



**19 June 2018**

Joined cases 50/2017 and 1/2018

# **FINAL DECISION**

**[Appellant],**

**v**

**the Single Resolution Board**

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

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## FINAL DECISION

In Joined Cases 50/2017 and 1/2018,

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 ], a Spanish citizen, represented by [Lawyer],

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, Kaarlo Jännäri,

makes the following final decision:

#### Background of facts

1. This appeal, in case 50/17, relates to the SRB decision of 22 September 2017 (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) SRMR and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereinafter ”Regulation 1049/2001”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents (SRB/ES/2017/01, hereinafter ”Public Access Decision”). This appeal, in case 1/18, also relates to the SRB decision of 28 November 2017 (hereinafter the “Second Confirmatory Decision”) rejecting the Appellant’s second confirmatory application, by which the SRB was requested by the appellant to reconsider its position in relation to their initial request and the SRB’s response thereto, concerning the access to further documents. This appeal also relates to the following SRB decision of 13 March 2018 (hereinafter the “Revised Confirmatory Decision”) whereby the SRB amended both its Confirmatory Decisions, following the decisions rendered in cases 38 to 43/17 by the Appeal Panel on 28 November 2017 and the disclosure of documents that the SRB made on 2 February 2018.
2. By the first and second initial requests and the confirmatory applications, the Appellant requested access to several documents concerning the resolution of Banco Popular Español

(hereinafter referred to as “Banco Popular”), as precisely identified in the First Confirmatory Decision and in the Second Confirmatory Decision.

3. The notice of appeal against the First Confirmatory Decision was submitted on 6 November 2017 and was referenced as case 50/17. The Appeal Panel appointed as rapporteur the Member Professor Marco Lamandini.
4. On 30 November 2017, in case 50/17 the Appeal Panel wrote to the Parties suggesting that, in light of the Appeal Panel decisions adopted in cases 38 to 43/17 on the same issue, the hearing of the appeal be deferred until after the SRB amended its confirmatory decisions in such cases and produced, possibly also to the benefit of the Appellant, the documents that the SRB was now compelled to disclose, in a duly redacted version, under these Appeal Panel decisions. The Parties agreed.
5. Meanwhile, the notice of appeal against the Second Confirmatory Decision was submitted on 8 January 2018 and was referenced as case 1/18. The Appeal Panel appointed as rapporteur the Member Professor Marco Lamandini.
6. On 5 February 2018, the Appeal Panel wrote to the Appellant noting that the SRB had published on 2 February 2018 several documents in order to comply with the Appeal Panel decisions in cases 38 to 43/17. The Appeal Panel requested the Appellant to assess whether the documents published by the SRB on 2 February 2018 justified the withdrawal of the appeal. The Appellant responded on 20 February 2018 noting that the appeal was not withdrawn because, in the Appellants’ view, a large number of documents requested by the Appellant had not been produced at all and the documents that had been produced remained, in the Appellant’s view, heavily redacted.
7. On 13 March 2018, the SRB amended the First Confirmatory Decision and the Second Confirmatory Decision “in light of the guidance by the SRB Appeal Panel in its decisions of 28 November 2017, in cases No. 38/2017-43/2017” and “taking into account the appeal before the Appeal Panel” in this case and “all the relevant circumstances of the this case” (Revised Confirmatory Decision, p. 1) and adopted the Revised Confirmatory Decision. With the Revised Confirmatory Decision the SRB, having taken into account “the guidance provided by the Appeal Panel in the context of other cases, the consultation and feedback received from the respective EU and national authorities and the entities concerned, as well as other relevant factors, such as the time that has elapsed since the resolution action to which the documents refer” (Revised Confirmatory Decision, p. 6), granted partial access to the following documents: (1) the Resolution Decision; (2) the valuation report carried out by the SRB (“Valuation 1 Report”) and the valuation report of Deloitte (“Valuation 2 Report”); (3) the resolution plan in respect of Group Banco Popular, as adopted by the Board on 5 December 2016 (“2016 Resolution Plan”); (4) the sale process letter of FROB dated 6 June 2017 (“Sale Process Letter”); (5) The Decision of the SRB of 3 June 2017 concerning the marketing of Banco Popular, addressed to FROB (SRB/EES/2017/06, the “Marketing Decision”); (5) the cover letter submitted to the SRB by FROB and the certificate of FROB’s Governing

Committee; (7) the communication of BBVA of 6 June 2017, concerning its withdrawal from the sale process and (8) the letter of Bank of Spain dated 7 June 2017 concerning the acquisition of a qualifying holding by Banco Santander. Regarding the other requested documents, the SRB's position expressed in the Confirmatory Decision remained unchanged but, where appropriate, further considerations supporting the non-disclosure of such documents were provided with the Revised Confirmatory Decision.

8. On 27 March 2018, the Appeal Panel invited the Appellant, in light of the SRB having adopted on 13 March 2018 the Revised Confirmatory Decision to confirm that the pending appeal was to be considered as (also) directed against the Revised Confirmatory Decision. The same question was also raised at the hearing on 16 April 2018. The Appellant confirmed that the appeal relates also to the Revised Confirmatory Decision.
9. On 16 April 2018, a hearing was held in Brussels, at the SRB premises. Since several appeals of the same nature had been filed, (cases 44/17-54/17, 56/17 and 1/18), the Appeal Panel considered appropriate under Article 13 of the Appeal Panel Rules of Procedure to convene on its own initiative a joint hearing, in order to hear the Parties and ask clarifications in relation to all relevant aspects of the case, as necessary for the just determination of the appeal. The Appeal Panel specified that the hearing would have been held, in the morning session, in Spanish language of the proceeding in cases 44, 45, 47, 50, 52, 53, 54/17 and 1/18, (with simultaneous translation into English for the convenience of the Appeal Panel and of the other Parties) and, in the afternoon session, in English (language of the proceeding in cases 48, 49, 51 and 56/17). The Appeal Panel also clarified that, in order to avoid disproportionate costs and burdens for all appellants, 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 Appellant appeared and both Parties presented oral arguments.
10. At the end of the hearing, the Appeal Panel, due to the specific features of the case and its exceptional circumstances (relating to the adoption of the Revised Confirmatory Decision during the course of the appeal against the Confirmatory Decision), granted the Parties the opportunity to submit, by 20 April 2018, their speaking notes used at the hearing and, by 27 April 2018 post hearing briefs.
11. On 30 April 2018, the Appeal Panel, having recalled that, in cases 38 to 43/17, the Appeal Panel had confidential access to the full text of the SRB Resolution Decision, of the related Valuation Report as well as of the 2016 Resolution Plan, determined that, in order to rule in the case, it was necessary to examine, under strict confidentiality *vis-à-vis* the Appellant, also: (1) The 2017 Liability Data Report submitted to the SRB by Banco Popular; (2) The 2017 Critical Functions Report submitted to the SRB by Banco Popular; (3) The documents received from Banco Popular about the private sales process as referred to in Recital (30) and

(31) of the Resolution Decision (e.g. draft presentation of Jefferies/Arcano and letter from Banco Popular to the SRB dated 4 June 2017); (4) The communication made by Banco Popular Español to the ECB on 6 June 2017 in accordance with Article 21 of Spanish Law 11/2015 declaring the non-viability of the bank; (5) The (full text of the) communication of BBVA of 6 June 2017, concerning its withdrawal from the sale process. For this purpose, as a measure of inquiry weighing confidentiality against the right to an effective legal remedy, having regard also to Article 104 of the General Court's Rules of Procedure, the Appeal Panel ordered the Board (i) to deposit with the Appeal Panel's Secretariat by 15 May 2018 at the SRB premises, one or more numbered hardcopies of the above and (ii) subject to the adoption of appropriate technological 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.

12. On 16 May 2018, the Secretariat notified the Parties that according to Article 13 of the Appeal Panel Rules of Procedure, the Appeal Panel, having considered that the appeals in case 50/17 and 1/18 relate to the same Revised Confirmatory Decision and involve the same or similar issues as requested by Article 13 of the Rules of Procedure, directed that the appeals be consolidated and be jointly decided with the present decision.
13. Finally, on 29 May 2018, the Appeal Panel notified the Parties that, having examined the additional documents whose access was granted under strict confidentiality to the Appeal Panel, 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**

14. 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: (i) 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; (ii) the Appeal Panel considered both the arguments supporting the original appeal against the Confirmatory Decision and those raised by the Parties in respect of the Revised Confirmatory Decision during the proceeding.

### **Appellant**

15. The Appellant seeks access to a number of documents concerning the Banco Popular resolution identified in detail in paragraph 1 of the Revised Confirmatory Decision (those documents are also individually detailed and considered below in the present decision).

16. Such access is sought by the Appellant to verify the merit of the SRB's assessment, in order to effectively exercise any legal remedy available to the Appellant as Banco Popular shareholder affected by the Resolution Decision. As a general remark, the Appellant argues that it should be granted access to the documents which have been produced, or used, by the SRB in order to adopt the Resolution Decision, because this is necessary to defend its interests as a shareholder affected by the Resolution Decision and for court proceedings. The Appellant argues that the right of access to the documents requested is necessary to ensure transparency and legitimacy of the SRB's decisions and denial of access is not consistent with the rule of law and the principles of democracy, transparency and right of defence, which are recognized by the Charter of Fundamental Rights. The Appellant further argues that the documents published in redacted form on 2 February 2018, although they provide greater information than was previously available, still withhold information necessary to ensure the respect of fundamental principles, that the denial is based on a mistaken application of the exceptions under Article 4 of Regulation 1049/2001 (the Appellant discusses and objects in detail to the factual reasons put forward by the Board to justify the denial of access under the relevant exceptions) and that the arguments used by the Board to deny wider access to the documents requested are not in line with the case-law of the CJEU, because, on one hand, it has the effect of obfuscating and concealing the Board's resolution policy stripping EU citizens of any defence and, on the other hand, once the Resolution Decision is adopted and implemented, there is no point, in the Appellant's view, in limiting access to the requested documents, because there is no risk of either Spain or its current banking system facing financial instability. The Appellant argues therefore that the Board did not proportionately balanced the interests at stake, particularly in light of the fundamental rights of openness (enshrined in Article 1 of the Treaty of the European Union) and effective judicial remedy (in Article 47 of the Charter).
17. The Appellant also argues that Article 90(4) SRMR should be read as setting out a distinct regime of access to documents (or at least to some of the Board's documents) and that the Appellant is entitled to obtain access to the requested documents also under the regime of Article 90(4) SRMR, because the conditions set out herein are met in the present case. In the Appellant's view, this would also offer the opportunity to the Board to adopt specific measures protecting the confidentiality of the access, so as to prevent the public in general from having access to the same documents disclosed to the Appellant.

Board

18. The Board argues that Article 90 SRMR foresees two distinct types of regimes for access to documents: (i) a general regime set out by Regulation 1049/2001, applicable to the SRB as per Articles 90(1) and 90(2) SRMR and (ii) a specific regime set out in Article 90(4) SRMR, applicable only to persons who are the subject of the SRB decision. This mirrors, in the Board's view, the provisions of the Charter of Fundamental Rights, which distinguishes between right to access to documents (for any citizen of the European Union) and right to access to the subject's own file. The Board argues therefore that applicants who are not

entitled to obtain access to documents under the conditions of Article 90(4) SRMR may however rely on the general regime of regulation 1049/2001 and their request has to be treated in accordance with those provisions. The Board further notes, that documents disclosed on the basis of Regulation 1049/2001 become “public” following their disclosure in the sense that the SRB in the future will have to grant access to them to any other citizen of the Union requesting their disclosure, whereas documents which are disclosed under Article 90(4) SRMR remain covered by the applicable exceptions to their disclosure set out in Regulation 1049/2001 if the SRB receives requests for access by persons other than the subject of the decision.

19. The Board considers that the Appellant is subject to the general regime for access to documents set out by Regulation 1049/2001 but is not entitled to access the SRB’s file on the basis of Article 90(4) SRMR.
20. The Board further argues that it has now granted access, taken into account the guidance provided by the Appeal Panel in the context of other cases and the consultation and feedbacks received from the respective EU and national authorities and the entities concerned, partial access to a series of documents but that no additional disclosure can be granted because this is prevented by the application of the following exceptions foreseen in Regulation 1049/2001 and the Public Access Decision to the relevant parts of the relevant documents for which access is denied, as the case may be: (a) the protection of the public interest as regards the financial, monetary or economic policy of the Union of a Member State; (b) the protection of commercial interest of a natural or legal person; (c) the protection of privacy and integrity of the individual; (d) the protection of the purpose of inspections, investigations and audits; (e) the protection of the decision-making process. In particular, the Revised Confirmatory Decision provides, first, an overview of the exceptions preventing full access to the documents and the reasoning supporting the applicability of these exceptions and, then, a detailed assessment of each of the documents for which access is, partially or entirely, denied and the specific reasons supporting this conclusion.
21. The Board finally stresses the relevance, in the present case, of the general presumption of non-accessibility regarding documents in the Board’s file and notes that, where such presumption applies, it is up to the applicant to demonstrate, by reference to specific arguments, that documents or parts thereof should not be covered by this general presumption.

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

22. The Appeal Panel preliminary notes that in its decisions rendered in cases 38 to 43/17, which contributed to the adoption by the Board of the Revised Confirmatory Decision, it stated overriding principles that, in its view, must also fully guide in the determination of the present appeal and namely:
  - (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. (...)*”). In the present case, the Appellant submitted nonetheless that access to the documentation denied by the SRB was sought in order to be able to exercise its right of defence in respect of the Banco Popular resolution and that an action seeking annulment of the Resolution Decision and further actions seeking damages had been already filed before the General Court.

- (b) The Appellant is subject to the regime for access to documents set out by Article 90(1) SRMR together with Regulation 1049/2001. As indicated by Article 85(3) of the 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 therefore cannot rely, at least in this appeal, on the right to access the SRB’s file on the basis of Article 90(4) SRMR. The Appeal Panel must therefore determine if the Appellant is entitled to access the requested documents, in whole or in part, having regard solely to Regulation 1049/2001 and to the Public Access Decision. As to the Public Access Decision the Appeal Panel notes that it implements Regulation 1049/2001 by adopting “practical measures” to this aim and must therefore be interpreted and applied so as to ensure its full consistency with Regulation 1049/2001. The Appeal Panel further notes that, although the regime of Article 90(4) SRMR is not relevant to the effect of the present appeal, Regulation 1049/2001 and the Public Access Decision must be interpreted taking into account also the special limitations set out in Article 90(4) SRMR in such a manner that they do not make each other devoid of purpose (this means that Regulation 1049/2001 and the Public Access Decision cannot grant access to documents for which access is expressly excluded by 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 (in state aid, mergers, cartels, infringement and court proceedings) 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-514/11 P and C-605/11 P (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 certain degree of discretion. 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), provided that the actual viability of judicial review in respect of decisions is ensured (see to this effect in light of judgment 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

23. It is against this background, and in light also of the further guidance that can be inferred from the recent GCEU judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234, that this appeal must be decided taking into account the

disclosures by the SRB on 2 February 2018 and the adoption of the Revised Confirmatory Decision, noting further that:

- (a) in its decisions in cases 38/17 to 43/18 the Appeal Panel did not require the Board to make an integral disclosure of the Valuation Report, the Resolution Decision and the 2016 Resolution Plan and conceded that in the specific assessment of the relevant parts of these three documents, which could be redacted under the relevant exceptions recognised by Regulation 1049/2001, the Board retains a margin of discretion (and quite a wide margin, 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) in its decisions in cases 38/17 to 43/18 the Appeal Panel found that access to the documents received or exchanged with the ECB or the European Commission for internal use as part of the file and deliberations could be legitimately refused by the Board according to Article 4(3) of Regulation 1049/2001 and 4(3) of the Public Access Decision and no overriding public interest in disclosure was shown by the appellants in those cases; moreover, that access could and should be sought directly with the ECB, because the ECB holds them without having received the same from another institution or agency for internal use or part of deliberations within the context of an inter-institutional cooperation framework, in accordance with the special rules governing public access to ECB decisions;
- (c) in its decisions in cases 38/17 to 43/18, the Appeal Panel found, as to the documents pertaining to the sale of the Banco Popular (in particular the decision of the Executive Session of the Board of 3 June 2017 and sale process letter of FROB), that a significant part of such documents were released by the Board and that the denial of full access to them was duly substantiated by the Board in compliance with its obligation to state reasons and was justified under the applicable exceptions invoked by the Board. The same held true also for the request to receive the Banco Santander offer.

24. For the just determination of this appeal, the Appeal Panel carefully reviewed, against the redacted versions disclosed by the SRB on 2 February 2018 and in light of the arguments raised by the SRB with the Revised Confirmatory Decision and by the Appellant, the confidential version of the Resolution Decision, the Valuation Report and also the last Banco Popular Resolution Plan. As mentioned above, the Appeal Panel deemed also necessary to order to the SRB confidential disclosure to the Appeal Panel of additional documents for which access was complementarily sought, and thoroughly reviewed also the non-confidential version of such documents.

## **Resolution Decision**

25. The Appellant requests disclosure of the full text of the Resolution Decision, considering insufficient the additional disclosures made by the SRB on 2 February 2018 through a new redacted version granting access to several additional parts of the Resolution Decision. The Appellant claims that the Board's refusal to grant access to the full text of the Resolution Decision is not justified under the exceptions of Regulation 1049/2001 and is not rightly substantiated by the Board. To this effect, the Appellant pleads in detail the provisions of Regulation 1049/2001 in light of the case law of the CJEU and concludes that the Board did not comply with all these provisions, as interpreted by the Court, insisting that there is an overriding public interest in disclosure also in light of the fundamental rights enshrined in the Treaties and in the Charter. The Appellant further argues that disclosure months later the adoption the Resolution Decision does not pose any risk of financial instability, that the Board did not properly clarify why Article 88 SRMR should be applied in the present circumstances and that, in any event, the denial of access is contrary to a proportionate exercise of the exceptions to disclosure set out in the Regulation 1049/2001. In the Appellant's view, a proper defence against the Resolution Decision requires a detailed knowledge of the exact circumstances which governed the action of the public authority and keeping the requested information hidden is precisely what undermines the stability of the financial system of the Union, the financial and economic policies of the EU and the policy relating to the resolution of credit institutions. The Appellant further argues that, as a shareholder of Banco Popular affected by the Resolution Decision, the Appellant is entitled to have access to the requested documents both under Regulation 1049/2001 and Article 90(4) SRMR (and Article 41(2) of the Charter of Fundamental Rights) and this access is instrumental to the exercise of the right of defence under Article 47 of the Charter.
26. The SRB objects, in the Revised Confirmatory Decision and in this appeal proceeding, that access to the full text of the Resolution Decision is prevented by several exceptions of Regulation 1049/2001 and that: (a) certain elements of Article 4.4.1 and 4.4.2 of the Resolution Decision, if disclosed, would compromise the internal methodology used by the SRB for the preparation for resolution and for resolution and this may give rise to unfounded speculations about the way in which the SRB might conduct future assessments, unduly influencing the behaviour of credit institutions; (b) the SRB is bound by confidentiality obligations under Union Law and this pertains in particular to certain elements in Article 4.4.; (c) several parts of the Resolution Decision could not be disclosed because the ECB, as the originator of the information, has objected to their disclosure (recitals 24(h), 25, 26(c) and (d), 43 and Article 2.1.) and the SRB quotes at length the specific arguments used by the ECB to justify its position.
27. The Appeal Panel preliminarily reiterates, in respect of the grounds of appeal related to Article 90(4) SRMR developed by the Appellant, that the Appeal Panel has no competence to hear appeals against a decision of the Board referred to in Article 90(4). The clear and unambiguous reading of Article 85(3) SRMR is compelling. As already noted, the Appeal

Panel must therefore determine if the Applicant is entitled to access the Resolution Decision and the other requested documents, in whole or in part, having regard solely to Regulation 1049/2001 and to the Public Access Decision. The Appeal Panel further notes that in its decisions in cases 38 to 43/17 it stated that, once a partial disclosure is made, in the specific assessment of the relevant parts which should not be disclosed under the relevant exceptions provided for by Regulation 1049/2001, the Board maintains a margin of discretion (see to this effect judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55), provided that the following principles are respected: (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). Moreover, the protection of commercial interests may justify the redaction of specific items of information or of parts of a documents, but hardly a full denial of access.

