Single
Resolution Board
Appeal Panel

28 February 2019

Case 15/2018

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 15/18

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[1] (the "SRMR"),

[Apellant], 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 30 August 2018 (hereinafter the "Confirmatory Decision") rejecting the Appellant's confirmatory application, by which the SRB was requested by the Appellant 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 documents[2] (hereinafter "Regulation 1049/2001"), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents[3] (hereinafter "Public Access Decision").

2. By the initial request and the confirmatory application, the Appellant requested access to the following: Register (date and time of entry) with regard to Deloitte's Provisional Valuation 2, Final Valuation 2, Valuation 3, FOLTF assessment and the communications where the SRB, Commission and Council decided upon the resolution tools applied to Banco Popular Español S.A. (hereinafter "Banco Popular"). The initial application was rejected by the SRB. The Appellant submitted a confirmatory application requesting the SRB to reconsider its position,

[1] OJ L 225, 30.7.2014, p.1.
[2] OJ L 145, 31.5.2001, p. 43
[3] SRB/ES/2017/01.

further clarifying that the Appellant did not seek access to a registry of incoming and outgoing mail but required to know the time and date of reception or drafting of said documents which would have to be recorded in the SRB's registry. The SRB rejected also the confirmatory application with the Confirmatory Decision which is the subject of the appeal in the present case.

3. The notice of appeal was notified to the Board on 3 September 2018.

4. On 12 September 2018 the Appeal Panel informed the Parties that the appeals were stayed until the publication by the Board of the documents whose disclosure was ordered by the Appeal Panel with its decisions of 19 June 2018 in other cases concerning access to documents related to the Banco Popular resolution.

5. On 7 November 2018 the Appeal Panel wrote to the Parties informing that the SRB had published on 31 October 2018 such documents. The Board clarified that, in the instant case, it considered not necessary to revise the Confirmatory Decision considering such new disclosures. The Appeal Panel invited the Appellant to file a statement clarifying whether it was satisfied with the documents published by the SRB on 31 October 2018 and whether the appeal was withdrawn or upheld. On 7 November 2018 the Appellant responded that the appeal was upheld. The parties were therefore granted appropriate terms for their submissions.

6. The Board submitted its response on 22 January 2019. The Appellant did not submit any further observations on the SRB's response.

7. On 22 January 2019 the Appeal Panel asked the Appellant to reply by 28 January 2019, if they considered necessary to discuss the case in a hearing or if they intended to waive their right to an oral hearing according to the Rules of Procedure. The same question was forwarded to the SRB on the 29th January 2019. Both parties confirmed in writing that they waived their right to an oral hearing: the Appellant on 23 January 2019, the SRB confirmed on the 30th January 2019.

8. On 6 February 2019 the Appeal Panel, having considered the final submissions of both Parties, their waiver of their right to make oral representations at an hearing and having also concluded, in light of the particular circumstances, object and developments of the case, which were extensively pondered by the Appeal Panel, that it was not necessary to convene on own initiative such an hearing to deliberate on the appeal, notified the Parties that the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and 20 of the Rules of Procedure.

Main arguments of the parties

9. The main arguments of the parties are briefly summarised below. However, in order to avoid unnecessary duplications, more specific arguments raised by the Parties shall 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

10. The Appellant challenges the Confirmatory Decision and, clarifying its position with the appeal, it specifies that it is not seeking copies of a register or "a record of the incoming and outgoing mail of the documents" listed under items a) to e) of the application but "rather the times and dates of receipt or generation of said documents, which must be held by the SRB, and so recorded in its register of documents".

11. Such access is sought by the Appellant because, in the Appellant's view, said documents must be recorded under Article 3 and 11 of Regulation 1049/2001 and Article 24 of the European Code of Good Administration.

Board

12. The Board argues, in the first place, that the public register of documents under Article 11 of Regulation 1049/2001 does not coincide with a register of incoming and outgoing correspondence and document circulation as described by the Appellant as being used in [.] administrative procedures of the Appellant's home country and it is rather a register which only contains documents which according to the discretion of the respective institution can be made publicly available in order to make citizens' rights under Regulation 1049/2001 more effective. The Board clarifies that it does not possess a register of entry with the times and dates of reception or drafting of the documents mentioned by the Appellant.

