



29 April 2019

Joined Cases 9/2018, 11/2018, 13/2018, 16/2018 and 2/19

FINAL DECISION

[...],

Appellant,

v

The Single Resolution Board

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

TABLE OF CONTENTS

Background of facts3
 Appellant8
 Board9
Findings of the Appeal Panel 11
Tenor21

FINAL DECISION

In Joined Cases 9/18, 11/18, 13/18, 16/18 and 2/19

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”),

[**Appellant**] 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 five SRB decisions of 27 April 2018, 2 August 2018, 16 August 2018 and 4 September 2018 (hereinafter, the “First Confirmatory Decisions”) and 12 February 2019 respectively (hereinafter the “Second Confirmatory Decision”) rejecting five of the Appellant’s confirmatory applications, by which the Appellant requested the SRB to reconsider its position in relation to the Appellant’s 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 S.A. (hereinafter, “Banco Popular”) and more specifically the following:
 - a) With the first initial and confirmatory application, the Appellant has requested access to the resolution decision (hereinafter, the “Resolution Decision”) and the related valuation report drawn up by Deloitte;
 - b) With the second initial and confirmatory application, the Appellant has requested access to: (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 sale process; (4) the communication of BBVA of 6 June 2017 concerning its withdrawal from the sale process; (5) the communication made by Banco Popular on 6 June 2017, declaring the non-viability of the entity; (6) the contract with Deloitte entered into for the purpose of the valuation in the context of the resolution of the Banco Popular; (7) the definite valuation 2; (8) the valuation 3; and (9) the documents that justify the FOLTF assessment made by the ECB.
 - c) With the third initial and confirmatory application, the Appellant has requested access to the contract the SRB entered into with Deloitte for the purpose of the valuation in the context of the resolution of Banco Popular, and namely the framework contract for services, the specific contract no. 8 with appendices, and amendments to the specific contract no. 8.
 - d) With the fourth initial and confirmatory application, the Appellant has requested access to: (1) all the information and protocols used by the SRB and FROB to guarantee an absence of conflict of interest with regard to the law firm [...]; (2) any registered document where [law firm] intervened within the resolution context; (3) the binding offer submitted by Banco Santander S.A. on 7 June 2017; (4) the sale purchase agreement signed by FROB and the purchaser on 7 June 2017; (5) the report on the basis of which it was decided the resolution action by the SRB.
 - e) With the fifth initial and confirmatory application, the Appellant has requested access to documents of the SRB in which the alternative private sector measures were assessed after the ECB had declared Banco Popular FOLTF.
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 four

confirmatory applications with the First Confirmatory Decisions which were the original subject of the appeals in cases 9/18, 11/18, 13/18 and 16/18, respectively.

4. The notices of appeal in these initial appeals were notified to the Board respectively on 8 June 2018 (case 9/18), 9 August 2018 (case 11/18), 30 August 2018 (case 13/18) and 6 September 2018 (case 16/18).
5. On 12 June 2018 (in case 9/18) and 12 September 2018 (in cases 11/18, 13/18 and 16/18), the Appeal Panel informed the Parties that the appeals were stayed, pending implementation of the Appeal Panel's decisions of 19 June 2018 (which on 12 June 2018 were forthcoming). These appeals were stayed until the publication by the Board of the documents whose disclosure was ordered by the Appeal Panel with such decisions.
6. On 12 September 2018, the Appeal Panel wrote to the Parties to inform them that cases 9/18, 11/18, 13/18 and 16/18 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 8 November 2018 the Appellant replied that he had no such intention and asked the Appeal Panel to request the Board the publication of the documents in their entirety as per the Appellant's previous appeals.
9. On 30 November 2018, in line with the instructions 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 that his original appeals against the Confirmatory Decisions were extended against the Revised Confirmatory Decision.
11. On 31 January 2019, the Board filed its response to the Appellant's submissions concerning the Revised Confirmatory Decision.
12. On 12 February 2019, the Board adopted, in response to the Appellant's confirmatory application referred to in point 2, letter e) above, the Second Confirmatory Decision.

13. The Second Confirmatory Decision was appealed as well, and the notice of appeal (case 2/2019) was notified to the Board on 18 February 2019.
14. On 5 March 2019, the Appeal Panel wrote to the Parties informing that case 2/19 was consolidated with joined cases 9/18, 11/18, 13/18 and 16/18 according to Article 13 of the Appeal Panel's Rules of Procedure.
15. The Board submitted its response to the appeal in case 2/2019 on 27 March 2019.
16. On 11 March 2019, the Appeal Panel asked the Parties if they considered necessary to discuss the case in a hearing. The Board has confirmed in writing that it waived its 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.
17. 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 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 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.
18. 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 the hearing, the present appeal would have been 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.
19. On 27 March 2019, the Appeal Panel - having recalled that in previous cases the Appeal Panel had confidential access to the full text of the SRB Resolution Decision, of the related Valuation Report, of the 2016 Resolution Plan, of the 2017 Liability Data Report submitted to the SRB by Banco Popular, of the 2017 Critical Functions Report submitted to the SRB by Banco Popular, of 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), of the communication made by Banco Popular to the ECB on 6 June 2017 in accordance with Article 21 of Spanish Law 11/2015 declaring the non-viability of the bank, of the (full text) of the communication of BBVA of 6 June 2017, concerning its withdrawal from the sale process – ordered the Board, 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, (i) to deposit with the Appeal Panel’s Secretariat by 9 April 2019 at the SRB premises, one or more numbered hardcopies of all contracts (Lot 1, Lot 2, Lot 3 and all related amendments and appendices) the SRB entered into with Deloitte and (ii) subject to the adoption of appropriate technical means and all necessary security measures, to allow remote access to the Appeal Panel Members *via* electronic devices to an electronic copy of the same for reading only.

20. The hearing referred to above was held in Brussels on the 11 April 2019. The Appellant was represented at the hearing by [] together with [.....], who had previously presented a valid power of attorney. Both Parties made oral representations, and the Appeal Panel could benefit from a discussion of the relevant issues. The Appellant’s representatives provided a joint presentation of the cases discussed in this appeal, stating an overall view that focused more on the process by which Banco Popular was subject to public intervention, than on the specific and relevant elements surrounding the documents disclosure requested in each particular case. The Board’s representatives divided their presentation on issues of admissibility of the complaint, the admissibility of new evidence, and on the merits, where they distinguished between general aspects common to all the appeals, and specific aspects related to only some of the appeals. Both parties answered questions posed by the Appeal Panel and had the opportunity for rebuttal as regards the answers provided by the other party.
21. 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

22. 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 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 of whether a specific mention to each

of them is made or not in this decision; (ii) the Appeal Panel considered both the arguments supporting the original appeal against the Confirmatory Decisions and those discussed by parties in respect of the Revised Confirmatory Decision during the proceeding.

Appellant

23. In case 9/18 the Appellant argues that the full content of the requested documents (the Resolution Decision and the related Valuation Report drawn up by Deloitte) should be made available to him, and, in that sense, refers to the General Court judgement of 26 April 2018, *Espirito Santo Financial (Portugal) v ECB*, T-251/15, EU:T:2018:234.
24. In case 11/18 the Appellant requests additional documents (definitive valuation report 2 and documents that justify the FOLTF assessment made by the ECB, including the corresponding minutes to the meetings). The Appellant alleges that the resolution decision was adopted in an opaque manner, and without sufficient basis, and also alleges that the choice of the resolution tool adopted (bail-in) was not the only one available. As to the definitive valuation report 2, the Appellant further alleges that, contrary to the SRB's allegations that this was not necessary, the preparation of a definitive valuation report is mandatory under Article 20(11) SRMR and the SRB failed to comply with this duty.
25. In case 13/18 the Appellant claims that he had requested access to all contracts with Deloitte relating to Banco Popular and that the SRB has not given him access to Lot 1 and Lot 3 contracts and to the amendments of 1 September 2017. The Appellant further argues that by redacting certain information on the third page in Section 4 of Annex I of the request for services it becomes impossible to determine whether Deloitte has complied or not with its obligations under such contract. In addition, the Appellant raises several questions regarding the documents granted by the SRB in its initial response and confirmatory response as well as on the definitive valuation.
26. In case 16/18 the Appellant claims that the SRB has not complied with Article 20(6) and Article 20(11) SRMR because the Board should have performed an ex-post definitive valuation as soon as practicable which the Board failed to ensure. The Appellant further complains that the SRB has failed to comply with the duty to justify the resolution action taken and raises several questions in this respect, e.g. whether there were other resolution options available. The Appellant also claims that access to the Share Purchase Agreement (SPA) entered into with Santander should be granted because "it is a public contract" in the sense that it is an agreement with a public administration (FROB).
27. In case 2/19 the Appellant claims, specifically with respect to matters relating to the access to documents requested with the initial and confirmatory applications and properly pertaining to an appeal against the Second Confirmatory Decision, that the Board should make accessible its minutes of the meetings of the Board that have dealt with the situation of the Banco Popular

because they are official documents of the administrative process and relate to decisions which affected the public.

28. These specific allegations for each of the cases were supplemented by the presentation made during the hearing, which encompassed all the above cases. In that presentation, the Appellant argued that the actions of the Board have resulted in a breach of the soundness and public trust that are among the goals of the Single Resolution Mechanism. In the Appellant's view, this is due to the non-compliance with the requirements to adopt a resolution decision, and the lack of transparency with which the different parties acted during the Banco Popular case. The Appellant argued that the sequence of events leading to the Banco Popular resolution show a crisis precipitated by the ECB's withdrawal of liquidity, followed by the withdrawal of deposits, of public institutions among others. The Appellant alleged that this occurred in a non-transparent context with regard to the parties that participated in the process. This aspect is currently under criminal investigation in Spain. About the subject matter of the present proceedings, i.e. document disclosure, the Appellant argued that the Board has a biased interpretation of the SRM Regulation and Regulation 1049/2001, against the general principle of broad access to documents, and the need to state reasons for each denial, something that, according to the Appellant, the Board has failed to do. The Appellant argued that in the instant cases there is a special need to protect the general interest in ensuring legitimacy, and citizen participation.

Board

29. The Board argues, in case 9/18, that it has now granted, in compliance with the guidance provided by the Appeal Panel in the context of other cases, partial access to the Resolution Decision (where only a residual part is still redacted) and to the Deloitte valuation report. It further submits that the redactions still present in the above documents are necessary to prevent that disclosure could affect the financial situation and market situation of the Santander Group as the purchaser of Banco Popular and that the General Court judgment in *Espirito Santo* confirms that disclosure of methodological information can be refused if it could lead market participants to predict the strategy, tactics and methods which may be employed by supervisors as part of future interventions. In line with that case law, the SRB has explained in detail in the Revised Confirmatory Decision that disclosure of certain elements that contain internal methodology could undermine the protection of the financial markets.
30. The Board argues in case 11/18, regarding the Appellant's first plea, i.e. the breach by the SRB of article 20(11) SRMR by not drafting a definitive valuation 2, that the appeal is inadmissible, as the allegation of SRB's non-compliance falls outside the scope of review of the Appeal Panel pursuant to article 85 of SRMR, and alternatively, that the SRB position complied with Regulation 1049/2001, as this regulation cannot compel the production of a document that does not exist, or is not in the possession of the EU institution. The SRB also argues that all its responses complied with the times set forth in Regulation 1049/2001.

Finally, with regard to the FOLTF assessment, the SRB argues that the Appellant is mistaken in arguing that the SRB alleged that it did not have the FOLTF assessment; the actual objection to disclosure has to do with the fact that the documents pertaining to such assessment are documents of the ECB, which are subject to a special disclosure regime, which cannot be circumvented by making an indirect application to the SRB.

31. The Board argues in case 13/18 that the Appellant, with the initial and confirmatory application, asked for the contract entered into with Deloitte for the Banco Popular valuation and therefore the request to access other contracts with Deloitte concerning analysis of financial statements and accounting advice (Lot 1) and legal advice (Lot 3) is falling outside the scope of the Appellant's initial application and is therefore inadmissible. The Board further argues that they are irrelevant. As to the amendments of 1 September 2017, the Board clarifies that it is the amendment 4 which was granted to the Appellant, excluding personal data, as an attachment to the initial response. As to the contract entered into by the SRB with Deloitte for the purposes of valuation 3, the SRB argues that the assignment of carrying out the valuation 3 is included in Annex 1 to the request of services, which was made available to the Appellant with the redaction of only one paragraph, which, in the Board's view, does not hamper the proper understanding of the document. Regarding such redaction in Annex 1, the Board further clarifies that the non-disclosed parts constitute a description of the scenario which the SRB requested from the contractor in order to make the necessary assessment of the quality criterion 1 regarding the methodology and contains therefore data related to the resolution process, which could compromise the internal methodology of the SRB. As to the additional questions and considerations raised by the Appellant, the SRB argues that they are inadmissible because the public's right of access to documents under Regulation 1049/2001 does not imply a duty on the part of the European institutions, bodies or agencies to reply to requests for information from an individual. These questions and considerations therefore fall outside of the scope of Regulation 1049/2001 and are thereby also beyond the competence of the Appeal Panel in accordance with Articles 85(3) and 90(3) SRMR.
32. The Board argues in case 16/18 that the first plea concerning 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. The Board further notes that the Appellant has not even requested to access the definitive valuation with its initial request in the procedure leading to the appeal in case 16/18. As to the plea concerning the SPA, the Board submits that this is a third-party document, which originates partly from FROB and partly from Banco Santander and the latter objected to its disclosure. Moreover, the Appeal Panel's decisions of 19 June 2018 confirmed the Board's positions with respect to the SPA.
33. In case 2/19 the Board argued that the appeal is inadmissible because the Appellant has used the case to widen the scope of its request, by making a broader request for documents than the one presented with the initial and confirmatory applications and, in the merit, that its minutes

are internal preparatory documents whose disclosure is prevented by the need to protect the internal decision-making process, as also confirmed by the Appeal Panel in previous decisions.

34. The Board supplemented these specific arguments for each case in the written submissions with those provided in the hearing. The Board made some general points and some specific points. The Board began with the objections to the admissibility of the appeal, arguing that the scope of review of the Appeal Panel is restricted to the need to disclose documents that already exist, i.e. it does not include the possibility to decide whether the Board actions were legal, or whether certain documents should exist, as the Appellant is asking the Panel to do with regard to the decision over the definitive valuation report. The Board also alleged that the Appellant had failed to state sufficient grounds in a coherent and intelligible manner, and it was not always possible to link the arguments to the cases.
35. With regard to the specific arguments on disclosure of documents, the Board argued that the rules on access to documents enshrine an *erga omnes* principle, which does not take into consideration the identity of the person, but merely the contents of the document, and that, to the extent that Board's interpretation has been confirmed by the Appeal Panel, that interpretation should be considered final in subsequent cases. The Board also argued that, when it comes to documents covered by the presumption of non-accessibility, it is for the Appellant to demonstrate why the presumption must not be upheld, something that, the Board argued, the Appellant had failed to do in this case, and, in any case, the overriding public interest, which may apply to disregard the presumption, does not apply to documents covered by the monetary policy exceptions. Furthermore, according to the Board, it has duly fulfilled the duty to give reasons, and the passage of time had not changed the applicability of the presumption, and the exception of commercial interest is still present, to the extent that the business of Banco Popular has been acquired by Banco Santander.

Findings of the Appeal Panel

36. 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 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 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

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

- (a) the Appeal Panel did not deem necessary to require the Board to make an integral disclosure of the requested documents and conceded that in the specific assessment of the relevant parts of the relevant documents, which could be redacted under the relevant exceptions recognised by Regulation 1049/2001, the Board retains a margin of 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 reasons in such a way that effective judicial review can be conducted;
- (b) the SRB was entitled to blank out the 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 those set forth under 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 as 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 disclosures by the Board.

38. 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 cases 3/18, 14/18, 15/18 and 22/18). The Appeal Panel – to the extent that parallels may be drawn with the instant case – also considered the most recent CJEU judgments on access to documents pertaining to financial supervision of 19 June 2018, *BaFin v Ewald Baumeister*, case C-15/16, EU:C:2018:464, of 13 September 2018, *Enzo Buccioli*, C-594/16, EU:C:2018:717, of 13 September 2018, *UBS Europe v DV*, C-358/16, EU:C:2018:715; of 12 March 2019, *De Masi and Varoufakis v ECB*, EU:T:2019:154 and of 13 March 2019, *Espirito Santo Financial Group v ECB*, case T-730/16, EU:T:2019:161 in light of the legal corollaries arising from these cases in addition to previous case law already quoted.
39. 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 as such 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.

40. The Appeal Panel notes, to the effect of the just determination of the present appeal, that in its previous decisions of 28 November 2017 and 19 June 2018 the Appeal Panel has held that:
- (a) Access to the Resolution Decision could be granted with the limited redactions specified by the Appeal Panel and that 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 large extent duly justified and complied with the Appeal Panel's decisions of 28 November 2017, but some redactions were still beyond what was 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 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 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 to the full text of the FOLTF assessment and of the ECB and SRB communications and exchanges in 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 to 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, bearing in mind 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.
41. Based upon the foregoing, which shows the principles, precedents and previous decisions 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.
42. Before proceeding with the specific details for each appeal, it is important to stress a general consideration. The Appeal Panel, pursuant to article 85 SRM Regulation, has a limited scope of review, which means that, for example, it cannot examine the legality of the resolution decision, the correctness of the FOLTF assessment, or the need to undertake an *ex post* valuation. Furthermore, to ensure the functionality of the Board, if the Board complied with all relevant procedural rules, properly stated its reasons and did not incur in any manifest error, the Appeal Panel cannot substitute its opinion for that of the Board, which means that, on issues where the assessment of the facts may render itself to different interpretations, e.g.

the impact of certain disclosures on financial stability, it should defer to the Board's interpretation, unless there is a specific reason not to. Moreover, an appeal cannot be used, as the Appellant did in case 2/19, to widen the scope of the request for documents in respect to the original request made with the initial and confirmatory applications.

43. In the instant cases, 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 9/18, to the Resolution Decision and the Valuation 1 Report and the Valuation 2 Report; (ii) as to the Appellant's requests in case 11/18, the Valuation 3 Report, the 2017 Liability Data Report, the 2017 Critical Function Report, the documents received from Banco Popular about the private sale process, the communication of BBVA of 6 June 2017 concerning its withdrawal from the sale process, the communication made by Banco Popular on 6 June 2017, declaring the non-viability of the entity; (iii) as to the Appellant's requests in case 13/18, the Deloitte Framework Contract and its related SC 8 with Appendices, with minor redactions that refer to the methodology for the SRB's assessment.
44. The Board also informed that the following documents requested by the Appellant do not exist: the definitive Valuation 2 Report (case 11/18), information or protocols used by SRB and FROB to guarantee absence of conflict of interest with regard to the law firm Uria Menéndez (case 16/18) and of a registered document where Uria Menéndez intervened in the resolution context of Banco Popular (case 16/18). 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).
45. As to the remaining documents for which access was denied (such as the contractor tender, the binding offer submitted by Banco Santander on 7 June 2017 and the Share Purchase Agreement signed by the FROB and the purchaser dated 7 June 2017; as well as the documents presented to the Board and the minutes of the meetings of the Board that have dealt with the situation of the Banco Popular, or the correspondence between the SRB and the ECB in relation to the situation of Banco Popular), 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 to 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).

46. The Appeal Panel refers, in this respect, to the specific reasons stated by the Board in paragraphs 3.1, 3.2, 3.3, 4.1, 4.2, 4.3, 4.4, 1(e) of the Revised Confirmatory Decision (in cases 9/18, 11/18, 13/18 and 16/18) and in paragraphs 3.1, 3.2, 3.3, 4 of the Second Confirmatory Decision (in case 2/19), 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.
47. 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 and of the Deloitte valuation report (requested by the Appellant in case 9/18); in the 2017 Liability Data Report submitted to the SRB by Banco Popular; the 2017 Critical Functions Report submitted to the SRB by Banco Popular; the documents received from Banco Popular about the private sale process; the communication of BBVA of 6 June 2017 concerning its withdrawal from the sale process; the communication made by Banco Popular on 6 June 2017, declaring the non-viability of the entity and the FOLTF assessment made by the ECB (requested by the Appellant in case 11/18).
 - (b) The non-disclosure of the SPA entered into with Santander (requested by the Appellant in case 16/18) and of the minutes of the Board (requested by the Appellant in case 2/19).
48. As to the contracts with Deloitte entered into for the purpose of the valuation in the context of the resolution of the Banco Popular (requested in case 11/18 and more specifically in case 13/18) the Appeal Panel, for the just determination of this appeal, carefully reviewed the redacted version of the Annex I to the Request for Services disclosed by the SRB against the confidential version of such Annex I, in light of the arguments raised by the SRB with the Revised Confirmatory Decision and by the Appellant. The Appeal Panel also carefully reviewed all contracts (Lot 1, Lot 2 and Lot 3 and related amendments) entered by the Board with Deloitte.
49. The Appeal Panel notes that, since the Appellant, with the initial and confirmatory applications, asked solely for the contract entered into with Deloitte for the Banco Popular valuation, contracts with Deloitte concerning analysis of financial statements and accounting advice (Lot 1) and legal advice (Lot 3) fall outside the scope of the Appellant's initial application. The appeal in this respect is therefore inadmissible. As to the amendments of 1 September 2017, the Board clarified that this amendment was already granted to the

Appellant, excluding personal data, as an attachment to the initial response. The Appeal Panel verified and can confirm this factual statement. As to the contract entered into by the SRB with Deloitte for the purposes of valuation 3, the SRB argues that the request to carry out the valuation 3 is included in Annex 1 to the request of services, which was made available to the Appellant with the redaction of only one paragraph, which, in the Board's view, does not hamper the proper understanding of the document. Regarding such redaction in Annex 1, the Board further clarifies that the non-disclosed parts constitute a description of the scenario which the SRB requested from the contractor in order to make the necessary assessment of the quality criterion 1 regarding the methodology and contains therefore data related to the resolution process, which could compromise the internal methodology of the SRB. The Appeal Panel reviewed carefully and thoroughly the redacted section of Annex 1 and finds that the Board stated the reasons why these limited redactions are considered covered by one of the exceptions to document disclosure, and the Appeal Panel could not identify in the redactions any contents which could be needed by the Appellant as a means to ensure the judicial protection of its position. The arguments made by the Appellant in the written submission, or at the hearing, were broad and all-encompassing, and touch upon points of transparency and public interest, which have been duly weighed and analysed in this and previous decisions by the Appeal Panel precisely to, on the one hand, ensure in an effective manner transparency and accountability, without, on the other hand, undermining the concurring public interest underpinning the exceptions to disclosure in Regulation 1049/2001. There have been no further arguments whatsoever on the part of the Appellant to justify the additional disclosures requested, and it is not the role of the Appeal Panel to substitute its judgment for that of the Board, nor to create precise and specific reasons where none have been provided by the Appellant, once the Appeal Panel has verified, in light of the arguments raised by the Appellant, that the redactions are not such as to prevent the Appellant from benefitting of full judicial protection of its position.

50. As to the questions and considerations raised by the Appellant in case 13/18, the Appeal Panel considers them inadmissible because the public's right of access to documents under Regulation 1049/2001 does not imply a duty on the part of the European institutions, bodies or agencies to reply to requests for information (and not for documents) from an individual. Furthermore, many of the Appellant's inquiries are directed to question the fulfilment by the valuer of its duties under the contract, or the timing in the Board's adoption of decisions concerning the contractual relationship with the independent valuer, or the latter's independence from the final buyer, all of them aspects that fall outside the scope of review by the Panel, and outside the scope of application of provisions on access to documents under Regulation 1049/2001 and the Appeal Panel has no competence in accordance with Articles 85(3) and 90(3) SRMR to hear appeals in this respect.
51. Finally, the plea in case 16/18 concerning the alleged violation by the Board of Article 20 SRMR for not having produced a definitive valuation, and for having breached, in the existing valuation, what envisaged in the SRMR, is outside the scope of Regulation 1049/2001 and

seems to imply a complaint for a failure to act by the Board. The Appeal Panel has no competence, under Articles 85 and 90 SRMR, to hear appeals in this respect. Moreover, as noted by the Board, the Appellant has not requested to access the definitive valuation with its initial request in the procedure leading to the appeal in case 16/18.

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: