



**19 June 2019**

Case 18/2018

# **FINAL DECISION**

**[...]**

**Appellant,**

**v**

**the Single Resolution Board**

Christopher Pleister, Chair  
Marco Lamandini, Rapporteur  
Luis Silva Morais, Vice-Chair  
David Ramos Muñoz  
Kaarlo Jännäri

**TABLE OF CONTENTS**

**Background of facts ..... 3**  
    Appellant ..... 5  
    Board ..... 6  
**Findings of the Appeal Panel ..... 7**  
**Tenor ..... 20**

**FINAL DECISION**

In Cases 18/18

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<sup>1</sup> (the “SRMR”),

[**Appellant**] a legal entity represented [lawyer] 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), David Ramos Muñoz, Kaarlo Jännäri,

makes the following final decision:

**Background of facts**

1. This appeal relates to the SRB revised confirmatory decision of 31 October 2018 (hereinafter, the “Revised Confirmatory Decisions”), by which the Board revised its amended confirmatory decision of 13 March 2018 following the Appeal Panel’s decision of 19 June 2018 in case 52/17, 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<sup>2</sup> (hereinafter “Regulation 1049/2001”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents<sup>3</sup> (hereinafter “Public Access Decision”).
2. With its initial request of 7 July 2017 and its confirmatory application of 31 August 2017, the Appellant has requested access to several documents prepared or used by the Board in the context of the resolution of Banco Popular Español (hereinafter, “Banco Popular”) as specified in paragraph II of the Revised Confirmatory Decision.

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<sup>1</sup> OJ L 225, 30.7.2014, p.1.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43

<sup>3</sup> SRB/ES/2017/01.

3. The SRB responded to the confirmatory application with the confirmatory decision of 22 September 2017, refusing in whole or in part access to several of the requested documents. The Appellant filed an appeal against this confirmatory decision (which was recorded as case 52/17). Pending such appeal and following the decisions adopted by the Appeal Panel on 28 November 2017 in other access to documents cases relating to the Banco Popular resolution, the Board disclosed significant parts of various documents relating to the resolution action in respect of Banco Popular and replaced in a first step the original confirmatory decision with the amended confirmatory decision of 13 March 2018. In case 52/17, the appeal originally filed against the confirmatory decision of 22 September 2017 was thus extended by the Appellant to the SRB amended decision of 13 March 2018. The Appeal Panel decided on the appeal in case 52/17 with its decision of 19 June 2018, remitting to the Board the amended decision of 13 March 2018.
4. In order to comply with the Appeal Panel's decision of 19 June 2018 in case 52/17, on 31 October 2018 the Board published several additional documents concerning the Banco Popular resolution and adopted the Revised Confirmatory Decision that is the subject of the present appeal.
5. The notice of appeal in the present case was notified to the Board on 18 December 2018. The language of the appeal is Spanish.
6. On 31 January 2019 the Board, having requested and having been granted by the Appeal Panel an extension of the period for filing its response in accordance with Article 6(4) of the Rules of Procedure, filed its response in English. The Spanish version of the response was notified to the Appellant on 13 March 2019.
7. On 13 March 2019 the Appeal Panel asked the Parties if they considered necessary to discuss the case in a hearing. The Appellant confirmed in writing that it intended to make oral representations at a hearing. The Appeal Panel therefore informed the Parties that the hearing would be scheduled in Brussels for 11 April 2019.
8. On 26 March 2019 the Appellant submitted its reply.
9. On 29 March 2019 the Board requested authorization to submit a rejoinder prior to the oral hearing and requested therefore to postpone the hearing. In the quite exceptional circumstances of this appeal (where compliance with a previous Appeal Panel decision between the same Parties is contested), the Appeal Panel considered appropriate to grant to the Board the opportunity to file a rejoinder, also to facilitate the most effective and productive discussion at the hearing. The hearing was therefore postponed, and the Parties informed of the new date in due course prior to the hearing.
10. The Board submitted its reply on 30 April 2019 in English and on 7 May 2019 in Spanish.

11. The hearing was held in Brussels at the Conference Centre of the European Commission premises on 4 June 2019. Since two appeals with certain similarities had been filed in cases 18/18 and 19/18, the Appeal Panel considered appropriate under Article 13 of the Appeal Panel Rules of Procedure to convene a joint hearing, in order to hear the Parties and ask clarifications in relation to all relevant aspects of the cases, as necessary for the just determination of the appeals. The Appeal Panel specified that the hearing would be held in Spanish and English (with simultaneous interpretation from Spanish into English for the convenience of the Appeal Panel and the Board as to the oral representations made in Spanish and with simultaneous interpretation from English into Spanish for the convenience of the Appellants as to the oral representations of the Board and the questions of the Appeal Panel made in English). The Appeal Panel also clarified that, in order to avoid disproportionate costs and burdens for the Appellant, the hearing was not to be considered a compulsory requirement for the parties of the proceedings. Failure to attend would therefore not be treated as a waiver or a withdrawal of the appeal and would not dispense the Appeal Panel from taking the absent party's written submissions into consideration. Nonetheless, if a party failed to attend the hearing, the hearing would proceed in its absence. The Parties appeared and presented oral arguments.
12. After the hearing, before the close of business of 4 June 2019, the Appeal Panel 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**

13. 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, in the section of this decision devoted to 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

14. The Appellant claims, with its first plea, that the Board has failed to comply with the instructions of the Appeal Panel with its decision of 19 June 2018 in case 52/17, as regards the specific documents for which the Appeal Panel remitted the case to the Board. With the second plea, the Appellant claims that the SRB, in the Revised Confirmatory Decision, applied the exceptions listed in Article 4 of Regulation 1049/2001 in an incorrect manner. With the third plea, the Appellant claims that the SRB has breached Article 41 of the Charter of Fundamental Rights of the European Union as the SRB allegedly failed to provide sufficient reasoning for its decision to keep certain parts of the requested documents confidential. With the fourth plea, the Appellant claims that there are overriding public

interests in the sense of Regulation 1049/2001 that justify the disclosure of the requested documents, such as the right to property in accordance with Article 17 of the Charter of Fundamental Rights of the European Union, the right to an effective remedy and to a fair trial in accordance with Article 47 of the Charter and the right to transparency and control of arbitrary behaviour in accordance with Article 42 of the Charter.

15. The Appellant complemented these observations in the oral hearing, where it had the opportunity to reply to the Board's arguments. On the issue of admissibility, the Appellant alleged that the case was admissible because Article 90 (3) of the SRMR does not exclude from appeal proceedings the Board decisions that are adopted in execution of a previous Appeal Panel decision, since excluding a second appeal would deprive the Appeal Panel from reviewing whether its decisions are properly implemented, and furthermore because this has been the position of the Appeal Panel (e.g. in decisions such as 2/18) and also considering General Court (in cases where government acts having been annulled by the General Court were replaced by new acts, which were challenged in their turn, for which purposes the Appellant cited case T-1/97, which was followed by new government acts, and those acts challenged again in cases T-116/01 and T-118/01). On the substance, the Appellant focused on some of the redacted parts of the documents, which, in its view, did not comply with the Appeal Panel decisions 42/17 and 52/17, as well as other decisions. Without being exhaustive, the focus was placed on (i) the critical functions report, the passages referring to the discontinuance of Emergency Liquidity Assistance (ELA) by the ECB, since, according to the Appellant, this information would be key to establish whether Banco Popular's was a case of provisional illiquidity, or structural illiquidity; and (ii) certain parts of the Valuation Report, such as those concerning the situation of deposits, which should be disclosed without redactions.

#### Board

16. The Board preliminarily argues that the appeal is inadmissible because, in the Board's view, Article 85(3) SRMR only provides for a single appeal against decisions listed therein and the Appeal Panel has already decided the case with its decision of 19 June 2018 in case 52/17. Otherwise, in the Board's view, there would be a risk of a vicious circle of perpetual appeals, and in so doing, the Appeal Panel's findings would become so granular that there would remain in effect insufficient room for the exercise of the discretion of the SRB. Moreover, the Board argues that Article 85(8) SRMR does not provide for such unlimited power of review by the Appeal Panel. In the Board's view, a vicious circle of perpetual appeals would create legal uncertainty and might jeopardise the Appellant's right to an effective remedy before the General Court of the European Union. The Board further claims that the appeal would also be inadmissible if the appeal were to be interpreted as a new request for the same documents already requested in case 52/17.
17. On the merits, the Board argues, preliminarily, that the appeal can only concern those documents for which the Appeal Panel has remitted the SRB's Amended Confirmatory

Decision in case 52/17, and, with regard to the Appellant's first plea, that the Board has fully complied with the Appeal Panel's decision and has disclosed – fully or in a duly redacted form – all the documents that were subject to the remittal by the Appeal Panel (the Board specifies in detail in paragraph 46 of its response the disclosures made in accordance with the Appeal Panel's decision). As to the Appellant's second plea, the Board argues that the Appellant has failed to demonstrate how the application of the exceptions listed in Article 4 of Regulation 1049/2001 by the SRB was erroneous. As to the third plea, the Board argues that, in relation to those documents or parts which remain confidential, the SRB explained in detail why it maintained its view that these documents should not be disclosed, providing comprehensive reasoning why certain parts of the requested documents fall within the exceptions provided by Article 4 of Regulation 1049/2001. Further, the Board argues that it has elaborated on the continuing need to protect each undisclosed document or part thereof. As to the fourth plea, the Board argues that the appeal is limited to the assessment on whether the SRB has complied with the Appeal Panel's decision in case 52/17 and in that decision the Appeal Panel has already taken into account the arguments put forward by the Appellant whether an overriding public interest exists that would justify the disclosure of the requested documents and acknowledged that such interest existed only with regard to some documents for which the Board has then made the appropriate disclosures. The Board further argues that, according to the case-law of the CJEU, a possible interest in obtaining documents for the purposes of court proceedings constitutes a private and not a public interest.

18. In the oral hearing the Board focused on some of these arguments. On admissibility, the Board alleged that the Appellant was trying to introduce a circular element in the appeal proceedings, and emphasized that a subsequent appeal on Board acts that implement an Appeal Panel decision is not only inefficient, but also would disregard the competences of the Appeal Panel. The Board added that the Appeal Panel views in case 2/18 should be considered *obiter dictum*. In any event, should the appeal be accepted as admissible, its scope should be narrowed down to determining whether the Board implemented correctly the Appeal Panel decision. On the merits, the Board argued that it had complied with the Appeal Panel decision by disclosing additional parts (e.g. in the Valuation report 1) or providing additional justifications (e.g. in sections 3.2. or 4.1. of the Resolution Plan).

### **Findings of the Appeal Panel**

19. The Appeal Panel preliminary notes, as to the language of this appeal, that the Appellant used the Spanish language, which was the language also of case 52/17 and the Board used the English language, on the assumption that the Revised Confirmatory Decision adopted on 31 October 2018 was delivered in English because English is the working language of the SRB, and that therefore English was the language of the contested decision in accordance with Article 5(2) of the Appeal Panel's Rules of Procedure. The Appeal Panel notes, in the first place, that, in the exceptional circumstances of the present appeal – where the Appellant contests that the Board duly complied with the Appeal Panel decision rendered on 19 June

2018 in case 52/17 – the Appeal Panel considered necessary to preliminarily ensure that translations into Spanish of the Board’s response and rejoinder were provided to the Appellant and that the Appellant could use Spanish throughout the entire appeal and at the hearing because, although the Revised Confirmatory Decision was notified to the Appellant by the Board only in English, the Appeal Panel would have expected that the Revised Confirmatory Decision following the Appeal Panel decision of 19 June 2018 would be drafted in Spanish since it originated from a proceeding in Spanish. Spanish was indeed the language of the initial and confirmatory requests of the Appellant and of the Board’s decisions challenged by the Appellant in case 52/17. Spanish was therefore the language of the proceedings in case 52/17. The official language of the Appeal Panel decision in case 52/17 was also Spanish, although for reasons of expediency (considering that the internal working language of the Appeal Panel is English and the Appeal Panel cannot rely on translation services comparable to those of the CJEU) the English version of the Appeal Panel decision was notified to the Parties immediately after its adoption in English, with a note clarifying that the official text of the decision was however to be considered the one in Spanish which would follow as soon as available. For the same reasons, also this decision will be notified to the Parties in English immediately after its adoption, but its official text in Spanish shall follow as soon as available.

20. As to the admissibility of the appeal, the Appeal Panel notes that the Revised Confirmatory Decision adopted on 31 October 2018 fully replaced the amended confirmatory decision of 13 March 2018 and therefore only the Revised Confirmatory Decision can at present be deemed to have legal effects vis-à-vis the Appellant. In its decisions of 23 February 2018 in case 2/18 and of 28 February 2019 in case 3/18, the Appeal Panel had already the opportunity of clarifying for all due purposes that the Appeal Panel’s decision to remit a case to the Board, in the Appeal Panel’s view, is functionally similar to the annulment of a Union measure by the CJEU, because, as set out in Article 85(8) SRMR, 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, as such, a new decision that must be in full compliance with the Appeal Panel’s decision, as it is also the case, ‘*mutatis mutandis*’ 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 annulment judgment.
21. This means that, in the Appeal Panel’s view, the appeal filed against the Revised Confirmatory Decision is an appeal against a different decision from the one appealed by the same Appellant in case 52/17 and the fact that the Appeal Panel adopted a decision in case 52/17 does not prevent, as such, the Appellant from initiating a new appeal seeking the remittal to the Board under Article 85(8) also of the Revised Confirmatory Decision. Such proceedings do not have the same subject-matter (for a similar finding, albeit in the judicial context, see judgment of 5 August 2003, 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).

