



9 October 2019

Case 6/2019

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 Case 6/19

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010¹ (the “SRMR”),

[.], with address for service [.] (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 24 July 2019 (hereinafter the “Confirmatory Decision”) rejecting the Appellant’s confirmatory application, by which the SRB was requested by the Appellant to reconsider its position in relation to its initial request and the SRB’s response thereto, concerning the access to documents in accordance with Article 90(1) of SRMR and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereinafter “Regulation 1049/2001”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents³ (hereinafter “Public Access Decision”).
2. By the initial request and the confirmatory application, the Appellant requested access to the following: a) the documentation in which Banco de España established the minimum requirement for liquidity breached by Banco Popular the days prior to its resolution; b) the documentation assessed by the SRB which proves that the insolvency of Banco Popular was either temporary or permanent, as well as the date and time of reception of such documents. The initial application was rejected by the SRB. The Appellant submitted a confirmatory

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

application requesting the SRB to reconsider its position. The SRB rejected also the confirmatory application with the Confirmatory Decision which is the subject of the appeal in the present case.

3. On 24 July 2019 the Appellant sent an email to the Appeal Panel contesting the Confirmatory Decision. The Appeal Panel considered however that such email was insufficiently motivated as to the grounds of the appeal according to Article 5(4) of the Rules of Procedure and asked therefore the appellant to clarify whether such an email was intended to be an appeal under Articles 85 and 90 SRMR and, in the affirmative, to present the grounds of the appeal.
4. The appellant sent an email on 30 July 2019 clarifying that the Appellant intended indeed to appeal the Confirmatory Decision and briefly stated the grounds for such an appeal.
5. The notice of appeal was notified to the Board on 12 August 2019. At the same time, the Appeal Panel further drew to the Appellant's attention that the Appeal Panel already held in several cases that, pursuant to the case law of the General Court, if an institution, agency or body states that a document does not exist in the file or it is not in its possession, the institution, body and agency can rely on a rebuttable presumption that, indeed, the document does not exist and if the document does not exist, Regulation 1049/2001 is not applicable, because it does not provide any right to information which is not reflected in a document produced or held by the relevant EU body.
6. The Appeal Panel invited therefore the parties, according to Article 5(1)(a) of the Rules of Procedure, to submit within two weeks their written submissions only on the admissibility of the appeal.
7. The Appellant submitted its brief submissions on 16 August 2019.
8. On 22 August 2019 the Board asked an extension of two weeks until 9 September 2019 to respond on the admissibility issue in accordance with Articles 8, 9 and 6(4) of the Rules of Procedure, "due to current absences in the team considering the holiday period". The Appeal Panel granted such an extension.
9. On 9 September 2019 the Board submitted its response on admissibility.
10. On 19 September 2019 having considered the submissions of both Parties the Chair notified the parties that he 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 as to the determination on the admissibility of the appeal.

Main arguments of the parties

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

to the extent necessary for the just determination of this appeal, where this decision shows the findings of the Appeal Panel. It is also specified that the Appeal Panel considered every argument raised by the Parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

Appellant

12. The Appellant challenges the Confirmatory Decision arguing that (a) “the non-inclusion of documents in the file may result in a negligence [by the SRB] that cannot be hidden by the professional secrecy and that, if it occurs, the public interest would prevail”; (b) “There is no exception in the regulation which impedes to explain the reasons why relevant documents are not included in the file of the case and [are not] in the public domain”; (c) “The refusal of access to certain documents due to their non-existence in the file would imply a deterioration of the file itself or negligence by the agency and there is no justification by the SRB not to include the documents requested in the file and to publish them”.
13. The grounds of the appeal suggest that the Appellant asks the Appeal Panel (i) to determine whether the Board should have either included certain documents in its file for the Banco Popular resolution or explained why they were not included and (ii) to order their inclusion in the file and their publication.

Board

14. The Board argues that the appeal is inadmissible because the Appellant does not ask in his appeal a review of the Confirmatory Decision and the remittal of the same to the Board nor states any grounds against the Board’s response that it does not hold the documents requested.
15. The Board further argues that the Appellant asks in reality the Board to create a new file or to modify an existing file relating to the Banco Popular resolution and this falls outside the scope of Article 85 SRMR and therefore outside the competence of the Appeal Panel.
16. The Board finally argues that the Appellant asks the Appeal Panel to order the Board to explain why certain documents were not included in the file, and also this request falls outside the scope of Article 85 SRMR.

Findings of the Appeal Panel

17. The Appeal Panel preliminary notes that in its previous decisions rendered on 28 November 2017⁴, 23 March 2018⁵, 19 June 2018⁶, 28 February 2019⁷, 11 April 2019⁸, 29 April 2019⁹ and on 19 June 2019 (all accessible at www.srb.europa.eu), it recalled the overriding principles, hereby restated, which should guide in the assessment of the requests of access to documents related to the Banco Popular resolution:

- (a) The right of access is a transparency tool of democratic control of the European institutions, bodies and agencies and is available to all EU citizens irrespective of their interests in subsequent legal actions (see for instance judgment 13 July 2017, *Saint-Gobain Glass Deutschland*, C-60/15, EU:C:2017:540, paragraphs 60 and 61 and in particular judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 20: “*as the addressee of those decisions [denying access to documents], the applicant is therefore entitled to bring an action against them. (...)*”).
- (b) As indicated by Article 85(3) SRMR, the Appeal Panel has only competence to hear appeals against a decision of the Board referred to in Article 90(3) SRMR and Regulation 1049/2001.
- (c) According to Regulation 1049/2001 “*the purpose of [the] Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access*” (recital 4) and “*in principle, all documents of the institutions should be accessible to the public*” (recital 11). Regulation 1049/2001 implements Article 15 TFEU which establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies (such right is also recognized as a fundamental right by Article 42 of the Charter of Fundamental Rights). However, certain public and private interests are also protected by way of exceptions and the Union institutions, bodies and agencies should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks (recital 11).
- (d) In principle, exceptions must be applied and interpreted narrowly (see e.g. judgment 17 October 2013, *Council v. Access Info Europe*, C-280/11, EU:C:2013:671, paragraph 30). However, case-law on public access to documents in the administrative context (as opposed to case law on public access in the legislative context) suggests that a less open stance can be taken in the administrative context because “*the administrative activity of the Commission does not require as extensive an access to documents as that concerning*

⁴ Decisions of 28 November 2017 in cases 38 to 43/17 and decisions 19 June 2018, in cases 44 to 54/17 + 1 and 7/18.

⁵ Decision of 23 March 2018, in case 2/18.

⁶ Decisions of 19 June 2018 in cases 44/17 to 54/17+ 1 and 7/18.

⁷ Decisions of 28 February 2019 in cases 3/18, 14/18, and 15/18 and 22/18.

⁸ Decisions of 11 April 2019 in cases 12/18, 1/19, 3/19, 4/19.

⁹ Decisions of 29 April 2019 in joined cases 9, 11, 13, 16/18 + 2/19; joined cases 10, 17 and 20/18; and case 5/19.

the legislative activity of a Union institution” (see to this effect judgment 4 May 2017, *MyTravel v. Commission*, T-403/15, EU:T:2017:300, at paragraph 49; judgment 21 July 2011, *Sweden v. Commission* C-506/08 P, EU:C:2011:496, at paragraphs 87-88; judgment 29 June 2010, *Commission v. Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 60-61).

- (e) Settled case-law permits Union institutions, bodies and agencies to rely in relation to certain categories of administrative documents on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by Regulation 1049/2001 (see to this effect judgment 28 June 2012, *Commission v. Edition Odile Jacob*, C-404/10, EU:C:2012:393; judgment 21 September 2010, *Sweden and Others v. API and Commission*, C-514/07 P, EU:C:2010:541; judgment 27 February 2014, *Commission v. EnBW*, C-365/12 P, UE:C:2014:112; judgment 14 November 2013, *LPN and Finland v. Commission*, C-514/11 P and C-605/11 P EU:C:2013:738; judgment 11 May 2017, *Sweden v. Commission*, C-562/14 P EU:C:2017:356). Where the general presumption applies, the burden of proof is shifted from the institution to the applicant, who must be able to demonstrate that there will be no harm to the interest protected by the Regulation 1049/2001. This also means that the Union institutions, bodies or agencies are not required, when the general presumption applies, to examine individually each document requested in the case because, as the CJEU noted in *LPN and Finland v. Commission*, Joined Cases C-514/11P and C-605/11P (cited above, paragraph 68), “*such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global*”. At the same time, though, settled case law clarifies that, since the possibility of relying on general presumptions applying to certain categories of documents, instead of examining each document individually and specifically before refusing access to it, would restrict the general principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation 1049/2001, “*the use of such presumptions must be founded on reasonable and convincing grounds*” (judgment 25 September 2014, *Spirlea v. Commission*, T-306/12, EU:T:2014:816, paragraph 52).
- (f) When determining whether disclosure is prevented by the application of one of the relevant exceptions under Regulation 1049/2001, EU institutions, bodies and agencies enjoy in principle a margin of discretion (due to the open-textured nature of at least some of the relevant exceptions). Review is then limited, according to settled case law, to verifying whether procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers (see, among others, judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 53; judgment 29 November 2012, *Thesing and Bloomberg Finance v ECB*, T-590/10, EU:T:2012:635, paragraph 43); in any event, the

actual viability of judicial review must be ensured (see to this effect in light of judgment 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

18. In the instant case, however, the Appeal Panel finds that the Appellant did not show an actual interest in his appeal, since following the Appellant's requests, the Board clearly informed the Appellant that the requested documents were not existing.
19. The Appeal Panel notes in this respect that, although the definition of 'document' to the effect of Regulation 1049/2001 must not be interpreted restrictively, as it is clearly shown by the wide encompassing wording of Article 3, letter a) of Regulation 1049/2001 once a European institution, body or agency asserts that a document does not exist, according to settled case law, it is not obliged to create a document which does not exist (CJEU, judgment of 11 January 2017, *Typke v. Commission*, C-491/15 P, EU:C:2017:5 at para 31) and the institution, body and agency can rely on a rebuttable presumption that, indeed, the document does not exist (GCEU, judgment 23 April 2018, *Verein Deutsche Sprache v. Commission*, T-468/16, EU:T: 2018:207). The Appellant did not even attempt to reverse such rebuttable presumption in the instant case.
20. Moreover, according to settled case law, once the institution, body and agency asserts that a document is not in its possession, it is not obliged to provide explanations as to why it does not hold such document (judgment of 11 June 2015, T-496/13, *McCullough v Cedefop*, EU:T:2015:374, paragraph 50).
21. The Appeal Panel further notes that, since the Appeal Panel's competence to hear appeals concerning access to documents is limited by Article 85(3) and 90(3) SRMR to the review of confirmatory decisions adopted by the Board according to Regulation 1049/2001 and cannot transcend such limits, it manifestly falls outside the scope of Article 85 SRMR and of the competence of the Appeal Panel to determine – departing to the actual content of the Confirmatory Decision - whether the Board was, or was not, negligent in non-holding the requested documents in the file of the Banco Popular resolution, or to order to the Board to explain why certain documents were not included, or to order to publish them even if the Board does not hold them in the file.

On those grounds, the Appeal Panel hereby:

Dismisses as inadmissible the appeal.

Helen Louri-Dendrinou

Kaarlo Jännäri

Luis Silva Morais
Vice-Chair

Marco Lamandini
Rapporteur

Christopher Pleister
Chair

For the Secretariat of the Appeal Panel: