



11 April 2019

Case 4/2019

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 4/19

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 1093/2010¹ (the “SRMR”),

[...], 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 12 February 2019 (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 documents² (hereinafter “Regulation 1049/2001”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents³ (hereinafter “Public Access Decision”).
2. By the initial request and the confirmatory application, the Appellant has requested access to the date and time of the minutes of the Executive Session of the Board in which any alternative private sector measures were assessed in the context of the resolution of Banco Popular Español (hereinafter, “Banco Popular”). The SRB rejected the confirmatory application with the Confirmatory Decision which is the subject of the appeal in the present case.

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

3. The notices of appeal were notified to the Board on 18 February 2019
4. The Board submitted its response to the appeal on 15 March 2019.
5. On 18 March 2019 the Appeal Panel asked the Parties if they considered unnecessary to discuss the case in a hearing. Both Parties confirmed in writing that they waived their right to an oral hearing.
6. On 27 March 2019 the Appeal Panel notified the Parties that 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 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

7. The main arguments of the parties are briefly summarised below. However, in order to avoid unnecessary duplications, more specific arguments relating to each document raised by the parties shall be considered, to the extent necessary for the just determination of this appeal, where this decision addresses each of these documents 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

8. The Appellant argues that, contrary to the reasoning of the Board, the refusal to disclose the time of the meeting of the Executive Session of the Board in which any alternative private sector measures were assessed is not justifiable under Art. 4 of Regulation 1049/2001. First, the Board does not justify how it makes the necessary balancing between the risks and damages that the disclosure of this information would entail, and the right of access to documents set forth in the corresponding rules. Furthermore, in the view of the Appellant, the disclosure of the time and date of this Executive Session would not have any negative effects either on the decision-making process of the Board, or on financial stability. The Appellant does not ask for the entire content of the minutes for this Executive Session but only for the date and time when the session took place. The refusal by the Board to provide access to this information without any further specification, without a proper balancing of rights/interests, and without a “test of harm” constitutes no reason to deny access. Furthermore, the Appellant finds that there is an overriding public interest in the disclosure of the requested information because European citizens have a right to know whether the procedures adopted by European institutions are undertaken following the rules applicable to that effect. Knowing the date and time of the SRB Executive Session will help to know that such session took place, as mandated

by the rules, and cannot affect financial market stability, or gravely harm the SRB's future decision-making process. Thus, the interest in knowing the fact that the rules were complied with, once deprived of any request to know any financial information, or preparatory documents, considering the absence of harm, justifies a superior interest in having such document disclosed.

Board

9. The Board argues that the refusal to grant access to the minutes or parts thereof is based on the exception of Art. 4(3) of Regulation 1049/2001, as the disclosure would seriously undermine the SRB's decision-making process, and there is no overriding public interest in disclosure. The Board states that the minutes qualify as an internal preparatory document of the SRB and thus fall under the general presumption of non-accessibility. With regard to Art. 4(6) of Regulation 1049/2001, even granting partial access to the minutes would not be possible without undermining the exception of Art. 4(3) of Regulation 1049/2001. In the Board's view, where the document requested falls under a general presumption, such document does not fall within the obligation of disclosure, in full or in part. Finally, the Board states that it could not identify an overriding public interest in disclosure and that the arguments brought forward by the Appellant did not substantiate any such interest. According to the Board, it fell to the Appellant to demonstrate the existence of such interest.

Findings of the Appeal Panel

10. The Appeal Panel preliminary notes that in its previous decisions rendered on 28 November 2017 and 19 June 2018 (all accessible at www.srb.europa.eu), it was held that the following overriding principles, hereby restated for all relevant purposes, 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) To the effect of this appeal, the Appellant is subject to the regime for access to documents set out by Article 90(1) of the SRMR together with Regulation 1049/2001. As indicated by Article 85(3) SRMR, the Appeal Panel has no competence to hear appeals against a decision of the Board referred to in Article 90(4) SRMR. The Appellant can therefore not rely, in this appeal, on the right to access the SRB's file on the basis of Article 90(4) SRMR.

- (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). Article 4 of Regulation 1049/2001 sets out these exceptions as follows:

Article 4

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period

of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

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

11. Also in light of the GCEU judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234, the Appeal Panel decisions of 19 June 2018 further clarified that:

- (a) the Appeal Panel did not deem necessary to require the Board to make an integral disclosure of the requested documents and conceded that in the specific assessment of the relevant parts of the relevant documents, which could be redacted under the relevant exceptions recognised by Regulation 1049/2001, the Board retains a margin of appreciation (in particular in respect of the assessment whether disclosure would undermine the public interest under Article 4(1)(a) of Regulation 1049/2001), provided that the Board complies with its obligation to state the reasons in such a way that effective judicial review can be conducted;
- (b) the SRB was entitled to blank out those specific data and information that, on careful and reasonable examination, could objectively raise actual concerns either of financial stability or of protection of commercial interests. The Appeal Panel pointed out that, in this respect, in the specific assessment of the relevant parts which should not be disclosed, the Board has to duly consider that: (i) exceptions to public access are to be interpreted narrowly, (ii) Article 4 of the Public Access Decision must be interpreted in conformity with Regulation 1049/2001 and cannot create broader exceptions to the disclosure obligation than what provided for in Article 4 of Regulation 1049/2001, and (iii) refusal to disclose must be supported by a specific finding that the disclosure of such part of the document would actually undermine a protected interest in a credible scenario and must be substantiated in such a way, so to enable interested parties to challenge the correctness of those reasons and courts to conduct their review (see on this point again judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55).
- (c) the SRB assessment, of which parts of the relevant documents could not be disclosed under the relevant exceptions provided for by Regulation 1049/2001 was done to a large extent in compliance with the applicable procedural rules, with the duty to state reasons and without a manifest error of assessment or a misuse of powers, and thus within the

limits of the exercise by the Board of the margin of discretion which must be recognized to it according to 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). The Appeal Panel further considered that the SRB, in stating the reasons justifying its partial denial of access, could legitimately take account also of possible future behaviours (e.g. risk of unwarranted market speculation), if not purely hypothetical but reasonably foreseeable in a credible scenario and sufficiently specific (the need of protection must be genuine).

(d) Nonetheless, some denial to access or redactions in the non-confidential version of some of the relevant documents, in the Appeal Panel's view, went beyond these limits and required therefore further disclosure by the Board.

12. For the just determination of this appeal, the Appeal Panel considered all arguments raised by the Appellant in this appeal, also in light of the previous decisions adopted by the Appeal Panel on 28 November 2017 (in cases 38 to 43/17), 23 March 2018 (in case 2/18), 19 June 2018 (in cases 44 to 57/17, 1 and 7/18) and 28 February 2019 (in cases 3/18; 14/18; 15/18 and 22/18). The Appeal Panel – to the extent that parallels may be drawn with the instant case - also considered 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 Buccioli*, 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.
13. The Appeal Panel notes, to the effect of the just determination of the present appeal, that in its previous decisions of 28 November 2017 and 19 June 2018 the Appeal Panel has held, in respect to applications to access the full content of the minutes of the Board, that the Board had duly stated the reasons why full access to the minutes of the Board that dealt with the situation of Banco Popular could be legitimately refused pursuant to the exceptions contemplated under Regulation 1049/2001 these reasons did not show and manifest error of assessment and no overriding public interest in disclosure was proved by the appellants.
14. However, the Appeal Panel notes that, in the instant case and contrary to previous appeals, the Appellant does not ask for access to the entire content of the minutes of the Executive Session but only an almost completely redacted version of such minutes, only showing the date and time when the session took place.
15. The Appellant clarifies, in this respect, that this extremely limited access to the relevant document will help to verify that such session took place, as mandated by law, and that therefore procedural rules were duly respected by the SRB in the Banco Popular resolution process. In the Appellant's view the disclosure of the minutes limited only to the part of it

showing date and time cannot credibly affect financial market stability, or gravely harm the SRB's future decision-making process.

16. The Board denies such a partial, and very limited, access arguing that as elaborated by the Court of Justice where the documents requested are covered by a general presumption of non-accessibility, as it happens to be in the instant case where the Board refers to the exception of Article 4(3) of Regulation 1049/2001 (protection of decision-making process), such documents can be refused in full from public access.
17. The Appeal Panel finds that the Board's reliance on the general presumption, in the instant case, cannot justify the refusal to disclose an almost entirely redacted version of the minutes showing only the date and hours of the meeting, as shown in the minutes. The Appeal Panel preliminarily notes that case law has clarified that the purpose of the general presumptions as regards certain categories of document 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, the position of the Board has consisted in conducting an individual examination of the minutes and concluding that they could not be disclosed in their entirety to duly protect the decision-making process.
18. According to settled case-law of the GCEU (see judgment of 7 October 2014, *Schenker v Commission*, T-534/11, EU:T:2014:854 and the case-law cited herein; more recently judgement of 13 March 2019, *Espirito Santo Financial Group v ECB*, case T-730/16, EU:T:2019:161), when the Board is required to disclose only a very limited and specific part of a document, it must consider specifically whether it is possible to grant such an access to the very specific parts of the document requested, and should grant such an access if it results that the extremely limited disclosure would not prevent the aim pursued by the exception to disclosure from being achieved, also taking into account that access to the rest of the document is refused.
19. In the instant case, the Appeal Panel cannot see how the disclosure of only the date and hour of the meeting of the Executive Session as recorded in the minutes – provided that any other content of the minutes is entirely blanked out – could credibly jeopardise the Board decision-making process.
20. In the Appeal Panel's view, this case is factually different from previous cases where the appellants had requested full access to the minutes. In those cases the Appeal Panel held that the Board had duly offered reasons to substantiate the position that full access to the minutes could not be granted. In the Appeal Panel's view, this is a different situation. The Appellant, in the instant case, specified with its initial and confirmatory application that he was seeking access only to one single item (the few words which indicate date and hour of the meeting) of such minutes. Such item does not refer to the substantive content of the discussions or deliberations recorded in the minutes but only to the date and hours when the meeting took

place. The Board failed to state sufficient reasons why access to this single item in an almost entirely redacted version of the minutes and with no reference whatsoever to the substantive content of such minutes should be denied.

21. In the Appeal Panel's view, access to this extremely limited part of the document, which refers to the meeting's date and time, would not entail disclosure of the substantive content of the meeting. Therefore, it cannot jeopardize the internal decision-making process of the Board also in future cases.

On those grounds, the Appeal Panel hereby:

Remits the case to the Board.

David Ramos Muñoz

Kaarlo Jännäri

Luis Silva Morais
Vice-Chair

Marco Lamandini
Rapporteur

Christopher Pleister
Chair

For the Secretariat of the Appeal Panel :