



27 January 2020

Case 7/2019

FINAL DECISION

[.],

Appellant,

v

the Single Resolution Board

Christopher Pleister, Chair
Marco Lamandini, Rapporteur
Luis Silva Morais, Vice-Chair
Helen Louri-Dendrinou
Kaarlo Jännäri

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FINAL DECISION

In Case 7/19

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 1093/2010¹ (the “SRMR”),

[.], with address for service in [.], (hereinafter the “Appellant”)

v

the Single Resolution Board (hereinafter the “Board” or “SRB”),

(together referred to as the “Parties”),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Marco Lamandini (Rapporteur), Luis Silva Morais (Vice-Chair), Helen Louri-Dendrinou and Kaarlo Jännäri,

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 25 October 2019 (hereinafter the “Confirmatory Decision”) rejecting the Appellant’s confirmatory application, by which the Appellant requested the SRB to reconsider its position in relation to its initial request and the SRB’s response thereto, concerning the access to documents in accordance with Article 90(1) of SRMR and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereinafter “Regulation 1049/2001”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents³ (hereinafter “Public Access Decision”).
2. By the initial request of 30 July 2019 the Appellant requested access to the following documents: a) the list of documents provided by the SRB to the law firm Linklaters; b) each and every document provided to Linklaters. The request was rejected by the Board on 16 September 2019. On the same day, the Appellant submitted a confirmatory application requesting the SRB to reconsider its position. The SRB also rejected the confirmatory

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

application with the Confirmatory Decision which is the subject of the appeal in the present case.

3. On 1 November 2019 the Appellant sent an email to the Appeal Panel contesting that his request for access to certain documents was denied by the SRB. As the Appellant did not identify, at the time, the SRB Confirmatory Decision he was contesting, the Appeal Panel Secretariat responded to the Appellant, drawing the Appellant's attention to this fact and pointing out that the procedure to file an appeal with the Appeal Panel can be found on the SRB website, in the section referring to the Appeal Panel.
4. On the 12 November 2019 the Appellant sent a new email, contesting the Confirmatory Decision for the grounds briefly discussed in such a new email and attached the appealed Confirmatory Decision.
5. On the 20 November 2019 the Appeal Panel, having determined that this is a case where admissibility must be examined before any consideration, if any, of the merit, according to Article 5(4)(a) and 9(2) of the Rules of Procedure, asked the Parties to submit within two weeks their written submissions on the admissibility of the appeal.
6. Both Parties made their written submissions.
7. On 3 January 2020 the Appeal Panel, having considered the submissions of both Parties notified the Parties that the Chair considered that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and 20 of the Rules of Procedure as to the determination on the admissibility of the appeal.

Main arguments of the parties

8. The main arguments of the Parties are briefly summarised below. However, in order to avoid unnecessary duplications, more specific arguments raised by the Parties, if any, may be considered, to the extent necessary for the just determination of this appeal, where this decision shows the findings of the Appeal Panel. It is also specified that the Appeal Panel considered every argument raised by the Parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

Appellant

9. The Appellant challenges the Confirmatory Decision arguing that the SRB breached the principle of equal treatment by providing to its lawyers (Linklaters), the independent valuer (Deloitte) and the purchaser (Banco Santander) more information than to the former shareholders of Banco Popular. The Appellant further refers to case law in *Buccioni* (judgment of 13 September 2018, *Enzo Buccioni v Banca d'Italia*, C-594/16, ECLI:EU:C:2018:717), alleging that, according to such case law, Directive 2013/36/EU

allows the competent authority to disclose to those directly affected by the bankruptcy or forced liquidation of the credit institution confidential data, provided that do not affect third parties involved in the recovery attempts of such entity, if they are necessary for use in judicial proceedings.

Board

10. The Board argues that the appeal is inadmissible because the Appellant does not ask in his appeal a review of the Confirmatory Decision and the remittal of the same to the Board nor states any grounds against the part of the Appealed Decision that the Board does not hold one of the documents requested.
11. The Board further argues that the Appellant requests access to the same documents or categories of documents for which the Appeal Panel already upheld the arguments put forward by the Board justifying the non-disclosure of such documents. Moreover, the Appellant failed to provide any evidence on the change of legal and factual circumstances which would warrant a reassessment of the accessibility of the requested documents.
12. The Board finally objects that the Appellant makes several statements not related to the appealed Confirmatory Decision, which are therefore outside the scope of the Appeal Panel's competence.

Findings of the Appeal Panel

13. The Appeal Panel finds, in the first place, that, as to the request of “the list of documents provided by the SRB to the law firm Linklaters”, the appeal is inadmissible because the Board already informed the Appellant that the request could not be handled, since the document requested was not in the possession of the SRB. According to settled case law, once a European institution, body or agency asserts that a document does not exist, it is not obliged to create a document which does not exist (CJEU, judgment of 11 January 2017, *Typke v. Commission*, C-491/15 P, EU:C:2017:5 at para 31) and the institution, body and agency can rely on a rebuttable presumption that, indeed, the document does not exist (GCEU, judgment 23 April 2018, *Verein Deutsche Sprache v. Commission*, T-468/16, EU:T:2018:207). The Appellant did not even attempt to reverse such rebuttable presumption in the instant case.
14. Moreover, according to settled case law, once the institution, body and agency asserts that a document is not in its possession, it is not obliged to provide explanations as to why it does not hold such document (judgment of 11 June 2015, T-496/13, *McCullough v Cedefop*, EU:T:2015,374 paragraph 50).
15. The Appeal Panel further holds that also the request for the review of the Confirmatory Decision as to the refusal to give access to “each and every document provided to Linklaters” is inadmissible because the Appellant has failed to state any specific grounds for revision.

Also the argument that, in the Appellant's view, shareholders and bondholders of Banco Popular are entitled, under Regulation 1049/2001, to the same documents that the Board shared with its legal advisor is manifestly insufficient to state a valid ground of appeal. Equal treatment can be alleged solely where situations that are factually and legally comparable received different treatment. The law firm Linklaters was not given access to such documents based upon Regulation 1049/2001. This makes Linklaters' access to such documents inherently different from the access to documents that may be granted to a citizen of the Union under Regulation 1049/2001. Linklaters received from the SRB all the necessary documents related to the resolution of Banco Popular for the specific task of assisting professionally the SRB in the pending litigation before the EU Courts. Moreover, the communications with legal advisors are covered by the exception of Article 4(2) second indent of Regulation 1049/2001 and the Appellant did not show any overriding public interest in the disclosure of these documents. This means that the Appellant cannot validly claim any violation of the principle of equal treatment.

16. Nor the Appellant can rely, in the instant case, on the case law in *Buccioni* because that particular case did not concern the application of Regulation 1049/2001 but the interpretation of Article 53 of Directive 2013/36/EU.

On those grounds, the Appeal Panel hereby

Dismisses as inadmissible the appeal.

Helen Louri-Dendrinou

Kaarlo Jännäri

Luis Silva Morais
Vice-Chair

Marco Lamandini
Rapporteur

Christopher Pleister
Chair

For the Secretariat of the Appeal Panel :