



19 October 2020

Case 4/2020

FINAL DECISION

[.],

Appellant,

v

the Single Resolution Board

Christopher Pleister, Chair
Marco Lamandini, Rapporteur
Luis Silva Morais, Vice-Chair
Helen Louri-Dendrinou
Kaarlo Jännäri

TABLE OF CONTENTS

Background of facts 3

Appellant 6

Board 7

Findings of the Appeal Panel 7

Tenor 8

FINAL DECISION

In Case 4/20

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), Helen Louri-Dendrinou and Kaarlo Jännäri,

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 22 June 2020 (hereinafter the “Confirmatory Decision”) rejecting the Appellant’s confirmatory application, by which the Appellant requested the SRB 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 his initial emails of 10 and 19 March 2020 and 24 April 2020, the Appellant requested access to the following documents and information: (i) all the documentation prepared by the SRB in relation to the coronavirus before its arrival in Europe and after it, in reference to the banking and its stock market crashes, specific contingency plans once it was known what was happening in China; (ii) information on all meetings held and decision taken on this issue; (iii) studies on possible pandemics carried out by the institution prior to Covid-19; (iv) the number of the people infected, dead or recovered within the institution; (v) the previous studies regarding the pandemic carried out by the institution within its risk-control system;

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

- (vi) the economic items in medical and test material and the amount used by the components of the institution; (vii) the chronological measures taken as a result of the decisions made by each country in the Union; (viii) date and time of the first alert received due to the Covid-19 and the date and time of the first measures taken by the institution; (ix) date and time of the delivery of the material to the staff.
3. In its initial response of 13 May 2020 the SRB communicated the Appellant that it could not grant his request, because the requests under points (ii), (iv), (vi), (viii) and (ix) do not constitute a request for access to documents but a request for information which does not fall under the scope of Regulation (EC) No 1049/2001; with respect to the requests under points (i), (iii) and (v) the SRB informed the Appellant that it does not hold any document that would correspond to the description in the request.
 4. On the same date, 13 May 2020 the Appellant submitted a confirmatory application, requesting the SRB to reconsider its position with respect to the documents and information requested. In response, on 22 June 2020, the SRB rejected the confirmatory application with the Confirmatory Decision, which is the subject matter of the present appeal.
 5. On 29 June 2020 the Appellant sent an email to the Appeal Panel contesting the Confirmatory Decision. However, since the email was lacking the essential elements necessary to be considered an appeal under the Rules of Procedure, the Appeal Panel sent to the Appellant the following communication:

Dear [.],

We received your email of 29 June 2020, with enclosed the Confirmatory Decision of 22 June 2020.[.].

*According to Article 5 of the said Rules of Procedure, a party wishing to bring an appeal against a decision of the Board under Article 85(3) Regulation 806/2014 shall do so by way of a “notice of appeal”. To fulfil the requirements of such notice of appeal, the appellant needs not only to (1) identify the decision subject to the appeal, (2) use the language of the decision, (3) annex (or attach) the appealed decision; but also and importantly (4) include (a) **a statement of why the appeal is admissible under article 85 (3) Regulation 806/2014;** (b) **a statement of grounds on which it is based;** (c) a statement of the grounds to justify a suspension of the decision’s effect, if a request for such suspension is made; and (d) the documents on which the appellant intends to rely (article 5 of the Rules of Procedure, sections (1)-(4)). **If the appellant does not wish to suspend the effects of the appealed decision, nor does he intend rely on specific documents, it suffices with a statement of why the appeal is admissible, and of the grounds on which it is based.***

These requirements are not exacting and are sufficiently straightforward. They are also necessary. It is the appellant’s initiative that sets the procedure in motion, and it is the appellant’s responsibility to provide the grounds for the Appeal Panel to decide. The terms used by the Rules of Procedure, such as “a statement of why the appeal is admissible” or a “a statement of grounds”, are clear, but also sufficiently open to make room for a case-by-case assessment of the circumstances, including the fact of whether the appellant is represented by

*counsel. **And yet, there has to be a minimum content.** That minimum content is what enables the Appeal Panel to understand what is being appealed, and on what grounds.*

Your email does not even try to explain why the Confirmatory Decision may be wrong, why the requests presented are requests for documents and not information. Furthermore, it is settled case-law that once a European institution, body or agency asserts that a document does not exist, it is not obliged to create a document which does not exist (CJEU, judgment of 11 January 2017, Rainer Typke v. Commission, C-491/15 P, EU:C:2017:5 at para 31) and that 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). Following the Court of Justice, the Appeal Panel has repeatedly acknowledged this principle, including in decision(s) which resulted from appeals filed by yourself. Yet, you offer no explanation as to why an exception may exist in this case, nor arguments as to why the Appeal Panel should interpret the above cited case law differently, nor any justification that helps identify what the “dispute” is about.

In order for your email to qualify as appeal, it is therefore necessary that you supplement your email with a proper appeal, with a sufficient statement of grounds, before the expiry of the deadline of six week from the notice of the Confirmatory Decision of 22 June 2020.

Failing such a necessary supplement to your email of 29 June 2020, the Appeal Panel would not be in a position to take further action in this matter.

6. On 10 July 2020 the Appellant filed the appeal against the Confirmatory Decision presenting some arguments as to the grounds of appeal. Therefore, the Appeal Panel - having determined that these minimal grounds were yet sufficient for the application of 10 July 2020 to qualify as an appeal – notified the Board of the appeal on 24 July 2020.
7. On 31 July 2020 the Board requested an extension of the initial deadline to respond, which was granted by the Appeal Panel on 5 August 2020.
8. On 4 September 2020 the Board filed its response.
9. On 14 September 2020 the Appeal Panel, having considered the initial submissions of both Parties, notified the Parties the following procedural order:

The Appeal Panel has determined that, for the just determination of the appeal in case 4/20 it is necessary for the Appeal Panel to ask the SRB the following question, and, conditional upon the answer to the question, introduce a subsequent request:

If the Appellant’s reference to “all the documentation prepared by the SRB in relation to the coronavirus before its arrival in Europe and after it, in reference to the banking and its stock market crashes, specific contingency plans once it was known what was happening in China” were to be interpreted in a broad sense as referring to documents prepared after the unfolding of the Covid-19 pandemic in Europe and before the date of the confirmatory request including (i) any form of communication (including notices and blogs) published by the SRB or (ii) letters or others means of communications addressed to the industry or to European institutions and/or (iii) to specific internal and staff documents prepared by the SRB, all of them concerning any possible impact of Covid-19 emergence on the fulfilment of the tasks of the SRB and/or addressing the most likely or necessary courses of action to be taken by the SRB to adjust, in the fulfilment of its duties, its banks resolution’s preparation or management to the new and

unexpected circumstances , can the Board confirm, for purposes of full procedural clarification, comprehensiveness and corresponding legal certainty, that no such documents were prepared and are not accordingly held by the SRB?

In the event that, specifically in light of the above clarification on the scope of the request, one or more of these documents might exist, the Appeal Panel will examine, under strict confidentiality vis-à-vis the Appellant, all such documents.

*For this purpose, and subject to the answer of the Board to the question above, as a measure of inquiry weighing confidentiality against the right to an effective legal remedy at this stage of the proceedings, having regard also to Article 104 of the General Court's Rules of Procedure, the Appeal Panel orders the Board: (i) to deposit with the Secretariat of the Appeal Panel by **7 October 2020** at the SRB premises, one or more numbered hardcopies of the above documents and subject to the adoption of appropriate technical means and all necessary security measures, to allow remote access to the Appeal Panel Members via electronic devices to an electronic copy of the same for reading only. Having regard also to Article 104 of the General Court's Rules of Procedure, the above documents shall neither be communicated to the Appellant nor shall be part of the file of these proceedings open to the access of the Appellant, corresponding exclusively to a mere element intended for comprehensive information and due diligence on the case on the part of the Appeal Panel, as per its previous practice in procedural matter.*

10. On 7 October 2020 the Board filed its response to the question of the Appeal Panel.
11. On 14 October 2020 the Appeal Panel invited the Parties to inform within 2 working days the Secretariat of the Appeal Panel if they requested a hearing for the discussion of the case, specifying that, from its part, the Appeal Panel would not consider necessary such a hearing for the just determination of the appeal.
12. The Parties informed the Secretariat of the Appeal Panel that they waive their right to have a hearing: the Appellant on 14 October 2020 and the Board on the 16 October 2020.
13. On 16 October 2020 the Appeal Panel, having considered the submissions of both Parties notified the Parties that the Chair considered 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