13. The Board further notes that the Appellant is not requesting specific documents existing and in the possession of the Board but rather information concerning times and dates when some documents related to the Banco Popular resolution were received or produced. In the Board's view, this request falls outside the scope of Regulation 1049/2001 and thus of the Appeal Panel competence under Article 90 SRMR.

14. The Boards argues in the third place that the European Code of Good Administration serves as a guide for the SRB in its relation with the public and for the SRB's administrative practice; however, according to its Article 3, which provides that the Code's general principles apply "to the relations of the institutions and their administrations with the public, unless they are governed by specific provisions", Regulation 1049/2001 sets out such specific provisions which govern access to documents and they must be considered as *lex specialis* in the meaning of Article 3 of the Code.

Findings of the Appeal Panel

15. The Appeal Panel preliminary notes that in its previous decisions rendered on 28 November 2017 and 19 June 2018 (all accessible at www.srb.europa.eu), it recalled the overriding principles, hereby restated, which should guide in the assessment of the requests of access to documents related to the Banco Popular resolution:

(a) The right of access is a transparency tool of democratic control of the European institutions, bodies and agencies and is available to all EU citizens irrespective of their interests in subsequent legal actions (see for instance judgment 13 July 2017, *Saint-Gobain Glass Deutschland*, C-60/15, EU:C::2017:540, paragraphs 60 and 61 and in particular judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 20: "*as the addressee of those decisions* [denying access to documents], *the applicant is therefore entitled to bring an action against them.* (...)").

(b) As indicated by Article 85(3) SRMR, the Appeal Panel has only competence to hear appeals against a decision of the Board referred to in Article 90(3) SRMR and Regulation 1049/2001.

(c) According to Regulation 1049/2001 "*the purpose of* [the] *Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access*" (recital 4) and "*in principle, all documents of the institutions should be accessible to the public*" (recital 11). Regulation 1049/2001 implements Article 15 TFEU which establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies (such right is also recognized as a fundamental right by Article 42 of the Charter of Fundamental Rights). However, certain public and private interests are also protected by way of exceptions and the Union institutions, bodies and agencies should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks (recital 11).

(d) In principle, exceptions must be applied and interpreted narrowly (see e.g. judgment 17 October 2013, *Council v. Access Info Europe*, C-280/11, EU:C:2013:671, paragraph 30). However, case-law on public access to documents in the administrative context (as opposed to case law on public access in the legislative context) suggests that a less open stance can be taken in the administrative context because "*the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution*" (see to this effect judgment 4 May 2017, *MyTravel v. Commission*, T-403/15, EU:T:2017:300, at paragraph 49; judgment 21 July 2011, *Sweden v. Commission* C-506/08 P, EU:C:2011:496, at paragraphs 87-88; judgment 29 June 2010, *Commission v. Technische Glaswerke Ilmenau,* C-139/07 P, EU:C:2010:376, paragraphs 60-61).

(e) Settled case-law permits Union institutions, bodies and agencies to rely in relation to certain categories of administrative documents on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by Regulation 1049/2001 (see to this effect judgment 28 June 2012, *Commission v. Edition Odile Jacob,* C-404/10, EU:C:2012:393; judgment 21 September 2010, *Sweden and Others v. API and Commission,* C-514/07 P, EU:C:2010:541; judgment 27 February 2014, *Commission v. EnBW,* C-365/12 P, UE:C:2014:112; judgment 14 November 2013, *LPN and Finland v. Commission,* C-514/11 P and C-605/11 P EU:C:2013:738; judgment 11 May 2017, *Sweden v. Commissio*n, C-562/14 P EU:C:2017:356). Where the general presumption applies, the burden of proof is shifted from the institution to the applicant, who must be able to demonstrate that there will be no harm to the interest protected by the Regulation 1049/2001. This also means that the Union institutions, bodies or agencies are not required, when the general presumption applies, to examine individually each document requested in the case because, as the CJEU noted in *LPN and Finland v. Commission,* Joined Cases C-514/11P and C-605/11P (cited above, paragraph 68), "*such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global*". At the same time, though, settled case law clarifies that, since the possibility of relying on general presumptions applying to certain categories of documents, instead of examining each document individually and specifically before refusing access to it, would restrict the general principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation 1049/2001, "*the use of such presumptions must be founded on reasonable and convincing grounds*" (judgment 25 September 2014, *Spirlea v. Commission,* T-306/12, EU:T:2014:816, paragraph 52).

(f) When determining whether disclosure is prevented by the application of one of the relevant exceptions under Regulation 1049/2001, EU institutions, bodies and agencies enjoy in principle a margin of discretion (due to the open-textured nature of at least some of the relevant exceptions). Review is then limited, according to settled case law, to verifying whether 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 (see, among others, judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 53; judgment 29 November 2012, *Thesing and Bloomberg Finance v ECB,* T-590/10, EU:T:2012:635, paragraph 43); in any event, the actual viability of judicial review must be ensured (see to this effect the judgment 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

16. In the instant case, however, the Appeal Panel finds that it is first of all questionable that the Appellant can show an actual interest in his appeal. This is due to the fact that following the

Appellant's requests, the Board - whilst noting that the requested register and thus documents showing times and dates when the documents mentioned by the Appellant were received or produced were not existing – "only for reasons of transparency" already informed the Appellant, with the Confirmatory Decision (on pages 3-4), that (a) the Valuation 2 and the FOLTF assessment were received by the SRB on 6 June 2017; (b) the Valuation 3 report was received by the SRB on 14 June 2018; (c) the SRB submitted the resolution scheme to the Commission in the early morning of 7 June 2017 and the Commission endorsed the resolution scheme on the same day.

17. The Appeal Panel further notes that, although the definition of 'document' to the effect of Regulation 1049/2001 must not be interpreted restrictively, as it is clearly shown by the wide encompassing wording of Article 3, letter a) of Regulation 1049/2001 - which qualifies as 'document' "*any content*" "*whatever its medium*" "concerning a matter relating to the policies, activities and decisions falling within the institution's sphere", specifying at the same time that such content can either be written or stored in electronic form (simply) recorded in any visual or audio-visual way - once a European institution, body or agency asserts that a document does not exist, according to settled case law, 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).

18. The Board clarified that it has not established a register of incoming and outgoing mail with indication of the times and dates of reception or of drafting of the documents relevant for its activity, and this is the reason why it could not provide the Appellant with a specific document providing evidence of such times and dates. Contrary to the Appellant's claim on this, the Appeal Panel finds that the Board was not obliged, under Article 11 of Regulation 1049/2001, to establish such a register. In the Appeal Panel's view, the Board duly complied with Article 11 of Regulation 1049/2001 though the establishment of the register of publicly accessible documents which can be found in its website at https://srb.europa.eu/en/public-register-of-documents.

19. The Appeal Panel finally notes that its competence to hear appeals concerning access to documents is limited by Article 85(3) and 90(3) SRMR to the review of confirmatory decisions adopted by the Board according to Regulation 1049/2001 and cannot transcend such limits. The Appellant's claim based on Article 24 of the Code of Good Administration if and to the extent that such provision could possibly be deemed applicable in the instant case (something that is highly doubtful in the scenario in which the specific provisions of Regulation 1049/2001 derogate from the Code and constitute *lex specialis* to the effect of Article 3 of the same, as the Appeal Panel incidentally considers to be the case) is thus beyond the scope of review of the Appeal Panel.

On those grounds, the Appeal Panel hereby

Dismisses the appeal.

Helen Louri-Dendrinou	Kaarlo Jännäri	Luis Silva Morais Vice-Chair

Marco Lamandini Rapporteur	Christopher Pleister Chair