

30 August 2017

case 12/17

DECISION

[Appellant]

appellant

v

the Single Resolution Board

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

DECISION

In Case 12/17,

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (the “SRMR”),

[Appellant], [address], Spain, appellant,

v

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

THE APPEAL PANEL,

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

makes the following decision.

(1) **The procedure**

1. The notice of appeal was received by the Secretariat of the Appeal Panel on 19 July 2017.
2. Mr [Appellant] held subordinated bonds of Banco Popular Español, S.A. (“Banco Popular”) and seeks the annulment of the Board’s decision dated 7 June 2017 whereby the Board placed Banco Popular under resolution and adopted a resolution scheme. The scheme includes a full write-down of the shares in Banco Popular, a conversion into shares of all additional tier 1 instruments issued by Banco Popular followed by a full write-down of the shares resulting from this conversion, and a conversion into shares of all tier 2 instruments issued by Banco Popular followed by a sale to Banco Santander S.A. for a total consideration of €1 of the shares resulting from this conversion.
3. The operative part of the notice of appeal reads as follows:

For all the above reasons, I REQUEST:

That this document be admitted, that the appeal against the abovementioned decision dated 7 June be admitted pursuant thereto, and that following a due procedure such decision be declared null and void.

4. On 20 July 2017, the Vice-Chair of the Appeal Panel informed Mr [Appellant] that, on a preliminary analysis, the contested decision appeared to fall outside the Appeal Panel's jurisdiction. The Vice-Chair set the following timetable for the submission by the parties of their observations on the admissibility of the appeal: observations of Mr [Appellant] by 25 July 2017, response of the Board by 28 July 2017 and rebuttal of Mr [Appellant] by 1 August 2017. The Vice-Chair also requested each party to advise if it wished to make oral representations. Mr [Appellant] filed observations on 24 July 2017. The Board responded on 28 July 2017, in English; a Spanish version of the response followed on 3 August 2017. Mr [Appellant] filed a rebuttal on 9 August 2017.

(2) Arguments of the parties

5. Mr [Appellant] contends that no access was given to the documentation relating to the contested decision, in breach of Article 90(3) of the SRMR and of Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ("Regulation 1049/2001"). The appeal is therefore admissible pursuant to Article 85(3) of the SRMR. In his rebuttal of 9 August 2017, Mr [Appellant] submits further arguments that actually go to the merits rather than the admissibility of his appeal, and therefore need not be addressed at this stage.
6. The Board notes that the notice of appeal does not state why it is admissible, in breach of Article 5(4)(a) of the Appeal Panel's Rules of Procedure. The Board further contends that the contested decision was made pursuant to Article 18 of the SRMR and, therefore, is not of a type that can be appealed against in accordance with Article 85(3). The Board states that decisions referred to in Article 90(3), against which an appeal is possible, are the decisions that reject a confirmatory application. The appellant did not submit any such confirmatory application and his appeal is, as a consequence, inadmissible.

(3) Findings of the Appeal Panel

7. The Spanish version of the Board's response and Mr [Appellant]'s rebuttal were submitted after the deadlines set by the Vice-Chair. Given that the delay was minimal and that neither party objected, the Appeal Panel admits both documents.
8. The jurisdiction of the Appeal Panel is determined by Article 85(3) of the SRMR: appeals to the Appeal Panel are permitted against decisions of the Board referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) of the SRMR. Other types of decisions of the Board are not

appealable to the Appeal Panel; they may be appealable to the Court of Justice of the European Union in accordance with Article 86(1) of the SRMR and Article 263 TFEU, subject to the admissibility conditions set out in these provisions.

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

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

10. Article 7 of Regulation 1049/2001 provides:

Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

...

11. Article 8 of Regulation 1049/2001 provides:

Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

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

12. It follows from the above provisions that the types of decisions contemplated under Article 90(3) of the SRMR, against which appeals may be submitted to the Appeal Panel, are the decisions made by the SRB under Article 8 of Regulation 1049/2001. These are the decisions whereby the SRB, expressly or tacitly, refuses totally or partially to grant access to documents requested by way of a confirmatory application. A confirmatory application is a request for reconsideration of a prior decision whereby the SRB, expressly or tacitly, refused totally or partially to grant access to documents requested by way of an initial application.
13. The following steps must therefore have taken place before an appeal may be made to the Appeal Panel in connection with Article 90(3) of the SRMR: a first 'initial' application for access to documents, a first (express or tacit) decision by the SRB rejecting in whole or in part the initial application, a second 'confirmatory' application reiterating the rejected initial application, and a second (express or tacit) decision by the SRB rejecting in whole or in part the confirmatory application.
14. Mr [Appellant] does not assert having made any initial or confirmatory application, and does not assert either that the SRB rejected any application for access to documents made by him pursuant to Regulation 1049/2001. The contested decision is therefore not 'a decision of the Board referred to in ... Article 90(3)' of the SRMR and is not, as such, capable of being appealed to the Appeal Panel pursuant to Article 85(3) of the SRMR.
15. The contested decision relates to the resolution of a credit institution. It is based on Articles 14 to 29 (Part II, Title I, Chapter 3, 'Resolution') of the SRMR. This is a decision of a type which is not listed in Article 85(3) of the SRMR. The appeal is therefore not admissible.

On those grounds, the Appeal Panel hereby:

- 1. Declares that the appeal is not admissible.**

Yves Herinckx
Vice-Chair

Eleni Dendrinou-Louri

Kaarlo Jännäri

Marco Lamandini

Luis Silva Morais

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