22 May 2024

Case 1/2024

FINAL DECISION

[.],
Appellant,

v

the Single Resolution Board

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

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FINAL DECISION

In Case 1/2024,

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[1] (the "**SRMR**"),

[.], a legal entity with headquarters in [.], represented by [.], [.], with offices 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), Luis Silva Morais (Vice-Chair and Co-Rapporteur), Marco Lamandini (Co-Rapporteur), Helen Louri-Dendrinou and Kaarlo Jännäri

makes the following final decision:

Background of facts

1. This appeal relates to the decision of 21 December 2023 (hereinafter the "**Contested Decision**") replacing the SRB decision of 28 July 2022 (hereinafter the "**Original Decision**") following the Appeal Panel decision of 8 March 2023 in case 4/2022 that had remitted the case and the Original Decision to the Board. The Original Decision had rejected the Appellant's confirmatory application, by which the SRB was requested by the Appellant to reconsider its position in relation to its initial request and the SRB's response thereto, concerning the access to documents in accordance with Article 90(1) SRMR and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereinafter "**Regulation 1049/2001**"), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents[3] (hereinafter "**Public Access Decision**").

2. By the initial request (originally filed on 10 March 2022 with the [.] and subsequently referred to the SRB and registered at the SRB on 22 April 2022) the Appellant requested access to documents concerning [.] in respect of [.], and in particular the: (i) SRB Decision [.] concerning the exercise of powers under the national law transposing Article 33a of

[1] OJ L 225, 30.7.2014, p.1.
[2] OJ L 145, 31.5.2001, p. 43
[3] SRB/ES/2017/01.

Directive 2014/59 /EU in respect [.] which was [.] at the time by the Appellant ("**[.]**" or "**SRB Decision [.]**"); and (ii) SRB Decision of [.] on the adoption of a resolution scheme in respect of [.] ("**SRB Decision [.]**" or the "**SRB Resolution Decision**" or "**SRB Decision [.]**").

3. In its response of 9 June 2022 (hereinafter, the "**Initial Response**"), the SRB granted the Appellant partial access to the SRB Decision [.] as well as to the SRB Decision [.], including access to the [.] attached thereto. In this respect, the SRB provided the Appellant with the non-confidential versions of these decisions and informed the Appellant that access to the entire content of the decisions could not be granted. In particular, the SRB considered that the exceptions to disclosure under Article 4(1)(a) fourth indent (*protection of financial, economic or monetary policy of the EU or a Member State*) and Article 4(2), first indent (*protection of commercial interests*) of Regulation 1049/2001 were applicable. The SRB also stated that it had not identified any overriding public interest justifying the full disclosure of the information falling under the exception provided by Article 4(2) of Regulation 1049/2001. Moreover, the SRB referred to its professional secrecy obligations under Article 88 SRMR.

4. On 30 June 2022, the Appellant submitted a confirmatory application (hereinafter the "**Confirmatory Application**") requesting the SRB to reconsider its position and specifically to provide the Appellant with the "non redacted versions" of (1) SRB Decision [.] "*specially with respect to information pertaining to determining* [.] *as failing or likely to fail; justification of lack of possibility to utilize alternative methods; and justification pertaining to public interest [.]*" and (2) SRB Decision [.] "*specially with respect to information pertaining to valuations of [.]*".

5. With the Original Decision of 28 July 2022, the SRB informed the Appellant that it decided to confirm the Initial Response in its entirety based on the application of the exceptions provided for in Articles 4(1)(a) fourth indent and 4(2), first indent of Regulation 1049/2001. In addition, the SRB provided additional reasons to justify the refusal to grant access to the confidential versions of both SRB Decision [.] and SRB Decision [.] and its annexes in response to the arguments raised by the Appellant. In particular, the SRB recalled its obligation under Article 88(5) SRMR to ensure the protection of confidential information and explained that the non-confidential version of the SRB Decision [.] and SRB Decision [.] and its annexes clearly disclose the reasoning followed by the SRB and the methodology used by it.

6. The Appellant appealed before the Appeal Panel the Original Decision and the Appeal Panel, with decision of 8 March 2023, found in favour of the Appellant on the second ground of appeal and remitted the case to the Board, noting that "the statement of reasons of the Contested Decision is insufficient and that the Board committed a manifest error in assessment in relying on the exception of Article 4(1)(a) fourth indent of Regulation 1049/2001 to justify several redactions in the public version of the SRB Decision [.] and of the SRB Decision [.] and of the [.] and [.] attached thereto". The Appeal Panel further noted that the Board,

upon remittal, "shall adopt an amended decision in line with the principles stated [in the Appeal Panel's decision of 8 March 2023]".

7. Following the Appeal Panel's decision of 8 March 2023, on 21 December 2023 the Contested Decision was eventually adopted by the Board precisely with a view to amend the Original Decision in order to comply with the Appeal Panel's decision of 8 March 2023.

8. The Appellant is however dissatisfied with the Contested Decision, in particular about the timing of its adoption and about several aspects of its content and has filed a notice of appeal against the Contested Decision on 1 February 2024.

9. Upon receipt of the notice of appeal, the Chair appointed as co-rapporteurs the Vice-Chair Professor Luis Morais da Silva and the member Professor Marco Lamandini; the notice of appeal was then notified by the Secretariat to the Board on 7 February 2024. The Secretariat informed the Board that, in accordance with Article 6(5) of the Rules of Procedure (hereinafter "**RoP**") of the Appeal Panel, the Board could file a response within two weeks of the service of the notice of appeal, i.e. by 21 February 2024.

10. On 8 February 2024, the Board submitted a reasoned request for an extension of the deadline for the filing of its response.

11. On 12 February 2024, the Appeal Panel decided to grant the extension requested.

12. On 6 March 2024, the Board submitted its response to the appeal.

13. On 21 March 2024, the Appellant submitted its rejoinder to the Board's response.

14. On 22 March 2024, the Secretariat of the Appeal Panel notified the Appellant's rejoinder to the Board and informed the same that, also with reference to RoP Article 8(1), considering the period of the public holidays in the European institutions and bodies of 28-29 March 2024 and 1 April 2024, the Board could file a reply to the Appellant's rejoinder by 12 April 2024.

15. On 12 April 2024, the Board submitted its reply.

16. On 15 April 2024, the Appeal Panel invited both parties to inform the Appeal Panel by 19 April 2024 if they wished to discuss orally the case at a hearing to be held in Brussels on 29 April 2024 or if they waived their right to the hearing. The Appellant confirmed its intention to discuss orally the case at a hearing.

17. On 23 April 2024, the Secretariat of the Appeal Panel confirmed to the parties that the hearing would be held in Brussels on 29 April 2024.

18. On 29 April 2024, the hearing was held in Brussels. Both parties appeared and presented oral arguments. Both parties reiterated their respective positions, adding further considerations of fact and law. The parties also answered questions from the Appeal Panel for the clarification of facts relevant for the just determination of the appeal.

19. On 7 May 2024, the Appeal Panel notified the parties that the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and 20 of the Rules of Procedure.

Main arguments of the parties

20. The main arguments of the parties are briefly summarised below. However, to avoid unnecessary duplications, the description in this section of the Appeal Panel's decision is limited to the illustration of the essential elements of the pleas of the Appellant and of the responses of the Board to such pleas, because the more detailed arguments of both parties are then thoroughly described and considered in the findings of the Appeal Panel's decision with respect to each of the several grounds of appeal raised by the Appellant. It is specified that the Appeal Panel considered all arguments raised by the parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

Appellant

21. In the notice of appeal, the Appellant summarizes its claims, arguing that the Contested Decision is illegal mainly because of the following reasons: (a) The timing of adoption of the Contested Decision, 9.5 months after the Appeal Panel's decision to remit the case, involves a further unlawful withholding of documents over a long period of time; (b) the Contested Decision constitutes a mere decision to amend as opposed to the amended decision which is prescribed by Art. 85(8) SRMR and Art. 21(4) RoP; (c) the Contested Decision withholds the great majority of relevant documents without specifying them and providing a ground for a denial of access; (d) None of the three grounds of a denial of access specified in the Contested Decision are valid and appropriately substantiated; (e) the Appeal Panel decision of 8 March 2023 is not complied with by the Contested Decision; (f) in the adoption of the Contested Decision procedural rights of the Appellant were breached.

22. More specifically, as also summarized by the Board in its response, the Appellant raises in fact thirteen separate grounds of appeal, as follows (the following is a synthetic view of the arguments, which are developed in further detail in each separate ground).

23. The alleged failure to adopt the Contested Decision within a reasonable time (paragraphs 11 to 13 of the notice of appeal) (first ground of appeal).

24. The alleged failure to adopt an amended confirmatory decision (paragraphs 14 and 15 of the notice of appeal) (second ground of appeal).

25. The alleged failure to disclose documents other than the SRB Decision [.] and SRB Decision [.] (paragraphs 16 to 19 of the notice of appeal) (third ground of appeal).

26. The alleged failure to sufficiently reason the Contested Decision (paragraphs 21 to 24 of the notice of appeal) (fourth ground of appeal).

27. The alleged erroneous reliance on the exception set out in Article 4(1)(a), fourth indent of Regulation 1049/2001 (paragraphs 25 to 34 of the notice of appeal) (fifth ground of appeal).

28. The alleged erroneous reliance on the exception set out in Article 4(2), first indent of Regulation 1049/2001 (paragraphs 35 to 52 of the notice of appeal) (sixth ground of appeal).

29. The alleged erroneous reliance on the exception set out in Article 4(2), third indent of Regulation 1049/2001 (paragraphs 53 to 62 of the notice of appeal) (seventh ground of appeal).

30. The alleged reliance of grounds for refusal outside Regulation 1049/2001 (paragraphs 63 to 69 of the notice of appeal) (eighth ground of appeal).

31. The alleged confusion between the exceptions set out in Regulation 1049/2001 (paragraphs 70 to 78 of the notice of appeal) (ninth ground of appeal).

32. The alleged use of consultations with third parties as a ground for refusal (paragraph 79 of the notice of appeal) (tenth ground of appeal).

33. The alleged failure to substantiate its refusal (paragraphs 80 to 94 of the notice of appeal) (eleventh ground of appeal).

34. The alleged breach of the procedural rights of the Appellant (paragraphs 95 to 97 of the notice of appeal) (twelfth ground of appeal).

35. The alleged failure to apply rules other than Regulation 1049/2001 (paragraph 98 of the notice of appeal) (thirteenth ground of appeal).

36. With the rejoinder the Appellant replied to the arguments raised by the Board with its response and, maintaining all grounds previously raised, requested the Appeal Panel to reject all the arguments made by the Board. At the hearing the Appellant further developed its arguments on the grounds raised in the appeal and responded to the questions of the Appeal Panel.

Board

37. The Board does not contest the admissibility of the appeal, and preliminarily notes that, in the case at hand, the Appeal Panel must review the Contested Decision in its entirety. The Board notes that, in the present circumstances, the Appellant has raised against the Contested Decision, with the sole exception of the twelfth ground of appeal, grounds of appeal which are different from those that the Appellant had raised against the Original Decision in case 4/2022 or are similar to those originally raised in case 4/2022 yet are referred to the Contested Decision and not the Original Decision. The Board further notes that the decision of the Appeal Panel in the present appeal could be reviewed by the General Court and the General Court would be able to exercise a full review of the merits of all grounds of appeal presented by the Appellant before the Appeal Panel only to the extent that the Appeal Panel would review the Contested Decision in its entirety.

38. As to the grounds of appeal raised by the Appellant, the Board argues that they are unfounded.

39. As to the first ground of appeal, the Board argues that the applicable legal framework does not set any precise time-period within which the SRB has to adopt an amended confirmatory decision upon remittal of the case to the Board. According to Article 21(4) of the RoP, the SRB must adopt an amended decision "as soon as reasonably possible in light of the complexity of the case and the amendments to be made, as well as in compliance with good administrative practices" and this rule is in line with settled case-law according to which an institution has a reasonable time to comply with a judgment of the Court of Justice (judgment of 11 December 2017, case T-125/16, Firma Léon Van Parys/Commission, EU:T:2017:884, paragraph 51 and the case-law cited). In the Board's view, the Appellant has not demonstrated that the SRB exceeded what is reasonable, considering the sensitive nature of the relevant documents as well as the consultation of the relevant stakeholders.

40. As to the second ground of appeal, the Board argues that the position of the Appellant is contradictory and does not explain why the Contested Decision would be "a mere decision to amend the appealed decision". In the Board's view this is not the case. The SRB amended the Confirmatory Decision adopting an amended decision, notably by adding a new section 4 in which it assessed in detail the content of the relevant documents, in line with the guidance provided by the Appeal Panel in its decision rendered in case 4/2022.

41. As to the third ground of appeal, the Board argues that such ground relies on the erroneous premise that the Appellant requested access to documents other than SRB Decision [.] and SRB Decision [.], without considering that the Appellant had agreed with the scope of its request as defined by the SRB in the Initial Response. In section D of the Confirmatory Application, the Appellant requested the SRB "to reconsider [its] position and provide [.] with the following documents in their non-redacted version: (i) SRB Decision no. [.] […] and (ii) Decision of the Single Resolution Board of [.] on the adoption of a resolution scheme in respect of [.] – SRB Decision ([.])". By doing so, the Appellant narrowed the scope of its request only to such documents.

42. As to the fourth ground of appeal, the Board argues that the purpose of the Contested Decision was precisely to amend the Confirmatory Decision to correct the deficiencies identified by the Appeal Panel in its decision in case 4/2022, in accordance with Article 85(8) SRMR. To this effect, the Board has strengthened the reasoning of the Original Decision to further explain why parts of the relevant documents remain covered by some of the exceptions set out in Article 4 of Regulation 1049/2001.

43. As to the fifth ground of appeal, the Board argues that all five limbs of this ground raised by the Appellant are unfounded. As regards the first limb, the Board clearly indicated that the disclosure of information could undermine the "public interest as regards the financial and economic policy of the Union". As regards the second limb, the SRB plays a key role in the protection of financial stability of the EU, which is one of the objectives of the financial and economic policy of the EU. As regards the third limb, the SRB has complied with its duty to state reasons. As regards the fourth limb, an "*absolute*" exception to disclosure can apply to

either part of or an entire document and is "*absolute*" because it cannot be overridden by another public interest consideration. As regards the fifth limb, the SRB notes that its reference to paragraphs 37 and 38 of the judgment of the General Court in case T-376/13, Versorgungswerk, ECLI:EU:T:2015:361 is right in light of paragraph 73 of the same judgment.

44. As to the sixth ground of appeal, the Board argues that all five limbs of the ground are unfounded. As regards the first limb, the fact that the SRB disclosed additional parts of the relevant documents shows that the SRB does not oppose to transparency. As regards the second limb, the Board insists that it complied with its duty to state reasons and explained in detail why the disclosure of "*Information concerning [.] deteriorating position and related measures*" and "*Valuation risk factors*" could undermine the protection of the commercial interests of [.]. As regards the third limb, as far as the SRB understands, the allegation seems to concern the merits of SRB Decision [.], which is outside the scope of the appeal. As regards the fourth limb, the Board reiterates that it complied with its duty to state reasons. As regards the fifth limb, the Board argues that it did assess the issue of the overriding public interest in the Contested Decision.

45. As to the seventh ground of appeal, the Board contends that all three limbs of the ground are unfounded. In the first limb, the Board argues that, when the Appeal Panel finds that a confirmatory decision is not sufficiently reasoned, the SRB has to amend the reasoning in order to strengthen it in order to comply with its duty to state reasons. In so doing, the Board is also entitled to introduce amendments in a confirmatory decision, other than those resulting from the decision of the Appeal Panel. As regards the second limb, the Board argues that the valuation 3 remains an "*investigation*" within the meaning of Article 4(2), third indent of Regulation 1049/2001 despite the fact that the valuation 3 is not performed by the SRB itself, yet by an external valuer and this is so also when there is no active fact-gathering by the valuer. As to the need to protect the identity and the role of the valuer, the SRB did not commit any manifest error of assessment. As regards the third limb, the European courts have held that at the confirmatory stage, the institution can change the exceptions relied upon at the initial stage, yet they have not found that the institution must give the applicant the opportunity to provide its views on the new exceptions. Consequently, the SRB did not have to run a right to be heard process prior to adopting the Contested Decision.

46. As the eighth ground of appeal, the Board denies that it relied on Article 88 SRMR and Article 41 of the Charter to refuse to disclose the entire content of the requested documents.

47. As to the ninth ground of appeal, the Board argues that the alleged intent of the SRB not to rely on the exception set out in Article 4(3) of Regulation 1049/2001 is based on pure speculation of the Appellant. It is therefore manifestly unfounded. As regards the alleged confusion between Article 4(1)(a), fourth indent and Article 4(3) of Regulation 1049/2001, the Appellant refers to a statement made at the second paragraph of page 10 of the Contested Decision where the SRB essentially stated that the disclosure would unduly generate the expectation that the SRB will act the same way in future resolution cases. The Board argues

that this explanation is clearly related to the protection of financial and economic policy of the EU.

48. As to the tenth ground of appeal, the Board argues that as the requested documents were drawn up or contain information deriving from or related to third parties, the SRB consulted them with a view of assessing whether the exceptions set out in Article 4(1) or (2) of Regulation 1049/2001 applied, in line with Article 4(4) thereof. However, contrary to the Appellant's claim, the Board argues that those consultations do not constitute grounds for refusal to disclose the full content of the requested documents. The Board further contends that, as explained in sections 3 and 4 of the Contested Decision, the SRB only relied on the exceptions set out in Article 4(1)(a), fourth indent, Article 4(2), first and third indents and Article 4(3) of Regulation 1049/2001 in order to refuse to disclose the entire content of the requested documents.

49. As to the eleventh ground of appeal, the Board argues that both its two limbs are unfounded. As regards the first limb, the Board argues that it enjoys a margin of discretion when it applies the exceptions set out in Regulation 1049/2001. Accordingly, the review of the Appeal Panel is limited to verifying, among others, whether the SRB committed a manifest error of assessment. In the Board's view, in the first limb, the Appellant merely expresses its wish that the SRB should have disclosed more parts of the requested documents. However, it does not in any manner demonstrate that the SRB committed a manifest error of assessment. As regards the second limb, the Board argues that it sufficiently explained why certain parts of the requested documents are covered by the exceptions set out in Article 4 of Regulation 1049/2001 and contends that further to the decision of the Appeal Panel, the SRB re-assessed whether "*liquidity information*" would be covered by one or more of the exceptions set out in Article 4 of Regulation 1049/2001, concluding that the disclosure of "*liquidity information*" would not only undermine the protection of financial and economic policy of the EU (as stated in the Original Decision), but also that it would also undermine the protection of [.] commercial interests.

50. As to the twelfth ground of appeal, the Board argues that the Appeal Panel does not have jurisdiction to assess an alleged breach of the right for access to the file and that the right to be heard and the duty to state reasons have not been violated.

51. As to the thirteenth ground of appeal, the Board argues that it is particularly vague. Apart from Article 41 of the Charter, the Appellant does not identify any "*rules*" that would have been breached by the SRB. Moreover, the Appellant fails to explain how the SRB would have breached them and does not put forward any evidence in support of its allegations.

52. With its reply the Board reiterated and further clarified such arguments and replied to the arguments raised by the Appellant with its rejoinder to its response and insisted that it had duly complied with the Appeal Panel's decision in case 4/2022. At the hearing the Board further developed its arguments in response to the grounds of appeal and responded to the questions of the Appeal Panel.

Findings of the Appeal Panel

53. The Appeal Panel has carefully examined the pleas raised by the Appellant and the arguments of the Board in response and has duly taken into account all the parties' contentions, whether expressly referred to herein or not, in the present proceedings, including their answers to the questions of the Appeal Panel at the hearing. The Appeal Panel acknowledges and duly appreciates the technical contributions of the parties' legal counsels to enlighten in detail all relevant aspects of this appeal.

Admissibility of the appeal.

54. Both parties have requested the Appeal Panel to subject the Contested Decision to a comprehensive review. The Appellant seeks "the remittal to the SRB without qualification". The Appellant argues that "a remittal for the limited purpose of rectifying certain defects is not sufficient and would amount to a partial rejection of the present appeal".

55. The Board submits, in turn, that the Appeal Panel should review the Contested Decision in its entirety and notes that the Appellant's grounds of appeal raised in this case are mostly different from those raised in case 4/2022 against the Original Decision and where the Appellant raises grounds which are similar to those raised in case 4/2022, it does so with respect to the amended parts of the Contested Decision. In light of the principle of effective judicial protection under Article 47 of the Charter, the Board considers that the Appeal Panel's decision should address all grounds, so as to allow to the General Court, if an application for annulment is made against the Appeal Panel's decision, to examine the discussion on the merits of all grounds of appeal.

56. The Appeal Panel wishes first to recall its precedents which have already addressed the question of the Appeal Panel's review of an amended decision adopted by the Board upon remittal by the Appeal Panel of a previous decision. In particular, the Appeal Panel refers to its decision of 10 November 2023, in case 6/2023, where the Appeal Panel discussed at length the issue, also in light of its precedents.

57. The Appeal Panel notes, first, that, as already held in paragraph 58 of its decision in case 6/2023, in its view, when the Appeal Panel dismisses an appeal in part, while it finds in favour of the Appellant in part, remitting the case, in principle the new appeal should not result in a retrial of the parts of the original decision for which the Appeal Panel's decision did not require an amendment. A different approach would, in substance, grant the Appellant a second chance to retry those parts of the original decision for which its grounds of appeal had been already dismissed by the Appeal Panel or which the Appellant had failed to challenge in the first appeal. This would be in violation of the deadline of six weeks set out by Article 85 SRMR for the filing of the appeal.

58. At the same time, the Appeal Panel acknowledges that this case presents clear differences with past cases. First, unlike the appeal in case 6/23 the Appellant is not restating the same grounds of its previous appeal nor it is trying to introduce for the first time new grounds

concerning parts of the Original Decision that it failed to challenge in the first appeal. In the present case, the Appellant is challenging the new reasons that the Board has offered to justify in the Contested Decision certain partial redactions, including the continuing existence of certain redactions which are in its view inconsistent with the Appeal Panel decision which has remitted the case to the Board in case 4/22.

59. Second, the process leading from the Original Decision challenged in case 4/22 to the Contested Decision challenged in this case, and the Appellant's requests are different from those in other cases. In cases 2/18, 18/18, or 19/18, to cite some, the Board primarily granted additional disclosures, and, when the amended decision was appealed by the same parties, the purpose of the appeal, and of the ensuing second Appeal Panel's decision was, as the Appeal Panel noted in it decision of 10 November 2023 in case 6/23, at paragraph 51, to "swiftly enable the correction of any unintended non-compliance of the Board when implementing the decision of the Appeal Panel, or to clarify the Panel's view as regards the nature of the revision requested of the Board".

60. In this case the Board followed the Appeal Panel's guidance by including a new and more specific part in the statement of reasons, as requested by the Appeal Panel's decision, and to do so it also undertook new consultations with stakeholders, which lasted several months. This resulted in additional disclosures, and additional, or entirely new, reasons to justify the remaining redactions. In some points the Board has also reconfirmed certain redactions, some of which the Appeal Panel had expressly considered unwarranted with its decision in case 4/22. The Board has nonetheless provided additional reasons to justify those redactions. In all cases, it is necessary to check the new reasons stated by the Board to justify certain redactions and to understand to what extent those new reasons make the Contested Decision compliant with the Appeal Panel's decision in case 4/22 and, more in general, the applicable legal framework.

61. In so doing, the Appeal Panel needs to ensure protection of the integrity of the administrative proceedings and of the right to an effective judicial protection before the European Courts. In cases where the Appeal Panel dismisses an appeal in part, while it finds in favour of the Appellant in part, remitting the case, it is not yet settled by the case-law of the European Courts, in this quite specific context, if the Appellant lacks the possibility to challenge the parts where the appeal is dismissed because the case as a whole was remitted. Even though the Appeal Panel is not a judicial body *proprio sensu*, it is well determined to ensure the full respect of the Appellant's right to an effective judicial protection before European courts, especially since the Appeal Panel's role is now acknowledged in the system of judicial protection under the new Article 58a of the Statute of the Court of Justice. This has *inter alia* implications for the admissibility of the present appeal.

62. The Appeal Panel also acknowledges, that – as the Appellant noted – after the adoption by the Appeal Panel of its decision of 10 November 2023 in case 6/23, Advocate General Kokott rendered her opinion in case C-181/22, Nemea Bank v ECB, ECLI:EU:C:2023:935 and held that the case-law on confirmatory acts is not applicable where the prior act has not become

final because it was challenged in front of Union courts. Whilst the Appeal Panel will closely follow the case-law of the Court of Justice in order to fully comply with it, including the *Nemea Bank* case once it is decided, the Appeal Panel also notes that there are fundamental differences in the functioning of the administrative review bodies within the SRM and the SSM, which warn against mechanical inferences from one context to the other.

63. In light of the reasons stated above, in the case at hand, where the Board has adopted a new decision that substantially modifies the previous one, especially in its reasoning but also in the extent of the redactions in the relevant documents, and the Appellant alleges non-compliance of the Contested Decision with the Appeal Panel's decision in case 4/22, but also challenges the reasoning of the new decision, raising fundamental matters of principle, the Appeal Panel considers therefore admissible all grounds of the present appeal, because they either pertain to the parts of the Contested Decision which are new vis-à-vis the Original decision or to the process leading to the adoption of the Contested Decision. The Appeal Panel shall therefore consider in the merit all grounds of appeal raised by the Appellant.

(a) First ground of appeal: the delay in adopting the Contested Decision.

64. By the first ground of appeal, the Appellant raises the question of the delay by which the Board has adopted the Contested Decision after the Appeal Panel remittal decision.

65. The Appeal Panel acknowledges that, as noted by the Board in its submissions, the adoption of the Contested Decision has required consultations with more than 10 different stakeholders on aspects which may have significant implications on financial stability, resolution policy and commercial interests of the entity transferred and its acquiror. Thus, the delay may have been caused by the delays of the consulted stakeholders in responding with their necessary feedbacks.

66. The Appeal Panel is however not persuaded that more than nine months from the date of the Appeal Panel's decision is a reasonable time pursuant to Article 21(4) RoP to adopt the Contested Decision to amend the Original Decision. This is so in particular in the present case, where the Contested Decision is a confirmatory decision under Regulation 1049/2001 and the Appeal Panel's decisions had already pointed quite selectively to the reasons considered insufficient and to the redactions which in the Appeal Panel's view were not duly justified.

67. However, in the Appeal Panel's view, a remittal of the Contested Decision on this ground, which is the only remedy available to the Appeal Panel within its remit under Article 85 SRMR, would be devoid of purpose and even be counterproductive for the Appellant. Such a remittal would not remedy the delay of the Contested Decision and thus would serve no practical purpose in the context of Article 85 SRMR. On the contrary, it would also delay the possibility for the Appellant, if it so wishes, to take further this issue under Article 86 SRMR to the attention of the General Court. For this reason, and with the qualifications above, the ground is dismissed.

(b) Second ground of appeal: the alleged failure by the Board to adopt an amended decision

68. By its second ground of appeal, the Appellant alleges that the Board failed to adopt an amended decision and adopted instead a decision purporting to amend the original decision, in breach of the SRMR, Regulation 1049/2001, and other relevant legal provisions.

69. The Board replies that the Appellant's allegation is confusing, as the Appellant refers, in different parts of its appeal, to both an "amended confirmatory response" and "a mere decision to amend", and, in any event, fails to explain the meaning of this second expression. The Board argues that it has adopted an amended decision, in line with the Appeal Panel guidance in case 4/22.

70. The Appellant's ground of appeal refers to the Board's compliance with its legal obligations under Article 85(8) SRMR.

71. Under this provision, the Board is bound by the decision of the Appeal Panel and shall adopt an amended decision. In the Appeal Panel's view, the extent of this obligation to comply, applying by analogy European courts' case-law on Article 266 TFEU, comprises not only the operative part of the Appeal Panel decision, but also the grounds underlying the operative part (see the judgment of the General Court in case T-504/19 Crédit Lyonnais v ECB ECLI:EU:T:2021:185, paragraph 36, set aside on other grounds, or judgments of the Court of Justice of 26 April 1988, Joined Cases C-97/86, 99/86, 193/86 and 215/86, Asteris and Others v Commission, ECLI:EU:C:1988:199, paragraph 27; judgment of 6 March 2003, C 41/00 P, Interporc v Commission, , EU:C:2003:125, paragraph 29).

72. In the present case, the Board adopted the Contested Decision on 21 December 2023, stating that, in compliance with the Appeal Panel decision 4/22, it "hereby amends the Confirmatory Response", and it added a new section 4, where it provided a detailed assessment of the reasons why the contents of the different documents could not be disclosed.

73. Thus, there is no evidence that the Board failed to adopt an amended decision. It did adopt such decision, and it acknowledged that such decision sought to comply with the Appeal Panel's guidance in its decision 4/22.

74. A different question is whether the Contested Decision has complied in substance with the grounds underlying the operative part of the Appeal Panel's decision. Nevertheless, such compliance cannot be established in the abstract, but is inextricably linked to other grounds of appeal, which are more closely related to the assessment of the actual compliance with the Appeal Panel decision. This assessment shall be made in the corresponding grounds.

75. With the caveat above, the second ground of appeal is therefore dismissed.

(c) Third ground of appeal: disclosure of "other relevant documents".

76. By its third ground the Appellant alleges that the Board failed to disclose "other relevant documents". The Board alleges that the Appellant relies on the erroneous premise that it requested access to documents other than the SRB Decision [.] and the SRB Decision [.].

77. Upon careful consideration of the broad initial application of 10 March 2022, of the Initial Response of 9 June 2022, and of the Confirmatory Application of 30 June 2022, the Appeal Panel sides on this point with the Board that the Appellant, with its Confirmatory Application, under letter C) at page 2, not only specified but also limited its request for access "to the following documents in their non-redacted version": (i) the SRB Decision [.], "especially with respect to information pertaining to determining [.] as failing or likely to fail; justification of lack of possibility to utilize alternative methods; and justification pertaining to public interest [.]; and (ii) the SRB Decision [.] "especially with respect pertaining to valuations of [.]".

78. The Appeal Panel finds therefore that the Appellant agreed in the end with its Confirmatory Application to the scope of its request to access to documents as specified by the Board with the Initial Response (documents of which the Appellant asked, with the Confirmatory Application, the unredacted disclosure in their full content), and in doing so it narrowed the broad initial scope of its initial application.

79. Therefore, the third ground of appeal is dismissed.

(d) Fourth ground of appeal: failure to provide reasons.

80. By its fourth ground, the Appellant alleges that the Board has not sufficiently reasoned the Contested Decision and has failed to provide sufficient reasons to explain for each document or part thereof why its redaction was justified by the exception(s) set out in Article 4 of Regulation 1049/2001. The Board replies that it has, on the contrary, strengthened the reasoning of the Original Decision, by including a new section 4 in the Contested Decision.

81. The Appeal Panel, in its decision in case 4/22 found at paragraph 81 that the statement of reasons of the Original Decision was insufficient because the Board did not properly and specifically justify "the refusal of public access for several parts of the SRB Decision [.] and of the SRB Decision [.] (and the [.] attached thereto) which have been redacted. In particular, it has failed to do it for several redactions in a clear and unequivocal manner, from which it is possible to understand and ascertain, first, whether that redacted part or information does in fact fall within the sphere covered by the exception relied on and, secondly, whether the need for protection relating to that exception is genuine".

82. Following this remittal, the Board subsequently adopted the Contested Decision, where it included indeed a new section 4, to strengthen the justification for failure to provide full disclosure for each concrete document, and each part of the document.

83. Whether each reason is connected or not with the specific (remaining) redactions, and whether they adhere to the guidance provided by the Appeal Panel in case 4/22 is a matter to be

discussed in the following and more specific grounds. However, it is undeniable that the Board has included additional reasoning, by means of a new section 4, and that that reasoning refers on the contrary to the specific redactions, and their justification under the relevant exceptions provided for by Regulation 1049/2001.

84. Therefore, the fourth ground of appeal is dismissed.

(e) Fifth ground: the "policy" exception (protection of financial, economic or monetary policy).

85. By its fifth ground the Appellant alleges that the Board's reliance on the exception under Article 4(1)(a) fourth indent (protection of financial, economic or monetary policy of the EU or a Member State) of Regulation 1049/2001 is vague, shows a misunderstanding of the Board's own role, fails to substantiate the ground, misunderstands the exception's absolute nature, and misapplies settled case-law of European courts. The Board responds that its decision was specific about the interest being protected, that the Board has a role in the protection of financial stability, that it complied with its duty to state reasons, that an "absolute" exception can apply to parts of a document and is such because it cannot be overridden by any public interest in disclosure, and that it properly applied the case-law by European courts.

86. On most limbs the Appeal Panel sides with the Board. The Board was clear about the interest being protected and gave reasons as to why it considered that certain parts of the SRB Decision [.] and [.] as well as of [.] could not be disclosed. The Board also has a role to play in the protection of financial stability (as already acknowledged by the Appeal Panel e.g. in its decisions in cases 18/18, 19/18, 21/18 or 6/22), and, in any event, what Article 4(1)(a) fourth indent of Regulation 1049/2001 requires is not that the institution holding the document has competences over financial stability, but that the "disclosure" of the document "would undermine the protection of […] the financial, monetary, or economic policy of the Community or a Member State". The application of the exception only to parts of the document is also in line with Regulation 1049/2001, where Article 4(3) states that "If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released".

87. The question, however, remains whether the substance of the exception was adequately applied by the Board, also in light of the Appeal Panel's findings in case 4/22, in particular with respect to the liquidity position of the institution in the days preceding the resolution.

88. On this the Appeal Panel found in case 4/22 that the Board's Original Decision was vitiated by a manifest error. The Appeal Panel remitted therefore in part to the Board finding (e.g., at paragraphs 85 to 89) that disclosure should be granted as to ''at least the main percentages giving evidence of how the liquidity situation of the institution deteriorated in the days preceding the resolution and how this situation was assessed by the authorities to conclude that the entity was failing or likely to fail''.

89. Following the Appeal Panel's adoption of its decision in case 4/22, the Board, in the Contested Decision, accepts additional disclosures (as it results from a careful comparison of the documents disclosed with the Contested Decision vis-à-vis those disclosed with the Original Decision), yet not on the specific percentages of deposit withdrawals and liquidity deterioration in the days preceding resolution. However, with regard to the liquidity position, it includes a new section 4, where it elaborates at length the reasons why disclosure would undermine the financial, monetary or economic policy of the Union or a Member State.

90. Such reasons and explanations openly show a disagreement with the Appeal Panel's interpretation and application of Article 4(1)(a) fourth indent of Regulation 1049/2001. The specific paragraph of the Contested Decision states the following:

> "Disclosing meaningful details of the methodology applied in this particular case might give rise to speculations about the way in which the SRB and other authorities might conduct future assessments although such assessments are by nature context-specific and not necessarily transposable to other financial institutions. For example, disclosure of particular LCR and counterbalancing capacity metrics might give rise to conjectures about specific patterns/benchmarks informing the decisions of the SRB and their mechanical application, regardless of the context specific to each case. Similar rationale applies to particular deposit outflows metrics (including the particular type of deposits concerned). In addition, disclosure of certain information on how authorities considered or assessed possible measures could be misinterpreted and lead to speculations about the way in which the SRB and other authorities assess available sources of information. Disclosure could thus lead to a misunderstanding and a generalised expectation that authorities will necessarily act in a similar way in future cases".

91. The Appeal Panel had clearly expressed its different view on this point in case 4/22 where it held that the disclosure of those data and information would not plausibly give rise to unfounded speculations about the way in which the SRB might act in the future nor would unreasonably influence the behaviour of other market participants and compromise the effectiveness and reliability of the internal methodology used by the SRB for the preparation for resolution and for the resolution of financial institutions. The Appeal Panel noted that there is no indication in the framework of resolution that the Board is subject to rigid triggers, and/or must apply those triggers in a mechanistic fashion. On the contrary, the triggers of an idiosyncratic crisis are often context-specific, and therefore lessons learnt from the data pertaining to a specific crisis, such as the one of [.], are not necessarily transposable to other financial institutions.

92. The decision in case 4/22 further stated that disclosing meaningful details of the triggers in a crisis, in the Appeal Panel's view, does not compromise the methodologies of the SRB nor would lead to a misunderstanding and a generalised expectation that the SRB will necessarily act in a similar way in all future crises. Furthermore, there were special surrounding circumstances which gave rise to the liquidity crisis of [.], due to a sudden and extremely serious [.] crisis. If anything, it would be the refusal to disclose that could give rise to unfounded speculations as to the circumstances that led to the crisis management measures adopted over [.]. Indeed, in a situation where there is already rampant speculation over the real situation of the bank, and the rationale for deploying crisis management measures over

it, disclosure can limit such speculation, and help the public assess that the grounds and methodology were technical in nature.

93. Thus, contrary to the Board's view, the Appeal Panel found that wider public access to the information available in the SRB Decision [.] and [.] as well as in the [.] attached thereto on how the [.] liquidity situation deteriorated would strengthen, not undermine, the financial policy and financial stability of the Union. Disclosure of the circumstances and methodologies not only make the Board more accountable, they also help other market participants and the public at large to gain a better understanding of the measures taken by the Board and enhance public trust. From this point of view, if anything, the protection of the financial policy of the Union under Article 4(1)(a) fourth indent of Regulation 1049/2001 is better served, in the Appeal Panel's view, by more, rather than by less public disclosure.

94. Thus, on this point it is quite evident that there is a disagreement between the Board and the Appeal Panel on grounds of law. The Board referred in the written submissions and at the hearing to two cases decided by the General Court, i.e., judgments of 4 June 2015, case T-376/15, Versorgungswerk der Zahnärztekammer Schleswig-Holstein v ECB, ECLI:EU:T:2015:361 and of 6 October 2021, case T-827/17, Aeris Invest Sàrl v ECB, ECLI:EU:T:2021:660) to further substantiate its reasons on this exception.

95. The Appeal Panel, however, is not persuaded that these cases offer legal reasons contrary to the Appeal Panel's findings. The *Versorgungswerk* case analysed the refusal by the ECB to disclose concrete, broken-down information about government bonds purchased under the Securities Markets Programme (SMP), an EU-wide program of bond purchases, which could reveal information about the bonds of a Member State in a delicate financial position, and whose stability was at stake. The situations are not comparable. The EU-wide nature of a monetary policy operation, the stability of the Member State were clear, and the risk of market speculations was well established, as it happens with central bank purchases (Versorgungswerk, paragraph 78). The application of crisis management measures over an individual financial institution, where the risk of speculation is based on several mistaken assumptions by market players is clearly different. Incidentally, the Appeal Panel notes that the amount of deposit outflows per day and the amount of all deposits immediately payable were clearly indicated in the judgment of the General Court in case T-280/18, ABLV Bank v SRB, ECLI:EU:T:2022:429, at paragraphs 117-123, and this could in principle allow for the inference of the daily percentage of deposit outflows, and yet there are no indications that this disclosure has undermined financial policy.

96. The *Aeris* case concerned a request of documents in the context of the resolution of Banco Popular. However, that case concerned several decisions, several documents, and different submissions. The submissions concerning the exception that disclosure of specific documents would undermine financial or monetary policy comprised the disclosure of the ceiling for emergency liquidity assistance (ELA), the amount of ELA actually granted, and the collateral provided. As stated by the General Court:

> 147 While it is true that the confirmatory application did not seek access to information expressly relating to the monetary policy or financial stability of the European Union or of a Member State, it cannot be inferred from this that the information identified by the ECB as relevant in the light of that application is concerned solely with Banco Popular's individual situation.
>
> 148 It is apparent from both Decision LS/PT/2017/66 of 11 August 2017 and the second contested decision that the information concerning the ELA ceiling, the amount of ELA actually granted and the collateral provided arose in a very specific regulatory context underpinned by considerations of price stability, monetary policy and financial stability of the European Union, with the result that that information necessarily goes beyond the specific case of a single credit institution.

97. Therefore, in the Appeal Panel's view, the use of the "policy" exception, as understood by the General Court, is unavailing in the present case.

98. The Appeal Panel considers however that this finding is not enough to refer back the case to the Board as to the redactions on the information concerning [.] deteriorating position and related measures.

99. Although the Appeal Panel still holds that the reliance of the Board on the exception of Article 4(1)(a) fourth indent of Regulation 1049/2001 to justify the redactions concerning the percentages of deposit outflows, liquidity coverage and counterbalancing capacity is not well placed, it must also be duly considered that the Board has added in section 4 of the Contested Decision additional reasons based also on other exceptions to justify the redaction of such percentages and data, and namely the protection of commercial interest of the parties concerned under Article 4(2) of Regulation 1049/2001 and the protection of the confidentiality of information, noting that this information originates from the supervisor and that the ECB stated that this information falls withing the scope of Article 4(1)(c) [of ECB Decision 2004/258] ("*confidentiality of information that is protected as such under Union law*") in conjunction with the first indent of Article 4(2) ("the commercial interests of a natural or legal persons") and disclosure thereof would affect [.], thereby impacting the smooth functioning of the prudential supervision as a whole. For this reason, to the extent said information appears in the ECB's assessment of [.] as FOLTF, the ECB has redacted said information from the public version of the FOLFT.

100. When inquired upon this aspect during the hearing the Board specifically referred to the above-mentioned judgment of the General Court of 6 October 2021, case T-827/17, Aeris Invest Sàrl v ECB, ECLI:EU:T:2021:660. In the *Aeris* case the General Court found that the refusal by the ECB to disclose the liquidity situation and capital ratios of Banco Popular was justified. The General Court found that, whereas relying on a general presumption of confidentiality may be against the principles outlined in *Baumeister* (judgment of the Court (Grand Chamber) of 19 June 2018, BAFIN v Baumeister ECLI:EU:C:2018:464) the information requested was in any event confidential, as the information was not in the public domain (*Aeris,* paragraphs 207-228), and the ECB was entitled to take the view that disclosure would adversely affect the commercial interest of third parties, notably Banco Popular and Banco Santander (*Aeris,* paragraphs 230-250), and did not commit a manifest error in finding

that disclosure would adversely affect the proper functioning of the prudential supervision system (*Aeris*, paragraphs 251-271).

101. More specifically, it results from paragraph 26 of the judgment of the General Court in *Aeris* that "the ECB took the view that information concerning Banco Popular's liquidity situation and capital ratios was protected under the exceptions laid down in Article 4(1)(c) of Decision 2004/258, relating to the protection of the confidentiality of information that is protected as such under EU law, and in the first indent of Article 4(2) of that decision, relating to the protection of the commercial interests of a natural or legal person".

102. It further results that in *Aeris:* (a) At paragraph 202, the General Court accepted "that the information at issue is nevertheless covered by the exception laid down in Article 4(1)(c) of Decision 2004/258", (b) At paragraph 249, that "the ECB was entitled to take the view that the information to which it refused access on the basis of Article 4(1)(c) of Decision 2004/258 was capable, when the contested decisions were adopted, of specifically and actually undermining the interests of Banco Popular or of Banco Santander" (paragraph 248 specifies in turn that the ECB justified the redaction by noting that "the assessment of the impact of Banco Popular's liquidity situation on the funding and operating structure of its subsidiary Banco Popular Portugal was commercially sensitive and could trigger unwarranted speculation about the group's financial and liquidity situation"). In *Aeris* the Court concluded therefore, at paragraphs 303 and 306 respectively that:

> 303 It is clear from all the foregoing that, first, as regards the information concerning Banco Popular's liquidity situation and capital ratios, the second contested decision is justified in law by the grounds it contains relating to the exception laid down in Article 4(1)(c) of Decision 2004/258.
>
> 306 It follows from those findings that even if access to the documents and information referred to in paragraphs 303 to 305 above was also refused on the basis of the first indent of Article 4(2) of Decision 2004/258, there is no longer any need to rule on the merits of the third plea alleging infringement of that provision. The third plea must be dismissed as ineffective in any event since, in order for the contested decisions to be well founded in law, it is sufficient if one of the exceptions put forward by the ECB in order to refuse access to the requested documents was justified.

103. The Appeal Panel, in light of the considerations of principle developed in its decision in case 4/22 on the merits of more, rather than less public disclosure on that information, may have doubts about the link first established by the supervisory authority from which the information originates and then reiterated by the Contested Decision between the confidentiality of that supervisory information (which is protected as such for the ECB by Article 4(1)(c) of the ECB Decision 2004/258) and the exception of Article 4(2)first indent of Regulation 1049/2001 as well as about the actual commercial interests which may be affected by the disclosure of that information. However, when European courts decide on an issue as a matter of law (and the *Aeris* findings are final, after the judgment on appeal of 27 April 2023, ECLI:EU:C:2023:345), it is not for the Appeal Panel to question that decision, but see if it applies in the specific case, and, in this case, there is too close a similarity between the two cases for the Appeal Panel to depart from the findings of *Aeris* in respect of the new (and additional) reasons offered now by the Contested Decision and based on Article 4(2) first

indent of Regulation 1049/2001 and Article 4(1)(c) of ECB Decision 2004/258 in conjunction with the same Article 4(2).

104. In this regard, even if the confidentiality of information does not operate as a separate exception to disclosure under Regulation 1049/2001, once the General Court has clearly shown in *Aeris* that it is ready to accept the ECB's explanation that refusal to disclose the parts of documents involving the liquidity and capital position of an entity was justified because disclosing those confidential information would undermine the interest of the entity subject to resolution and "*the proper functioning of the prudential supervision and resolution system*", the Appeal Panel considers that those interests will also be undermined if disclosure of such information is obtained not from a document of the ECB but from a document of the SRB which incorporates the supervisory data originated by the ECB. If it is not, it is for European courts to clarify the scope of the exception that they have allowed in *Aeris*.

105. The Appeal Panel considers therefore that the new reasons stated by the Board in the Contested Decision based on Article 4(2) first indent of Regulation 1049/2001 and Article 4(1)(c) ECB Decision 2004/258 in conjunction with the same Article 4(2) to justify the redactions of the information concerning the liquidity positions - which supplement those, already present in the Original Decision, based on Article 4(1)(a) fourth indent of Regulation 1049/2001, which the Appeal Panel considers unavailing in the present case - cannot be held as such (manifestly or not) erroneous. The Appeal Panel also notes that, although in *Aeris* at paragraph 306 the General Court, in the end, found that there was no longer any need to rule on the merits of the plea alleging infringement of Article 4(2) of Regulation 1049/2001, the General Court at paragraph 249 nonetheless alluded to the fact that "the ECB was entitled to take the view that the information to which it refused access on the basis of Article 4(1)(c) of Decision 2004/258 was capable, when the contested decisions were adopted, of specifically and actually undermining the interests of Banco Popular or of Banco Santander".

106. The Appeal Panel, as it acknowledged in its decision in case 7/22, is aware that in a system of cooperation between authorities (the ECB, the Board, and national authorities) and private parties (the supervised bank or the acquiror) trust and confidence are essential, and that parties may abstain from cooperating if the information shared is disclosed. The Appeal Panel is also aware that, as the number of parties involved on the inside increases, each party may have a concrete and legitimate interest to object to specific disclosures of specific parts of the documents, and the aggregate effect may be a disclosure that is, in total, unsatisfactory. However, on such matter of principles, the Appeal Panel, within its limited remit, can only defer to European courts and co-legislators.

107. For these reasons also the fifth plea must be dismissed as ineffective and the case cannot be remitted on this ground to the Board in any event since, although the Appeal Panel agrees with the Appellant that the Board has erroneously applied the exception of Article 4(1)(a) fourth indent of Regulation 1049/2001 as a justification to redact some information concerning [.] deteriorating liquidity position, in order for the Contested Decisions to be well founded on this point it is sufficient for the new reasons stated in the Contested Decision (and

not present in the Original Decision) that one of the other exceptions put forward by the Board in order to refuse disclosure of those specific information was not (manifestly) erroneous.

(f) Sixth ground: the commercial interest exception.

108. By its sixth ground the Appellant alleges that the Board relies on the exception under Article 4(2), first indent (commercial interests) of Regulation 1049/2001 in a way that rejects the transparency regime, that it fails to specify the concrete commercial interests and how they would be harmed, that the Board has dramatized the liquidity situation of [.], and that it fails to link the allegation to a concrete withholding of documents or redactions and that the Board erroneously found that there was no overriding public interest. The Board replies that, by disclosing additional parts of the relevant documents the Board showed that it does not oppose to transparency, that it duly reasoned why disclosure of the specific information concerning the deteriorating position of [.] and related measures as well as the valuation of risk factors could undermine the protection of the commercial interests of [.], that some of the Appellant's allegations seem to relate to the merits of SRB Decision [.] and therefore fall outside the scope of the appeal, that the Board duly stated the reasons and duly assessed the issue of the overriding public interest and that the Appellant justified its request for access to the documents in order to make its case before courts, but that, according to settled case-law, obtaining documents for the purpose of court proceedings does not constitute public interest.

109. On the different limbs of this grounds the Appeal Panel sides with the Board. The Board is not using the exception of Article 4(2)first indent of Regulation 1049/2001 to reject or negate the transparency regime, but to refuse disclosure of certain parts of the documents, and for those redactions which are justified under this exception the Board specifies in the Contested Decision that the interests protected are those of [.] "which continues to carry on its banking business independently of its former shareholder".

110. The question, however, remains whether the substance of the exception was adequately applied by the Board, also in light of the Appeal Panel's findings in case 4/22.

111. In its decision in case 4/22 the Appeal Panel held that, in its confidential review of both SRB Decision [.] and SRB Decision [.] (including [.] attached hereto) it understood and could accept that the redaction of some information and of certain data and sentences were genuinely justified in order to protect third party commercial interests (and the Appeal Panel mentioned some examples) and therefore were warranted pursuant to Article 4(2) of Regulation 1049/2001. It found however that, due to the lack of a specific reasoning in the Original Decision pertaining to each element which was redacted, the statement of reasons was insufficient and invited the Board to duly explain in a clear and unequivocal manner what redactions were justified by each specific exception, and how.

112. The Board considered its position, and disclosed some additional parts of the documents, confirming the redaction of other parts, and providing an additional justification as to why those specific parts could not be disclosed under this exception.

113. Unlike the policy exception pursuant to Article 4(1)(a) fourth indent of Regulation 1049/2001, on the protection of commercial interests the Appeal Panel provided more general guidance.

114. In this sense, the Board has undeniably strengthened its justification for refusing to disclose, and thus, on this ground, it has complied with the Appeal Panel's guidance. The Appeal Panel further reiterates that in *Aeris* extensively discussed above, the General Court expressly accepted at paragraph 242 that a similar refusal to disclose certain parts of the requested documents could be justified to protect the interest of the acquirer of the resolved entity.

115. By its fifth limb of the sixth ground the Appellant alleges that the Board failed to properly deal with the issue of the existence of an overriding public interest in disclosure, because some of the exceptions relied upon by the Board are relative exceptions, which may yield in the presence of an overriding public interest in disclosure, which is dealt with superficially, and without a proper balancing by the Board, while the claim that there is no such overriding public interest is not credible, there is no assessment of the balance of interests, and the Board does not deal with the Appellant's submissions in this regard. The Board replies that, even if the Appellant failed to indicate what was the overriding public interest, or to identify the proceedings before European courts as an overriding public interest the Board assessed the interest in such proceedings as such potential interest and concluded that there was no such interest.

116. In principle, it is for the Board to assess, and justify the existence of exceptions to disclosure, while it is for the Appellant to prove the existence of an overriding public interest in disclosure. As stated by the Court of Justice, "the onus is on the party arguing for the existence of an overriding public interest to rely on specific circumstances to justify the disclosure of the documents concerned and that setting out purely general considerations cannot provide an appropriate basis for establishing that an overriding public interest prevails over the reasons justifying the refusal to disclose the documents in question" (judgment of the Court of Justice of 11 May 2017, case C-562/14 P, Sweden v Commission, EU:C:2017:356, paragraph 56; see also judgment of 14 November 2013, LPN and Finland v Commission, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 93 and 94 and the case-law cited).

117. In the present case, the Board has assessed the existence or not of an overriding public interest in disclosure in section 5 of the Contested Decision, as well as part of the assessment of the exceptions for non-disclosure, in sections 4. Such assessment is certainly succinct, but it fell on the Appellant to provide compelling grounds to consider that such interest was present and justified full disclosure and, in the Appeal Panel's view, the Appellant failed to do so.

118. For these reasons, the sixth ground of appeal is dismissed.

(h) Seventh ground: Article 4(2) third indent of Regulation 1049/2001 and the protection of the purpose of inspections, investigations and audits.

119. By its seventh ground of appeal, the Appellant alleges that the Board made erroneous reliance on the exception set out in Article 4(2), third indent of Regulation 1049/2001. In the first limb

of this ground the Appellant argues that the protection of the purposes of inspections, investigations and audits is a new ground for refusal that the Board could not add in the Contested Decision. In the second limb the Appellant alleges that the Board did not demonstrate that the protection of the purpose of inspections, investigations and audits is relevant in the case at hand. In the third limb the Appellant reiterates that, also in respect to this exception, the Board erroneously found that there was no overriding public interest and claims that the Board has not duly respected its right to be heard.

120. Conversely the Board contends that all three limbs of the ground are unfounded. In the first limb, the Board argues that, when the Appeal Panel finds that a confirmatory decision is not sufficiently reasoned, the SRB has to amend the reasoning in order to strengthen it in order to comply with its duty to state reasons. In so doing, the Board is also entitled to introduce amendments in a confirmatory decision, other than those resulting from the decision of the Appeal Panel. As regards the second limb, the Board argues that the valuation under Article 20 SRMR remains an "*investigation*" within the meaning of Article 4(2), third indent of Regulation 1049/2001 despite the fact that the valuation is not performed by the SRB itself, yet by an external valuer and this is so also when there is no active fact-gathering by the valuer. As to the need to protect the identity and the role of the valuer, the SRB did not commit any manifest error of assessment. As regards the third limb, the EU courts have held that at the confirmatory stage, the institution can change the exceptions relied upon at the initial stage, yet the EU courts have not found that the institution must give the applicant the opportunity to provide its views on the new exceptions. Consequently, the SRB did not have to run a right to be heard process prior to adopting the Contested Decision.

121. In section 4 of the Contested Decision the Board duly identifies the specific information that is covered by the exception, which refers to the identity and role of the independent valuer, and explains that "disclosure of the identity and role of the independent valuer could negatively affect the completion of the valuation process by undermining the independent valuer's ability to finalise the process free from external pressure and in an independent way". The Board also states that the valuation process pursuant to Article 20 SRMR remains ongoing.

122. The Appel Panel considers that European courts have accepted that, at a confirmatory stage, the institution can change the exceptions relied upon at the initial stage (judgment of 28 March 2017, T-210/15, Deutsche Telekom v Commission, ECLI:EU:T:2017:224, paragraphs 82 to 84) and the Appeal Panel is of the view that the same principle is valid also when a confirmatory decision is referred back by the Appeal Panel to the Board for the adoption of an amended confirmatory decision. Indeed, once the Appeal Panel has found that the Original Decision was insufficiently reasoned, the Board was called to amend the reasoning in order to strengthen it, and in so doing the Board had to make a re-assessment of the disclosures to be granted in light of the Appeal Panel's findings and of the reasons to be stated to justify the remaining redactions. This re-assessment, in the Appeal Panel's view, could also legitimately lead to the conclusion that certain redactions which in the Original Decision were based on an exception which the Appeal Panel considered unavailable or insufficiently justified could be

reconfirmed relying on a different exception, which the Board had not considered before on the assumption that the exception on which it had originally relied was sufficient to justify the redaction.

123. The Appeal Panel further considers that, as also noted by the Board, in line with the case-law of European courts (judgment of 7 September 2017, C-331/15, French Republic v Schyter, ECLI:EU:C:2017:639, at paragraph 46) the scope of the exception covers all processes whose purpose is to collect and analyse information in order to enable the institution or agency to take a position, and this, in the Appeal Panel's view, embraces, as argued by the Board, also the activity of an external valuer (without any need to make distinctions to this effect based upon the more or less active role in the gathering of information committed to the valuer or the qualification as audit of its results).

124. The Appeal Panel further accepts that the disclosure of the identity and role of the valuer could in principle negatively affect, as stated by the Board, the completion of the valuation process, by exposing the same to potential external pressures at a stage when the valuation process, as argued by the Board, is still ongoing.

125. Consequently, the seventh ground of appeal is dismissed.

(i) Eighth and Ninth grounds: reliance on grounds to refuse access outside Regulation 1049/2001, and confusion of grounds.

126. By its eighth and ninth grounds, the Appellant alleges that the Board, as a basis for refusing access to documents, has relied on grounds outside Regulation 1049/2001, especially the obligation of confidentiality under Article 88 SRMR, and by its tenth ground it states that the Board confuses the grounds of appeal, because it does not wish to allege the "real" motivation, which is the protection of the decision-making process, under Article 4(3) Regulation 1049/2001. The Board replies that it is clear from the decision that it relied only on the grounds stated therein, namely those under Article 4(1)(a), fourth indent, Article 4(1)(b), and Article 4(2), first indent of Regulation 1049/2001.

127. The Appeal Panel wishes to recall that in its decisions in case 4/22, paragraph 66, and previously in case 1/21, it held that, in its view, in *Baumeister* the Court clarified that Article 54(1) of Directive 2004/39 (functionally corresponding to Article 88 SRMR), must be interpreted as meaning that all information relating to a supervised entity and communicated by it to the competent authority, and all statements of that authority in its supervision files, including its correspondence with other bodies, do not constitute, unconditionally, confidential information that is covered by the obligation to maintain the professional secrecy laid down in that provision. The Court held indeed that only information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interest of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of supervised entities is to be so classified. The Court further acknowledged that the passage of time is a circumstance that is normally liable to have an influence on the analysis of whether the

conditions governing the confidentiality of the information concerned are satisfied at a given point in time.

128. In the Contested Decision the Board has referred to Article 88 SRMR in the context of consultations with third parties of the potential disclosure of non-public information (§ 2.3. of the Contested Decision) but has not alleged Article 88 SRMR as an independent ground to refuse disclosure. Arguments of confidentiality have been duly considered under the fifth ground of appeal, not as a separate exception to disclosure under Regulation 1049/2001, but as a modulating factor in the determination of the policy exception to the disclosure of information originated by the supervisor, in light of the impact of certain disclosures in "*the proper functioning of the prudential supervision and resolution system*", in accordance with the *Aeris* case. Thus, the allegation that the Board has used Article 88 as an independent ground is unsubstantiated.

129. Also unsubstantiated is the allegation that the Board uses the exceptions to disclosure under Article 4(1)(a), fourth indent, and Article 4(2), first and third indent of Regulation 1049/2001 as a way not to allege the exception under Article 4(3) of the same text. There is no evidence that the Board is alleging some exceptions to avoid relying on a different exception.

130. Consequently, the eighth and ninth grounds of appeal are dismissed.

(j) Tenth ground of appeal: the consultations with third parties.

131. By its tenth ground the Appellant alleges that the Board attempts to turn consultations with third parties as an additional ground to refuse disclosure, by implying that any third-party objection or even just potential interest in non-disclosure justifies a denial of access and thereby exempts the Board from having to provide an appropriate reason. The Board replies that, since the documents requested were drawn up, or contain information deriving from or related to third parties, the SRB consulted them with a view of assessing whether the exceptions applied, but that it did not intend to use this as a separate exception.

132. Although the Board has relied on third parties' consultations to assess the application of exceptions, it has not claimed this as a blanket exception nor that any objection to disclosure received by third parties needs to be accepted as such. Rather, it has stressed that the Board, alone, was responsible for the decision to not disclose in full. The possibility of taking into account the interests of third parties in assessing the application of one of the relevant exceptions has been considered above, in relation to the fifth and sixth grounds. Since the Board has made clear that third-party consultations are not relied upon as an independent ground the allegation is unfounded.

133. Therefore, the tenth ground is dismissed.

(k) Eleventh ground of appeal: the reasons to substantiate the refusal to disclose.

134. By its eleventh ground the Appellant alleges that the Contested Decision provides an insufficient statement of reasons. In the first limb, the Appellant alleges that the Board

redacted parts of the relevant documents in a way that the disclosed parts were deprived of "any meaningful content". In the second limb, the Appellant alleges that the Board did not sufficiently explain how the exception relates to each part that it is not disclosed.

135. In its findings in its decision in case 4/22, at paragraph 81, the Appeal Panel held that:

> […] the Appeal Panel finds […] that the statement of reasons of the Contested Decision is insufficient because the Board has not properly and specifically justified the refusal of public access for several parts of the SRB Decision [.] and the SRB Decision [.] which have been redacted. In particular it has failed to do it for several redactions in a clear and unequivocal manner, from which it is possible to understand and ascertain, first, whether that redacted part or information does in fact fall within the sphere covered by the exception relied on and, secondly, whether the need for protection relating to that exception is genuine.

136. The Appeal Panel acknowledges that the Contested Decision has complied with these findings, by providing an additional section 4, where the Board offers detailed reasons for refusing to disclose certain parts of the documents. Those reasons concretize the interests being protected, and how they relate to the specific parts of the relevant documents, in a way which, in the Appeal Panel's view and upon careful consideration of the documents disclosed now with the Contested Decision and their remaining redactions, enables now the reader to understand whether the redacted content falls within the scope of the exception relied on and to understand the need of protection justifying the non disclosure of that specific information identified by the Board.

137. The Appellant may well disagree with those reasons, as it appears from its appeal. However, it cannot be disputed that the Appellant perfectly understands the reasons used by the Board, since in this ground, under an allegation of an insufficiency of reasons, what the Appellant really does is to challenge the substance of those reasons.

138. The eleventh ground is dismissed.

(l) Twelfth ground of appeal: the procedural rights of the Appellant

139. By its twelfth ground the Appellant alleges that the Board has breached the Appellant's right of access to the file, its right to be heard and has violated the principle that the statement of reasons cannot be subsequently changed, amended or supplemented, especially if the relevant decisions have already been challenged judicially as happened in the present case. The Board replies that the right of access to the file falls outside the present proceedings, that in a confirmatory stage an institution can change the reasons relied upon at the initial stage, and that it has complied with the duty to state reasons.

140. The Appeal Panel has dealt with the right of access to the file in its case 4/22. There the Appeal Panel held that, pursuant to 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 and therefore cannot confirm or remit an SRB decision which denies access to the file. Furthermore, when the Appellant clarified that it was not challenging a decision denying access to the file but was

rather requesting, in the context of the appeal before the Appeal Panel to have access to the file pursuant to Article 41 of the Charter on Fundamental Rights, the Appeal Panel held that if an Appellant could get access, in the course of the proceedings before the Appeal Panel to the confidential version of the documents to which it has requested public access before a decision on the legality of the Contested Decision concerning the redactions or denial of disclosure made by the Board is taken by the Appeal Panel, the Appeal Panel's decision concerning the Contested Decision (which is a confirmatory decision under Regulation 1049/2001) would be made irrelevant and devoid of purpose (Appeal Panel decision in case 4/22, paragraph 62).

141. By reiterating these findings in the present case, the Appeal Panel finds that the Appeal Panel has no competence to decide on a request of access to the file. This is a choice made by the co-legislators who drafted Articles 85(3) and 90(4) SRMR, and the choice is clearly stated.

142. Regarding the allegation of a change in the statement of reasons, the Appeal Panel refers to its findings when discussing the seventh ground and reiterates that, in the Appeal Panel's view, nothing in the Treaties or in the relevant legal framework prohibits the Board from relying on different reasons in a case like the present one, where the subsequent decision by the Board is an amended decision and has been prompted by a finding by the Appeal Panel that its statement of reasons in the original decision was insufficient, and not in compliance with the law. In those circumstances, this does not require, as also the Board noted referring to the case-law of European courts in *Deutsche Telekom*, that the applicant be allowed to provide its view.

143. For these reasons, the twelfth ground of appeal is dismissed.

(m) Thirteenth ground: the relevance of rules other than those under Regulation 1049/2001.

144. By its thirteenth ground the Appellant alleges that, in its assessment of the request for access, the Board failed to apply legal provisions beyond Regulation 1049/2001, such as Article 41 of the Charter, despite the Appellant's request was broader, and went beyond a request of public access to documents under Regulation 1049/2001, and that, despite limitations on its competence, the Appeal Panel competence depends on whether a Board's act is reviewable, and, if it is, the Appeal Panel has to apply all relevant legislation. The Board replies that this ground is particularly vague, and that the Appellant fails to provide any concrete reference to the specific rules that the Board should have applied.

145. The Appeal Panel finds that, indeed, it is not easy to identify the rules referred to by the Appellant. Fundamental rights, such as Article 41 or Article 47 of the Charter, have been duly considered by the Appeal Panel in its findings, as have essential procedural requirements, such as the duty to state reasons. The Appellant's claim could also be read as an indirect reference to the need to grant access to the file, under Article 41 of the Charter: an issue already considered in discussing the previous ground.

146. Therefore, the thirteenth ground of appeal must be dismissed.

On those grounds, the Appeal Panel hereby:

Dismisses the appeal

Helen Louri Dendrinou SIGNED	Kaarlo Jännäri SIGNED	Luis Silva Morais Vice-Chair and Co-Rapporteur SIGNED

Marco Lamandini Co-Rapporteur SIGNED	Christopher Pleister Chair SIGNED

For the Secretariat of the Appeal Panel:

[.]
SIGNED