



29 April 2019

Joined Cases 10/2018, 17/2018 and 20/2018

FINAL DECISION

[...],

Appellant,

v

The Single Resolution Board

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

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FINAL DECISION

In Joined Cases 10/18, 17/18 and 20/18

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

[...], with address for service in[.....], [...] (hereinafter the “Appellant”)

v

the Single Resolution Board (hereinafter the “Board” or “SRB”),

(together referred to as the “Parties”),

THE APPEAL PANEL,

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

makes the following final decision:

Background of facts

1. These appeals relate to 3 (three) SRB decisions, of 27 April 2018 and of 19 September 2018 (hereinafter the “First Confirmatory Decisions”) and of 20 December 2018 (hereinafter the “Second Confirmatory Decision”) rejecting the Appellant’s confirmatory applications, by which the SRB was requested by the Appellant to reconsider its position in relation to its initial requests and the SRB’s responses 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”). It must be noted that, following the Appeal Panel’s decisions rendered in other cases on 19 June 2018 and the publication of documents that the SRB made on 31 October 2018 after the adoption of the First Confirmatory Decisions, these appeals also relate to the decision of 30 November 2018 (hereinafter the “Revised Confirmatory Decision”) whereby the SRB amended its First Confirmatory Decisions.

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

2. By the initial requests and the confirmatory applications, the Appellant has requested access to several documents prepared or used by the Board in the context of the resolution of Banco Popular Español (hereinafter, “Banco Popular”) and more specifically the following:
 - a) With the first initial and confirmatory application, the resolution decision (hereinafter, the “Resolution Decision”) and the related valuation reports drawn up by SRB and Deloitte;
 - b) With the second initial and confirmatory application, the definite valuation report and the FOLTF assessment made by the ECB;
 - c) With the third initial and confirmatory application, (1) the SRB letters of 24 May 2017 and 2 June 2017 to Banco Popular, concerning requests for information; (2) the documents received from Banco Popular in relation to the private sale process (i.e. draft presentations [...], ‘Hippocrates Resolution Process Considerations’ of June 2017 and the letter from Banco Popular to the SRB dated 4 June 2017); (3) the cover letter submitted to the SRB in relation to the offer of Banco Santander by FROB and the certificate of FROB’s Governing Committee; (4) the offer submitted by Banco Santander on 7 June 2017.
3. Access to several of these documents, mostly with some redactions and thus in a non-confidential version, was granted by the Board to the Appellant following the initial applications, also in compliance with the decisions adopted by the Appeal Panel on 28 November 2017 in other access to documents cases relating to the Banco Popular resolution. Regarding the documents for which access was denied, the Appellant submitted confirmatory applications requesting the SRB to reconsider its position. The SRB rejected the first two confirmatory applications with the First Confirmatory Decisions, which were the original subject of the appeals in cases 10/18 and 17/18, respectively.
4. The notices of appeal in these initial appeals were notified to the Board respectively on 8 June 2018 (case 10/18) and 25 September 2018 (case 17/18).
5. On 12 June 2018 (in case 10/18) and 26 September 2018 (in case 17/18), the Appeal Panel informed the Parties that these appeals were stayed, pending implementation of the Appeal Panel’s decisions of 19 June 2018 (which on 12 June 2018 were forthcoming) and therefore until the publication by the Board of the documents whose disclosure was ordered by the Appeal Panel with such decisions.
6. On 26 September 2018 the Appeal Panel wrote to the Parties to inform them that the cases 10/18 and 17/18 had been consolidated according to Article 13 of the Appeal Panel’s Rules of Procedure.
7. On 31 October 2018 the Board implemented the Appeal Panel’s decisions of 19 June 2018 and published several additional documents concerning the Banco Popular resolution.

8. On 7 November 2018, the Appeal Panel informed the Parties of the publication of such documents by the SRB on 31 October 2018. The Appeal Panel also requested the Appellant to clarify whether the Appellant was content with the publication of such documents and intended to discontinue the appeals in the joined cases or if the Appellant insisted on the continuation of the appeals. On 7 November 2018, the Appellant replied that he had the intention to continue the appeals.
9. On 30 November 2018, in line with the instruction provided by the Appeal Panel, the Board amended and replaced the First Confirmatory Decisions in light of the Appeal Panel's decisions of 19 June 2018 and of the publication of documents on 31 October 2018 and adopted the Revised Confirmatory Decision. The Appeal Panel granted to the Parties appropriate terms to submit their observations in respect of the Revised Confirmatory Decision.
10. On 3 December 2018 the Appellant filed its submissions clarifying his original appeals against the Confirmatory Decisions were extended against the Revised Confirmatory Decision.
11. On 20 December 2018, the Board adopted, in response to the Appellant's confirmatory application referred to in point 2, letter c) above, the Second Confirmatory Decision.
12. Also the Second Confirmatory Decision was appealed and the notice of appeal (case 20/2018) was notified to the Board on 17 January 2019.
13. The Board submitted its response to the appeal in case 20/2018 on 14 February 2019.
14. On 5 March 2019 the Appeal Panel wrote to the Parties informing that case 20/18 was consolidated to joined cases 10/18 and 17/18 according to Article 13 of the Appeal Panel's Rules of Procedure.
15. On 11 March 2019, the Appeal Panel asked the Parties if they considered necessary to discuss the case in a hearing. The Board confirmed in writing that it waived their right to an oral hearing. The Appellant expressed an interest to participate in such a hearing but clarified that he could not afford the costs of the participation to such a hearing and asked to be reimbursed of such costs.
16. On 22 March 2019, the Appeal Panel wrote to the parties clarifying that the Appeal Panel cannot cover the Appellant's costs and that own costs are in principle borne by each party. The Appeal Panel asked the Board to clarify whether the SRB could and would be willing to reimburse such costs and noted that, in any event, in order to avoid disproportionate costs and burdens for appellants, the hearing is not to be considered a compulsory requirement for the parties of the proceedings but an entitlement of the parties according to Article 18 (1) of the Appeal Panel's rules of Procedure. Failure to attend a hearing will therefore not be treated as a waiver or a withdrawal of the appeal and will not dispense the Appeal Panel from taking the absent party's written submissions into consideration. In response to the Appeal Panel's

request, the Board clarified that it could not reimburse the Appellant's costs to attend the hearing.

17. The Appeal Panel further noted that, in this specific case, there were other parallel appeals related to access to documents concerning the Banco Popular resolution. In those other appeals the appellants already confirmed that they could attend the hearing, at their costs and the Appeal Panel convened therefore a hearing for 11 April 2019. The Appeal Panel indicated that, if the Appellant was not able to participate in this hearing, the present appeal would be declared lodged after the date of the hearing. This would both minimise the effects of absence of the Appellant at the hearing, and allow the Appeal Panel to decide on this appeal having also had the chance to listen to the oral representations of other appellants, in parallel cases.
18. The hearing referred to above was held in Brussels on the 11 April 2019. The Appellant did not appear nor was he duly represented (no valid power of attorney was provided). The representative of another appellant, who stated being the father of the Appellant, appeared however at that hearing and made representations in other joined cases 9/18, 11/18, 13/18, 16/18 and 2/19.
19. On 23 April 2019, the Appeal Panel clarified to the Parties that further documents that were not deposited by the Parties with the appeals, responses and replies respectively were considered by the Appeal Panel not necessary for the just determination of the appeals. The Appeal Panel notes in this respect that under Article 16(4) of the Rules of Procedure no new evidence may subsequently be submitted save for good reason. On the same date the Appeal Panel notified the Parties that the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and 20 of the Rules of Procedure.

Main arguments of the parties

20. 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 discussed by the parties in respect of the Revised Confirmatory Decision during the proceeding.

Appellant

21. The Appellant, in case 10/18, argues that the full content of the requested documents (the Resolution Decision and the related valuation reports) should be made available to him to enable the control that the Board acted lawfully and argues that the Board cannot rely on the exceptions provided for by Regulation 1049/2001. The Appellant refers to this effect to the General Court judgment of 26 April 2018, *Espirito Santo Financial (Portugal) v ECB*, T-251/15, EU:T:2018:234. The Appellant argues further that, in the absence of the information requested, it is not possible to subject the actions of the SRB to a proper and adequate scrutiny.
22. In case 17/18, the Appellant argues that the additional documents requested (definitive valuation report and FOLTF assessment made by the ECB and the documents exchanged with the Board in this respect) are also necessary to control the legality under the SRMR of the resolution of Banco Popular. As to the definitive Valuation 2 Report, the Appellant further argues that, although the Board states that this was not necessary, the preparation of a definitive valuation report is mandatory under Article 20(11) SRMR and the Board failed to comply with this duty. The Appellant also argues that the Board did not disclose some key information regarding the positive or optimistic scenarios in the valuation. The Appellant puts forward additional, and broadly formulated complaints about the opacity of the proceedings, and the inapplicability of the principles stated by the judgement of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, because the actors and circumstances are different (the Appellant, however, does not delve deeper into the reasons why). The Appellant also argues that, given the profile of the case, the overriding public interest does not need to be proven.
23. In case 20/18 the Appellant insists on some of the arguments expressed in previous cases, regarding the necessity of the disclosures to hold the SRB actions accountable, such as the documents concerning the decision to sell Banco Popular to Banco Santander (including the documents received from Banco Popular, the accompanying letter sent by FROB to the SRB in relation to the sale, and the certified agreement by the FROB's governing body, and the binding offer presented by Banco Santander), as well as the second valuation report. In relation to the former, the Appellant alleges that the Board and Banco Santander blame each other for the non-disclosure. In relation to the latter, the Appellant insists that the report was mandatory in the present case. The Appellant finally insists that it is in the overriding public interest knowing how all the process was conducted and access to the documents requested is necessary to this purpose.

Board

24. The Board argues, in case 10/18, that, exceptions, such as the protection of public interest, as regards the financial, monetary or economic policy, protection of commercial interests of natural or legal persons, protection of privacy and the integrity of the individual must be applied. Upon a detailed assessment, which focuses on each of the documents whose disclosure is being requested, the Board argues that it has now granted, in compliance with the guidance provided by the Appeal Panel in the context of other cases decided by the Appeal

Panel, partial access to the Resolution Decision (where only a residual part is still redacted) and to the Valuation 1 Report and the Valuation 2 Report. It also argues that the redaction of some parts of the relevant documents is in line with the recent case law of the General Court, such as the judgment of 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234.

25. The Board argues, in case 17/18, that the allegation lacks any merit, and that the alleged violation of Article 20 SRMR clearly falls outside the scope of Regulation 1049/2001 and therefore also outside the competence of the Appeal Panel under Articles 85 and 90 SRMR. It also alleges that the competence to decide on access to documents cannot justify the creation of a document that does not exist.
26. The Board argues, in case 20/18, that the Appellant seems to have assembled pieces from other appeals, because the requests for the disclosure of documents do not correspond to the requests initially made, and the arguments are inconsistent with the requests. The Board also alleges that the appeal is inadmissible because it fails to state the grounds for appeal. The Board also argues that the Appeal Panel has confirmed the Board's decision to redact some parts of the documents. Finally, the Board argues that the exceptions to disclosure under article 4 Regulation 1049/2001 have been duly applied.

Findings of the Appeal Panel

27. The Appeal Panel preliminarily notes that in its previous decisions rendered on 28 November 2017 and 19 June 2018 (all accessible at www.srb.europa.eu), it was held that the following overriding principles, hereby restated for all relevant purposes, should guide in the assessment of the requests of access to documents related to the Banco Popular resolution:
 - (a) The right of access is a transparency tool of democratic control of the European institutions, bodies and agencies and is available to all EU citizens irrespective of their interests in subsequent legal actions (see for instance judgment 13 July 2017, *Saint-Gobain Glass Deutschland*, C-60/15, EU:C::2017:540, paragraphs 60 and 61 and in particular judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 20: “*as the addressee of those decisions [denying access to documents], the applicant is therefore entitled to bring an action against them. (...)*”).
 - (b) To the effect of this appeal, the Appellant is subject to the regime for access to documents set out by Article 90(1) of the SRMR together with Regulation 1049/2001. As indicated by Article 85(3) SRMR, the Appeal Panel has no competence to hear appeals against a decision of the Board referred to in Article 90(4) SRMR. The Appellant can therefore not rely, in this appeal, on the right to access the SRB's file on the basis of Article 90(4) SRMR.

- (c) According to Regulation 1049/2001 “*the purpose of the Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access*” (recital 4) and “*in principle, all documents of the institutions should be accessible to the public*” (recital 11). Regulation 1049/2001 implements Article 15 TFEU which establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies (such right is also recognized as a fundamental right by Article 42 of the Charter of Fundamental Rights). However, certain public and private interests are also protected by way of exceptions and the Union institutions, bodies and agencies should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks (recital 11). Article 4 of Regulation 1049/2001 sets out these exceptions as follows:

Article 4

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
 - (a) the public interest as regards:
 - public security,
 - defence and military matters,
 - international relations,
 - the financial, monetary or economic policy of the Community or a Member State;
 - (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
 - commercial interests of a natural or legal person, including intellectual property,
 - court proceedings and legal advice,
 - the purpose of inspections, investigations and audits,unless there is an overriding public interest in disclosure.
3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.
5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.
6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.
7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of

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

- (d) In principle, exceptions must be applied and interpreted narrowly (see e.g. judgment 17 October 2013, *Council v. Access Info Europe*, C-280/11, EU:C:2013:671, paragraph 30). However, case-law on public access to documents in the administrative context (as opposed to case law on public access in the legislative context) suggests that a less open stance can be taken in the administrative context because “*the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution*” (see to this effect judgment 4 May 2017, *MyTravel v. Commission*, T-403/15, EU:T:2017:300, at paragraph 49; judgment 21 July 2011, *Sweden v. Commission* C-506/08 P, EU:C:2011:496, at paragraphs 87-88; judgment 29 June 2010, *Commission v. Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 60-61).
- (e) Settled case-law permits Union institutions, bodies and agencies to rely in relation to certain categories of administrative documents on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by Regulation 1049/2001 (see to this effect judgment 28 June 2012, *Commission v. Edition Odile Jacob*, C-404/10, EU:C:2012:393; judgment 21 September 2010, *Sweden and Others v. API and Commission*, C-514/07 P, EU:C:2010:541; judgment 27 February 2014, *Commission v. EnBW*, C-365/12 P, UE:C:2014:112; judgment 14 November 2013, *LPN and Finland v. Commission*, C-514/11 P and C-605/11 P EU:C:2013:738; judgment 11 May 2017, *Sweden v. Commission*, C-562/14 P EU:C:2017:356). Where the general presumption applies, the burden of proof is shifted from the institution to the applicant, who must be able to demonstrate that there will be no harm to the interest protected by the Regulation 1049/2001. This also means that the Union institutions, bodies or agencies are not required, when the general presumption applies, to examine individually each document requested in the case because, as the CJEU noted in *LPN and Finland v. Commission*, Joined Cases C-514/11P and C-605/11P (cited above, paragraph 68), “*such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global*”. At the same time, though, settled case law clarifies that, since the possibility of relying on general presumptions applying to certain categories of documents, instead of examining each document individually and specifically before refusing access to it, would restrict the general principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation 1049/2001, “*the use of such presumptions must be founded on reasonable and convincing grounds*” (judgment 25 September 2014, *Spirlea v. Commission*, T-306/12, EU:T:2014:816, paragraph 52).
- (f) When determining whether disclosure is prevented by the application of one of the relevant exceptions under Regulation 1049/2001, EU institutions, bodies and agencies enjoy in principle a margin of appreciation (due to the open-textured nature of at least

some of the relevant exceptions). Review is then limited, according to settled case law, to verifying whether procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers (see, among others, judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 53; judgment 29 November 2012, *Thesing and Bloomberg Finance v ECB*, T-590/10, EU:T:2012:635, paragraph 43); in any event, the actual viability of judicial review must be ensured (see to this effect judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

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

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

of the exercise by the Board of the margin of discretion which must be recognized to it according to settled case law (again, judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55). The Appeal Panel further considered that the SRB, in stating the reasons justifying its partial denial of access, could legitimately take account also of possible future behaviours (e.g. risk of unwarranted market speculation), provided that they are not purely hypothetical but reasonably foreseeable in a credible scenario and sufficiently specific (the need of protection must be genuine).

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

29. For the just determination of this appeal, the Appeal Panel considered all arguments raised by the Appellant in these appeals, also in light of the previous decisions adopted by the Appeal Panel on 28 November 2017 (in cases 38 to 43/17), 23 March 2018 (in case 2/18), 19 June 2018 (in cases 44 to 57/17, 1 and 7/18) and 28 February 2019 (in case 3/18, 14/18, 15/18 and 22/18). The Appeal Panel – to the extent that parallels may be drawn with the instant case – also considered the most recent CJEU judgments on access to documents pertaining to financial supervision of 19 June 2018, *BaFin v Ewald Baumeister*, case C-15/16, EU:C:2018:464, of 13 September 2018, *Enzo Buccioni*, C-594/16, EU:C:2018:717, of 13 September 2018, *UBS Europe v DV*, C-358/16, EU:C:2018:715, of 12 March 2019, *De Masi and Varoufakis v ECB*, EU:T:2019:154 and of 13 March 2019, *Espirito Santo Financial Group v ECB*, case T-730/16, EU:T:2019:161 in light of the legal corollaries arising from these cases in addition to previous case law already quoted.
30. The Appeal Panel further notes that, as already held with the decisions of 23 March 2018 in case 2/18 and of 28 February 2019 in case 3/18, the Revised Confirmatory Decision replaced the First Confirmatory Decision and therefore only the Revised Confirmatory Decision can at present be deemed to have legal effects vis-à-vis the Appellant. The Appeal Panel further notes that, for reasons of procedural economy, which also benefited the Appellant, the Appellant was granted the possibility to extend the appeal, in the instant case, against the Revised Confirmatory Decision and the Appellant explicitly did so. Whilst the Appellant has therefore an actual interest in having the Appeal Panel deciding over whether to confirm or remit the Revised Confirmatory Decision and the Second Confirmatory Decision to the Board, in the Appeal Panel's view there is no legal interest in having an Appeal Panel decision over the First Confirmatory Decisions, which have been replaced by the appealed Revised Confirmatory Decision and, as such, are at present devoid of legal effects.
31. The Appeal Panel notes, to the effect of the just determination of the present appeals, that in its previous decisions of 28 November 2017 and 19 June 2018 the Appeal Panel has held that:

- (a) Access to the Resolution Decision could be granted with the limited redactions specified by the Appeal Panel and the non-confidential version of the Resolution Decision published by the Board on 2 February 2018 (following the Appeal Panel decisions of 28 November 2017) was duly justified and complied with the Appeal Panel's decisions;
- (b) Access to the SRB Valuation 1 Report and Deloitte Valuation 2 Report could be granted with some redactions as specified by the Appeal Panel and the non-confidential version of these documents published on 2 February 2018 was to a large extent duly justified and complied with the Appeal Panel's decisions of 28 November 2017, but some redactions were still beyond what was duly justified and further disclosure was thus necessary; following the Appeal Panel's decisions of 19 June 2018, the Board published a new non-confidential version of the Valuation 1 Report and of the Deloitte Valuation 2 Report on 31 October 2018;
- (c) Access to the 2016 Resolution Plan could be granted with some redactions as specified by the Appeal Panel and the non-confidential version of this document published on 2 February 2018 was to a large extent duly justified and complied with the Appeal Panel's decisions of 28 November 2017, but some redactions were still beyond what was duly justified and further disclosure was thus necessary; following the Appeal Panel's decisions of 19 June 2018, the Board published a new non-confidential version of the 2016 Resolution Plan on 31 October 2018;
- (d) Access to the 2017 Liability Data Report could be granted with redactions as specified by the Appeal Panel; following the Appeal Panel's decisions of 19 June 2018, the Board published a non-confidential version of the 2017 Liability Report on 31 October 2018;
- (e) Access to the 2017 Critical Functions Report could be granted with redactions as specified by the Appeal Panel; following the Appeal Panel's decisions of 19 June 2018, the Board published a non-confidential version of the 2017 Critical Functions Report on 31 October 2018;
- (f) Access to the communication made by Banco Popular on 6 June 2017, declaring the non-viability of the entity 2016 could be granted with some redactions as specified by the Appeal Panel; following the Appeal Panel's decisions of 19 June 2018, the Board published a non-confidential version of this document on 31 October 2018;
- (g) Access to the documents received from Banco Popular in relation to the private sale process could be granted, with some proportionate redactions as specified by the Appeal Panel; following the Appeal Panel's decisions of 19 June 2018, the Board published a non-confidential version of these documents on 31 October 2018;
- (h) Denial to access the full text of the FOLTF assessment and of the ECB and SRB communications and exchanges on this regard was duly justified in compliance with the

applicable rules, with the duty to state reasons and without any manifest error of assessment or misuse of powers;

- (i) Denial to access the offer submitted by Banco Santander on 7 June 2017 and the SPA signed with FROB was duly justified in compliance with the applicable rules, with the duty to state reasons and without any manifest error of assessment or misuse of powers, also considering that other documents relating to the sale process (Sale Process Letter, Appendix 1 – draft sale and purchase agreement) were disclosed and the content of such offer and SPA can be inferred from the Sale Process and the Resolution Decision;
- (j) Access to requests of information from SRB and exchanges with Banco Popular could be legitimately refused by the Board and no overriding public interest in disclosure was found;
- (k) Access to the documents received or exchanged with the ECB, FROB, the European Commission for internal use as part of the file and deliberations could be legitimately refused by the Board and no overriding public interest in disclosure was found;
- (l) Access to the documents presented to the Board and the minutes of the Board that dealt with the situation of Banco Popular could be legitimately refused by the Board and no overriding public interest in disclosure was found.

32. Based upon the foregoing, which, in the Appeal Panel’s view, clearly shows the principles and the precedents which must guide in the determination of the present appeals, the Appeal Panel finds that both the Revised Confirmatory Decision and the Second Confirmatory Decision are in line with the previous findings of the Appeal Panel and with the applicable provisions of Regulation 1049/2001.

33. With the publication of the documents made by the Board on 31 October 2018 and with further disclosures made specifically to the Appellant in the proceedings leading to the First Confirmatory Decisions, the Appellant has been granted access: (i) as to the Appellant’s requests in case 10/18, to the Resolution Decision, the Valuation 1 Report and the Valuation 2 Report; (ii) as to the Appellant’s requests in case 17/18, the non-confidential version of the FOLTF assessment made by the ECB (iii) as to the Appellant’s requests in case 20/18, the SRB letter dated 4 June 2017 and the draft presentation [...] ‘Hippocrates Resolution Process Considerations’ of June 2017, including most parts of the Lazard presentation (appendix to the draft presentations of [...]); the cover letter submitted to the SRB in relation to the offer of Banco Santander by FROB and the certificate of FROB’s Governing Committee, with the exception only of limited personal data.

34. The Board also informed that the definitive valuation report requested by the Appellant in case 17/18 does not exist. As the Appeal Panel already held in its decisions of 28 February 2019 in cases 14/18 and 15/18, once a European institution, body or agency asserts that a

document does not exist, according to settled case law, the institution, body or 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). In the instant case, the Appellant failed to present any evidence to rebut such presumption. Furthermore, in such case the institution, body or agency is not obliged to create a document which does not exist (CJEU, judgment of 11 January 2017, *Typke v. Commission*, C-491/15 P, EU:C:2017:5 at para 31).

35. As to the remaining documents for which access was denied (such as the full text of the documents requested in cases 10/18 and 17/18 and requests of information from SRB and exchanges with Banco Popular, and more specifically the SRB letters of 24 May 2017 and 2 June 2017 and the binding offer submitted by Banco Santander on 7 June 2017 in case 20/18), both the Revised Confirmatory Decision and the Second Confirmatory Decision offer specific justifications, which are in compliance with the applicable provisions of Regulation 1049/2001 and in line with the Appeal Panel's previous decisions. These reasons are also within the limits of the margin of discretion which must be recognized by the Board in the assessment of the risk of occurrence of one or more of the situations which justify the use of the exceptions to public access to documents under Regulation 1049/2001 according to the principles set out above and in conformity with 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).
36. The Appeal Panel refers, in this respect, to the specific reasons stated by the Board in paragraph 4.1., 4.2. and 4.3. of the Revised Confirmatory Decision (in cases 10/18 and 17/18) and in paragraph 4.1., 4.2., 4.3 and 4.4. of the Second Confirmatory Decision (in case 20/18), which, in the Appeal Panel's view, offer a sufficient and specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the Board's denial of access, in whole or in part, of the relevant documents. Such reasons comply with the principles stated above and, in the Appeal Panel's view, do not show any manifest error and were stated in a sufficiently specific manner.
37. The Appeal Panel further refers to its previous decisions of 28 November 2017 and 19 June 2018 as regards:
 - (a) The redactions justified in the non-confidential versions of the Resolution Decision, of the Valuation 1 Report and of the Valuation 2 Report (requested by the Appellant in case 10/18) and of the FOLTF assessment made by the ECB (requested by the Appellant in case 17/18).
 - (b) The non-disclosure of requests of information from SRB and exchanges with Banco Popular, and more specifically the SRB letters of 24 May 2017 and 2 June 2017 and the binding offer submitted by Banco Santander on 7 June 2017 (requested by the Appellant in case 20/18).

38. Finally, also the plea in case 17/18 concerning the alleged violation by the Board of Article 20 SRMR for not having produced a definitive valuation, is outside the scope of Regulation 1049/2001 and seems to imply a complaint for failure to act by the Board and the Appeal Panel has no competence under Articles 85 and 90 SRMR to hear appeals also in this respect.

On those grounds, the Appeal Panel hereby:

Dismisses the appeal.

David Ramos Muñoz

Kaarlo Jännäri

Luis Silva Morais
Vice-Chair

Marco Lamandini
Rapporteur

Christopher Pleister
Chair

For the Appeal Panel Secretariat: