Single
Resolution Board
Appeal Panel

25 September 2017

case 19/17

DECISION

[Appellant]

appellant

v

the Single Resolution Board

Yves Herinckx, Vice-Chair
Eleni Dendrinou-Louri
Kaarlo Jännäri
Marco Lamandini
Luis Silva Morais

DECISION

In Case 19/17,

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 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 (the "SRMR"),

[Appellant], address unknown, appellant, represented by Mr Juan Ignacio Navas Marques, abogado, and Mrs Anna Artalejo Rubio, abogada, Navas & Cusí Abogados, calle Velázquez 18, 28001 Madrid, Spain, where address for service is elected,

v

the Single Resolution Board, represented by Dr Elke König, Chair,

THE APPEAL PANEL,

composed of Yves Herinckx, Vice-Chair, Eleni Dendrinou-Louri, Kaarlo Jännäri, Marco Lamandini and Luis Silva Morais,

makes the following decision.

(1) The procedure

1. The notice of appeal was received by the Secretariat of the Appeal Panel on 19 July 2017.

2. Mrs [Appellant] was an investor in Banco Popular Español, S.A. ("Banco Popular"). More specifically, she held ● Banco Popular shares as well as "participationes preferentes" securities of the DE0009190702 series with an aggregate face value of €●. She seeks the annulment of the Board's decision dated 7 June 2017 whereby the Board placed Banco Popular under resolution and adopted a resolution scheme. The scheme includes a full write-down of the shares in Banco Popular, a conversion into shares of all additional tier 1 instruments issued by Banco Popular followed by a full write-down of the shares resulting from this conversion, and a conversion into shares of all tier 2 instruments issued by Banco Popular followed by a sale to Banco Santander S.A. for a total consideration of €1 of the shares resulting from this conversion.

3. The operative part of the notice of appeal reads as follows:

> *Requests*
>
> *The annulment of the decision of 7 June 2017.*
>
> *One. - Formation of the Appeal Panel as envisaged under Article 85(1) of Regulation (EU) No 806/2014.*
>
> *Two. - The annulment of the decision SRB/EES/2017/08 of the Single Resolution Board.*

4. On 24 July 2017, the Vice-Chair of the Appeal Panel and the parties discussed the organisation of the proceedings by conference call, also in relation to six other identical appeals where the appellants were represented by the same counsel. It was agreed, in particular, that a first round of written observations would be limited to questions relating to the admissibility of the appeal and that no hearing should be held in respect of this phase of the proceedings. The Vice-Chair issued on 25 July 2017 a procedural decision inviting the Board to submit its written response to the appeal and Mrs [Appellant] to submit her written rebuttal, in each case with regard only to admissibility, by 3 August 2017 and 14 August 2017 respectively. The Board filed its response on 3 August 2017, in English; a Spanish version of the response followed on 9 August 2017. Mrs [Appellant] filed her rebuttal on 15 August 2017.

(2) Procedural issues

5. The Board objects that the demand aiming at the establishment of the Appeal Panel is deprived of meaning and is therefore inadmissible.

6. The Appeal Panel is a permanent body. It is available to adjudicate appeals submitted to it and need not be constituted anew on each occasion. Therefore, the demand seeking the formation of the Appeal Panel has no object.

7. The Board further objects to the insufficient clarity of the procedural directions given by the Appeal Panel with regard to the submission of the parties' observations, to the fact that the Board was required to submit its observations on the admissibility of the appeal whilst the notice of appeal did not specify with sufficient clarity and concision the reasons why Mrs [Appellant] considered her appeal to be admissible, and to the fact that the procedural directions given in this case were different from those given in other similar cases, being cases 1/17 to 5/17, 12/17 and 13/17.

8. With regard to the alleged lack of clarity of the procedural directions, the decision of the Vice-Chair dated 25 July 2017 was issued pursuant to Article 11(1) of the Rules of Procedure and was worded as follows:

> *1. The SRB shall submit its written response, with regard only to the admissibility of the appeals, by 3 August 2017.*
>
> *2. The Appellants shall submit their written rebuttal, with regard only to the admissibility of the appeals, by 14 August 2017.*
>
> *3. The Appeal Panel shall then decide on the admissibility of the appeals. Directions on the conduct of the merits phase of the proceedings shall be given if and when appropriate.*

The Board failed to explain in what way this procedural decision would not have been sufficiently clear.

9. The notice of appeal sets out Mrs [Appellant]'s arguments in support of the alleged admissibility of her appeal. These arguments were developed with sufficient clarity for the Board to be in a position effectively to respond. The Board indeed did so in its response of 3 and 9 August 2017.

10. As to the difference between the procedural directions given in this and other cases, it should be recalled that the Appeal Panel pursues an efficient and fair handling of all appeals that are put before it. This implies that procedural directions are tailored to the specific circumstances of each case. In this particular case, one of the reasons for the directions given was the fact that Mrs [Appellant] had set out in her notice of appeal the grounds on which she considered her appeal to be admissible. Paragraph 3 of the public version of the Appeal Panel's decisions in cases 1/17 to 5/17, which reads as follows, shows that the circumstances of these five earlier cases were different:

> *On 27 June 2017, the Vice-Chair of the Appeal Panel informed Mr [Appellant] that, on a preliminary analysis, the contested decision appeared to fall outside the Appeal Panel's jurisdiction. The Vice-Chair requested Mr [Appellant] to submit by 3 July 2017 his observations on the admissibility of the appeal and to advise by the same date if he wished to make oral representations. Mr [Appellant] did not respond.*

Cases 12/17 and 13/17, also invoked by the Board, are still pending and confidential at the time of writing this decision.

(3) Arguments of the parties

11. Mrs [Appellant] contends that no access was given to the valuation report prepared by Deloitte prior to the contested decision, in breach of Article 90(3) of the SRMR and of Article 8 of Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ("Regulation 1049/2001"). Article 90(3) is one of the provisions listed in Article 85(3) of the SRMR and the

appeal is therefore admissible. The Deloitte valuation report is an essential procedural requirement with regard to the contested decision (CJEU, 29 October 1980, 139-79, *Maizena*) and its omission leads to the invalidity of the contested decision. Since the Chair of the Board publicly stated to the press that the Board would not disclose this report, it would have been futile for Mrs [Appellant] to submit an application for access to that document in accordance with Regulation 1049/2001; it is manifest that such an application would have been rejected.

12. A combined reading of Articles 85(3) and 86(2) of the SRMR and of Article 85(2) and (3) of Directive 2014/59 of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the "BRRD") makes it clear, according to Mrs [Appellant], that an appeal is open to all citizens and residents of the Union who are affected by a resolution decision and not just to the entity being placed under resolution. The acts of the institutions of the Union must be reviewable by the judiciary and the legal provisions in respect of admissibility of appeals must be interpreted broadly so as to give effect to this principle. Mrs [Appellant], as a holder of shares and securities of Banco Popular who has suffered a financial loss caused by the contested decision, has a direct and legitimate interest to this appeal (CJEU, 18 May 1994, C-309/89, *Codorniu*).

13. The Board contends that the contested decision was made pursuant to Article 18 of the SRMR and, therefore, is not of a type that can be appealed against in accordance with Article 85(3). The Board states that decisions referred to in Article 90(3), against which an appeal is possible, are the decisions that reject a confirmatory application. Mrs [Appellant] did not submit any such confirmatory application and her appeal is, as a consequence, inadmissible.

(4) Findings of the Appeal Panel

14. The Spanish version of the Board's response and Mrs [Appellant]'s rebuttal were submitted after the deadlines set by the Vice-Chair. Given that the delay was minimal and that neither party objected, the Appeal Panel admits both documents.

15. The jurisdiction of the Appeal Panel is determined by Article 85(3) of the SRMR: appeals to the Appeal Panel are permitted against decisions of the Board referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) of the SRMR. Other types of decisions of the Board are not appealable to the Appeal Panel; they may be appealable to the Court of Justice of the European Union in accordance with Article 86(1) of the SRMR and Article 263 TFEU, subject to the admissibility conditions set out in these provisions.

16. Article 90(3) of the SRMR provides:

> *Decisions taken by the Board under Article 8 of Regulation (EC) No 1049/2001 may be the subject of a complaint to the European Ombudsman or of proceedings before the Court of Justice, following an appeal to the Appeal Panel, referred to in Article 85 of this Regulation, as appropriate, under the conditions laid down in Articles 228 and 263 TFEU respectively.*

17. Article 7 of Regulation 1049/2001 provides:

> ***Processing of initial applications***
>
> *1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.*
>
> *2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.*
>
> ...

18. Article 8 of Regulation 1049/2001 provides:

> ***Processing of confirmatory applications***
>
> *1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.*
>
> *2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.*

> *3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.*

19. It follows from the above provisions that the types of decisions contemplated under Article 90(3) of the SRMR, against which appeals may be submitted to the Appeal Panel, are the decisions made by the SRB under Article 8 of Regulation 1049/2001. These are the decisions whereby the SRB, expressly or tacitly, refuses totally or partially to grant access to documents requested by way of a confirmatory application. A confirmatory application is a request for reconsideration of a prior decision whereby the SRB, expressly or tacitly, refused totally or partially to grant access to documents requested by way of an initial application.

20. The following steps must therefore have taken place before an appeal may be made to the Appeal Panel in connection with Article 90(3) of the SRMR: a first 'initial' application for access to documents, a first (express or tacit) decision by the SRB rejecting in whole or in part the initial application, a second 'confirmatory' application reiterating the rejected initial application, and a second (express or tacit) decision by the SRB rejecting in whole or in part the confirmatory application.

21. Mrs [Appellant] does not assert having made any initial or confirmatory application, and does not assert either that the SRB rejected any application for access to documents made by her pursuant to Regulation 1049/2001. Her argument about the futility of such an application cannot be accepted; the two-stage application process organised by Regulation 1049/2001 implies a presumption that institutions and agencies of the Union are capable of changing their mind, in whole or in part, when requested to revisit an initial negative decision and Mrs [Appellant] brings no evidence that this presumption would necessarily be wrong in this particular case. Furthermore, it must be noted that the object of Mrs [Appellant]'s appeal is the annulment of the resolution of Banco Popular, not the disclosure of the Deloitte report. The contested decision is therefore not 'a decision of the Board referred to in ... Article 90(3)' of the SRMR and is not, as such, capable of being appealed to the Appeal Panel pursuant to Article 85(3) of the SRMR.

22. The question whether the Deloitte report constitutes an essential procedural requirement in relation to the contested decision goes to the merits of the appeal, not to its admissibility.

23. Mrs [Appellant] correctly points out that acts of the institutions and agencies of the Union must be reviewable by the judiciary. The rule of law is one of the founding principles of the Union, in accordance with Article 2 TEU, and the right to an effective remedy is guaranteed by Article 47 of the Charter of Fundamental Rights of

the European Union. This does not imply, however, that the Appeal Panel is the proper body to hear a challenge against the contested decision.

24. The Treaty on the Functioning of the European Union, by its Articles 263 and 277 on the one hand and its Article 267 on the other, and the SRMR, by its Articles 85 and 86, have established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of the acts of the Board. As indicated in paragraph 15, decisions of the Board that are not appealable to the Appeal Panel may be appealable directly to the Court of Justice of the European Union, subject to the applicable conditions as to admissibility. Where a decision of the Board is addressed to a national resolution authority, natural or legal persons who cannot, by reason of the admissibility conditions stated in the fourth paragraph of Article 263 TFEU or in Article 85(3) of the SRMR, challenge directly that decision do have protection against the application to them of that decision by the national resolution authority. Such persons may plead the invalidity of the Board decision at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, pursuant to Article 267 TFEU (see, with regard to the similar system of legal remedies applicable to regulatory acts, CJEU, 28 April 2015, C-456/13, *T & L Sugars*, paragraphs 30, 31 and 45 to 48; CJEU, 3 October 2013, C-583/11, *Inuit Tapiriit Kanatami*, paragraphs 92 to 96). Therefore, the argument of Mrs [Appellant] to the effect that the Appeal Panel must accept jurisdiction in this case cannot be accepted.

25. For the same reasons, the allegation that the contested decision caused losses to Mrs [Appellant] does not imply that an appeal before the Appeal Panel is the proper route for a legal remedy.

26. The contested decision relates to the resolution of a credit institution. It is based on Articles 14 to 29 (Part II, Title I, Chapter 3, ‘Resolution’) of the SRMR. This is a decision of a type which is not listed in Article 85(3) of the SRMR. The appeal is therefore not admissible.

On those grounds, the Appeal Panel hereby:

1. Declares that the appeal is not admissible.

Yves Herinckx Vice-Chair	Eleni Dendrinou-Louri	Kaarlo Jännäri
Marco Lamandini		Luis Silva Morais

This decision is signed in Spanish and in English. The Spanish version is authentic; the English version is a translation.