



**11 April 2019**

Case 1/2019

# **FINAL DECISION**

**[...],**

**Appellant,**

**v**

**the Single Resolution Board**

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

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## FINAL DECISION

In Case 1/19

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010<sup>1</sup> (the “SRMR”),

[Appellant], 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 decision of 20 December 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<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. By the initial request, the Appellant requested access to the following: (a) any communications between the SRB and Banco Santander exchanged the months before Banco Popular’s resolution and related to the resolution of Banco Popular; (b) minutes of the Banco Popular auction; (c) a specific declaration of conflict of interest by Deloitte with respect to Banco Popular. In the initial response, the Board explained that the SRB is not in possession of the documents sub (a) and (c). As to the documents referred to sub (b), the Board granted

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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.

access to the cover letter submitted to the SRB by FROB in relation to the offer by Banco Santander and the certificate of FROB's Governing Committee.

3. The Appellant submitted a confirmatory application requesting the SRB to reconsider its position in respect of the documents pertaining to the Banco Popular auction and clarified more specifically that access was sought concerning the time of reception of the offers in a sealed envelope by the competent national authorities. The SRB rejected the confirmatory application with the Confirmatory Decision. This is the subject of the appeal in the present case.
4. The notice of appeal was notified to the Board on 17 January 2019.
5. The Board submitted its response on 14 February 2019. The Appellant did not submit any further observations to the SRB's response.
6. On 11 March 2019, the Appeal Panel asked the parties 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. Both Parties confirmed in writing that they waived their right to an oral hearing.
7. On 27 March 2019 the Appeal Panel, having considered the 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 of the case, that it was not necessary to convene on own initiative such a 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**

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

9. The Appellant challenges the Confirmatory Decision arguing that he cannot understand how the SRB could not be in possession of documented information on the time when tenders were received in sealed envelopes by the competent national authorities, considering that "the SRB is the one that initiated the resolution process" and the requested "document falls within the scope of the Regulation 1049/2001". Furthermore, even if such documents would be at FROB,

the SRB should have at its disposal all documents relating to the resolution of Banco Popular or otherwise request the documents from FROB (or the other authorities involved).

### Board

10. The Board argues that the appeal is inadmissible if it must be interpreted as a mere request for information on the time when tenders were received and not as a request for documents covered by Regulation 1049/2001. In the Board's view, the appeal is furthermore inadmissible as the Appellant has failed to sufficiently specify the grounds of the appeal. On the merits, the Board argues that documents containing the requested information are not in its possession, that the auction procedure was carried out in Spain and that the SRB has provided access to the documents that it received from FROB relating to that process. According to Article 2(3) of Regulation 1049/2001, documents which the SRB does not hold do not fall within the scope of such Regulation, and there is no obligation for the Board to procure documents, which the Board does not hold, from other authorities or third parties.

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

11. The Appeal Panel preliminarily notes that, although this appeal could be better specified in arguing its pleas, its content, in the instant case, can nonetheless be considered sufficient to allow to the Board and the Appeal Panel to understand the claims raised by the Appellant, taking into account the fact that the appeal is filed without the legal assistance of any law firm and the use of the exceptions provided for in Regulation 1049/2001 by the Board is contested by the Appellant. The Appeal Panel considers therefore that, in the circumstances, the appeal can be deemed admissible.
12. The Appeal Panel preliminarily notes that in its previous decisions rendered on 28 November 2017 and 19 June 2018 (all accessible at [www.srb.europa.eu](http://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 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) 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. 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 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 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).

13. The Appeal Panel further held in its decisions of 28 February 2019 in cases 14/18 and 15/18 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. That provision considers as ‘document’ “*any content*” “*whatever its medium*” “*concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere*”. That provision also specifies that such content can either be *written* or *stored* in electronic form (simply) *recorded* in any visual or audio-visual way. Yet, once a European institution, body or agency asserts that a document does not exist, according to settled case law, it 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), and 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).
14. In the instant case, in the Appeal Panel’s view, the Appellant is not seeking an information from the Board (which would fall outside the application of Regulation 1049/2001) but, instead, documented evidence of the printed dates and hours when tenders were received in sealed envelopes by the competent national authority within the context of the auction procedure for the sale of Banco Popular. The appeal is therefore admissible.
15. However, the Board has clarified that (i) the auction procedure was carried out in Spain and that the SRB has provided access to the documents that it received from FROB relating to that

process, and (ii) the Board does not hold any document showing the time of reception of the offers in a sealed envelope by the competent national authority (FROB).

16. The Appeal Panel notes that, as specified in Article 2(3) of Regulation 1049/2001, the scope of the right of access is limited to the “documents held by an institution, that is to say documents drawn up or received by it and in its possession”. As already pointed out above, even if the concept of ‘document’ is broad, it refers to information already stored, written or recorded in a medium that is already in existence. Conversely, in this case the Board has stated that the document requested does not exist. Under this premise, once a European institution, body or agency asserts that a document does not exist, the institution, body and agency can rely on a rebuttable presumption that, indeed, the document does not exist (GCEU, judgment 23 April 2018, *Verein Deutsche Sprache v. Commission*, T-468/16, EU:T: 2018:207). The Appellant failed to rebut such presumption that the requested documents are not in possession of the SRB. Furthermore, the institution, body or agency 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).
17. The Appeal Panel finally notes that any claim that the institution, body or agency which has not the possession of a document, should request such document to other authorities to the purpose of meeting a request of access to documents falls outside the scope of Regulation 1049/2001. Moreover, the Appeal Panel’s 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.

On those grounds, the Appeal Panel hereby

**Dismisses the appeal.**

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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 Secretariat of the Appeal Panel :