22. 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 Board decision and its subsequent amendments and that this would create legal uncertainty and jeopardise the right recourse to the Court of Justice.
23. In the Appeal Panel's view, considering the margin of appreciation pertaining to the Board's assessment on the merits, it is not to be expected within such normative context that a Board decision adopted to comply with the Appeal Panel decision should constitute the basis for an endless cycle of appeals, as somehow evidenced by the actual contours of the last cycle of appeals related with the matter at stake. The risk of circular reviews is thus minimal. Conversely, the possibility of an appeal against a revised confirmatory decision can be relevant to point to unintended non-compliance of the Board when implementing the decision of the Appeal Panel, or to clarify the Panel's view as regards the nature of the revision requested of the Board. Accordingly, this minor iteration, far from hindering legal certainty and the Appellant's rights, on the contrary tends to enhance both. It also appears an efficient and proportionate way to settle in advance, if possible, differences between the parties and an effective tool to ensure an even more timely compliance with the terms of the Appeal Panel decision. Thus, if the scenario is one where the parties disagree as to whether an Appeal Panel decision has been properly complied with, and the alternatives are (i) to only be able to seek recourse before the GCEU to enforce an Appeal Panel decision, or (ii) to also be able to seek a second Appeal Panel decision, where the Panel can also clarify any issue left open in the previous decision, the second option appears to be a more balanced and efficient use of resources, one that, far from leading to a perpetuation of litigation, may decisively contribute to filter unnecessary judicial litigation in the interest of due process. Such positive outcome is especially highlighted if one considers that the Appellants would, in any event, still have open the possibility to have recourse before the GCEU to challenge the Appeal Panel decision after the first or second appeal.
24. 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 wording of the provision does not exclude those decisions which have been taken in order to comply with a previous Appeal Panel decision remitting the case to the Board. In the case at hand, the right to an effective judicial remedy is not jeopardised by such an interpretation. On the contrary, what this interpretation does is grant the Appellant the very same procedural guarantees that are granted by Article 90(3) with respect to the original confirmatory decision also with respect to the subsequent amended confirmatory decisions.
25. The Board also contends that its interpretation of Articles 85 and 86 SRMR would be in line with Article 24 of 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 (and works differently) 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, when preparing the new draft decision to be submitted to the ECB Governing Council, is not bound by the ABoR’s decision. Article 24(7) SSMR expressly clarifies that: “*The Supervisory Board shall take into account the opinion of the Administrative Board of Review and shall promptly submit a new draft decision to the Governing Council. The new draft decision shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision*”. This means that, in the SSM context, it would be contradictory to allow for a further review by the ABoR of the new draft of a final decision prepared by the Supervisory Board, since such draft decision, and the final decision adopted by the Governing Council of the Bank, are legally free to derogate from the ABoR’s opinion. Conversely, the opposite is true in the SRM context, and a possible review by the Appeal Panel of the Board’s amended decision adopted upon remittal appears to be, as already noted, the most cost-efficient and timely way to ensure effective compliance with the Appeal Panel’s decision, as required by its binding nature.

26. This means that the appeal against an amended decision adopted by the Board upon remittal by the Appeal Panel is, in principle, admissible, although – as already held by the Appeal Panel in its decision of 23 February 2018 in case 2/18 - 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. This means that the appeal can only concern those documents for which the Appeal Panel has remitted the case to the Board and cannot extend, as a *de novo* review, to all other documents or parts thereof for which the Appeal Panel decision of 19 June 2018 found that the Board had acted in compliance with Regulation 1049/2001, that its decision was adopted respecting the applicable procedural rules and the duty to state reasons, and had stated accurately the facts without incurring in any manifest error of assessment or of misuse of powers. This strict assessment, on the part of the Appeal Panel, of the grounds of an appeal against an amended decision adopted by the Board upon remittal by the Appeal Panel, as characterized *supra*, effectively ensures a consistent narrowing of any hypothetical successive cases brought by an appellant and the corresponding closing of any litigation cycles, as highlighted by recent cases dealt with by the Appeal Panel.
27. The Appeal Panel further notes that an appeal, as the one in the instant case, cannot challenge *de novo* the Revised Confirmatory Decision as to the documents for which the Appeal Panel has remitted the case to the Board. Since the Revised Confirmatory Decision subject to the appeal was adopted following the Appeal Panel’s decision in case 52/17, claiming an integral disclosure of such documents would disregard that the Appeal Panel already determined, in its previous decision in case 52/17, that the Board was not obliged to make an integral disclosure and that a disclosure with redaction would also comply with Regulation 1049/2001. In the Appeal Panel’s view, the reiteration of a request for integral disclosure of documents,

which was already dismissed, is inadmissible, due to the authority of the Appeal Panel's decision rendered in case 52/17 in this respect. The Appellant cannot reiterate before the Appeal Panel requests that were already dismissed by the decision the compliant implementation of which is sought by the Appellant.

28. The Appeal Panel therefore finds that, in the instant case, the appeal is admissible and can be considered on the merits solely within the limits set out above, and more specifically to the limited scope of determining whether the SRB has fully complied with the Appeal Panel's decision of 19 June 2018 in case 52/17 as regards the redactions in the remitted documents, and namely the Valuation 1 Report, the Valuation 2 Report, the 2016 Resolution Plan, the 2017 Liability Data Report, the 2017 Critical Functions Report and documents relating to the private sale process.
29. The Appeal Panel considers, in conducting its assessment on the Revised Confirmatory Decision's compliance with its decision of 19 June 2019 as to the documents for which the case was remitted to the Board, that in its previous decision of 19 June 2018 in case 52/17 it was held that:
  - (a) as to the Valuation 1 Report and the Valuation 2 Report, the non-confidential version of these documents published on 2 February 2018 was to a large extent duly justified and complied with the Appeal Panel's decisions of 28 November 2017, but some redactions were still beyond what was duly justified and further disclosure was thus necessary as specified in the decision, and namely: (1) in the Valuation Report 1, with the redaction of the columns referring to potential adjustments (low and high) and of the ensuing re-expressed amounts as of 31.3.2017, on pages 4 and 5 as well as the redaction of the amount of deposit outflows exceeded in a single day on 12, 16, 22, 23 and 31 May 2017 and 1 June 2017 in the first paragraph from the top of page 8 as well as the description of the actions taken by the supervised entity and their outcome in the third paragraph from the top of page 8; (2) in the addendum to the Provisional Valuation Report, with the redaction of all estimates in the tables on pages 3, 6, 8 and 9, while it should be noted that such redactions make this document almost unintelligible and make it impossible to understand whether the redacted parts do in fact fall within the area covered by the exception relied on and whether the need of protection is genuine. Accordingly, these redactions also make it impossible for the persons concerned and for the courts in their review to understand what was the effective role of such addendum to the Provisional Valuation Report in the adoption of the Resolution Decision; (3) in the Appendices to the Provisional Valuation Report, the redaction of data on page 3 and of the estimated outcome statement illustrating the potential insolvency counterfactual on pages 67-70; (4) in the Provisional Valuation Report, the data in the tables on pages 3 and 14 referring to the alternative insolvency scenario;
  - (b) as to the 2016 Resolution Plan, the non-confidential version of this document published on 2 February 2018 was to a large extent duly justified and complied with the Appeal Panel's decisions of 28 November 2017, but some redactions were still beyond what was

duly justified and further disclosure was thus necessary as specified in the decision, where it was stated that: “some redactions go beyond these limits and the reasons put forward by the Board to justify them are insufficient such as (i) to prevent interested parties from challenging the correctness of both those reasons and the Resolution Decision, and (ii) to prevent courts from conducting their review on both aspects and are therefore vitiated by manifest error in the application of the relevant exceptions under Regulation 1049/2001. This happens namely in the case of the data in the tables at paragraph 3.2., which show the loss-absorbing capacity of the Group (such information being markedly historic and group specific, it is unclear how revealing it could affect the resolution methodology used by the SRB and could lead to wrong conclusions in future cases, as the Board claims) and of the data in paragraph 4.1., which shows how the resolution plan addressed estimated liquidity needs in a hypothetical resolution scenario”;

- (c) as to the 2017 Liability Data Report, this should be published with redactions where necessary;
- (d) as to the 2017 Critical Functions Report, this should be published with redactions where necessary;
- (e) as to the documents received from Banco Popular in relation to the private sale process, they should be published with redactions where necessary.

30. For the just determination of this appeal, the Appeal Panel also considered – to the extent that parallels may be drawn with the instant case - among others the most recent CJEU judgments on access to documents pertaining to financial supervision of 19 June 2018, *BaFin v Ewald Baumeister*, case C-15/16, EU:C:2018:464, of 13 September 2018, *Enzo Buccioni v Banca d'Italia*, C-594/16, EU:C:2018:717, of 13 September 2018, *UBS Europe v DV*, C-358/16, EU:C:2018:715, of 12 March 2019, *De Masi and Varoufakis v ECB*, EU:T:2019:154 and of 13 March 2019, *Espirito Santo Financial Group v ECB*, case T-730/16, EU:T:2019:161, in light of the legal corollaries arising from these cases in addition to previous case-law already quoted.
31. The Board objects that a general presumption of non-accessibility should be recognised with regard to the documents included in the SRB's administrative file relating to a resolution action. The Appeal Panel notes, however that case law has clarified that the purpose of the general presumption of non-accessibility as regards certain categories of documents is to allow the institution or agency concerned to derogate from the requirement that there should be a specific and individual examination of each document sought, and to rely instead on general considerations applicable to certain categories of documents. In the instant case, however, the position of the Board is different, because the Board already conducted an individual examination of the remitted documents that were the subject matter of the Appeal Panel's decision of 19 June 2018.

32. The Appeal Panel therefore notes that, for the just determination of this appeal as to the remitted documents, it is necessary to verify on an individual basis if the Board has taken into account the guidance on further disclosure provided by the Appeal Panel with its decision of 19 June 2018 and if the remaining redactions of the remitted documents are in line with the applicable legal provisions of Regulation 1049/2001. In this assessment, to ensure the functionality of the Board and to respect the role and division of tasks provided for by the SRMR and Regulation 1049/2001, the Appeal Panel must verify if the Board complied with all relevant procedural rules, properly stated its reasons and did not incur in any manifest error, but cannot substitute its opinion for that of the Board where the applicable legal provisions grant a margin of appreciation to the Board. This means that, on issues where the assessment of the facts may lead to different interpretations, e.g. the impact of certain disclosures on financial stability or on protected commercial interests to the effect of the exceptions to access to documents under Regulation 1049/2001, the Board's margin of appreciation must be fully respected by the Appeal Panel. This means that, in such circumstances, the Appeal Panel should defer to the Board's interpretation, fully recognising its margin of appreciation, unless there is a specific reason not to do so.
33. Based upon the foregoing principles and precedents, the Appeal Panel finds that, in the instant case, the Revised Confirmatory Decision is mostly in line with the previous findings of the Appeal Panel, in particular with its decision of 19 June 2018 in case 52/17 and with the applicable provisions of Regulation 1049/2001, with the quite narrow exceptions, however, as specified in paragraph 37 below.
34. In the Appeal Panel's view, with the publication of the documents effected on 31 October 2018, with the exceptions as specified in paragraph 37 below, the Board effectively complied with the Appeal Panel's decision of 19 June 2018 and the Revised Confirmatory Decision provides specific justifications for the parts of the remitted documents access to which is still denied. The reasons provided by the Board in this context comply, in the Appeal Panel's view, with the applicable provisions of Regulation 1049/2001 and with the Appeal Panel's decision of 19 June 2018. These reasons are moreover within the limits of the margin of appreciation which must be recognized to the Board when assessing the risk that one or more of the situations which justify the use of the exceptions to public access to documents under Regulation 1049/2001 could materialise. The reasons are further in accordance with the principles set out above and in conformity with settled case law (again, judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55).
35. The Appeal Panel refers, in this respect, to the specific reasons stated by the Board in paragraphs 4.1., 4.2., 4.3. and 4.4. of the Revised Confirmatory Decision, which, in the Appeal Panel's view, offer a sufficient and specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the Board's denial of access, in whole or in part, of the relevant documents. These reasons comply with the principles stated above and, in the

Appeal Panel's view, do not show any manifest error and were stated in a sufficiently specific manner.

36. The Appeal Panel, referring also to its previous decision of 19 June 2018, notes that:
- (a) As to the Valuation 1 and Valuation 2 Reports, the Board has complied, with the exceptions specified below in paragraph 37, with the Appeal Panel's decision and the Appellant was insufficiently precise in its claim that the redactions are excessive "making the document incomprehensible". In the Appeal Panel's view, this is not the case, because the Appeal Panel decision of 19 June 2018 was clear in requiring the further disclosures that were considered necessary to ensure that interested parties could understand and challenge, if necessary, the resolution decision and courts could conduct their review. The Board complied with this guidance and published (i) the columns referring to potential adjustments (low and high) and of the ensuing re-expressed amounts as of 31.3.2017, the amount of deposit outflows in a single day on 12, 16, 22, 23 and 31 May and 1 June 2017 in the first paragraph from the top of page 8 (the Appeal Panel notes that in its decision of 19 June 2018 it requested at paragraph 35(a) the disclosure of such data and not of those indicated in the second paragraph of page 8, whose redaction fell within the margin of appreciation which must be recognised to the Board) and the actions taken by the supervised entity and their outcome in the Valuation 1 Report; (ii) all estimates in the tables on pages 3, 6, 8 and 9 in the Addendum to the Provisional Valuation Report; (iii) data and information on pages 3, 14, 63-64, 67-71, 74 in the Appendices to the Provisional Valuation Report, duly stating reasons, without incurring in any manifest error of assessment, why some part of these pages and other parts of this document could not be disclosed; (iv) the data in the tables on pages 3 and 14 referring to the alternative insolvency scenario in the Provisional Valuation Report, duly stating reasons, without incurring in any manifest error of assessment, why other parts of this document could not be disclosed;
  - (b) As to the 2016 Resolution Plan, the Appellant claims that out of its 35 pages, pages 4, 5, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 28, 29, 31, 32, 34 and 35 are fully or partially redacted, again "making the document incomprehensible". Also in this respect, in the Appeal Panel's view, this is not the case, because the Appeal Panel's decision of 19 June 2018 was clear in requiring the further disclosures that were considered necessary to ensure that interested parties could understand and challenge, if necessary, the resolution decision and courts could conduct their review. The Board, with the exception specified in paragraph 37 below, complied with this guidance and published the required data in the tables at paragraph 3.2. and most of the data in paragraph 4.1. showing how the resolution plan addressed estimated liquidity needs in a hypothetical resolution scenario;
  - (c) As to the 2017 Critical Functions Report and the 2017 Liability Data Report, these were disclosed in accordance with the Appeal Panel decision;

(d) As to the documents received from Banco Popular in relation to the private sale process, the letter from Banco Popular to the SRB of 4 June 2017 was almost fully disclosed with the exception of limited personal data, and significant parts of the draft presentation of Jefferies/Arcano and the Lazard presentation were disclosed, stating reasons for the redactions that were nevertheless kept. In the Appeal Panel's view, these reasons do not show a manifest error of assessment, and the Appellant's arguments do not specifically rebut those reasons in a way that supports the opposite. For this purpose, the Appeal Panel carefully reviewed the content of the confidential Lazard presentation against the content of the non-confidential version disclosed to the Appellant, which results quite extensively redacted from page 4 to 11, and could verify that all such redactions fall within the margin of appreciation that must be recognised to the Board. The reasons put forward by the Revised Confirmatory Decision on page 19 appropriately refer to the protection of commercial interest of several potential alternative purchasers (either banks or private equity firms around the world which in theory could show a potential interest in the acquisition of Banco Popular according to the subjective judgement and analysis of Lazard at the time of preparation of the presentation) and do not show any manifest error.

37. However, in the Appeal Panel's view the Board failed to fully comply with its decision of 19 June 2018 specifically as regards the following:

- a) in the Valuation Report 1 the Board released the information contained on pages 4 and 5, as requested by the Appeal Panel, but, as argued by the Appellant, still leaves the date of the footnote \*\* to the liabilities table redacted. This issue has been already considered by the Appeal Panel in case 3/18 with its decision of 29 February 2019 and the Board clarified that it is in the process of implementing the guidance provided by the Appeal Panel in case 3/18 in this regard. The Appeal Panel considers therefore that the matter must be handled by the Board by giving public access, as it did in the past with all parts of documents it disclosed following an Appeal Panel's decision, to the specific footnote on page 5.
- b) Page 25 of the 2016 Resolution Plan that was released in the non-confidential version published by the Board on its website on 2 February 2018, that is now redacted in the most recent version published on 31 October 2018. In the Appeal Panel's view the Board failed to state clear and sufficient reasons for this course of action in the Revised Confirmatory Decision. In principle, once a document or any part thereto has been made publicly available, the Board cannot reconsider the matter and replace the non-confidential version of the document with one containing redactions of data which were previously disclosed to the public.
- c) The data in section 4.1 (pages 25 and 26) of the 2016 Resolution Plan relating to the deposit outflows and rating decrease were still redacted contrary to the findings of the Appeal Panel in paragraph 42 of its decision 52/17 of 19 June 2018. The Board argues that certain data regarding the liquidity scenario relate to assumptions and policy choices that are not relevant solely for the case at hand, implying that the information is not purely

historic, nor institution-specific, but is such as to “give rise to speculation with regard to situations that may appear to be comparable as well as the way in which the SRB might act in future cases, which may in turn unduly influence the behaviour of other market participants”. This, in the Board’s view, “could ultimately hinder the SRB’s ability to fulfil its role as resolution authority in the future”. In the Appeal Panel’s view, since the Board was asked by the Appeal Panel to disclose all the data in paragraph 4.1. showing how the resolution plan addressed a possible liquidity stress scenario (paragraph 42 of the Appeal Panel’s decision of 19 June 2019), these concerns of the Board were duly weighed against the need to ensure that the relevant part of the document was not only fully intelligible but also fit for the purpose for which disclosure had been requested and granted. On the contrary, the redactions of the data on a rating decrease and outflows on pages 25 and 26 significantly reduce the value of the requested disclosure. This is justified with reasons that are not sufficiently specific. Those reasons do not clarify how and why revealing such information could effectively lead to wrong conclusions with regard to the application of resolution action in future cases. Therefore, the arguments are purely hypothetical and, accordingly, not specific enough in their current form to justify the redaction at stake.

38. Based upon the foregoing, the Appeal Panel considers therefore that the Appellant’s first plea, claiming the failure of the Board to comply with the Appeal Panel decision in case 52/17, is only partially founded, within the strict limits and exceptional points set out in paragraph 37 above.
39. The Appeal Panel further considers that also the Appellant’s second plea, according to which the Board relied on an extremely broad application of the exceptions to the disclosures of documents provided for in Article 4 of Regulation 1049/2001, not in line with settled case-law of the CJEU, is not founded. With the very limited exception provided for in paragraph 37 above there is no factual evidence nor any apparent reason to conclude that the Board applied incorrectly the exceptions provided for in Article 4 of Regulation 1049/2001.
40. The Appeal Panel finds appropriate to refer, in this respect, to its previous decisions rendered on 28 November 2017 and on 19 June 2018 (all accessible at [www.srb.europa.eu](http://www.srb.europa.eu)), where the Appeal Panel recalled and restated the overriding principles which should guide in the assessment of the requests of access to documents related to the Banco Popular resolution in compliance with settled case-law of the CJEU:
  - (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 Zahnärztekammer 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) 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).
- (c) 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 9 September 2008, *MyTravel v. Commission*, T-403/05, EU:T:2008:316, 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).
- (d) 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. Commission*, 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 of 25 September 2014, *Spirlea v. Commission*, T-306/12, EU:T:2014:816, paragraph 52).

- (e) 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 appreciation (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 Zahnärztekammer 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 of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

41. In the Appeal Panel’s view all these principles and the related case-law of the CJEU were respected by the Board (but for the minor non-compliance with its decision of 19 June 2018 set out in paragraph 37 above) with its Revised Confirmatory Decision in the instant case, where the Board clarified, with respect to the remitted documents, why (i) the exception of the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State justified some redactions in the non-confidential version of the Valuation Reports and of the 2016 Resolution Plan; (ii) the exception of the protection of commercial interests justified some redactions in the non-confidential version of the Valuation Reports, the 2016 Resolution Plan, the 2017 Liability Data report and the Lazard report; (iii) the exception of the protection of privacy justified some redactions in the non-confidential version of the Valuation 2 Report and the letter from Banco Popular to the SRB dated 4 June 2017; (iv) the exception of the purpose of inspections, investigations and audits justified some redactions in the non-confidential version of the 2016 Resolution Plan and 2017 Liability Data Report.
42. For the same reasons also the third plea of the Appellant, according to which the Board has breached Article 41 of the Charter of Fundamental Rights by failing to provide sufficient reasoning for its decision to retain parts of the requested documents as confidential, is, in the Appeal Panel view, unfounded. The Appeal Panel holds that the Board duly stated its reasons with respect to the redactions in the remitted documents and such reasons do not show any

manifest error of assessment. In doing so, the Board also duly complied with the principle of good administration set out in Article 41 of the Charter.

43. Finally, the Appellant claims that the Board failed to consider that a much wider disclosure of the requested documents should have been granted – considering that the Resolution Decision affects the right of property – in accordance with Article 17 of the Charter of Fundamental Rights. The Appellant furthermore pleads the right to an effective remedy and a fair trial in accordance with Article 47 of the Charter, as well as the right to access to information under Article 42 of the Charter. In this regard, the Appellant claims that these are overriding considerations of public interest in disclosure that the Board failed to take into account. However, such access to the requested documents would be necessary to show that there were no grounds for the resolution of Banco Popular, that there was no transparent competitive process for selling the entity and that the buyer did not pay the “real price of the business” on the day of the resolution. In the Appellant’s view, in the event the SRB’s position with regard to access to the documents requested remains unchanged, proper review of the resolution of Banco Popular would not be possible, affecting the transparency required from European institutions.
44. The Appeal Panel recalls that the scope of this appeal cannot exceed, for its admissibility, the issue whether the Board’s Revised Confirmatory Decision has complied with the Appeal Panel’s decision of 19 June 2018 as to the remitted documents. In its decision of 19 June 2018 in case 52/17, the Appeal Panel found that an overriding public interest in disclosure in the context of the exceptions under Article 4(2) of Regulation 1049/2001 existed with regard to the (i) the documents received from Banco Popular in relation to the private sale process and (ii) parts of the 2017 Liability Data Report and the 2017 Critical Functions Report. The Board, with the Revised Confirmatory Decision, published these documents in compliance with the Appeal Panel’s decision.
45. Furthermore, the existence of an overriding public interest in disclosure prevents the Board from relying on the exceptions set out in Article 4(2) of Regulation 1049/2001 but does not prevent the Board from relying on the exceptions set out in Article 4(1). In the instant case, many of the still redacted parts of the remitted documents are justified by the Revised Confirmatory Decision with the exception of the financial, monetary or economic policy of the Union or a Member State under Article 4(1) (consider to this effect, the Revised Confirmatory Decision, paragraphs 4.1., 4.2. and 4.5.).
46. The Appeal Panel further notes that all these fundamental rights, including the fundamental right of property, are duly taken into account by the SRMR and are to be considered as duly respected in the resolution context insofar as (i) the resolution action is lawfully adopted when a bank is failing or likely to fail in accordance with the SRMR provisions, (ii) the resolution is implemented at the point of non-viability of the resolved entity in compliance with all the SRMR requirements and (iii) compensation to affected shareholders or subordinated

bondholders is provided according to Articles 76(1)(e) and 20(16) SRMR, if they incur greater losses than they would have incurred in a winding up under normal insolvency proceedings.

47. In the Appeal Panel's view the disclosure of the non-confidential version of the remitted documents in compliance with the Appeal Panel's decision of 19 June 2018 in case 52/17, as well as the other documents related to the Banco Popular resolution publicly available, cannot be contested on the basis of the right of judicial protection under Article 47 of the Charter.
48. The Appeal Panel notes that the Board argued that the interest in obtaining documents for the purposes of court proceedings constitutes a private interest, not a public interest (which rules it out as an "overriding public interest" justifying disclosure), and cites, for this purpose, the GCEU judgment of 13 November 2015, *ClientEarth v Commission*, joined cases T-424/14 and T-425/14, EU:T:2015:848, paragraph 121. The Appeal Panel notes, however, that such judgment was appealed, and the Court of Justice, in its judgment of 4 September 2018, case C-57/16 P, EU:C:2018:660, decided to set aside the decision of the General Court and order the European Commission the disclosure of the requested documents. Yet, the basis for such decision was not the nature of the "overriding public interest", but the applicability of the presumption of confidentiality over certain documents (judgment of 4 September 2018, case C-57/16 P, EU:C:2018:660). Therefore, the CJEU decision cannot be used to support the Appellant's view, nor can the set-aside decision by the General Court be used to support the position of the Board. Yet the legal point argued by the Board (i.e. whether the fact that an Appellant requests document disclosure for the purpose of using those documents in legal proceedings automatically excludes the existence of an "overriding public interest") is not necessary to decide the present issue. In the Appeal Panel's view, the successive disclosures have offered the interested public information needed to initiate legal proceedings, where the courts can conduct a review of the Banco Popular resolution actions. Thus, the public dimension of judicial accountability has been respected, without unduly undermining the protection of the interests enshrined in Article 4(1) and (2) of Regulation 1049/2001. Should any further disclosures to the Appellant be individually needed for purposes of the specific proceedings lodged by the Appellant, they could be ordered in those specific proceedings. The Appellant acknowledged that it already initiated legal proceedings before the General Court and that, in a pending case, the CJEU can order the Board to deposit confidential versions of the documents necessary to decide on a specific case or ask the Board questions, to complement the information publicly available. From this perspective too, the Appellant's fundamental rights are not prejudiced.

On those grounds, the Appeal Panel hereby:

**Remits the case to the Board, to ensure compliance with its decision of 19 June 2018 within the limits of what specified in paragraph 37 of this decision.**

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David Ramos Muñoz

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Kaarlo Jännäri

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Luis Silva Morais  
Vice-Chair

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Marco Lamandini  
Rapporteur

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Christopher Pleister  
Chair

For the Appeal Panel Secretariat