14. The main arguments of the Parties are briefly summarised below. It is 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

15. The Appellant challenges the Confirmatory Decision claiming that he has the right to access the requested documents. He claims that he is not asking the SRB to create any document, but to disclose existing documents.
16. Contrary to the Board's allegations, the Appellant argues that the Board must necessarily hold documents fitting into the description made by the Appellant in the application because

it would appear incredible that, despite the possible effects of the Covid-19 pandemic on the banking system, the SRB did not prepare any documentation in relation to the expected coronavirus effects on possible banks resolution before its arrival in Europe and after it.

Board

17. The Board argues, first, that the appeal is inadmissible because the Appellant fails to state any pertinent grounds to contest the Confirmatory Decision. In the Board's view, nowhere in his appeal the Appellant actually contests the SRB's application of Regulation (EC) No 1049/2001. The Appellant merely refers to unrelated legal provisions without specifying how these provisions would call into question the assessment of the Confirmatory Decision.
18. The Board further argues that the Appellant failed to provide any evidence on any change of (legal and factual) circumstances that would warrant a reassessment of the accessibility of the requested documents.
19. On the merits, the Board argues that institutions are not compelled to create a document that does not exist in order to address a specific request for public access and that the Appellant, although he claims that the requested documents "should exist" does not bring forward any argument why the requested documents should exist according to the provisions mentioned by the Appellant in the appeal.
20. With its answer to the question posed by the Appeal Panel with the procedural order mentioned above, the Board argues that it conducted a search for Covid-19 related documentation in line with the Board's narrow interpretation of the request of the Appellant under point (i) of the request for document. The Board further added that if the Appellant were to submit a request for access to documents in line with the wording included in the Appeal Panel's question, the SRB is of the view that this would constitute a new initial application and it would in all likelihood require the SRB to reach out to the applicant with a view to finding a fair solution within the meaning of Article 6(3) of Regulation (EC) No. 1049/2001.

Findings of the Appeal Panel

21. As to the admissibility of the appeal, this is a case where the Appellant, a European citizen, decided to exercise his right of access to documents under Regulation 1049/2001 without the technical assistance of any law firm. This is a legitimate choice under EU law. According to the Appeal Panel's past practice, the standard applicable to the quality of the statement of grounds of the appeal is the one that may be reasonably expected of a party not represented by counsel. Thus, the appeal is admissible if a necessary minimum is met, i.e. if the grounds of appeal are, for all relevant legal purposes, sufficiently identifiable. This appeal, as subsequently completed by the Appellant upon request of the Appeal Panel, makes it understandable to the Board and to the Appeal Panel that, in the Appellant's view, the requested documents must exist, according to reasons that are sufficiently intelligible. Contrary to the Board's view, these reasons, as complementarily produced, dispute the assessment of the Confirmatory Decision. In the instant case, the appeal is thus admissible.

