board and repealing Decision ECB/2009/6 (ECB/2012/6), [2012] OJ L 117/13 (Decision 2012/235/EU). On Target2 in general, see P. Mülbert and R. Wiemann, 'The Statutory Authority of the European Central Bank and Euro-Area National Central Banks over

supervision departments within the ECB.[16] A common denominator can be extracted from the confidentiality regimes thus put in place: once a document has been classified as confidential, its exchange has to be regulated explicitly in a binding decision. Information that is classified as confidential in accordance with the criteria set out in the frameworks concerned may, in principle, not be disclosed, except in national court proceedings after authorization has been obtained and after having ensured that sufficient guarantees for safeguarding the confidentiality of the information have been in place at national level.[17]

Without such a decision, information exchanges do not seem to be possible within the ECB legal framework. It is clear from the above that the ECB does not allow confidential statistical information on private economic operators or Member States to be released publicly in the absence of a legal basis allowing it to do so, even though this information may be crucial for the adoption of monetary policy decisions.

Above and beyond the particular EU secondary legislation frameworks touching upon the issue of confidentiality, the ECB partially released a more detailed pro-active confidentiality regime. Included as an annex to its decision on confidentiality and the separation of monetary and prudential policies, the published excerpt forms part of an otherwise not publicly available ECB confidentiality regime. In accordance with that regime, each document is labelled or has to be labelled with one of five classifications, to each of which is attached a certain potential access right. Those classifications are ECB-SECRET, where access within the ECB is limited to those with a strict 'need to know', and approved by an ECB senior manager of the originating business area, or above; ECB-CONFIDENTIAL, in which case access within the ECB is limited to those with a 'need to know' broad enough to enable staff to access information relevant to their tasks and take over tasks from colleagues with minimal delay; ECB-RESTRICTED, which can be made accessible to ECB staff and, if appropriate, European System of Central Banks (ESCB) staff with a legitimate interest; ECB-UNRESTRICTED, which can be made accessible to all ECB staff and, if appropriate, ESCB staff; and ECB-PUBLIC, in which case they have been authorized to be made available to the general public.[18] According to the decision guaranteeing the abovementioned monetary and prudential policy separation, information classified as ECB-CONFIDENTIAL or ECB-SECRET under the ECB's confidentiality regime is to be considered as confidential for the purposes of information exchange in that particular context.[19] The criteria for classifying a document as secret or confidential have not, however, been made explicit in the context of that decision. Article 23.3 of the ECB Rules of Procedure only mentions that documents drawn up or held by the ECB shall be classified and handled in accordance with the organizational rules regarding professional secrecy and management and confidentiality of information.

TARGET2-Securities', in M. Tison et al., (eds.), *Perspectives in Company Law and Financial Regulation. Essays in honour of Eddy Wymeersch* (Cambridge University Press, 2009), p. 497–520; see also T. Tridimas, 'Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement', 28 *Yearbook of European Law* (2009), p. 216–307.

16. European Central Bank, 'Decision ECB/2014/39 of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank', *European Central Bank* (2014), https://www.ecb.europa.eu/ecb/legal/pdf/en_ecb_2014_39_f_sign.pdf (the Separation Decision). That decision was based upon Article 25 of Regulation No. 1024/2013/EU.
17. Article 3 Code of Conduct attached as Annex III to Decision 2012/235/EU.
18. Annex I, which is attached to the Separation Decision.
19. Article 2(1) of the Separation Decision.

2. Confidentiality in ECB micro-prudential supervision

In the realm of ECB prudential supervision, comparable confidentiality standards have been established in relation to the core prudential supervision activities and in relation to the statistics assembled to facilitate such supervision. With the entry into force of Regulation 1024/2013 and the establishment of the single supervisory mechanism (SSM), the ECB replaces the competent national authority as the home country supervisor for significant credit institutions established in a Eurozone Member State. As a result, the ECB can be considered a national competent authority for the purpose of this field of EU law. In that case, however, no general confidentiality framework that transcends sector-specific legislation is in place in this regard. More particularly, Article 53 of Directive 2013/36/EU (the fourth Capital Requirements Directive or CRD IV) calls for professional secrecy obligations and for limits on the disclosure of confidential information. The Directive does not, as such, define confidential information.[20] In addition, the minimum protection standards for safeguarding the confidentiality of statistical information have also been extended to ECB supervisory activities; Regulation 2015/373 inserted a new Article 8(4a) into Regulation 2533/98 that allows the ESCB to transmit confidential statistical information to authorities or bodies of the Member States responsible for the supervision of financial institutions, markets and infrastructures to the extent and at the level of detail necessary for the performance of their respective tasks.[21] Specific detailed rules on how to provide and safeguard the information thus requested have also been adopted in this context.[22]

The abovementioned rules also presume that the collection and exchange of prudential supervision information is founded on the need to safeguard the confidentiality of prudential supervision. From a mere textual interpretation of the provisions, it is clear that confidentiality and non-exchange of information constitute the starting points for the operation of the integrated EU banking supervision mechanism. The mere fact is that all situations for exchange are outlined in detail and that the Directive presupposes that any exchange of confidential information has to be regulated explicitly.[23] The consequence of this choice is twofold. Firstly, exchanges not explicitly covered by the Directive are, in principle, prohibited. This point is evidenced further by the specific need to adopt a supplementary ECB decision outlining the confines for the exchange of confidential information in the context of national criminal law investigations[24] and, likewise, a memorandum of understanding enabling the exchange of information between the ECB acting in

20. Articles 53–54 of 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, [2013] OJ L 176/338 (CRD IV). This Directive has to be applied by the ECB by virtue of Article 9 of Regulation No. 1024/2013/EU.
21. Council Regulation No. 2015/373/EU of 5 March 2015 amending Regulation (EC) No. 2533/98 concerning the collection of statistical information by the European Central Bank, [2015] OJ L 64/6.
22. Guideline 2016/256 of the European Central Bank of 5 February 2016 concerning the extension of common rules and minimum standards to protect the confidentiality of the statistical information collected by the European Central Bank assisted by the national central banks to national competent authorities of participating Member States and to the European Central Bank in its supervisory functions (ECB/2016/1), [2016] OJ L 47/16.
23. This can also be inferred from Recital 29 of the Preamble to the CRD IV, which states that in order to preserve the confidential nature of the information forwarded, the list of addressees (of exchanged information) should be strictly limited.
24. Decision 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), [2016] OJ L 192/73. In that regard also see Decision 2016/456 of the European Central Bank of 4 March 2016 concerning the terms and conditions for European Anti-Fraud Office

its prudential supervision capacity and the Single Resolution Board, responsible for the orderly winding up of failing credit institutions.[25] It also follows from the foregoing that exchanges with international organizations such as the International Monetary Fund (IMF) would not fall within the scope of the CRD IV exchange of confidential information framework.[26] Secondly, the exchanges in CRD IV being limited to prudential supervision, the regime outlined there also impedes in principle the exchange of information – on the basis of confidentiality concerns – between the monetary policy, including the European Systemic Risk Board's (ESRB) secretariat,[27] and prudential supervision units of the ECB. Indeed, Article 25(4) of Regulation 1024/2013 requires the ECB to ensure that the operation of the Governing Council is completely differentiated as regards monetary and supervisory functions. Such differentiation shall include strict separation of meetings and agendas and, by its very nature, would also limit the exchanges of information relating to credit institutions that may be relevant for both tasks engaged in by the ECB.

The ECB did therefore adopt a 2014 'separation'-decision, walling off both decision-making processes.[28] According to the separation decision, documents are confidential when they concern information classified as ECB-CONFIDENTIAL or ECB-SECRET under the ECB's confidentiality regime; other confidential information, including information covered by data protection rules or by the obligations of professional secrecy, created within the ECB or forwarded to it by other bodies or individuals; any confidential information falling under the professional secrecy rules of Directive 2013/36/EU; as well as confidential statistical information in accordance with Council Regulation 2533/98.[29] The decision states that access to confidential information by the supervisory or monetary policy function from the respective other policy function shall be determined by the ECB policy function that owns the information in accordance with the ECB's confidentiality regime, unless stated otherwise in this decision; the Executive Board taking the decision in the case of conflict between the two policy functions.[30] Confidential information can be

investigations of the European Central Bank, in relation to the prevention of fraud, corruption and any other illegal activities affecting the financial interests of the Union (ECB/2016/3), [2016] OJ L 79/34.

25. Article 30(7) of Regulation No. 806/2014/EU of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010, [2014] OJ L 225/1; see European Central Bank, 'Memorandum of Understanding between the Single Resolution Board and the ECB on cooperation and information exchange', *European Central Bank* (2015), https://www.ecb.europa.eu/ecb/legal/pdf/en_mou_ecb_srb_cooperation_information_exchange_f_sign_.pdf.
26. Articles 55–59 of the CRD IV list the different authorities, which do not include international organizations; only Member State authorities or third-country authorities are mentioned in those provisions. In practice, however, such information exchanges do take place, as diverse joint intervention programmes have made clear. For an example, see European Central Bank, 'Statement by the European Commission, the ECB and the IMF on Cyprus', *European Central Bank* (2015), https://www.ecb.europa.eu/press/pr/date/2015/html/pr150727.en.html.
27. European Systemic Risk Board, 'Decision of the European Systemic Risk Board of 21 July 2015 on the provision and collection of information for the macro-prudential oversight of the financial system within the Union and repealing Decision ESRB/2011/6 (ESRB/2015/2)', *ESRB* (2015), https://www.esrb.europa.eu/pub/pdf/other/150827_decision_on_the_provision_collection_information.pdf?9b448a00a317f2e224d59eda7f867b08.
28. For the decision, see note 15. Article 25 of Regulation No. 1024/2013/EU obliges the ECB to maintain this separation. See also C. Gortsos, '"Chinese Walls" within the European Central Bank after the Establishment of the Single Supervisory Mechanism', *SSRN* (2015), http://ssrn.com/abstract=2700176.
29. Article 2(1) of the Separation Decision.
30. Articles 5(3) and 6(2) of the Separation Decision.

disclosed when it concerns anonymized 'raw data'.[31] Non-anonymized data or policy recommendations can be transferred only when approved or expressly authorized by the Executive Board.[32]

Again, the criteria for classifying documents within the ECB-CONFIDENTIAL or ECB-SECRET categories have not been made available in general terms, resulting in the ECB being given the opportunity to classify documents as such without clear control over classification. Article 23a.3 of the Rules of Procedure only establishes that documents drawn up by the Supervisory Board, the Steering Committee and any substructures of a temporary nature established by the Supervisory Board shall be ECB documents and shall therefore be classified and handled in accordance with the confidentiality regime founded on the basis of Article 23.3 of the same rules.

B. Open communication features as a primary remedy to confidentiality-focused operations

From the inception of the Economic and Monetary Union with the Treaty of Maastricht and despite the commitment to confidentiality, transparency has also played a key role in the operations of the European Monetary Institute (EMI)[33] – the ECB's predecessor – and, ultimately, of the ECB itself. Long before other EU institutions started opening up their procedures and decision-making frameworks, openness as a policy choice undergirded the operations of the ECB, using this openness as a means to keep certain information confidential and to guarantee the free flow of information between the ECB and Member States' central banks within the ESCB.[34] It has to be emphasized, however, that such openness takes place outside of a formal legal framework, by the adoption of complementary communications strategies aimed at policy transparency.

In monetary policy, the openness focus has above all been procedural and related to making decision-making subjects and criteria as clear and predictable as possible, including the criteria accompanying or underlying specific decisions (see Section 1 below). In the context of prudential supervision, the ECB endeavoured to replicate the communications strategy underlying previous monetary policy activities. In that context, additional openness mechanisms have been inserted by means of an interinstitutional agreement with the European Parliament and a memorandum of understanding concluded with the Council (see Section 2 below).

1. Openness through monetary policy communications policy

Openness about monetary policy decisions taken at the ECB does not necessarily imply full transparency.[35] Rather, it consists of six complementary and targeted publication and

31. Article 2(3) of the Separation Decision: data transmitted by reporting agents, after statistical processing and validation, or data generated by the ECB through the execution of its functions.
32. Article 6(1) of the Separation Decision.
33. On the role and functioning of the ECB's predecessor, see P. Kenen, 'The Transition to EMU: Issues and Implications', 4 *Columbia Journal of European Law* (1998), p. 359–374.
34. For that point, implicitly, see P. Leino, 'European Central Bank and Legitimacy', *Harvard Jean Monnet Working Paper* 1/01 (2001), http://www.jeanmonnetprogram.org, p. 12–13.
35. European Central Bank, 'The Single Monetary Policy: the Role of Transparency and Openness, Speech delivered by Ms Sirkka Hämäläinen, Member of the Executive Board of the European Central Bank, at the Citizens' Agenda 2000 NGO Forum on 3 December 1999 in Tampere', *European Central Bank* (1999), https://www.ecb.europa.eu/press/key/date/1999/html/sp991203_5.en.html: 'the necessity for monetary policy to be predictable does not mean full predictability in the very short run, such as the exact timing or size of interest rate change decisions. It is more important

communications strategies, the elaboration of which results from either soft law or institutional practice:[36]

i. the issuance of a press release on monetary policy decisions immediately after each fortnightly Governing Council meeting;[37]
ii. the organization of a press conference at the ECB immediately after the first Council meeting each month;
iii. the regular and frequent appearances of the President at the European Parliament;
iv. the ECB Monthly Bulletin;[38]
v. the numerous speeches made and articles published by the members of the Governing Council.[39]
vi. more recently, audiovisual materials and broadcasts of press conferences have equally been added to the communications strategies envisaged in this regard.[40]

The combined reliance on different communications tools allows the provision of a swift and detailed account of ECB policy actions and current line of thinking to the media, markets and the general public through numerous communications channels.[41] From a legal point of view, it is nevertheless unfortunate that the different communications strategies and their relative importance are not outlined in a general communications framework. Drafting – and updating – such a framework also to be published on the website of the ECB would enhance the predictability of the communications strategies themselves, as part of the ECB's clear commitment to openness about its policies.

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that a central bank is transparent and predictable regarding its medium-term goals as well as its shorter-term policy line in general'. See also European Central Bank, 'The Monetary Policy of the ECB: Stability, Transparency, Accountability, Speech by Professor Otmar Issing Member of the Executive Board of the European Central Bank at the Royal Institute of International Affairs, London, 25 October 1999', *European Central Bank* (1999), https://www.ecb.europa.eu/press/key/date/1999/html/sp991025_1.en.html and B. Winkler, 'Which Kind of Transparency? On the Need for Clarity in Monetary Policymaking', *ECB Working Paper* No. 6 (2000), https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp026.pdf?62d31b7dc4a09ff7a06f1dd5455268b8.

36. See e.g. European Central Bank, 'The Changing Role of Communication, Introductory Remarks by Jean-Claude Trichet, President of the ECB at a dinner with members of the Internationaler Club Frankfurter Wirtschaftsjournalisten Frankfurt am Main, 15 December 2008', *European Central Bank* (2008), https://www.ecb.europa.eu/press/key/date/2008/html/sp081215_2.en.html.
37. European Central Bank, 'Presentation of the ECB's Annual Report 1998 to the European Parliament, Introductory statement delivered by Dr Willem F. Duisenberg, President of the European Central Bank, Strasbourg, 26 October 1999', *European Central Bank* (1999), https://www.ecb.europa.eu/press/key/date/1999/html/sp991026_1.en.html, stating that in doing so, the ECB went beyond the obligations imposed on it by the Treaty.
38. Ibid. According to Duisenberg, 'the information provided at the press conferences held after the meetings of the Governing Council, together with the analysis contained both in the ECB Monthly Bulletin and in the other channels of communication I mentioned earlier, comes very close, in substance, to the publication of "summary minutes"'.
39. European Central Bank, 'The Single Monetary Policy: The Role of Transparency and Openness, Speech delivered by Ms Sirkka Hämäläinen, Member of the Executive Board of the European Central Bank, at the Citizens' Agenda 2000 NGO Forum on 3 December 1999 in Tampere', *European Central Bank* (1999).
40. For press conferences, see European Central Bank, 'Press Conferences in 2016', *European Central Bank* (2016), https://www.ecb.europa.eu/press/pressconf/2016/html/index.en.html.
41. European Central Bank, 'The Single Monetary Policy: The Role of Transparency and Openness, Speech delivered by Ms Sirkka Hämäläinen, Member of the Executive Board of the European Central Bank, at the Citizens' Agenda 2000 NGO Forum on 3 December 1999 in Tampere', *European Central Bank* (1999).

Although the combined reliance on five or six monetary policy communications strategies has resulted in clarity surrounding ECB monetary policy communications, this approach does not remain free from criticism from an openness point of view. Whilst information is indeed published in a timely manner and it is understood that markets respond immediately to ECB communications,[42] the openness as currently envisaged is above all ex post and fails to emphasize the actual policy inclinations and policy deliberation choices underlying each decision. Although the ECB has published papers and reports on how it envisages macro-economic policymaking criteria to come into play in its decision-making procedures,[43] its communications strategy deals above all with results rather than policy benchmarks or balances. As a result, those benchmarks or balances only become known indirectly – through the publication of decisions and press releases – and after the decision has been taken. The testimony of former president Duisenberg before the European Parliament essentially confirmed that point.[44]

It is submitted that a more general and predictable framework of the policy choices that are available and can be chosen from could equally enhance the predictability of decision making. The adoption, in 2011, of a monetary policy booklet meets that aim, offering a one-stop guidebook for the policy considerations to be taken into consideration.[45] It can be stated that this guidebook necessarily complements the ex post specific communications tools and, as such, comprises a non-negligible asset of the ECB's monetary policy openness strategy.

2. Openness in ECB micro-prudential supervision

In the realm of the single supervisory mechanism, the ECB essentially replicated the monetary policy communications strategy. The approach to supervision is indeed available on the ECB banking supervision website and outlines the approach taken, in compliance with the CRD IV Directive and related legislation.[46] In relation to the SSM, and building upon this general strategy, the ECB also aims to develop more specific ex post communications, providing insight into the interconnectedness and supervisory cycle developments relating to prudential supervision.[47] The means of communication used on the ECB website demonstrate a similar communications approach to prudential supervision compared to the one already in place in relation to monetary policy.

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42. As confirmed by Duisenberg in European Central Bank, 'Presentation of the ECB's Annual Report 1998 to the European Parliament, Introductory statement delivered by Dr Willem F. Duisenberg, President of the European Central Bank, Strasbourg, 26 October 1999', *European Central Bank* (1999).
43. The information is generally available on its website, which also contains specific graphs and booklets aimed at creating openness in this respect.
44. European Central Bank, 'Hearing before the European Parliament's Committee on Economic and Monetary Affairs, Introductory statement delivered by Dr Willem F. Duisenberg, President of the European Central Bank Brussels, 29 November 1999', *European Central Bank* (1999), https://www.ecb.europa.eu/press/key/date/1999/html/sp991129.en.html.
45. European Central Bank, 'The Monetary Policy of the ECB', *European Central Bank* (2011), https://www.ecb.europa.eu/pub/pdf/other/monetarypolicy2011en.pdf?4004e7099b3dcdbf58d0874f6eab650e.
46. Ibid. In a speech delivered by Executive Board member Lautenschläger, the need to communicate and to be in a dialogue with individual banks, other key stakeholders involved in banking supervision, such as banking associations or auditors, Parliaments, and, last but not least, the general public was confirmed explicitly. According to the same speech, '[f]rom the outset the SSM has actively managed its communication with these different stakeholders. A few weeks before the SSM officially started, we published a guide describing our approach to supervision and the key features of our organization'.
47. Ibid.

The fact remains that, just like in monetary policy, a singular document outlining and relating the different communications strategies would again increase the predictability of such communications. The ECB has published a booklet containing its general approach to supervision.[48] More specific documents concerning supervisory analyses or the application of supervisory frameworks in relation to credit institutions are kept partially confidential.[49] Whilst such confidentiality could be justified by the need to safeguard the effectiveness of supervisory practices, it is not entirely clear how much ex ante supervisory information will at present be communicated. It would seem reasonable – in the interest of openness – to enhance clarity on this point and to disclose relevant general supervisory information in a pro-active fashion. The ECB has taken initiatives to be as open as possible regarding its 'stress test' approach for credit institutions.[50] Inserting a commitment to communication in the Rules of Procedure would also in this context contribute to that aim.

In addition to the general communications strategies and accompanying booklets or guidebooks enabling openness of ECB decision-making procedures, the ECB has also, to some extent, opened up its policymaking discretion to the Council and the European Parliament, to which the ECB is thus held accountable in relation to its prudential supervision tasks. An interinstitutional agreement concluded between the ECB and the European Parliament as well as a Memorandum of Understanding concluded with the Council thus complementing the general openness framework, by permitting both Parliament and the Council to have a closer look at the ECB decision-making processes.

Both the interinstitutional agreement and the Memorandum of Understanding highlight that supervisory information can be transmitted to either institution in order for it to properly hold the ECB to account.[51] To that extent, the ECB shall provide Parliament's competent committee with at least a comprehensive and meaningful record of the proceedings of the Supervisory Board that enables an understanding of the discussions, including an annotated list of decisions. At the same time, guarantees are to be put into place to maintain the level of confidentiality and non-disclosure of information concerned as present at the ECB level.[52] The Council's Memorandum of Understanding adopts the very same approach in this regard, merely stating that exchanged information shall be confidential.[53] By allowing both institutions access to confidential information, the ECB opens its doors to the representatives of the Member States and the EU peoples. In addition, the criteria for the appointment of the Chair and Vice-Chair of the Supervisory Board have to be made

48. European Central Bank, 'Guide to Banking Supervision', *European Central Bank* (2014), https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf.
49. For an illustration in relation to the Basel Pillar II supervision, see A. Baglione, *The European Banking Union: A Critical Assessment* (Palgrave–McMillan, 2016), p. 54.
50. For information publicly available in this regard, see European Central Bank, 'Comprehensive Assessment', *European Central Bank* (2018), https://www.bankingsupervision.europa.eu/banking/comprehensive/html/index.en.html.
51. Part I, Article 4 of the Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, [2013] OJ L 320/1 (the Interinstitutional Agreement); Part I, 2. of European Central Bank, 'Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism (SSM)' [Memorandum of Understanding], *European Central Bank* (2013), https://www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf.
52. Part I, Article 5 of the Interinstitutional Agreement.
53. Part I, Article 2(3) of the Memorandum of Understanding.

public in advance, so as to allow openness during appointment proceedings.[54] As such, the agreement and memorandum seek to have some control over the dealings of the ECB with confidential information without, however, being capable of modifying or changing the confidentiality framework in place at that institution. Rather, the agreement and memorandum allow the Parliament and Council to look behind the closed-door operations of the ECB in prudential supervision. The Parliament does not have similar rights in monetary policy decision making.[55] In addition, Member States' parliaments, which also have a right of control in the SSM, are at present only given general reports in which no confidential information will be made available to the extent that this can happen before the European Parliament or the Council.[56]

C. Access to ECB documents as a secondary remedy to confidential decision making

In addition to its commitment to open communications, and in line with the long-standing individual fundamental right of access to documents,[57] the ECB also adopted a complementary legal framework allowing individuals to request access to ECB documents, relating to both monetary policy and prudential supervision activities. Currently, ECB Decision 2004/258/EC,[58] which replaced an earlier 1998 Decision,[59] constitutes the starting point in this respect.

Acknowledging that access to documents is an essential part of the ECB's information and communications policy, the 1998 Decision already aimed to offer clear rules promoting good administration, by helping officials to deal accurately and promptly with requests from the public for documents. To that extent, and in line with the 1997 Ombudsman Draft Recommendation on public access, the ECB allowed for access to administrative documents. Administrative documents, in accordance with the 1998 Decision, were to be defined as 'any record, whatever its medium, which contains existing data and which relates to the actual organisation and functioning of the ECB. In addition, it shall mean any such record relating to the organisation and functioning of the European Monetary Institute (EMI)'.[60] That notion could thus be interpreted to include staff regulations, organizational features, public procurement contracts and documents maintained by the ECB and EMI.

In the wake of the adoption Regulation 1049/2001 widening and generalizing the access to documents held by the Commission, the European Parliament and the Council[61] and by a call from

54. Part II of the Interinstitutional Agreement and of the Memorandum of Understanding.
55. For a critique, see F. Amtenbrink and K. van Duin, 'The European Central Bank Before the European Parliament: Theory and Practice after Ten Years of Monetary Dialogue', 36 *European Law Review* (2009), p. 561–583.
56. For that point, see Article 21 of Regulation No. 1024/2013/EU.
57. See Article 42 of the Charter of Fundamental Rights in the European Union, [2012] OJ C 326/391: '[a]ny 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 documents of the institutions, bodies, offices and agencies of the Union, whatever their medium'.
58. See note 9.
59. Decision 1999/284/EC of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank, [1999] OJ L 110/30.
60. Article 1(2) of Decision 1999/284/EC.
61. Regulation No. 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L 145/43 (Regulation No. 1049/2001/EC). The literature on the regulation has been voluminous, see P. Craig, *EU Administrative Law* (Oxford University Press, 2012), p. 360 et seq. for references to such literature. For an analysis of case law resulting from the regulation, see also J. Helikoski and P. Leino, 'Darkness at the Break of Noon: The Case Law on Regulation no. 1049/2001 on Access to Documents', 43 *Common Market Law Review* (2006), p. 735–781.

those institutions to the other EU institutions to follow suit, the ECB was also invited to widen its access to documents regime. This resulted in Decision 2004/258/EC.[62] According to that decision, any citizen of the Union, and any natural or legal person residing in or having its registered office in a Member State, has a right of access to ECB documents.[63] The decision offers a procedure similar to the one in Regulation 1049/2001 enabling access to Commission, Council and European Parliament documents: first, an application can be lodged, following which a decision whether or not to grant access will be taken within 20 working days by the Director-General Secretariat of the ECB.[64] In the event of a refusal, a confirmatory application can be made, also within 20 working days, to the Executive Board, asking for reconsideration.[65]

In accordance with the 2004 Decision, access can now be granted to any document, that is, any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) drawn up or held by the ECB and relating to its policies, activities or decisions, as well as documents originating from the EMI and from the Committee of Governors of the central banks of the Member States of the European Economic Community (Committee of Governors).[66] That means that access rights are no longer limited to administrative documents, but also extend, in principle, to monetary policy and prudential supervision documents. In the *Dufour* judgment, the General Court confirmed that ECB databases are also to be considered as 'documents' falling within the ambit of the Public Access decision.[67] According to the Court, 'the entirety of the data contained in a database constitutes a document within the meaning of [Article 3(a) of Decision 2004/258]'; the specific organization, analysis and formatting of data in the context of a database does not take away the classification of those data – and of the database itself – as documents for the purpose of public access.[68]

The decision offers a set of exceptions to access, that can be distinguished in per se exceptions, general exceptions and third-party exceptions. Falling within the per se exceptions ambit implies that those documents are always considered to be excluded from access if a document contains content that touches upon one of the interests or objectives protected by those exceptions. According to the decision, those exceptions relate to documents undermining the public interest, and the privacy and integrity of the individual in accordance with Union legislation regarding the protection of personal data and the confidentiality of information that is protected as such under EU law.[69] If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.[70] The decision also confirms the Rules of Procedure in stating that the exceptions to the right of access only last for a maximum of 30 years.[71]

62. Which replicates Regulation No. 1049/2001/EC, as the General Court confirmed in Case T-590/10 *Thesing and Bloomberg v. ECB*, EU:T:2012:635, para. 44.
63. Article 2(1) of Decision 2004/258/EC; that decision states that the ECB may, subject to the same conditions and limits, grant access to ECB documents to any natural or legal person not residing or not having its registered office in a Member State.
64. Article 7 of Decision 2004/258/EC.
65. Article 8 of Decision 2004/258/EC.
66. Article 3(a) of Decision 2004/258/EC.
67. Case T-436/09 *Dufour v. ECB*, EU:T:2011:634, para. 183.
68. Ibid., para. 157.
69. See Article 4 of Decision 2004/258/EC.
70. Article 4(5) of Decision 2004/258/EC.
71. Article 4(6) of Decision 2004/258/EC.

The public interest *per se exception* is defined broadly[72] by the ECB decision, so as to include documents undermining public interest as regards the *confidentiality* of the proceedings of the ECB's decision-making bodies, the Supervisory Board or other bodies established pursuant to Regulation 1024/2013; the financial, monetary or economic policy of the Union or a Member State; the internal finances of the ECB or of the national central banks (NCBs); the integrity of euro banknotes, public security, international financial, monetary or economic relations; the stability of the financial system in the Union or in a Member State, the Union's or a Member State's policy relating to the prudential supervision of credit institutions and other financial institutions; the purpose of supervisory inspections; and the soundness and security of financial market infrastructures, payment schemes or payment service providers.[73] Thus formulated, the list of per se exceptions basically includes the different documents and data deemed confidential in specific provisions of ECB legislation, but also extends beyond those provisions to instances where one of the public interest reasons can be invoked.

In its case law on the scope of the public interest exceptions, the General Court confirmed its stance also taken with regard to Regulation 1049/2001, according to which the exceptions to the right of access referred to in Article 4 of Decision 2004/258 derogate from the right of access to documents, and must therefore be interpreted and applied strictly.[74] At the same time, the ECB must be recognized as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by that exception could undermine the public interest. The EU Courts' judicial review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers.[75] In so stating, the General Court does confirm that any decision not granting access must be reasoned. In *Versorgunswerk der Zahnärtzekammer Schleswig-Holstein*, it was stated that the ECB has to explain the risk of undermining the interest being protected in a sufficiently specific manner when refusing access.[76] To that extent, it is required to compare the existing situation, in which access to the documents has not (yet) been granted, with a hypothetical situation, in which access to the documents has been granted.[77] At the same time, the General Court also confirmed in *Dufour* that it is in some cases open to the ECB to base its decisions in that regard on general presumptions when not granting access.[78] That phrase being inspired by the case law on Regulation 1049/2001, it also presupposes that access to ECB documents can be refused categorically and on the basis of a summary reasoning. So far, the case law in relation to the ECB has not elaborated on the scope of such general presumptions.

72. For a critique that exceptions have been phrased too broadly, thus impeding true wide access to documents in relation to Regulation No. 1049/2001/EC, see D. Adamski, 'How Wide is "The Widest Possible"? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited', 46 *Common Market Law Review* (2009), p. 521–549. The same critique could be voiced in relation to the ECB Public Access Decision.
73. Article 4(1) of Decision 2004/258/EC.
74. Case T-590/10 *Thesing and Bloomberg v. ECB*, EU:T:2012:635, para. 41; Case T-376/13 *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. ECB*, EU:T:2015:361, para. 73.
75. Case T-590/10 *Thesing and Bloomberg v. ECB*, para. 43.
76. Case T-376/13 *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v ECB*, para. 76.
77. Ibid., para. 75.
78. Case T-436/09 *Dufour v. ECB*, para. 141.

In addition, the decision also contains a set of additional general exceptions. Within that framework, the ECB shall refuse access to a document *unless there is an overriding public interest in disclosure*, where disclosure would undermine the protection of the commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, and the purpose of inspections, investigations and audits.[79] The criteria used in this regard are essentially copy-pasted from Regulation 1049/2001. It can thus be presumed that their interpretation will take place along the lines established by the Courts' case law of that similar provision. Additionally, access to a document drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and Member States' central banks or supervisory authorities, shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.[80] Contrary to a similar provision in Regulation 1049/2001, the ECB does not have to demonstrate that disclosure would seriously undermine its decision-making processes; the mere fact that access to a preliminary document is being requested suffices for the exception to come into play. So far, case law is lacking on what could be accepted as an overriding public interest in this context.[81]

The third category of exceptions relates to third-party documents or situations. Two situations can be distinguished in this regard. Firstly, a third party can be the author of a document currently maintained by the ECB. In that case, the ECB shall consult the third party concerned with a view to assessing whether an exception in this Article is applicable, unless it is clear that the document shall or shall not be disclosed. Just like Regulation 1049/2001, the decision does not grant an explicit veto right to the other institution concerned, but envisages at least some dialogue between the two institutions.[82] The inverse is also true, as Article 5 states that documents that are in the possession of a Member State Central Bank that have been drawn up by the ECB as well as documents originating from the EMI or the Committee of Governors may be disclosed by that Central Bank 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.[83] In cases of doubt, Member States' central banks are invited – yet not obliged – to refer the request to the ECB. Secondly, a third-party situation can occur whenever documents reflect exchanges of views between the ECB and other relevant authorities and bodies. Although the document is drafted by the ECB, its interactions with other authorities may warrant additional attention. In that situation, access shall be refused even after the decision has been taken, if disclosure of the document would seriously undermine the ECB's effectiveness in carrying out its tasks, unless there is an overriding public interest in disclosure.[84] In any case, the ECB will have to indicate how granting access would in that situation undermine its effectiveness.

79. Article 4(2) of Decision 2004/258/EC.
80. Article 4(3) of Decision 2004/258/EC, para. 1.
81. Given that the decision is based on Regulation 1049/2001/EC, continuous inspiration can obviously be drawn from the case law surrounding that regulation.
82. Article 4(4) of Decision 2004/258/EC; for ESRB (European Systemic Risk Board) documents, the decision refers to the ESRB Public Access decision, containing a similar regime, yet tailored to that Board's functioning; see Decision of the European Systemic Risk Board of 3 June 2011 on public access to European Systemic Risk Board documents (ESRB/2011/5), [2011] OJ C 176/3.
83. In that regard also see Decision 2015/811/EU 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), [2015] OJ L 128/27.
84. Article 4(3) of Decision 2004/258/EC, para. 2.

Contrary to the actual ECB decision-making framework grounded in confidentiality, confidentiality here appears to be structured as an exception to an otherwise transparent decision-making format. The question can therefore be raised, to what extent the general confidentiality provisions and the access to documents' exceptions in the context of this decision relate to each other.

A tentative answer to that question appears to be found in the interinstitutional agreement concluded between the ECB and the European Parliament, which states in a recital that 'the conditions under which a document of the ECB is confidential are laid down in Decision 2004/258/EC of the ECB (ECB/2004/3)'.[85] That statement is most remarkable, as it turns upside down the premise of confidentiality on which the ECB decision-making framework has been based. At the same time, however, the recital clearly indicates that the decision only determines the (general) conditions falling within which a document will be deemed confidential. Those general conditions are nevertheless phrased in an ex post and reactive manner and have been construed in a most open-textured way to the likes of Regulation 1049/2001. As such, they seem to promote a case-by-case confidentiality assessment of any specific document, access to which has been requested.

So far, neither the decision itself nor the EU Courts' case law on ECB access to documents have established an explicit link between the ex ante provisions on confidentiality outlined above, constituting an integral part of the ECB legal framework. It can therefore be questioned to what extent the classification of a document or of information as confidential in compliance with the monetary policy or prudential supervision instruments outlined above suffices for access to that document to be refused. In the setup of the public access decision, it would seem that the classification of a document as confidential in accordance with those standards does not automatically imply that the document can never be accessed. The EU judiciary has refrained from linking specific confidentiality provisions to access to documents' exceptions. The *Dufour* case was the only occasion on which the Court referred vaguely to the potential for general presumptions of confidentiality to remain in place in ECB access cases.[86] The lack of more case law on this point does not permit the offering of more conclusive illustrations in this respect. It follows from this assessment that no clear links seem to have been established between confidentiality and access to documents provisions at ECB level.

3. The future of ECB decision making in an increasingly open EU law environment

In light of the foregoing overview, it can be questioned whether the co-existence of confidential decision making and the compensatory openness tools present at the ECB are compliant with the EU principle of openness outlined in Article 15 TFEU. Although, on a general level, the ECB's regime seems reconcilable with the open-textured obligations found in Article 15 TFEU (see Section A below), the compatibility of the current regime with the spirit of that provision appears difficult to confirm. Acknowledging those potential problems, this paper therefore proposes two modifications to align the ECB decision-making structures to that spirit (see Section B below).

85. Recital G of the Preamble to the Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, [2013] OJ L 320/1.
86. Indeed, see Case T-436/09 *Dufour v. ECB*, para. 141.

Doing so would guarantee that the ECB shows its clear commitment to openness, acting more directly in compliance with the requirements imposed by Article 15 TFEU (see Section C below).

A. Compatibility, in practice, with the letter of Article 15 TFEU

Article 15(1) TFEU requires the Union's institutions, bodies, offices and agencies to conduct their work as openly as possible. As a direct result, all EU institutions have to abide by the bundle of duties and concomitant rights attached to openness. Those duties include above all the obligation to make decision-making procedures transparent and to have a complementary access to document regime, preferably to the widest extent possible,[87] in compliance with Article 15(3) TFEU.

In that understanding, both open decision making and access to documents are not to be seen in isolation, but as complementary instruments contributing to the implementation of the principle of openness under EU law. The European Ombudsman also consistently seems to hint at this bundle of rights approach, promoting the adoption of more general openness guidelines in order pro-actively to avoid that an institution would be overburdened. The 1997 Ombudsman draft recommendation on public access to documents offers a good illustration of this.[88] Stating that communications strategies are an important part of opening up the EU's institutional framework to the eyes of the citizens, the Ombudsman also confirmed that it is important to recognize that an information strategy is not a substitute for rules about what to do when citizens take the initiative by asking for documents that have not been put in the public domain. Access rights are therefore necessary, in addition to openness features. The Recommendation does not, however, clearly state exactly how both openness and access features are related. In its 2005 Report on the openness of Council legislative meetings[89] as well as in its 12 July 2016 Report on transparency in trilogue talks between Commission, Council and European Parliament,[90] the Ombudsman most certainly advocates that more openness can counter future access to documents requests and subsequent litigation.[91]

Although access constitutes a fundamental individual right in its own way,[92] the transparent decision-making obligation added to Article 15(3) shows clearly that access is embedded in and

87. For an argument clearly in favour of this approach, see P. Leino, 'Transparency, Participation and EU Institutional Practice: An Inquiry into the Limits of the "Widest Possible"', *EUI Law Working Paper* No. 2014/03 (2014), http://cadmus.eui.eu/handle/1814/30580, p. 21.
88. See Special report from the European Ombudsman to the European Parliament following the own-initiative inquiry into public access to documents (616/PUBAC/F/IJH), [1998] OJ C 44/9.
89. European Ombudsman, 'Special Report from the European Ombudsman to the European Parliament Following the Draft Recommendation to the Council of the European Union in Complaint 2395/2003/GG', *European Ombudsman* (2003), http://www.ombudsman.europa.eu/cases/specialreport.faces/en/386/html.bookmark.
90. European Ombudsman, 'Decision of the European Ombudsman Setting out Proposals Following her Strategic Inquiry OI/8/2015/JAS Concerning the Transparency of Trilogues', *European Ombudsman* (2015), http://www.ombudsman.europa.eu/en/cases/summary.faces/en/69213/html.bookmark.
91. More prematurely on that point, see also Special report from the European Ombudsman to the European Parliament Following the Own-initiative Inquiry into Public Access to Documents (616/PUBAC/F/IJH), [1998] OJ C 44/9.
92. See also charter and earlier case law: Case T-194/94 *Carvel and Guardian Newspapers v. Council*, EU:T:1995:183, para. 65, which offers a clear illustration in this respect. In that paragraph, it was stated that it is clear both from the terms of Article 4 of Decision 93/731/EC and from the objective pursued by that decision, namely to allow the public wide access to Council documents, that the Council must, when exercising its discretion under Article 4(2), genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations. A truly individual and case-by-case analysis thus needed to be made.

directly related to openness. To the extent that a sufficient level of openness is provided for, individuals' access to documents can be limited seemingly to whatever is necessary to make such openness – and the core objectives underlying it – work. In that interpretation, nothing would seem to impede that the right of access to documents is interpreted in a more limited fashion, giving more way to the exceptions that are thus being elevated to constitutionally protected interests to be balanced with access to documents, against the background of a framework that promotes, regulates and structures openness in accordance with Article 15 TFEU and the other principles supporting the democratic functioning modalities of the European Union.[93]

The Court of Justice accepted early on that the specific regulatory regime and consent mechanism accompanying personal data protection has been held to prevail over the general right of access in Regulation 1049/2001.[94] The fact that another regulatory regime is in place imposing strict procedures and conditions governing data protection therefore in itself justifies a less extensive right of access to documents.[95] When assessing the compatibility of the ECB legal framework with the letter of Article 15 TFEU, it is important to remember that this provision only requires the institutions to function as openly as possible, providing for a transparent decision-making framework and an access to documents regime. From that perspective, institutions retain a significant amount of discretion to determine how far they will open up their decision-making frameworks as long as their proceedings are in some way made transparent and an access to documents regime is provided for.[96]

The ECB legal framework appears perfectly to comply with the conditions mentioned in that provision. On the one hand, it offers a clear open communications strategy aimed at countering the confidential nature of Governing Council proceedings. On the other hand, it has envisaged an access to documents regime in the Public Access decision, tailored in conformity with Regulation 1049/2001. In this respect, the only potentially worrying element is that the access to documents regime is not directly regulated in the ECB Rules of Procedure, as explicitly stipulated by Article 15(3). The explicit reference in Article 23.2 of the Rules of Procedure to the Governing Council's Public Access decision would nevertheless seem sufficient to alleviate concerns of incompatibility with Article 15(3) TFEU in this regard. As such, the ECB framework appears to be largely in conformity with EU primary law.

That point was already established prior to the entry into force of the Lisbon Treaty. At that time, it had been argued before the General Court that the ECB's Public Access decision and its per se exceptions would be incompatible with the general principle of EU law reflecting the fundamental right to access underlying that provision.[97] The General Court in that regard nevertheless stated that fundamental rights cannot be understood as 'unfettered prerogatives' and that it is 'legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left

93. A. Alemanno, On the Interaction Between Those Principles, 32 *European Law Review* (2014), p. 72–90.
94. See, inter alia, Case C-28/08 P *European Commission v. The Bavarian Lager Co. Ltd*, EU:C:2010:378, para. 78; Case T-115/13 *Dennekamp v. European Parliament (Dennekamp II)*, EU:T:2015:497, para. 68.
95. The data protection regime is governed by Article 13 of Regulation No. 45/2001/EC of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, [2001] OJ L 8/1.
96. For an argument clearly in favour of this approach, see P. Leino, *EUI Law Working Paper* No. 2014/03, p. 21.
97. Joined Cases T-3/00 and T-337/04 *Athanasios Pitsiorlas v. Council of the European Union and European Central Bank*, EU:T:2007:357, para. 174.

untouched'.[98] As such, the Court accepts the limits posited by the ECB on transparency in the access decision; nothing in Article 15(3) TFEU seems to indicate that this is no longer the case.

One could even argue that the ECB legal framework goes beyond the obligations relating to access imposed on it by Article 15 TFEU. It should indeed be remembered that Article 15(3) TFEU only imposes the obligation on the ECB to grant access to documents relating to its administrative tasks. The Treaty does not define the notion of administrative tasks subject to access obligations and 'other' tasks escaping those obligations. The 2012 decision by the Court of Justice relating to public access to administrative task-related documents also does not define that notion.[99] In the 1997 Ombudsman Draft Recommendation on public access, access could be limited to *administrative* documents, that is, documents relating to the internal institutional organization and functioning of an institution.[100] The Treaty does not only, however, refer to administrative documents, but to documents relating to administrative tasks. As the European Union has evolved and as its administrative roles in managing or overseeing the economy have increased significantly since 1996, one could argue that the Article 15 TFEU reference to 'administrative tasks' transcends the notion of 'administrative documents' as defined previously, thus also including documents relating to administrative policy tasks, such as monetary policy or prudential supervision tasks in relation to the ECB.[101]

The Court does not seem to agree on that position. In a case relating to the access to monetary policy documents maintained by the ECB, the General Court stated that the ECB Public Access Decision did not limit that right solely to documents falling within the exercise of its administrative tasks, as referred to in the fourth subparagraph of Article 15(3) TFEU, without defining the extent of this notion.[102] As such, it implicitly seems to consider monetary policy to fall outside the realm of administrative tasks engaged in by the ECB, thus implicitly considering this notion to be limited to internal organization and public procurement documents.[103] It is also clear, however, that in this interpretation, an EU institution can decide to extend its access regime beyond the minimum obligations outlined in Article 15. Nothing, according to the Court, would then seem to impede the ECB from limiting once again its access focus to internal administrative documents without infringing the letter of Article 15 TFEU.

At the same time, even when the notion of administrative tasks would be confined to institutional organization and functioning administrative documents, the Public Access decision would seem to contain one exception that is difficult to square with that narrow interpretation. In Article 4(1)(a), third indent of the public access decision, it is stated that access to documents, the disclosure of which would undermine the internal finances of the ECB, is to be refused. The notion of 'internal finances' being left undefined, one could be inclined to argue that it includes

98. Ibid., para. 220–221.
99. See Decision 2013/C 38/02 of the Court of Justice of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions, [2013] OJ C 38/2, Article 1 of which only refers to documents drawn up or received by it and in its possession, as part of the exercise of its administrative (i.e. non-judicial) functions.
100. Special report from the European Ombudsman to the European Parliament following the own-initiative inquiry into public access to documents (616/PUBAC/F/IJH), [1998] OJ C 44/9.
101. As has been advocated by openness advocacy groups such as Transparency International, see
102. Case T-590/10 *Thesing and Bloomberg v. ECB*, para. 79.
103. For this point see D. Curtin and J. Mendes, 'Article 42 – Right of Access to Documents', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), p. 1108.

documents pertaining to the ECB's budget and allocation of budgetary resources to specific tasks, which, as a result, could not be the subject of disclosure. According to Article 15(3) TFEU, those documents, as long as they relate to the ECB's institutional functioning, would nevertheless qualify as administrative documents that have to be disclosed. It is therefore crucial for the ECB, even when going beyond the administrative task requirement, to define what kinds of administrative documents can be disclosed, when they relate to organizational measures and their budgetary implications. To the extent that internal finances documents refers rather to the debt and equity on the ECB's balance sheet, one could say that such information is directly related to its monetary policy and therefore excluded from disclosure. A clarification of the Public Access decision that only *internal finances documents directly or indirectly relating to the ECB's balance sheet and leverage* would take away all doubt regarding the conformity of that exception with Article 15(3) TFEU. At the very least, that specific provision should be interpreted in this way so as to avoid the Public Access decision being deemed unconstitutional on that particular point.

B. Compatibility with the spirit of Article 15 TFEU?

Whilst the ECB legal framework is overall compatible with the letter of Article 15 TFEU, the internal finances exception's extensive interpretation notwithstanding, more serious questions can be raised regarding its compatibility with the spirit of that same provision. As such, it could be maintained that the spirit of Article 15 TFEU does indeed at the very least invite and perhaps oblige EU institutions to start from open decision making and to justify exceptions to such openness more clearly within their rules of procedure.[104] That spirit above all seems to have an impact on the ways in which confidentiality frameworks and openness features would have to co-exist within the ECB legal framework. The provision seems to require that institutions take openness, rather than confidentiality, as their decision-making starting point.[105] As a result, openness should be the starting point and confidentiality rather the exception, the maintenance of which would have to be justified by the institution concerned. In the current ECB setup; the inverse rather seems to be the case, confidentiality features not being construed as an exception to an otherwise open decision-making framework. It could indeed be argued that, from an Article 15 TFEU point of view, a clearer rephrasing is desirable, if only to demonstrate that the ECB is truly committed to openness as a principle underlying the EU legal order.

In an attempt to enhance the ECB legal framework's compatibility with the spirit of Article 15 TFEU, this part proposes specific modifications to the ECB decision-making framework that would allow better integration of the confidentiality and openness features of ECB decision making. Doing so would not fundamentally alter the ways in which the ECB functions, yet would nevertheless guarantee a more direct compliance with the aims and spirit of Article 15 TFEU. In

104. For that starting point, see the European Commission's Communication 93/C 166/04 on openness in the Community, [1993] OJ C 166/4. The Court adopted a similar stance in Joined Cases C 39/05 P and C 52/05 P *Sweden and Turco v. Council*, EU:C:2008:374, para. 59: it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is, in fact, rather a lack of information and debate that is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole. See also A. Alemanno, 32 *European Law Review* (2014), p. 81.

105. For a similar perspective, see L. Rossi and P. Vinagri e Silva, *Public Access to Documents in the EU* (Hart Publishing, 2017), p. 41.

practice, the steps to be taken in this regard are twofold. On the one hand, an additional provision within the Rules of Procedure referring to the principle of openness and/or Article 15 TFEU more explicitly can be proposed (see Section 1 below). On the other hand, a modification to Decision 2004/258/EC aimed at better embedding confidentiality within an openness-compatible and -oriented framework (see Section 2 below) could also additionally be imagined.

1. Proposed adaptation of the ECB Rules of Procedure

The ECB Rules of Procedure currently start from the premise that confidentiality is the modus operandi of the Governing Council and the Executive Board, in conformity with the ECB Statute. In the light of Article 15 TFEU, this modus operandi could still be maintained, as that provision only requires EU institutions to function as openly *as possible* in light of the mandate they have been entrusted with.

It is submitted, however, that it may be preferable to more directly include the ECB's commitment to openness in its Rules of Procedure, with a view to demonstrate directly the commitment to openness. As such, the institution's commitment to transparency would directly form part of the Rules of Procedure. In the current ECB Rules' setup, one could think of adding a new Article 23.1 of the Rules of Procedure indicating that the ECB endeavours to operate as openly as possible within the scope of its monetary policy mandate and in compliance with the obligations imposed on it by Article 15 TFEU. To that extent, it could also refer directly to the open communications strategy already maintained in this regard. Although those Rules of Procedure effectively have to comply with the Statute, they also need to comply with Article 15 TFEU; expressly highlighting the ECB's commitment to openness to the best extent possible would not immediately impose new legal obligations on the decision-making organizations to open up their decision-making procedures beyond the existing status quo, but it would at least demonstrate the ECB's willingness to conform to the openness commitment inserted in the Treaties since 2009. The provision could then read as follows.[106]

> Article 23
>
> *Openness, confidentiality and access to ECB documents*
>
> *23.1. The ECB shall operate in conformity with the requirements of openness stated in Article 15 TFEU. To that extent, the Governing Council will develop and publish a general open communications strategy outlining the ways in which decisions will be communicated to the public and the criteria and procedural steps taken in preparation of its decisions.*
>
> *The Governing Council will also develop and make public general organizational rules regarding management and confidentiality of information.*
>
> 23.2. The proceedings of the decision-making bodies of the ECB, or any committee or group established by them, of the Supervisory Board, its Steering Committee and of any its substructures of a temporary nature shall be confidential unless the Governing Council authorizes the President to make the outcome of their deliberations public. The President shall consult the Chair of the Supervisory Board prior to making any such decision in relation to the proceedings of the Supervisory Board, its Steering Committee and of any its substructures of a temporary nature.

106. The proposed modifications have been placed in italics.

> 23.3. Documents drawn up or held by the ECB shall be classified and handled in accordance with the organizational rules regarding professional secrecy and management and confidentiality of information. They shall be freely accessible after a period of 30 years unless decided otherwise by the decision-making bodies.
>
> 23.4. Public access to documents drawn up or held by the ECB shall be governed by a decision of the Governing Council. *Documents considered as ECB-CONFIDENTIAL or ECB-SECRET in accordance with the ECB confidentiality regime as well as documents deemed confidential in accordance with relevant EU secondary legislation will not be disclosed, unless a specific overriding reason mandating disclosure can be invoked by the applicant for access within the conditions set by the decision of the Governing Council on public access.*

The proposal outlined here contains four novelties that could enhance compatibility of the ECB decision-making framework with the spirit of Article 15 TFEU, without fundamentally modifying the ECB's decision-making features. In essence, the new elements added all make explicit – and thus more directly compatible with Article 15 TFEU – commitments to openness already present or potentially present within the ECB legal framework.

Firstly, the title of Article 23 could directly refer to openness as the starting point, so as to demonstrate that Article 15 TFEU is taken seriously at the ECB level. A reference to that provision in Article 23.1 would clarify that position even further. The mere reference to that provision does not, in itself, entail legal obligations that presently go beyond the openness focus already maintained at the ECB. As mentioned in the first part of this paper, openness obligations above all impose a clear communications strategy as well as an ex ante publication of decision-making criteria on institutions. A mere reference to Article 15 TFEU would confirm that commitment, as more specific obligations directly enshrined in a modified Article 23 of the Rules of Procedure would qualify and structure the scope of such openness obligations.

Secondly, the revised first paragraph of Article 23 would embed directly in the Rules of Procedure the obligation to publish and structure a clear communications strategy. As the overview in the second part of this paper demonstrated, a communications strategy is clearly in place in both monetary and prudential supervision policies, yet these strategies operate completely outside the formal procedural framework. Asking the Governing Council to outline in a predictable fashion the strategies for communication in a decision would create a legally embedded impression that communication and openness surrounding a decision is taken seriously at the ECB. Again, inserting this obligation would merely confirm a position already implicitly adopted by the ECB. Clearly demonstrating a commitment to open communications most directly conforms to what Article 15 TFEU imposes on EU institutions.

Thirdly, a commitment to openness also implies a commitment to making sure that citizens can predict the boundaries of confidential decision making and the documents that can be accessed. For that reason, clarity surrounding the ECB confidentiality regime is necessary. Insights into why documents are being classified as confidential may guarantee that individuals understand the decisions not to make those particular documents public. As mentioned in the second part of this paper, the ECB partly published its confidentiality regime in the light of the separation decision ensuring the confidentiality of information used in either monetary policy or prudential supervision policy spheres. Making that confidentiality regime more widely available and linking it directly to specific EU or ECB secondary legislation imposing confidentiality requirements on specific actions or documents as part of a general confidentiality strategy would at least increase openness about confidentiality, which in turn would make citizens better understand why and how

confidentiality plays a role in the ECB decision-making process. It would also help in making citizens understand why the different classifications in the confidentiality regime can be attributed to different documents. In doing so, the ECB would also more directly conform to the requirement already in place in Regulation 1049/2001, obliging the Commission, Council and European Parliament to publish the criteria for assigning top secret or confidentiality status to some documents.[107]

The confidentiality levels to be used could in that understanding remain the same as the ones currently relied on in the ECB's confidentiality strategy. It would nevertheless fall upon the ECB to clarify how the different categories relate to different documents. Particularly important in that regard is the distinction between ECB-SECRET and ECB-CONFIDENTIAL. It is not entirely clear from the currently published part of the ECB confidentiality regime how both classifications would differ from an access to documents/third-party point of view. To the extent that different nuances are relevant for the internal use of documents, the published confidentiality regime should also mention and explicate this. As such, openness regarding the criteria can truly be assured.

Fourthly, Article 23.4 could be relied on as a first step to explicitly link pro-active and ex ante confidentiality criteria pervading EU or ECB secondary legislation and the ex post and reactively formulated access to documents regime of Decision 2004/258/EC. As mentioned in the second part of this paper, both regimes operate in some kind of isolation from each other. It can nevertheless be submitted that more clarity on the criteria and different formats of confidential documents could also benefit the scope of access to documents. As the Courts have accepted that general exception categories not necessitating a document-by-document analysis of the rules in place can accompany an access regime, it would seem logical to exclude general categories of previously ex ante identified confidential documents from such access. To that extent, the proposed modification to the Rules of Procedure envisages the introduction of the categories of ECB-CONFIDENTIAL and ECB-SECRET as benchmarks for non-disclosure. Both categories are opted for in this regard as they have been considered to be confidential in the light of the separation decision and as it can be considered that documents meeting one of the specific secondary legislation confidentiality criteria would likely be classified as such. In the proposed modification to the Rules of Procedure, both confidentiality categories, flowing from the ECB's confidentiality regime currently in vogue, would thus be attributed important yet similar legal value. As the third limb of this proposal outlined, it is therefore essential that criteria for classifying a document as such are publicly available. A document classified as such would not be able to be disclosed, unless an applicant can, in accordance with Decision 2004/258/EC, bring a specific overriding reason for doing so. Adapting the Rules of Procedure in this way would directly link them to a publicly known confidentiality regime outlining criteria for non-disclosure and would also avoid frivolous access requests from having to be treated in detail by the institution concerned. In the light of a more general openness strategy and the communicating vessels' interpretation between openness and access implicitly underlying recent transparency case law, it can be maintained that this approach would be constitutionally feasible and even preferable.

The adaptations to the Rules of Procedure would above all serve to make openness as requested in Article 15 TFEU the starting point for ECB decision making, also highlighting what criteria are to be used to classify a document as confidential. The proposed obligation thus imposed on the

107. See Article 9(6) of Regulation No. 1049/2001/EC. At this stage, Decision 2004/258/EC does not contain a similar provision.

ECB would be to make more widely accessible and enshrine in a decision its confidentiality regime, outlining how it relates to the confidentiality frameworks in secondary legislation and to the access to documents regime. Offering a blueprint for the ECB's institutional functioning, an adapted Rules of Procedure would more directly breathe the spirit of openness the post-Lisbon Treaty framework imposed on all EU institutions, offices, bodies and agencies. Doing so would also allow the ECB to play a pro-active, treaty-conforming openness role in the post-Lisbon EU constitutional framework. Given the ECB's already clear, implicit commitment to openness and open communications strategies, it would seem a small step to turn it into a more explicit decision-making framework reality.

2. Embedding confidentiality more directly in openness debates by means of Decision 2004/258/EC

The proposal to refer to the existence confidentiality safe zones directly within Article 23 of the Rules of Procedure would also have an impact on the ECB's access to documents regime and Decision 2004/258/EC as well. That decision would itself indeed have to be adapted so as to acknowledge more generally the link between ex ante confidentiality regimes, ECB confidentiality classifications and exceptions to the access of documents. To that extent, an additional recital as well as a complementary provision can be proposed.

The recital – which would likely have to be inserted between current recitals (3) and (4) – could be worded as:

> Specific regulatory provisions and the confidentiality regime provide for criteria that allow a document to be considered as confidential. To the extent that those legislative or confidentiality regime criteria determine a document containing information that is confidential within the categories ECB-CONFIDENTIAL or ECB-SECRET, its disclosure should not be permitted. Documents falling in other categories can be disclosed if no public or private interest recognized by this decision impedes or limits such disclosure.

Phrased as such, it would be clear at the outset that documents falling into these categories – the criteria for which have been rendered public in the light of the proposed Article 23.1 modification – cannot be disclosed. As such, openness about confidentiality criteria would result in limiting ex post access applications, which is in compliance with the balanced interpretation of Article 15 TFEU.

The provision would then be phrased, 'Article 4.4.a. Documents containing information classified as ECB-CONFIDENTIAL or ECB-SECRET in accordance with the published ECB confidentiality regime cannot be disclosed'.

As the other documents could still benefit from the decision's access rights, there would be no need to exclude them explicitly by mentioning them as part of the exceptions to access. The existing grounds for access and the document-by-document review accompanying them could still be relied on in those circumstances, ensuring that access can be either obtained or contested in those instances.

C. Implementing the proposed modifications: A necessity under EU primary law?

The modifications proposed in Section B above would allow the ECB's confidentiality regimes to be embedded better within an openness-focused decision-making framework. Although it could be argued that, at first sight, the proposed adaptations or modifications merely constitute cosmetic

operations that would not in themselves change the functioning and confidentiality-focused decision making of the ECB, at least two legally relevant consequences would be brought about by their introduction.

Firstly, clarifying the openness–confidentiality balance would avoid legal arguments to be developed against the ECB that it does not take openness seriously or that it is acting in ways incompatible with EU law. Although in the past the General Court stated that Article 255 EC Treaty – guaranteeing access to documents – did not have a direct effect,[108] it is not clear to what extent individuals could presently invoke the less conditionally phrased Article 15(1) TFEU and challenge the compliance of the ECB's openness policies with that provision. In any case, by pro-actively adapting its decision-making framework to the openness mantra imposed by Article 15 TFEU, the ECB could avoid individuals having to devote time and effort to developing arguments that openness is not taken seriously.

Secondly, in taking a more pro-active compliance approach with Article 15 TFEU, the ECB would position itself more clearly as an institution committed to openness. Its actions in this field could be considered, by the European Ombudsman or even the Court of Justice, as exemplary and as a means to inspire other EU institutions further to develop their openness strategies. As such, the ECB has the opportunity, rather than being vilified for its confidential decision making, to structure future debates on how far and what kinds of openness Article 15 TFEU requires with only slight adaptations to its legal framework and without requiring significant modifications to its modus operandi.

4. Conclusions

This paper offered an overview of the confidential decision-making structures and compensating openness features underlying the European Central Bank's decision-making framework. Building on that overview, this paper subsequently analysed to what extent the access to documents and communications strategy regimes in place at the European Central Bank are compatible with the letter and spirit of Article 15 TFEU. Submitting that the ECB's confidentiality focus is not necessarily incompatible with the letter of Article 15 TFEU, this paper argued that the confidentiality starting point may nevertheless goes against its spirit. Seeking to overcome potential EU constitutional law compatibility issues, simple modifications to the Rules of Procedure and Staff Rules, complemented by additional guidelines made public, have been proposed. In doing so, openness and transparency would be elevated to more central features of institutional functioning.

Although the hands-on and often simple proposals – which do not necessitate Treaty or Statute modifications but rather Rules of Procedure or Staff Rules modifications – may at first sight seem to reflect a mere cosmetic operation – putting openness more clearly in the picture at the ECB – it was submitted that their introduction could contribute to the avoidance of future 'lack of openness' claims directed by the Ombudsman or third parties against the ECB. As a result, the ECB would show the other institutions and the citizens of the European Union that it takes openness as conceived by Article 15 TFEU seriously, in doing so even offering inspiration to other institutions to 'up their game' in this field.

108. See Case T-191/99 *Petrie et al.*, EU:T:2001:284, para. 35.