



23 March 2018

Case 2/2018

DECISION

Appellant

v

the Single Resolution Board

Christopher Pleister, Chair
Marco Lamandini, Rapporteur
Yves Herinckx, Vice-Chair
Kaarlo Jännäri
Luis Silva Morais

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DECISION

In Case 2/2018,

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”),

The Appellant,

v

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

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Marco Lamandini (Rapporteur), Yves Herinckx (Vice-Chair), Kaarlo Jännäri and Luis Silva Morais,

makes the following final decision:

Background of facts

1. In case 38/17 the Appellant filed an appeal under Article 90 SRMR against the SRB confirmatory decision concerning his request for access to certain documents pertaining to the Banco Popular resolution. On 28 November 2017 the Appeal Panel issued its decision on case 38/17, found that the SRB decision should be amended and to this effect remitted the case to the SRB according to Article 85(8) SRMR.
2. The SRB revised its initial confirmatory decision and adopted a revised confirmatory decision in order to comply with the Appeal Panel decision, which was notified to the Appellant on 1 February 2018.
3. The Appellant filed a additional appeal against the revised confirmatory decision; this appeal was notified on 6 February 2018 to the SRB.
4. **Arguments of the parties.**
5. With the additional appeal the Appellant claims that it is up to the Appeal Panel to determine if the revised confirmatory decision complies with its decision issued in case 38/17 and submits that the latter decision does not comply, and should thus be further amended to provide additional information to the appellant, as indicated in the appeal.
6. The SRB, with letter of 9 February 2018, submits that case 2/2018 is not a new appeal but rather a supplement that refers to former case 38/17. The SRB considers that with the notification of the amended decision adopted by the SRB in order to comply with the Appeal

Panel decision the case was closed. Instead, pursuant to Articles 86 and 90(3) SRMR, should the Appellant not be satisfied with the amended decision of the SRB, he may bring a complaint to the European Ombudsman or start proceedings before the Court of Justice in accordance with Article 263 TFEU. The SRB asks therefore that the Appeal Panel decides on the admissibility first.

7. The Appeal Panel adopted and filed a procedural order that was notified to the parties on 16 February 2018 whereby, according to Article 9 of the Appeal Panel RoP, it invited the parties to make submissions on admissibility. Both parties complied with the procedural order and reiterated and further clarified their arguments in their submissions on admissibility.

8. Findings of the Appeal Panel

9. The Appeal Panel, preliminarily, notes that, after the adoption of the Appeal Panel decision in case 38/17, the Appellant was the addressee of a revised confirmatory decision adopted by the SRB in order to comply with the Appeal Panel decision.
10. The Appeal Panel's decision to remit a case to the SRB to the effect that an appealed SRB decision be amended is functionally similar, in this respect, to the annulment of a Union measure by the CJEU. Article 85(8) SRMR clarifies indeed that, when the Appeal Panel remits the case to the SRB, "the Board shall be bound by the decision of the Appeal Panel and it shall adopt an amended decision regarding the case concerned". This indicates, in the Appeal Panel's view, that the amended decision is a new decision, as it is also the case when a decision of a Union agency is annulled by the CJEU and the Union agency wishes to replace such act which has been annulled with a new one in order to comply in good faith with the judgment.
11. This means that, in the Appeal Panel's view, the appeal filed against the amended confirmatory decision is an appeal against a different decision from the one appealed by the same Appellant in case 38/17 and the fact that the Appeal Panel adopted a decision in case 38/17 does not prevent, as such, the Appellant from initiating a new proceeding seeking the remittal to the Board under Article 85(8) also of the amended confirmatory decision, because the proceedings do not have the same subject matter (for a similar finding, albeit in the judicial context, see joined Cases T-116/01 and T-118/01, *P & O European Ferries and Others v. Commission*, ECLI:EU:T:2003:217, rejecting the plea of *res judicata* in respect of an earlier judgment pronouncing annulment in new proceedings seeking to annul the decision taken to comply with that judgment).
12. The Board contends, first, that, in so doing, "*this would create room for a vicious circle of permanent requests for reviews by the Appeal Panel of the same SRB decision and its subsequent amendments*" and, second, that, precisely to avoid such risk of circular reviews and also to guarantee the Appellant's right to an effective judicial remedy, "*Articles 86 and 90(3) SRMR foresee the recourse to the Court of Justice once the SRB has already decided*

on a case, regardless of whether it has confirmed the SRB's decision or has remitted the case to the SRB for amendment".

13. In the Appeal Panel's view, considered the wide margin of discretion pertaining to the SRB assessment on the merit and the nature of the review conferred upon the Appeal Panel, it is unlikely that a SRB decision adopted to comply in good faith with the Appeal Panel decision could be further remitted several times to the Board. The risk of circular reviews is thus minimal.
14. At the same time, the Appeal Panel finds that Article 90(3) SRMR refers to "decisions taken by the Board under Article 8 of Regulation (EC) No. 1049/2001" and the language of the provision does not exclude those decisions which have been taken in order to comply with a previous Appeal Panel decision to remit the case to the Board, if any. In the case at hand, the right to an effective judicial remedy is not jeopardised by such an interpretation. On the contrary, it extends to the Appellants the very same procedural guarantees which are granted by Article 90(3) to the original confirmatory decision also to subsequent amended confirmatory decisions, if any.
15. The Board also contends that the interpretation pleaded by the Board of Articles 85 and 86 SRMR would be in line with Article 24 of the Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions ("SSMR"). In the Appeal Panel's view this argument cannot be accepted, because the power of review conferred upon the Appeal Panel is different from the one conferred upon the Administrative Board of Review by Article 24 SSMR. Suffice to note that, unlike the Single Resolution Board, the Supervisory Board of the SSM is not bound by the ABoR decision (Article 24(7) SSMR).
16. This means that the appeal against an amended decision adopted by the Board upon remittal by the Appeal Panel is, in principle, admissible, although the actual grounds for such an appeal must be assessed separately and strictly in light of the specific terms of the compliance by the Board to the first decision by the Appeal Panel.
17. Despite the foregoing, admissibility must be determined having regard to the specific circumstances of each case. In the present case 2/18 the Appeal Panel finds that the admissibility of the appeal must be considered having regard to the specific requests filed by the Applicant with the appeal, also in light of the decision adopted by the Appeal Panel in case 38/17.
18. The Appellant's request are unclear: with regard to the valuation report, the Appellant seems to seek various items of information with regard to the liquidity situation of *Banco Popular*, as well as the value range outcome that may have been redacted in the published valuation report; with regard to the resolution decision, the relief sought is not at all understandable ("The Decision of the SRB of June 2017 on the Banco Popular, provided to us, improved at the time of publication as of 2 February 2018"). The Appeal Panel clarified in its decision in

case 38/17, that the Board was not ordered to make an integral disclosure of the Valuation Report and of the Resolution Decision (the two documents access to which was sought by the Appellant) and that in the specific assessment of the relevant parts which should not be disclosed, the Board retains a substantial margin of discretion.

19. This, in the Appeal Panel's view, indicates that the Appellant may not raise, as he seems to do albeit with some unclarity in his appeal, a request for integral disclosure which was already dismissed, as such, in the Appeal Panel decision in case 38/17. In respect of a new request for integral disclosure, which was already dismissed, the decision rendered in case 38/17 has authority and makes the new appeal devoid of purpose, and thus inadmissible.
20. The Appeal Panel further notes that, for an appeal to be admissible, the basic legal and factual particulars on which the appeal is based must be indicated coherently and intelligibly in the notice of appeal (CJEU, 2 March 2010, T-70/05, *Evropaiki Dynamiki v EMSA*, paragraph 78; CJEU, 14 December 2005, T-209/01, *Honeywell International*, paragraphs 53 to 56).
21. In the case at hand, in the Appeal Panel's view, the notice of appeal does not contain any plea or argument as to why the contested decision would be invalid. Hence, also for this concurring reason, the appeal is inadmissible.

Decision

On those grounds, the Appeal Panel by decision hereby:

- **Declares the appeal inadmissible.**