28. In light of these principles, which need to be confirmed also in the present case, the Appeal Panel considers that the SRB's assessment of which parts of the Resolution Decision could not be disclosed, as reflected in the Revised Confirmatory Decision, was done in compliance with the applicable procedural rules, that the duty to state reasons has been complied with in a specific way, that the facts have been accurately stated and there has not been a manifest error of assessment or a misuse of powers, but rather an 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; judgment 29 November 2012, *Thesing and Bloomberg Finance v ECB*, T-590/10, EU:T:2012:635, paragraph 43).
29. It is settled law that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case. In this case, a careful examination of the non-confidential version of the Resolution Decision shows, in the Appeal Panel's view, that the refusal to disclose the redacted parts of the Resolution Decision was 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 was substantiated in such a way, so to ensure, on one hand, that the statement of reasons was not in itself a disclosure of the content of the redacted part of the document (in other terms, a more detailed justification regarding the application of the relevant exceptions would have been likely to reveal the confidential content of these redacted parts) and, at the same time, to enable interested parties to challenge the correctness of those reasons and courts to conduct their review. From the Revised Confirmatory Decision (and in particular reading the same in conjunction with the new redacted version of the Resolution

Decision published on 2 February 2018) it is possible to understand and ascertain, (i), whether the redacted parts of the Resolution Decision do in fact fall within the area covered by the exception relied on and, (ii), whether the need for protection to which that exception relates is genuine (see to this effect, judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234, paragraph 56). Moreover, in the Appeal Panel’s view, the comparison between the non-redacted and the redacted version of the Resolution Decision shows that the redactions have been confined to the minimum necessary to ensure the satisfaction of the invoked need for protection under the relevant exception. This is clearly shown, for example, by the following: (a) in recital 24(h), the redaction is limited to the content of a supervisory assessment based on information collected from the bank which is not essential to, nor decisive for the understanding of the Resolution Decision and whose knowledge is not necessary for the review of the Resolution Decision; this redaction, in other terms, does not prevent, in the Appeal Panel’s view, the Appellant from being afforded a reasonable opportunity to present its case against the Resolution Decision, in compliance with the principles of equality of arms and effective judicial protection; (b) in recital 25, the redaction refers to the precise rate and amount of deposit outflows, but the fact that significant deposit outflows occurred before the Resolution Decision is clearly stated and further confirmed by recitals 23 and 29, thereby making unnecessary the knowledge of their precise amount for the understanding and review of the Resolution Decision; (c) in recital 26 (c) the amount of the ELA received is not disclosed, but the fact that ELA was granted following the 5 June 2017 Banco de España request and ECB no objection is clearly stated and knowing the precise amount of the ELA granted is not essential to understand the reasons why the Resolution Decision was adopted and for its review, it being only relevant the fact, clearly disclosed, that after such ELA “*the central bank was not in a position to pay out further ELA to the institution*” (see to this effect the same recital 26(c) and recital (45), where it is clarified that at the time of resolution the institution had “*a large number of encumbered assets*”, in this way suggesting that no sufficient collateral was available for further ELA); (d) in recital 26 (d), although the description of “the other measures” put in place by Banco Popular to correct the liquidity position is redacted, the fact that these measures were attempted and proved insufficient is clearly stated and this is further confirmed in recital (23); (e) in Article 2.1., although specific data supporting the FOLTF are redacted, the fact that there were objective elements indicating that the institution was likely to fail is clearly stated, and it is further complemented e.g. by Article 3.2.(a), which acknowledges that the “institution itself has recognized by letter to the ECB dated 6 June 2017 that it assesses that it meets the conditions for FOLTF and by recital (45) which clearly states that “*the failure of the institution follow[ed] from the deterioration of the liquidity situation of the institution*”.

30. It should be added that, although the SRB, in stating the reasons justifying, under the relevant exceptions provided for by Regulation 1049/2001, its partial denial of access, took account also of possible future behaviours in which market participants would engage following disclosure of the information contained in the redacted parts of the Resolution Decision and considered the effects such behaviour might have on future interventions, those reasons, in the Appeal Panel’s view, are not purely hypothetical but reasonably foreseeable in a credible

scenario. It has been argued, in particular at the hearing, that the use of terms, in the Revised Confirmatory Decision, like “could” or “may” or “might”, instead of “would”, to describe the kind of potential risks of future behaviours implicated by the disclosure, witnesses an overly extensive use of possible future behaviours as a justification for the denial of access. The Appeal Panel notes that the General Court, in its judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234, paragraph 101, stated that if the disclosure of the ceiling for the provision of emergency liquidity “could” have a negative impact on the perception of the financial situation by market participants, this potential risk would be sufficient to meet the test to be applied when assessing if the exceptions under Article 4 are rightly invoked. This indicates, in the Appeal Panel’s view, that the use of terms like “could” or “may” or “might” instead of “would” in the Revised Confirmatory Decision is not, by itself, a sufficient reason to believe that the exceptions invoked by the Board are not properly justified. Moreover, the assessment of such possible future behaviours falls within the margin of discretion of the Board (judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 58) provided that the Board stated its reasons in this respect and the reasons offered were specific enough to place the Appellant in a position to challenge them on the ground that they were unfounded (see to this effect, judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234, paragraph 121).

31. The same holds true for the ECB detailed explanations on the sensitivity of disclosure of ELA-related information and, in particular, that the publication of information on the ELA ceiling and the actual ELA amount provided may specifically and effectively undermine the effectiveness of monetary policy and financial stability and may also lead to misguided expectations that NCBs and the ECB will act in a similar way also in the future. The Appeal Panel notes, in this regard, that, also in its recent judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234, the GCEU considered reasonably foreseeable that disclosure of the ceiling for the provision of ELA was likely to open the door to speculation by market participants, thus giving rise to the risk of undermining the public interest as regards the stability of the financial system of a Member State and its financial, monetary and economic policy (paragraph 97). In the present appeal, unlike in the *Espirito Santo Financial v. European Central Bank* case (judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234, paragraphs 140; see also CJEU, judgment 3 July 2014, *Council v in ‘t Veld*, C-350/12 P, EU:C:2014:2039, paragraph 60), it does not result from the file that the essential content of the information requested had already been made public and therefore there is still, the risk that the public interest concerned may be undermined by the requested disclosure.
32. It is for the reasons stated above that the Appeal Panel considers that the SRB decision to partially redact within the strict limits set out above recitals 24(h), 25, 26(c) and (d), (43) and Article 2.1. does not collide with the decisions adopted by the Appeal Panel in cases 38 to 43/17 and is not vitiated by manifest error.

## Valuation Reports

33. The SRB made available on 2 February 2018 several parts of the Valuation Report carried out by SRB (“Valuation 1 Report”) and of the Valuation Report of Deloitte (“Valuation 2 Report”), which is in turn composed of the Provisional Valuation Report, the Addendum to the Provisional Valuation Report and the Appendices to Provisional Valuation Report. With the Revised Confirmatory Decision, the SRB notes that, in this way, access to most parts of the Valuation Reports is now granted and that access to the full text of the Valuation Reports cannot be granted since this is prevented by several exceptions of Regulation 1049/2001. The Board specifies in the Revised Confirmatory Decision the specific reasons which justify, in the Board’s view, the application of the relevant exceptions.
34. The Appellant requests disclosure of the full text of the Valuation Reports and argues that the Valuation Reports have been redacted too heavily, and considers therefore insufficient the disclosures made by the SRB on 2 February 2018 in this respect. The Appellant claims, for the same reasons stated above in support of the full disclosure of the Resolution Decision and for the other specific arguments raised in respect of the Valuation Reports, that the Board’s refusal to grant access to the full, or at least wider parts of the Valuation Reports is not warranted under the exceptions of Regulation 1049/2001 and is not sufficiently substantiated.
35. Also in this regard, the Appeal Panel preliminarily recalls that, in its decisions in cases 38 to 43/17, it concluded that a *partial* (but not an integral) disclosure of the Valuation Report was to be granted and that 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, also in this respect, in the specific assessment of the relevant parts which should not be disclosed, the Board maintains a margin of discretion but must duly consider at the same time 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).
36. In light of these principles, which need to be confirmed also in the present case, the Appeal Panel considers that the SRB assessment of which parts of the Valuation Reports could not be disclosed under the relevant exceptions provided for by Regulation 1049/2001, as reflected in the Revised Confirmatory Decision, 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, but rather 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).

37. The Appeal Panel refers in particular to the specific reasons stated by the Board in paragraph 4.2. of the Revised Confirmatory Decision, which (with the exception indicated in the following paragraph) offer a specific justification for each item redacted of the Valuation Reports, in conjunction with the relevant exceptions under Regulation 1049/2001, which, in the Appeal Panel's view, is not affected by manifest error. It should be added that, although the SRB, in stating the reasons justifying its partial denial of access, took account also of possible future behaviours (e.g. risk of unwarranted market speculation), those reasons were, in the Appeal Panel's view, not purely hypothetical but reasonably foreseeable in a credible scenario and were stated in a sufficiently specific manner which makes it possible to understand whether the redacted item does in fact fall within the area covered by the exception relied on and whether the need of protection is genuine.
38. Nonetheless, in the Appeal Panel's view, some redactions still go beyond these limits and the reasons put forward by the Board, , to justify them as specified in the Revised Confirmatory Decision, are manifestly 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 following: (a) in the Valuation Report 1, with the redaction of the columns referred to potential adjustments (low and high) and of the ensuing re-expressed amounts as of 31.3.2017, at 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 and the description of the actions taken by the supervised entity and their outcome in the third paragraph from the top at page 8; (b) in the addendum to the Provisional Valuation Report, with the redaction of all estimates in the tables at page 3, 6, 8 and 9, while it should be noted as 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 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); (c) in the Appendices to the Provisional Valuation Report, the redaction of data at page 3 and of the estimated outcome statement illustrating the potential insolvency counterfactual at pages 67-70; d) in the Provisional Valuation Report, the data in the tables at pages 3 and 14 referring to the alternative insolvency scenario.
39. The Revised Confirmatory Decision must therefore be remitted to the Board to ensure compliance with these findings.

## 2016 Resolution Plan

40. The SRB made available on 2 February 2018 most parts of the 2016 Resolution Plan. With the Revised Confirmatory Decision the SRB notes that access to the full text of it cannot be granted since this is prevented by several exceptions of Regulation 1049/2001. The Board specifies in the Revised Confirmatory Decision the specific reasons which justify, in the Board's view, the application of the relevant exceptions.
41. The Appellant requests disclosure of the full text of the 2016 Resolution Plan, argues that the 2016 Resolution Plan has been redacted too heavily, and considers therefore insufficient the disclosures made by the SRB on 2 February 2018 in this respect. The Appellant claims, for the same reasons stated above in support of the full disclosure of the Resolution Decision, that the Board's refusal to grant access to the full, or at least a wider text of the Resolution Plan is not warranted under the exceptions of Regulation 1049/2001 and is not sufficiently substantiated.
42. The Appeal Panel preliminarily recalls that, in its decisions in cases 39 to 43/17, it concluded that the SRMR does not provide for the publication of resolution plans and this indicates that the Board's view that their full publication could undermine the interests protected by the SRMR, by Regulation 1049/2001 and by the Public Access Decision is not manifestly erroneous (to the effect of settled case-law) and could call for a less open stance in respect to resolution plans than to the Resolution Decision and the Valuation Report. At the same time, however, the Appeal Panel considered that, in the present case, access is sought to the Resolution Plan of a credit institution which has been meanwhile resolved and such access, if granted, would take place several months after the adoption of the Resolution Decision. Based upon the foregoing the Appeal Panel, having carefully reviewed the confidential version of the Resolution Plan of December 2016, found that at least some parts of the Resolution Plan could be disclosed in redacted, non-confidential version without undermining the protection of the public interest under Article 4(1)(a) or a commercial interest under Article 4(2) of Regulation 1049/2001 and the corresponding provisions of the Public Access Decision. However in the preparation of such redacted, non-confidential version, the Board enjoys a certain 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) provided that it complies, *mutatis mutandis*, with the principles stated above.
43. In light of these principles, which need to be confirmed also in the present case, the Appeal Panel considers that the SRB assessment of which parts of the 2016 Resolution Plan could not be disclosed, as reflected in the Revised Confirmatory Decision, 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, but rather within the limits of the exercise by the Board of its margin of discretion.

44. The Appeal Panel refers in particular to the specific reasons stated by the Board in paragraph 4.4. of the Revised Confirmatory Decision, which offer a specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the non-disclosure of several items, which have been redacted in the 2016 Resolution Plan. It should be added that, although the SRB, in stating the reasons justifying its partial denial of access, took account also of possible future behaviours of market participants (e.g. risk that revealing information regarding resolution methodology could lead to wrong conclusion with regard to the application of resolution policy in future cases and thus undermine the effectiveness thereof), those reasons were not purely hypothetical but reasonably foreseeable in a credible scenario and were stated in a sufficiently specific manner, which made it possible to understand whether the redacted item does in fact fall within the area covered by the exception relied on and whether the need of protection is genuine.
45. Nonetheless, in the Appeal Panel's view, some redactions go beyond these limits and the reasons put forward by the Board to justify them are insufficient and 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 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.
46. The Revised Confirmatory Decision must therefore be remitted to the Board to ensure compliance with these findings.

#### **FOLTF Assessment and the SRB's consultation response**

47. The Appellant requests disclosure of the full text of the FOLTF Assessment and of the SRB consultation response concerning the draft FOLTF assessment of 6 June 2017.
48. The SRB objects that the FOLTF Assessment is a document that originates from a third party, (the ECB) and that full access to it cannot be granted because the ECB denied it and justified its position noting that it is covered by a general presumption of non-accessibility, since its disclosure would undermine the protection of the public interest under Article 4(1) c) of the Decision ECB/2004/3. This assessment falls within the scope of the ongoing supervisory file covered by professional secrecy obligation under Article 27 SSMR, 53 *et seq.* CRD IV and 84 BRRD. Accordingly, the SRB concludes that this document, to the extent that it has not been disclosed by the ECB, remains part of confidential documentation included in the ECB supervisory procedure file. In addition, the SRB objects that the full disclosure of the FOLTF Assessment is prevented also by the exception referred to in Article 4(1)(a) first indent of Regulation 1049/2001 (financial, monetary or economic policy of the Union or a Member

State). The same considerations apply, in the Board's view, to any communications, minutes or other documents related to the FOLTF Assessment and the relation between ECB and SRB in this respect, which are in addition protected by the exception of Article 4(3) of Regulation 1049/2001 (protection of decision-making process).

49. The Appeal Panel preliminarily recalls that, in its decisions in cases 39 to 43/17, it stated that access to the documents received or exchanged with the ECB or the European Commission for internal use as part of the file and deliberations, could be legitimately refused by the Board according to Article 4(3) of Regulation 1049/2001 and Article 4(3) of the Public Access Decision, and that no overriding public interest in disclosure was shown, in those cases. Although, pursuant to Article 2(3) of Regulation 1049/2001 applies, to all documents held by an institution, "that is to say, documents drawn up or received by it and in its possession", in the Appeal Panel's view, the SRB could deny access to them because they are documents received by the SRB for internal use as part of deliberations and preliminary consultations to the effect of Article 4(3) of Regulation 1049/2001 and Article 4(3) of the Public Access Decision, no overriding public interest in disclosure was shown and access to these documents should be requested directly to the ECB, by which the documents were drawn up and which holds them without having received them from another institution or agency for internal use or part of deliberations within the context of an inter-institutional cooperation framework. Direct request to the ECB, rather than an indirect access through the SRB, would prevent the circumvention of the special rules governing public access to ECB decisions (ECB Decision 2004/258). The Appeal Panel notes in this regard that the provisions of the ECB Decision 2004/258 are meant to protect the independence of the ECB and of the National Central Banks and the confidentiality of certain matters specific to the performance of the ECB's tasks, safeguarding at the same time the right of access (judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234, paragraph 40). It is therefore necessary that the ECB itself can assess whether or not a document drawn up by the ECB itself can be disclosed or not under the relevant ECB Decision on public access to documents. The Appeal Panel further notes that, in the opinion delivered on 17 December 2017, *BaFin v Ewald Baumeister*, C-15/16, EU:C 2017:958, Advocate General Bot concluded, at paragraph 49, that the requirement of trust which must exist between national supervisory authorities means "*that the exchange of information between them must be reinforced by the guarantee of confidentiality attaching to the information which they obtain and hold in the context of supervisory tasks*" and at paragraph 51 that "*even if the sensitivity of certain information held by the supervisory authorities is sometimes not evident at the outset, its disclosure may disturb the stability of the financial markets*".
50. In light of these principles, which need to be confirmed also in the present case, the Appeal Panel considers that the Board's denial of the full text of the FOLTF Assessment and of the other communications and drafts exchanged with the ECB on the FOLTF, as reflected in the Revised Confirmatory Decision, was done 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, but rather 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).

51. The Appeal Panel refers in particular to the specific reasons stated by the Board in paragraph 4.3. of the Revised Confirmatory Decision, which offer a specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the non-disclosure of the full text of the FOLTF Assessment and for any document exchanged by the ECB and SRB in this connection. Such reasons comply with the principles stated above and, in the Appeal Panel's view, do not show any manifest error. It should be added that, although the SRB, in stating the reasons justifying its partial denial of access, took account also of possible future behaviours of market participants (e.g. risk that revealing information may allow the inference of relevant elements of the Union's financial and economic policy and thus undermine the effectiveness thereof), those reasons were not purely hypothetical but reasonably foreseeable in a credible scenario and were stated in a sufficiently specific manner which made it possible to understand whether the redacted item does in fact fall within the area covered by the exception relied on and whether the need of protection is genuine.
52. The Appeal Panel further notes that the ECB's FOLTF Assessment was confirmed and complemented by the assessment made by the board of directors of Banco Popular itself on 6 June 2017 that the institution was likely to fail (see, e.g. recital (36) of the Resolution Decision) and in the Appeal Panel's view this circumstance is also to be considered when determining to what extent public access has to be granted to the text of the ECB's FOLTF Assessment and to all documents exchanged with the SRB related thereto.

### **2017 Liability Data Report and 2017 Critical Functions Report**

53. The Appellant requests disclosure of the full text of the 2017 Liability Data Report and 2017 Critical Functions Report submitted by Banco Popular to the SRB.
54. The SRB objects that the 2017 Liability Data Report and 2017 Critical Functions Report are documents covered by a general presumption of non-accessibility since its disclosure would undermine the protection of the purpose of investigations under Article 4(2) third indent of Regulation 1049/2001 and the protection of commercial interests under Article 4(2) first indent of Regulation 1049/2001. These documents contain bank-specific data which are covered by SRB's professional secrecy obligation under Article 88 BRRD.
55. The Appeal Panel examined, under strict confidentiality, the full text of these documents. It acknowledges that the full text of the Liability Data Report contains confidential data covered by SRB secrecy obligation. However, in the Appeal Panel's view, the refusal to disclose the 2017 Critical Function Report and the table at page 2 of the 2017 Liability Data Report showing in aggregate the liability structure of Banco Popular at the time of the Report – (i) in their full text or (ii) in a duly redacted form, should the Board deem necessary a redaction in the exercise of the margin of discretion pertaining to it and provided that its assessment is

made in full compliance with the principles set out in this decision – goes too far and is vitiated by manifest error in the application of the relevant exceptions under Regulation 1049/2001. In the Appeal Panel’s view there is a clear overriding public interest in its disclosure, in order to (i) enable the persons concerned to ascertain factual circumstances which may be relevant to understand why the credit institution failed and, why the resolution measures had to be adopted, and (ii) to enable courts to exercise their power of review over the resolution measure. The obligation of professional secrecy under Article 88 SRMR, to the extent it is applicable, and bearing in mind that it cannot make the access to documents regime devoid of purpose), must be duly balanced with this public interest (the Appeal Panel refers in this respect to the recent opinion of Advocate General Bobek, 12 June 2018, *Enzo Buccioni v. Banca d’Italia*, case C-594/16, EU:2018:425, in particular paragraphs 83-88 and CJEU, judgment 11 December 1985, *Hillenius*, C-110/84, EU:C:1985:495, in particular paragraph 33). Moreover, although these reports were part of the supervisory file and even assuming that there may still be sensitive information for commercial purposes in these documents, it is hardly credible that, as the Board claims, also the disclosure of duly redacted versions of these documents after one year may still cause harm to Banco Popular and its purchaser Banco Santander. In the Appeal Panel’s view the extent to which confidential information is worthy of protection should in principle diminish over time, because the liability structure and the critical functions after one year, after resolution and after the inclusion of Banco Popular in the Santander group are certainly different from those shown in the 2017 Reports. The same holds true for the argument that disclosure may affect the willingness of undertakings to fully cooperate with the authorities in the future, such cooperation being mandated by law.

56. The Revised Confirmatory Decision must therefore be remitted to the Board to ensure compliance with these findings.

#### **Appendix 1 to the Sale Process Letter**

57. The Appellant requests full disclosure of the Sale Process Letter, including the Appendix 1 (draft sale and purchase agreement).
58. The SRB has granted full access to this document, with the exception of limited personal data under the exception of Article 4(1)(b) of Regulation 1049/2001, but still objects to the disclosure of Appendix 1 to the Sale Process Letter, consisting of the draft Sale and Purchase Agreement. The SRB notes that the agreement with Banco Santander was signed based on the draft included in Appendix 1 and concludes that non-disclosure of Appendix 1 is covered by the exceptions of the protection of the financial policy of the Union under Article 4(1)(a) fourth indent of Regulation 1049/2001 and of the protection of Banco Santander commercial interests under Article 4(2), first indent of Regulation 1049/2001.
59. The Appeal Panel preliminary notes that in its decisions in cases 39 to 43/17 it acknowledged that the Board had already disclosed parts of the Sale Process Letter and notes that the refusal to grant full access to the Sale Process Letter, and in particular to its Appendix 1 was done 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, but rather 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).

60. The Appeal Panel refers in particular to the specific reasons stated by the Board in paragraph 4.8. of the Revised Confirmatory Decision, which offer, in the Appeal Panel's view, a specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the non-disclosure of the full text of the Sale Process Letter and in particular for its Appendix 1. Such reasons comply with the principles stated above and do not show any manifest error.
61. Moreover, in the Appeal Panel's view, since the content of such agreement can be inferred both from the Sale Process and from the Resolution Decision (see to this effect Article 6.5.) the Appellant did not show an overriding public interest in its disclosure and the refusal to disclose it does not prevent the persons concerned from ascertaining a relevant fact to understand the resolution measures adopted and the EU courts to exercise their power of review over the resolution measure.

**The offer submitted by Banco Santander on 7 June 2017 and the SPA signed by FROB**

62. The Appellant requests full disclosure of the offer submitted by Banco Santander on 7 June 2017 and the Share and Purchase Agreement signed by FROB.
63. The SRB objects to the disclosure noting that that non-disclosure of these documents is covered by the exception of the protection of Banco Santander commercial interests under Article 4(2), first indent of Regulation 1049/2001.
64. The Appeal Panel preliminary notes that in its decisions in cases 39 to 43/17 it acknowledged that the Board's refusal to disclose the Banco Santander offer was duly substantiated under the applicable exception invoked by the Board and further notes, in the present case, that the refusal to grant access to the offer submitted by Banco Santander on 7 June 2017 and the Share and Purchase Agreement signed by FROB under the exception of Article 4(2) of Regulation 1049/2001, as reflected in the Revised Confirmatory Decision, was done 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, but rather 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).
65. The Appeal Panel refers in particular to the specific reasons stated by the Board in paragraph 4.9. of the Revised Confirmatory Decision, which offer a specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the non-disclosure of the offer submitted by Banco Santander on 7 June 2017 and the Share and Purchase Agreement signed

by FROB. Such reasons, in the Appeal Panel's view, comply with the principles stated above and do not show any manifest error.

66. Moreover, since the content of such agreement can be inferred both from the Sale Process and from the Resolution Decision (see to this effect Article 6.5.), the Appellant did not show an overriding public interest in its disclosure and the refusal to disclose it does not prevent the persons concerned from ascertaining a relevant fact to understand the resolution measures adopted and the EU courts to exercise their power of review over the resolution measure.

**The decisions of the SRB concerning requests for information and the letters to Banco Popular**

67. The Appellant requests disclosure of the decisions of the SRB concerning requests for information and the letters to Banco Popular.
68. The SRB objects that these documents are part of confidential documentation of the SRB resolution file and should be regarded as being covered by a general presumption of non-accessibility based on the exceptions laid down in Article 4(1)(a) first indent of Regulation 1049/2001 and Article 4(2), third indent.
69. The Appeal Panel notes that the refusal to grant access to these documents, as reflected in the Revised Confirmatory Decision, was done 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, but rather 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).
70. The Appeal Panel refers in particular to the specific reasons stated by the Board in paragraph 4.10. of the Revised Confirmatory Decision, which offer a specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the non-disclosure of such documents. Such reasons comply with the principles stated above and, in the Appeal Panel's view, do not show any manifest error (on the principle that disclosure of documents in the file may undermine protection of the objectives of investigation activities see judgment 29 June 2010, *Commission v. Technische Glaswerke Ilmenau*, C-139/07, EU:C:2010:376; judgment 28 June 2012, *Commission v. Odile Jacob*, C-404/10 P, EU:C:2010:54).
71. It should be added that, although the SRB, in stating the reasons justifying its denial of access, took account also of possible future behaviours of market participants (e.g. risk that revealing information about the content and scope of such request could lead to arbitrary conclusions regarding possible actions in respect of other credit institutions that might receive comparable requests) which may undermine the ability of the SRB to effectively apply the resolution tool. Those reasons were not purely hypothetical but reasonably foreseeable in a credible scenario and were stated in a sufficiently specific manner, which made it possible to understand why

these documents do in fact fall within the area covered by the exception relied on and whether the need of protection is genuine.

**Documents received from Banco Popular in relation to the private sale process**

72. The Appellant requests disclosure of the documents received from Banco Popular in relation to the private sale process.
73. The SRB objects that these documents contain bank-specific data which are covered by SRB's professional secrecy obligation under Article 88 BRRD and that their non-disclosure is covered by the exception of Article 4(2), first indent of Regulation 1049/2001, also because FROB has objected that their disclosure would undermine the protection of commercial interest also of other third parties involved in the private sale process.
74. The Appeal Panel examined, under strict confidentiality, the full text of these documents and, in the Appeal Panel's view, the refusal to disclose them their full text or in a duly redacted form, should the Board deem necessary proportionate redactions in the exercise of the margin of discretion pertaining to the Board, in full compliance with the principles set out in this decision, is vitiated by manifest error in the application of the relevant exceptions under Regulation 1049/2001. In the Appeal Panel's view, there is a clear overriding public interest in its disclosure, in order (i) to enable the persons concerned to ascertain a relevant fact for the understanding of the Resolution Decision adopted (the reasons why there was no reasonable prospect of any alternative private sector measure to the effect of Article 18(1)(b)) and (ii) to enable the courts to exercise their power of review over the resolution. As already underlined *infra*, the obligation of professional secrecy under Article 88 SRMR, to the extent it is applicable, and bearing in mind that it cannot make the access to documents regime devoid of purpose), must be duly balanced with this public interest (the Appeal Panel refers again in this respect to the recent opinion of Advocate General Bobek, 12 June 2018, *Enzo Buccioni v. Banca d'Italia*, case C-594/16, EU:2018:425, in particular paragraphs 83-88 and CJEU, judgment 11 December 1985, *Hillenius*, C-110/84, EU:C:1985,:495, in particular paragraph 33). Moreover, even assuming that there may still be some sensitive information for commercial purposes, it is hardly credible that, as the Board claims, also the disclosure of duly redacted versions of these documents after one year may cause harm to Banco Popular and other third parties involved in the private sale process.
75. The Revised Confirmatory Decision must therefore be remitted to the Board to ensure compliance with these findings.

**The correspondence between (I) the SRB and FROB concerning the SRB's approval of documents relating to the marketing process and (II) the SRB, FROB, ECB and Banco Popular in relation to the situation of Banco Popular.**

76. The Appellant requests disclosure of the correspondence between (I) the SRB and FROB concerning the SRB's approval of documents relating to the marketing process and (II) the SRB, FROB, ECB and Banco Popular in relation to the situation of Banco Popular.
77. The SRB objects that these documents qualify as internal preparatory documents of the SRB and shall be regarded as being covered by a general presumption of non-accessibility, based on the exception disclosure of any such document would be prevented by the exception under Article 4(3) of Regulation 1049/2001 (protection of decision-making process).
78. The Appeal Panel preliminarily recalls that in its decisions in cases 39 to 43/17, it stated that the SRB could deny access documents received by the SRB for internal use as part of deliberations and preliminary consultations to the effect of Article 4(3) of Regulation 1049/2001 and Article 4(3) of the Public Access Decision and no overriding public interest in disclosure was shown by the Appellant.
79. In light of these principles, which need to be confirmed also in the present case, the Appeal Panel considers that the SRB denial of these documents as reflected in the Revised Confirmatory Decision, was done 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, but rather 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).
80. The Appeal Panel refers in particular to the specific reasons stated by the Board in paragraph 4.12. of the Revised Confirmatory Decision, which offer a specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the non-disclosure of such documents. Such reasons comply with the principles stated above and, in the Appeal Panel's view, do not show any manifest error. The Appeal Panel further notes that, in the opinion delivered on 17 December 2017, *BaFin v Ewald Baumeister*, C-15/16, EU:C:2017:958, Advocate General Bot concluded, at paragraph 49, that the requirement of trust which must exist between national supervisory authorities means "*that the exchange of information between them must be reinforced by the guarantee of confidentiality attaching to the information which they obtain and hold in the context of supervisory tasks*" and at paragraph 51 that "*even if the sensitivity of certain information held by the supervisory authorities is sometimes not evident at the outset, its disclosure may disturb the stability of the financial markets*".
81. In the Appeal Panel's view, the Appellant did not show an overriding public interest in their disclosure and the refusal to disclose them does not prevent the persons concerned from

ascertaining a relevant fact to understand the resolution measures adopted and the EU courts to exercise their power of review over the resolution measure.

**The documents presented to the Board and the minutes of the meetings of the Board that dealt with the situation of Banco Popular**

82. The Appellant requests disclosure of the documents presented to the Board and the minutes of the meetings of the Board, that dealt with the situation of Banco Popular.
83. The SRB objects that: (i) these documents include information the disclosure of which would undermine the stability of the financial system of the Union and its financial or economic policy, (ii) to the extent that these document refer to financial data of Banco Popular and its position in the market, their disclosure would undermine the protection of commercial interests of Banco Popular and its purchaser and (iii) they qualify as internal preparatory documents of the SRB and shall be regarded as being covered by a general presumption of non-accessibility, based on the exception disclosure of any such document would be prevented by the exception under Article 4(3) of Regulation 1049/2001 (protection of decision-making process).
84. The Appeal Panel preliminarily recalls that in its decisions in cases 39 to 43/17 it stated that the SRB could deny access documents for internal use as part of deliberations and preliminary consultations to the effect of Article 4(3) of Regulation 1049/2001 and Article 4(3) of the Public Access Decision and no overriding public interest in disclosure was shown by the Appellant.
85. In light of these principles, which need to be confirmed also in the present case, the Appeal Panel considers that the SRB denial of access to these documents as reflected in the Revised Confirmatory Decision, was done 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, but rather 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).
86. The Appeal Panel refers in particular to the specific reasons stated by the Board in paragraph 4.13. of the Revised Confirmatory Decision, which offer a specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the non-disclosure of such documents. Such reasons comply with the principles stated above and, in the Appeal Panel's view, do not show any manifest error. It should be added that, although the SRB, in stating the reasons justifying its denial of access, took account also of possible future behaviours which could adversely affect financial stability, (e.g. risk that revealing part of these documents could compromise the methodology the SRB applies for the resolution of credit institutions and might give rise to unfounded speculations about the way in which the SRB might act in future cases), those reasons were not purely hypothetical but reasonably

foreseeable in a credible scenario and were stated in a sufficiently specific manner which made it possible to understand why these documents do in fact fall within the area covered by the exception relied on and whether the need of protection is genuine.

87. Moreover, in the Appeal Panel's view, the Appellant did not show an overriding public interest in their disclosure and the refusal to disclose them does not prevent the persons concerned from ascertaining a relevant fact to understand the resolution measures adopted and the EU courts to exercise their power of review over the resolution measure.

On those grounds, the Appeal Panel hereby:

**Declares that the Revised Confirmatory Decision must be amended in accordance to this decision and remits the case to the Board to the effect of Article 85(8) SRMR.**

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Helen Louri-Dendrinou

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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