22. The appeal, however, can be considered only with respect to the requests for documents of the initial and confirmatory request (letters (i), (iii) and (v) of the request for documents) because the Appellant's original requests under points (ii), (iv), (vi), (viii) and (ix) do not constitute a request for access to documents but a request for information which, in accordance with settled case-law and the Appeal Panel's past practice, does not fall under the scope of Regulation (EC) No 1049/2001.
23. The Appellant's requested: (i) all the documentation prepared by the SRB in relation to the coronavirus before its arrival in Europe and after it, in reference to the banking and its stock market crashes, specific contingency plans once it was known what was happening in China; (iii) studies on possible pandemics carried out by the institution prior to Covid-19; (v) the previous studies regarding the pandemic carried out by the institution within its risk-control system. With respect to such requests the SRB informed the Appellant that it does not hold any document that would correspond to the description in the request.
24. It is settled case-law that once a European institution, body or agency asserts that a document does not exist, it is not obliged to create a document which does not exist (CJEU, judgment of 11 January 2017, *Rainer Typke v. Commission*, C-491/15 P, EU:C:2017:5 at para 31) and that 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). Following the Court of Justice, the Appeal Panel has repeatedly acknowledged this principle.
25. In the instant case, however, the Appeal Panel shared the Appellant's impression that it would appear quite surprising for the Board not to hold any documentation falling within the, quite broad, scope of the Appellant's request. Indeed, there were releases and blog entries published on the SRB's website which could fall within such a scope. Thus, the Appeal Panel inferred that the Board's reading of the Appellant's request may have been quite a narrow one. In light of this, the Appeal Panel considered it appropriate to ask the Board if, also under a broader reading of the Appellant's request, the Board could specifically confirm that the requested documents did not exist.
26. The Appeal Panel duly appreciated the answer given by the Board. Yet, this confirmed that the reason why the Board had stated in the Confirmatory Decision that the requested documents do not exist was because the Board read in narrow terms the content of the request under letter (i) of the Appellant.
27. The Appeal Panel concedes that the wording of the Appellant's request was conducive to interpretative ambiguities which may have, in good faith, misguided the assessment of the Board. However, the Appeal Panel believes that with his request under letter (i) ("*all the documentation prepared by the SRB in relation to the coronavirus before its arrival in Europe and after it, in reference to the banking and its stock market crashes, specific contingency plans once it was known what was happening in China*") the Appellant is willing to encompass the documentation "prepared by the SRB in relation to the coronavirus before its

arrival in Europe and after it” which is relevant for banks’ “specific contingency plans”, and more generally for the adjustment of the SRB policy to the banks’ resolution’s preparation or management in the new and unexpected circumstances of the (still ongoing, unfortunately) Covid-19 emergence. In this determination, the Appeal Panel also considers that the Appellant is not technically assisted by counsel, and that therefore his reference to “the banking and its stock market crashes” should, on the whole, be understood to refer to the actual or possible effects that the Corona virus crisis had or could have on banking and stock exchanges, and not with the aim of constraining the request only to stock market crashes involving banks, to the exclusion of any other Covid-19-related development or contingency, as the Board seemed to interpret.

28. The Appeal Panel further notes that the narrow and literal interpretation of the request for documents under letter (i) provided by the Board does not, in itself, provide any specific answer to the Appellant’s requests under letters (iii) and, more importantly, (v), with which the Appellant asked for “previous studies regarding the pandemic carried out by the institution within its risk-control system”. Here again, in the Appeal Panel’s view, it seems fair to conclude, in the circumstances, that the Appellant is seeking access to documentation prepared internally by the SRB after the unfolding of the pandemic, which could have informed the SRB actions in response to the Covid-19 emergence or could inform such actions in the future.
29. Based on the above, the Appeal Panel concludes therefore that, in the instant case, the rebuttable presumption that, indeed, the requested documents do not exist cannot be successfully opposed by the Board to the Appellant and that, therefore, the statement of reasons of the Confirmed Decision is insufficient. The case must therefore be remitted to the Board, for the adoption of an amended decision. Contrary to the Board’s view at paragraph 9 of its answer to the Appeal Panel of 7 October 2020, there is no need for the Appellant to submit a new application under Regulation 1049/2001 and the Board should respond to the Applicant’s confirmatory application in light of the clarification of the scope of the request given by the Appeal Panel with its procedural order of 14 September 2020 and with this decision.
30. The Appeal Panel fully understands the concern of the Board that the Appellant’s request, properly understood, may result quite far-reaching, which could justify further interaction and a loyal cooperation between the Appellant and the Board for the fair identification of the documents included. Article 6 of Regulation 1049/2001 provides, in such circumstances, the following (emphasis added):

*Article 6
Applications*

1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.

31. The Appeal Panel finds accordingly that Article 6 offers the right guidance to both Parties to loyally handle the matter in its further development and invites the Appellant to confer with the Board also informally with a view to finding a fair and balanced solution as to the reasonable number of documents which may be disclosed by the Board in response to the Appellant's requests under letters (i), (iii) and (v) of the initial request, with the amended confirmatory decision.

On those grounds, the Appeal Panel hereby

remits the case to the Board.

Helen Louri-Dendrinou

Kaarlo Jännäri

Luis Silva Morais
Vice-Chair

Marco Lamandini
Rapporteur

Christopher Pleister
Chair

For the Secretariat of the Appeal Panel: