28 November 2017

Case 43/2017

DECISION

[Appellant]

v

the Single Resolution Board

Christopher Pleister, Chair,
Marco Lamandini, Rapporteur,
Yves Herinckx, Vice-Chair,
Kaarlo Jännäri,
Luis Silva Morais

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DECISION

In Case 43/2017,

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (the "SRMR"),

[Appellant],

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), Yves Herinckx, (Vice-Chair), Kaarlo Jännäri and, Luis Silva Morais,

makes the following final decision.

1. This appeal relates to the SRB decision of 6 September 2017 (hereinafter "Appealed Decision") rejecting the Appellant's confirmatory application of 28 July 2017 (hereinafter "Confirmatory Application"), by which it requested the SRB to reconsider its position in relation to its initial requests of 29 June, 3 July and 11 July 2017 (hereinafter "Initial Requests") and the SRB's response thereto in a letter dated 27 July 2017 (hereinafter "Initial SRB Response"), 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 documents (hereinafter "Regulation 1049/2001"), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents (SRB/ES/2017/01, hereinafter "Public Access Decision").

2. By the Initial Request and the Confirmatory Application the Appellant requested access to the: (1) complete text of the Decision of the SRB of 7 June 2017 concerning the adoption of a resolution scheme in respect of *Banco Popular Español, S.A.* (SRB/EES/2017/08, hereinafter the "Resolution Decision"), (2) the related provisional valuation report (hereinafter the "Valuation Report"); (3) the failing or likely to fail (FOLTF) declaration; (4) any decisions adopted as early intervention measures; (5) the 2016 version of the resolution plan of Banco Popular Español as adopted by the SRB in its Executive Session on 5 December 2016; (6) the measures to correct Banco Popular's liquidity position as referred to in Recital (26) of the redacted version of the Resolution Decision.

3. The request for an appeal was originally submitted on 27 September 2017. The Appeal was served by the Appeal Panel Secretariat on the Board on 29 September 2017.

4. With procedural order No. 1 served on the parties on 6 October 2017 the Appeal Panel appointed as rapporteur in the present case Professor Marco Lamandini, specified that (i) the Board's response had to be served on the Appellant and filed with the Appeal Panel Secretariat within the deadline set out in Article 6(4) of the Rules of Procedure and that (ii) the Appellant was in turn authorized to serve on the Board and file with the Secretariat a reply to the Board response within two (2) weeks of the serving of the Board's response. With the same procedural order No. 1 the Appeal Panel, as a proportionate 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, ordered the Board to deposit with the Appeal Panel's Secretariat, within one week of service of procedural order No. 1 and at the SRB premises, one or more numbered hardcopies of the SRB Resolution Decision, of the related Valuation Report and of the Resolution Plan available to the Appeal Panel Members for inspection only.

5. The Board deposited with the Appeal Panel's Secretariat the requested documents in compliance with procedural order No. 1 and the Appeal Panel Members have had access to them as necessary.

6. On 13 October 2017 the Board requested the Appeal Panel the granting of an extension of two weeks for the filing of the SRB response to the Appeal. The extension was granted. The Board filed therefore its response on 26 October 2017. The Appellant, after having asked for and having been granted a short postponement of the original deadline set with Procedural Order 1, filed the authorized reply on 14 November 2017. It also deposited a memo prepared by *Compass Lexecon* (Miguel de la Mano and Karthnik Balisagar being the authors) offering a thorough economic perspective on the requested disclosure to the SRB. The Appellant asked the Appeal Panel to admit such memo as expert witness under Article 17 of the Rules of Procedure.

7. With procedural order No. 2 served on the parties on 24 October 2017 the Appeal Panel noted that, since several other appeals of the same nature had been filed since the date of notice of this appeal, in cases from 37/17 to 43/17 the Appeal Panel considered appropriate under Article 13 of the Appeal Panel Rules of Procedure to convene on its own initiative a joint and single hearing, in order to hear the parties and ask clarifications in relation to all relevant aspects of the case as necessary for the just determination of the appeal. The Appeal Panel specified that the hearing would have been held in English (language of the proceeding in all cases but for case 38/17), but Appellant in Case 38/17 was entitled to use the Spanish language (with simultaneous translation into English for the convenience of the Appeal Panel and of the other parties) and would have received simultaneous translation into Spanish of all the other parties' arguments in English. The Appeal Panel also clarified that, in order to avoid disproportionate costs and burdens for the Appellant, the hearing was not to be considered a

compulsory requirement for the parties of the proceedings. Failure to attend would not be treated as a waiver or a withdrawal of the appeal and would not dispense the Appeal Panel from taking the absent party's written submissions into consideration. Nonetheless, if a party failed to attend the hearing, the hearing would proceed in its absence.

8. The hearing was held in Brussels, at the SRB premises, on 16 November 2017. The Appellant appeared (the Appellant's expert Mr. de la Mano being also admitted to plead for the Appellant together with the Appellant lawyer). Both parties had the opportunity to orally plead the case and to make rebuttals; they also answered questions and requests for clarification from the Appeal Panel.

Main arguments of the parties

9. The main arguments of the parties are briefly summarised below (with the precision that the Appeal Panel duly considered all arguments raised by the parties, including those which, of necessity and for sake of a succinct structure of this decision, could not be summarized here below).

Appellant

10. The Appellant seeks access to the full content of the SRB Resolution Decision, to the Valuation Report, to the last version of the Resolution Plan adopted by the SRB in respect of Banco Popular Español as well as to the other, above mentioned, documents listed in the Initial Request and Confirmatory Application. Such access is sought "to the specific purpose of initiating judicial proceedings and exercise properly the right of defence against the Resolution Decision. In particular it was clarified at the hearing that the Appellant is seeking the annulment of the Resolution Decision and also brought an action for damages in relation to the Banco Popular resolution and these actions are pending before the General Court of the European Union.

11. The Appellant argues that Article 90 SRMR foresees two distinct types of regimes for access to documents: (i) a general regime set out by Regulation 1049/2001, applicable to the SRB as per Articles 90(1) and 90(2) SRMR and (ii) a specific regime set out in Article 90(4) SRMR, applicable only to persons who are the subject of the SRB decision. The Appellant refers in this respect to judgment 28 June 2012, *Commission v. Agrofert Holding*, C-477/10P, ECLI:EU:C:2012:394. The Appellant concludes that in the present case access to documents is sought under the regime provided for by Regulation 1049/2001 and Article 90(1) SRMR. The Appellant further argues that Article 90(4) SRMR could not be regarded in a way as informing the analysis of the treatment of requests submitted under the general regime of Regulation 1049/2001 to limit disclosure of documents which may remain undisclosed by the reasons stated in Article 90(4) SRMR.

12. In the merit, the Appellant, with its first plea, submits that the Appealed Decision is in breach of Article 296 TFEU because the SRB failed to explain why each document entails a specific

and actual danger to the interests protected by the exceptions under Regulation 1049/2001 invoked by the Board and the reasons stated by the SRB are drafted so broadly that it is impossible to infer how each of the requested documents would specifically undermine the SRB's policy for the resolution of credit institutions. In the Appellant's view, the Appealed Decision "is drafted so generically and in such broad terms that it could be applied to any other document and to any other situation or other bank different from Banco Popular" (reply, point 16, page 5).

13. The Appellant further submits, with its second plea, that the Appealed Decision applied stricter criteria than the ones contained in Regulation 1049/2001 and is therefore null and void for lack of a valid legal ground. In this regard, the Appellant considers in detail the general exception of Article 4(1)(a) and argues that this does not cover what is regulated under Article 4(1)(a) and 4(1)(c) of the Public Access Decision.

14. The Appellant, with its third plea, contests that it is unfounded to consider that granting full access to the documents requested would endanger the decision making process of the SRB and that the Board failed to show it according to the criteria set by settled case-law (the Appellant refers to judgment 7 July 2015, *Axa Versicherung AG v. European Commission*, T-677/13, ECLI:EU:T:2015:473).

15. With its fourth plea the Appellant submit that access to the requested document should not be refused on ground of confidentiality obligations because they apply only before the adoption of the Appealed Decision (and refers to this effect also to recital 116 SRMR and to the duty to read Article 88(5) SRMR in light of such recital).

16. Finally, with its fifth plea the Appellant argues that access to the Appealed Decision in full is necessary for the exercise of the right of access to justice as protected by Article 47 of the Charter.

Board

17. The Board argues that Article 90 SRMR foresees two distinct types of regimes for access to documents: (i) a general regime set out by Regulation 1049/2001, applicable to the SRB as per the first and second paragraph of Article 90 SRMR and (ii) a specific regime set out in Article 90(4) SRMR, applicable only to persons who are the subject of the SRB decision. This mirrors, in the Board's view, the provisions of the Charter of Fundamental Rights, which distinguishes between right to access to documents (for any citizen of the European Union) and right to access to the subject's own file. The Board argues therefore that applicants who are not entitled to obtain access to documents under the conditions of Article 90(4) SRMR may however rely on the general regime of regulation 1049/2001 and their request has to be treated in accordance with those provisions. The Board further notes, however, that documents disclosed on the basis of Regulation 1049/2001 become "public" following their disclosure in the sense that the SRB in the future will have to grant access to them to any other citizen of the Union requesting their disclosure, whereas documents which are disclosed under Article

90(4) SRMR remain covered by the applicable exceptions to their disclosure set out in Regulation 1049/2001 if the SRB receives requests for access by persons other than the subject of the decision.

18. On the merit, the Board responds to all pleas of the Appellant and, as regards the request to receive any decisions adopted as early intervention measures (request no. 4 of the Confirmatory Application) points out that "there are no such decisions adopted in respect of Banco Popular" and therefore access to these decisions could not be granted. The Board first notes that the SRB Response to the Initial Request provided the specific reasons, dealing with each of the documents separately. The Board further recalls all the exceptions to public access which, in the Board's view, apply to the requested documents. Further the Board argues that these documents are covered by a general presumption of non-accessibility, because they form part of the confidential documentation of an SRB resolution procedure file and are by nature equivalent in terms of sensitivity to those relating to State aid review or merger control proceedings. In particular, financial and commercial data of entities involved in a resolution action re of equivalent relevance to those required for the analysis by the European Commission of a State aid or a merger.

19. The Board notes in particular that these documents contain information the disclosure of which would undermine the protection of the public interest and that the SRB cannot consider the disclosure of confidential parts of the Resolution Decision, the Valuation Report and the Resolution Plan, and of the other requested documents covered by the exception of public interest, as there is, in the Board's view, a concrete risk that even limited information included therein may allow the inference of relevant elements of the Union's financial and economic policy as reflected in its resolution policy, which could jeopardise other market participants and in turn could impair the SRB's ability to act effectively in future cases.

20. The Board submits moreover that the confidential parts of these documents would also undermine the protection of the commercial interests of Banco Popular (which remained an operating credit institutions after resolution) and its purchaser.

21. Based upon the foregoing the Board finds that the exceptions which apply to the requested documents are: (i) Article 4(1)(a) first, second and third indent of the Public Access Decision (protection of the public interest) as to the Resolution Decision, the Valuation Report, FOLTF Declaration and the Resolution Plan; (ii) Article 4(1)(c) of the Public Access Decision (confidentiality of the information that is protected under Union law) as to the Resolution Decision, the Valuation Report, FOLFT Declaration and Resolution Plan; (iii) Article 4(2) of the Public Access Decision (protection of commercial interests) as to the Resolution Decision, the Valuation Report, the Resolution Plan and Measures to correct Banco Popular's liquidity position.

Findings of the Appeal Panel

22. The Appeal Panel preliminarily finds that, although the memo prepared by Compass Lexecon deposited by the Appellant with its reply can be accepted as one of the Appellant's documents in support of the appeal, this document cannot be considered or admitted as expert witness under Article 17 of the Rules of Procedure, because it is not "necessary for the just determination of the appeal", as expressly requested by Article 17.

23. The Appeal Panel further notes that the Appellant is the addressee of the Appealed Decision which denied the Appellant access to the requested documentation. As such the Appellant has standing to appeal the Appealed Decision according to Articles 90(3) and 85(3) SRMR. It should also be considered, in this respect, that under Article 2(1) Regulation 1049/2001 "*Any* citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in [the] Regulation [1049/2001]". The same principle is set out in Article 2(1) of the Public Access Decision.

24. Regulation 1049/2001 sets out, in Article 6(1), that the "applicant is not obliged to state reasons for the application", in this way suggesting that the applicant is not required to show its interest in the application. This is confirmed by settled case-law, according to which the right of access is a tool of democratic control of the European institutions, bodies and agencies and is available to every EU citizen irrespective of their interests in subsequent legal actions (see for instance judgment 13 July 2017, *Saint-Gobain Glass Deutschland GmbH v. European Commission*, C-60/15, ECLI:EU:C:2017:540, paragraphs 60 and 61 and judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, ECLI: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. [...] the applicant's right to bring an action against those decisions is not affected by its applications potentially being inadmissible before the ECB or by the withdrawal of an action by another applicant in another case before the General Court").

25. Although showing an interest in the revision of the Appealed Decision was not necessary, the Appellant submitted nonetheless that access to the documentation denied by the SRB was sought in order to be able to exercise its right of defence in respect of the Banco Popular resolution. In particular, the Appellant confirmed at the hearing held on 16 November 2017 that an action seeking annulment of the Resolution Decision and an action for damages were filed before the General Court and are currently pending. The Appellant, however, complained that both actions had to be initiated without knowing the full content of the Resolution Decision and noted that the documents to which access was denied would be used to state in detail the grounds of such actions. The Appeal Panel acknowledges that, in principle, the right to access to document may result to some extent also instrumental for the most effective exercise of the right of defence and notes incidentally that according to settled case-law applications for damages must indeed be sufficiently detailed and must state the evidence

from which the unlawful act or conduct can be identified, the reasons for which the applicant considers that there is a direct causal link between the act and the damage and the nature and the extent of the damage. Failure to meet these conditions leads to the inadmissibility of the action (see judgment 10 May 2006, *Galileo International Technology LLC and Others v. Commission of the European Communities*, T-279/03, ECLI:EU:T:2006:121). The Appeal Panel further notes that an action for annulment brought by shareholders or bondholders of a bank may or may not be admissible, according to settled case law, depending on the relevant factual circumstances (see to this effect judgment 26 March 2014, *Stefania Adorisio and Others v. European Commission*, T-321/13, ECLI:EU:T:2014:175, paragraphs 24-35 and order of 12 September 2017, *Fursin and Others v. European Central Bank*, T-247/16, ECLI:EU:T:2017:623, paragraphs 57 and 62-66).

26. The appeal against the Appealed Decision being admissible, it must be determined if the Appealed Decision denying access to the requested documents was justified, in full or in part, under Regulation 1049/2001 and/or Article 90(4) SRMR and/or under the Public Access Decision.

27. In the first place, the Appeal Panel finds that, in the present case, the Appellant is subject to the general regime for access to documents set out by Regulation 1049/2001 whereas the Appellant cannot rely in this appeal on the right to access the SRB's file on the basis of Article 90(4) SRMR. 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). The Appeal Panel must therefore determine if the Applicant is entitled to access the requested documents, in whole or in part, having regard solely to Regulation 1049/2001 and to the Public Access Decision. As to the Public Access Decision the Appeal Panel notes that (i) as laid down in Article 90(1) SRMR, Regulation 1049/2001 shall apply to documents held by the Board, (ii) the Board was required by Article 90(2) SRMR to "adopt practical measures for applying Regulation 1049/2001" and (iii) the Public Access Decision cannot therefore add new exceptions beyond those set out in Regulation 1049/2001 and must be interpreted and applied so as to ensure its full consistency with Regulation 1049/2001. For this reason the Appeal Panel, albeit having considered both, mostly refers hereunder to the relevant Articles of Regulation 1049/2001 and only where necessary to those of the Public Access Decision. The Appeal Panel further notes that, although the regime of Article 90(4) SRMR is not applicable in the present case, Regulation 1049/2001 and the Public Access Decision must be interpreted taking into account also the special limitations set out in Article 90(4) SRMR in such a manner that they do not make each other devoid of purpose (this means that Regulation 1049/2001 and the Public Access Decision cannot grant access to documents for which access is expressly excluded by Article 90(4) SRMR).

28. 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.

29. In principle, exceptions must be applied and interpreted narrowly (see e.g. judgment 17 October 2013, *Council of the European Union v. Access Info Europe*, C-280/11, ECLI: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. European Commission,* T-403/05, ECLI:EU:T:2008:316, at paragraph 49; judgment 21 July 2011, *Kingdom of Sweden v. European Commission,* C-506/08P, ECLI:EU:C:2011:496, at paragraphs 87-88; judgment 29 June 2010, *European Commission v. Technische Glaswerke Ilmenau GmbH,* C-139/07P, ECLI:EU:C:2010:376, paragraphs 60-61).

30. Moreover, settled case-law permits Union institutions, bodies and agencies to rely in relation to certain categories of administrative documents (in state aid, mergers, cartels, infringement and court proceedings) on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by the Regulation 1049/2001 (see to this effect judgment 28 June 2012, *European Commission v. Edition Odile Jacob SAS,* C-404/10P, ECLI:EU:C:2012:393; judgment 21 September 2010, *Kingdom of Sweden v. API and European Commission,* C-514/07P, ECLI:EU:C:2010:541; judgment 27 February 2014, European *Commission v. EnBW Energie Baden-Württemberg AG,* C-365/12P, ECLI:EU:C:2014:112; judgment 14 November 2013, *LPN and Republic of Finland v. European Commission,* C-514/11P and C-605/11P, ECLI:EU:C:2013:738; judgment 11 May 2017, *Kingdom of Sweden v. European Commissio*n, C-562/14 P ECLI: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.

31. 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 Republic of Finland v. European Commission* Joined Cases C-514/11 P 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".

32. 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 no 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).

33. When determining whether disclosure would undermine the public interest under Article 4(1)(a) of Regulation 1049/2001, EU institutions, bodies and agencies enjoy in principle wide discretion. Review is then limited, according to settled case law, to verifying whether procedural rules and the duty to state reasons have been complied with, whether the facts have

been accurately stated and whether there has been a "manifest error" of assessment or also a misuse of powers (see, among others, judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, ECLI:EU:T:2015:361, paragraph 53)

34. It is against this background that this appeal must be decided taking into account that, as regards the Banco Popular resolution:

a) the ECB published a non-confidential version of the ECB failing or likely to fail (FOLTF) assessment adopted by the ECB on 6 June 2017, where information "protected by professional secrecy and confidentiality rules inherent to banking supervision has been blanked out";

b) the Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Espanol S.A. was published on the Official Journal of the European Union 11 July 2017, L178/15;

c) the Resolution Decision of the SRB in its Executive Session of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Espanol (SRB/EES/2017/08) was published in a non-confidential version, with some parts blanked out (in particular in recitals 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 41, 43, 44, 45, 46 and in Articles 2.1., 3.2., 3.3., 3.4., 4.4.1., 4.4.2, 5.3, 6.3, 6.4, 6.6, 6.8, 6.10).

35. For the just determination of this appeal, the Appeal Panel carefully reviewed, under appropriate confidentiality, the confidential version of the Resolution Decision, the Valuation Report and the last Banco Popular Resolution Plan.

36. The Appeal Panel notes that the Board is a Union agency established by the SRMR according to Article 114 TFEU, vested with a degree of technical discretion in the performance of the tasks conferred upon it by the SRMR under the control of the Commission and the Council. A resolution scheme is adopted by the Board when the conditions set out in Article 18(1) SRMR are met. To this effect the Board is called to determine which is the most appropriate resolution tool to be applied for the achievement of the resolution objectives referred to in Article 14 SRMR. The resolution scheme is endorsed by the Commission and by the Council after its adoption. According to settled case-law, the conferral of these powers to a Union agency like the SRB is justified to the extent that the exercise of such powers can be subject to judicial review (see, to this effect, judgment 22 January 2014, *United Kingdom of Great Britain and Northern Ireland v. Parliament and Council of the European Union*, C-270/12, ECLI:EU:C:2014:18, at paragraphs 79-81). Therefore the actual viability of judicial review in respect of decisions adopted by the SRB is key to ensure full legitimacy and full accountability of the SRM.

37. This impinges also on fundamental rights. First, both the right to access to documents and the right to an effective judicial remedy are fundamental rights duly recognized by Article 42 and

47 of the Charter, respectively. Second, as recognised by recital (61) SRMR, the limitation on the rights of shareholders and creditors should comply with Article 52 of the Charter. Finally, as recognised in recital (62) SRMR, interference with property rights (a fundamental right according to Article 17 of the Charter) "should not be disproportionate" (meaning that affected shareholders and creditors should not incur greater losses than those which they would have incurred under normal insolvency proceedings).

38. The review of any resolution decision should allow affected shareholders and creditors to ascertain whether these fundamental rights and principles have been respected and the SRB powers have been exercised in compliance with, and within the limits set out by the SRMR as determined by its legal basis. This could however prove excessively challenging, or virtually impossible without knowing the relevant parts of the resolution decision and at least some parts of the valuation report, which represents the cornerstone of the economic assessment on which the Resolution Decision is based, as shown here below.

Valuation Report

39. The Appeal Panel notes, in the first place, that, although at the hearing the Appellant confirmed that it was seeking also disclosure of the identity of the author of the valuation report and the Board objected, the identity of the valuer was disclosed by the Board in the public version of the Resolution Decision in recital 41. The point is thus moot and the appeal has no object in this respect. The Appeal Panel further notes that, according to Article 20(15) SRMR "the valuation [is] an integral part of the decision on the application of the resolution tool or on the exercise of a resolution power or the decision on the exercise of the write-down or conversion power of capital instruments". The fact that the Valuation Report and the Resolution Decision represent two distinct components of a unitary act is also confirmed by the second sentence of the same Article 20(15) SRMR, according to which the valuation itself "shall not be subject to a separate right of appeal but may be subject to an appeal together with the decision of the Board".

40. Consequently, the Valuation Report displays an important function within the resolution procedure. According to Article 20 SRMR the Valuation Report is necessary "Before deciding on resolution action", because the valuation has the objective, according to Article 20(4) SRMR, "to assess the value of the assets and liabilities of an entity referred to in Article 2 that meets the conditions for resolution of Article 16 and 18". The purposes of the valuation are listed in Article 20(5) SRMR and those relevant in the case at hand are: (i) "to inform the determination of whether the conditions for resolution or for the write down are met" (Article 20(5)(a) SRMR); (ii) "to inform the decision on the appropriate resolution action to be taken in respect of the entity" (Article 20(5)(b) SRMR); (iii) "to inform the decision on the extent of the cancellation or dilution of instruments of ownership (Article 20(5)(c) SRMR); (iv) when the sale of business tool is applied, to inform the decision on the assets, rights and liabilities or instruments of ownership to be transferred and to inform the Board's understanding of what constitutes commercial terms for the purposes of Article 24(29(b) (Article 20(5)(f) SRMR);

(v) "in all cases, to ensure that any losses on the assets of an entity referred to in Article 2 are fully recognised at the moment the resolution tools are applied or the power to write down or convert relevant capital instruments is exercised" (Article 20(5)(g) SRMR).

41. The Appeal Panel therefore finds that the SRB decision to deny access *in full* to the Valuation Report under Regulation 1049/2001 is too far-reaching if properly measured against the fundamental rights and the principles of openness, transparency, accountability and democratic control informing European institutions, bodies and agencies. It is the Appeal Panel's view that, (i) even if the Board were right in contemplating the possibility of relying in fact on the application of the general presumption (a general presumption on which the General Court has recently showed a restrictive approach when considering the case of another European agency, where the relevant regulation expressly provided that Regulation 1049/2001 applied to access to documents and set out certain limited presumptions: judgement 13 January 2017 *Deza a. s. v. ECHA*, T-189/14R, ECLI:EU:T:2017:4, paragraphs 39 and 50) and (ii) even accepting that the Board has indeed appreciable discretion when determining whether disclosure would undermine the public interest under Article 4(1)(a) of Regulation 1049/2001, the Board's statement that *any* disclosure of the Valuation Report, and therefore also the disclosure of a redacted non-confidential version of the Valuation Report would undermine the purpose of the protection of an interest protected by Regulation 1049/2001 does not satisfy the Board's duty to state reasons and, for the reasons set out below, appears vitiated by a "manifest error" (to the effect of settled case law) *to the extent that the Board makes it applicable to the Valuation Report in its entirety*.

42. To come to this conclusion, the Appeal Panel carefully reviewed the Valuation Report and finds that several data, information, valuations and predictions which are shown in the Valuation Report should not raise actual concerns of financial stability nor relate to confidential information of commercial interest for the Banco Popular or for the purchaser and that their duly redacted disclosure would not undermine the protection of the public interest under Article 4(1)(a) or a commercial interest under Article 4(2) of Regulation 1049/2001. Several of these data, information, valuations and predictions as well as of the conclusions of the Valuation Report (where it shows, in summary, the valuer's estimated range of economic value of the entity, including the 'best estimate' in that range) are, in the Appeal Panel's view, of fundamental importance, albeit disclosed in a duly redacted form, to show why the Resolution Decision was adopted and why that particular resolution tool was preferable. In the Appeal Panel's view there are also appreciable data, information, valuations and predictions which do may pose a threat to such protected interests and they should not be disclosed. A redacted version of the Valuation Report would therefore allow to the SRB not to disclose those specific data and information which could in fact have impact on other market participants and/or resolution actions in the future.

43. The Appeal Panel finds therefore that, to the effect of a *partial* disclosure of the Valuation Report, the SRB is 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. In the specific assessment of the relevant parts which should not be disclosed, the Board maintains a substantial degree of discretion (see to this effect judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, ECLI:EU:T:2015:361, paragraph 55) but must 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 is 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, albeit merely prospective, scenario and must be substantiated in such a way, so to enable interested parties to apprehend and assess and, if the case may be, to challenge the correctness of those reasons and courts to conduct their review (see on this point again judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55 beside other relevant case-law). Moreover, the protection of commercial interests may justify the redaction of specific items of information or of parts of a document, but hardly a full denial of access. At the same time, the Board should duly consider that a partial disclosure would allow to the affected shareholders and creditors and to the public at large to better understand – to the extent possible without putting at risk financial stability and the bank's and purchaser's commercial interests according to the prudent and specific assessment to be made by the Board following the criteria set out above – the economic foundations and the reasons underpinning the resolution strategy adopted with the Resolution Decision, corresponding in this way to the principles of Article 15 TFEU and Article 42, but also Articles 17, 47 and 52 of the Charter of Fundamental Rights.

44. It is not the Appeal Panel's role to precisely identify the non-confidential content of the Valuation Report to be disclosed (and for this reason the Appeal Panel, despite having carefully examined any document in light of the relevant exceptions raised by the Board, finds that it is not appropriate to comment through a section-by-section analysis, which to some extent could also undermine the degree of, albeit more limited, confidentiality considered justified by this decision). According to Article 85(8) SRMR the Appeal Panel "may confirm the decision taken by the Board or remit the case to the latter. The Board shall be bound by the decision of the Appeal Panel and it shall adopt an amended decision regarding the case concerned".

45. Accordingly, the Appeal Panel determines that the Appellant has a right to access, under Regulation 1049/2001 and under the Public Access Decision, a non-confidential redacted version of the Valuation Report and remits the case to the Board for the preparation by the Board itself and for the disclosure to the Appellant of such non-confidential redacted version of the Valuation Report, taking into account the principles set out in this decision.

Resolution Decision

46. As to the Resolution Decision, the Appeal Panel welcomes the disclosure of a non-confidential version. However, for the same reasons stated above in respect to the Valuation Report, the Appeal Panel, having carefully reviewed the confidential, non-redacted version of the Resolution Decision, believes that:

(i) some parts of the Resolution Decision have been redacted beyond what would have been necessary to prevent any risk of adverse market reactions and not to undermine the public interest under Article 4(1)(a) of Regulation 1049/2001 or any other protected interest,

(ii) the Board's statements to justify the exception to disclosure are so overly vague and general that they cannot meet the Board's duty to state reasons because they would not enable the applicant to challenge their correctness and the courts to conduct their review (judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, ECLI:EU:T:2015:361, paragraph 55), and

(iii) in principle, the Resolution Decision should be disclosed to a larger extent than the Valuation Report due to the existing differences in their nature.

For these reasons the Appeal Panel finds that the Board failed to demonstrate that Article 4 justifies non-disclosure of at least the following redacted sections of the Resolution Decision: (a) on the preferred resolution tool as identified in the 2016 resolution plan: recitals 20, 22, 43, 44, and 45 and in Article 5.3.; (b) on the events that led to the Resolution Decision: recitals 19, 24, 25, 26, 27, 28 and 29 and Article 2.1.; (c) on the non availability of alternative measures: Articles 3.2., 3.3. and 3.4. (d) on the valuation: Article 6.4 and 6.10.

Resolution Plan

47. As to the last version of the Resolution Plan, the Appeal Panel first notes that the SRMR does not provide for the publication of resolution plans and this indicates, in the Board's view, that their full publication could undermine the interests protected by the SRMR, by Regulation 1049/2001 and by the Public Access Decision. In the Appeal Panel's view this assessment is consistent with the Board discretion in this domain and cannot be considered "manifestly erroneous" (to the effect of settled case-law), thus calling for a less open stance in respect to resolution plans than to the Resolution Decision and the Valuation Report (the Valuation Report, in turn, also calling for a relatively less open stance than the one to be applied to the Resolution Decision). At the same time, however, the Appeal Panel considers that, in the present case, access is sought to the Resolution Plan of a credit institution which has been meanwhile resolved and such access, if granted, would take place several months after the adoption of the Resolution Decision. Based upon the foregoing and for the same reasons stated above, the Appeal Panel, having carefully reviewed the confidential version of the Resolution

Plan of December 2016, finds that at least some parts of the Resolution Plan could be disclosed in a redacted, non confidential version without undermining the protection of the public interest under Article 4(1)(a) or a commercial interest under Article 4(2) of Regulation 1049/2001 and the corresponding provisions of the Public Access Decision. In the preparation of such redacted, non confidential version, the Board enjoys significant discretion, provided that it complies, *mutatis mutandis*, with the principles stated above in this decision.

48. Accordingly, the Appeal Panel determines that the Appellant has a right to access, under Regulation 1049/2001 and the Public Access Decision, a non-confidential redacted version of the 2016 Resolution Plan and remits the case to the Board for the preparation by the Board itself and for the disclosure to the Appellant of such non-confidential redacted version of the Resolution Plan, taking into account the principles set out in this decision.

Further documents

49. As to the further documents to which access was denied by the SRB with the Appealed Decision, the Appeal Panel finds that access to the documents received or exchanged with the ECB (like the FOLTF Declaration and the Measures to correct Banco Popular liquidity) or the European Commission for internal use as part of the file and deliberations could be legitimately refused by the Board according to Article 4(3) of Regulation 1049/2001 and 4(3) of the Public Access Decision and no overriding public interest in disclosure was shown by the Appellant.

50. Although Regulation 1049/2001 applies, according to Article 2(3), to all documents held by an institution, "that is to say, documents drawn up or received by it and in its possession", in the Appeal Panel's view, it must be noted that special rules (in particular Decision ECB/2004/3 as amended by ECB decisions 21 January 2015 and 27 March 2015; see also, in some respects, recital (59) and Article 27 of Regulation No. 1024/2013 and Article 53 et seq. Directive 2013/36/EU) apply to access to documents of the ECB and should not be circumvented via a request to the SRB to access such ECB documents according to SRB applicable provisions on public access. The Appellant should thus request access to these documents directly to the ECB under the applicable ECB public access rules. Moreover, the requested documents appear to be documents received by the SRB for internal use as part of deliberations and preliminary consultations within the context of an inter-institutional cooperation framework.to the effect of Article 4(3) of Regulation 1049/2001 and Article 4(3) of the Public Access Decision and for which no overriding public interest in disclosure was shown by the Appellant.

Decision

On those grounds, the Appeal Panel hereby:

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

Kaarlo Jännäri	Luis Silva Morais	Yves Herinckx Vice-Chair

Marco Lamandini Rapporteur	Christopher Pleister Chair