28 February 2019

Case 3/2018

FINAL DECISION

[….]

Appellants,

v

the Single Resolution Board

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

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FINAL DECISION

In Case 3/2018,

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"),

[Appellants] legal entities represented by [lawyer], with address for service [...] (hereinafter the "Appellants")

v

the Single Resolution Board (hereinafter the "Board" or "SRB"),

(together referred to as the "Parties"),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Marco Lamandini (Rapporteur), Luis Silva Morais (Vice-Chair), Helen Louri-Dendrinou, Kaarlo Jännäri**,**

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 3 April 2018 (hereinafter the "Confirmatory Decision") rejecting the Appellants' confirmatory application, by which the SRB was requested by the Appellants to reconsider its position in relation to its initial request (following the Appeal Panel decision of 28 November 2017 in case 39/17 between the same Parties and the disclosure of documents that the SRB made on 1 February 2018) and the SRB's response thereto, concerning the access to documents (and specifically the Valuation 1 Report) in accordance with Article 90 (1) of 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"). Following the decisions rendered in other (but similar) cases by the Appeal Panel on 19 June 2018 and the disclosure of documents that the SRB made on 31 October 2018, this appeal also relates to the decision of 30 November 2018 (hereinafter the "Revised Confirmatory Decision") whereby the SRB amended its Confirmatory Decision.

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

2. By the initial request and the confirmatory application, the Appellants requested access to the entire text of the Valuation 1 Report dated 5 June 2017 prepared in the context of the resolution of Banco Popular Español S.A. (hereinafter "Banco Popular"). Access to a redacted version of such Valuation 1 Report was granted by the Board to the Appellants on 1 February 2018 following the decision adopted by the Appeal Panel on 28 November 2017 in case 39/2017. However, the Appellants filed on 19 February 2018 an application requesting access to the entire text of the Valuation 1 Report in Spanish. This application was rejected by the SRB on 9 March 2018 because no Valuation Report 1 exists in Spanish. On the same day, the Appellants submitted a confirmatory application requesting the SRB to reconsider its position and to grant access to such Report in either English or Spanish. The SRB, by referring to the Revised Confirmatory Decision sent to the Appellants on 1 February 2018 following the Appeal Panel decision in case 39/17, rejected the confirmatory application with the Confirmatory Decision which was the original subject of the appeal in the present case.

3. The notice of appeal was submitted to the Board on 19 April 2018. The Appeal Panel appointed as rapporteur the Member Professor Marco Lamandini. On 3 May 2018 the SRB submitted its response to the appeal. The Appellants replied to the SRB response on 11 May 2018.

4. On 5 June 2018, the Appeal Panel wrote to the Parties asking if they deemed necessary a hearing. Both parties answered (the Appellants on 5 June 2018; the Board on 7 June 2018) that they considered (at the time) unnecessary to hold a hearing. On 12 June 2018 the Appeal Panel further informed the Parties that the appeal was stayed until the adoption of the decisions in cases 44/17 to 56/17 (which were, at the time, forthcoming and were published on 19 June 2018) and, after the adoption of such decisions, until the publication by the Board of the documents whose disclosure was ordered by the Appeal Panel with such decisions. Such publication occurred on 31 October 2018.

5. On 7 November 2018 the Appeal Panel wrote to the Parties informing that the SRB had published on 31 October 2018 several documents in order to comply with the Appeal Panel decisions in cases 44/17 to 56/17. The Appeal Panel invited the Appellants to file a statement clarifying whether they were satisfied with the documents (and specifically with the non-confidential version of the Valuation 1 Report) published by the SRB on 31 October 2018 and whether, accordingly, the appeal would be withdrawn. The Appellants responded that the appeal was maintained, although in general terms the Appellants were satisfied with the version of the Valuation 1 Report disclosed by the Board on 31 October 2018, because they nevertheless contested certain limited redactions, still present in the non-confidential version of the Valuation 1 Report published by the Board on 31 October 2018.

6. On 30 November 2018, considering the Appeal Panel decisions of 19 June 2018 and the disclosures made on 31 October 2018, the Board amended the Confirmatory Decision, adopting a Revised Confirmatory Decision. The Appeal Panel granted to the Parties appropriate terms to submit their observations in respect to the Revised Confirmatory Decision.

7. On 4 December 2018 the Appellants filed their submissions clarifying that their original appeal against the Confirmatory Decision remained effective but was also extended against the Revised Confirmatory Decision. In particular, the Appellants contested 5 specific redactions in the version of the Valuation 1 Report disclosed on 31 October 2018 and namely (a) the identity of the author of the "capital plan assessment and credit risk potential impact" on page 2, section 1.2., indent e); (b) the final sentence of the first paragraph of page 3; (c) the final sentence of paragraph 2 of page 3; d) the final paragraph of page 3; (e) the footnote with two asterisks on pages 4 and 5. The Appellants further asked the Appeal Panel to shorten, if possible, the deadlines set for the response of the Board to the submissions against the Revised Confirmatory Decision, originally set by the Appeal Panel for 31 January 2019.

8. On 12 December 2018 the Appeal Panel wrote to the Parties amending the deadline set for the Board to respond to the Appellants' submissions from 31 January to 15 January 2019 and from 15 February to 30 January 2019 for the Appellants to reply to the Board's response. The Board objected to this order on 14 December 2018; the order was nevertheless confirmed by the Appeal Panel on 18 December 2018, having regard to the fact (i) that the Board had already submitted a response to the original appeal, (ii) that the Appellants had filed their new submissions in respect to the Revised Confirmatory Decision well before the expiry of the original deadline, in this way granting more time to the Board to prepare its response, and (iii) that the Appellants limited the scope of their appeal and that the appeal was pending since April 2018 (albeit stayed after the adoption of the Appeal Panel decisions of 19 June 2018 until 7 November 2018).

9. The Board submitted its response on 14 January 2019. The Appellants submitted their reply on 23 January 2019.

10. On 24 January 2019 the Appeal Panel deemed appropriate, having specifically considered the adoption of the Revised Confirmatory Decision and the new submissions of the Appellants and of the Board, to reiterate the question to the Parties if they considered unnecessary to discuss the case in a hearing. The deadline to respond was set for 1 February 2019. Both Parties confirmed in writing that they waive their right to an oral hearing.

11. On 6 February 2019 the Appeal Panel, having considered the final submissions of both Parties, their waiver to the right to be heard and having also concluded that, in light of the particular circumstances, object and developments of the case, which were extensively pondered by the Appeal Panel, it was not necessary to convene on own initiative such hearing before deliberating on the matter, 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

12. The main arguments of the parties are briefly summarised below. However, in order to avoid unnecessary duplications, more specific arguments raised by the Parties shall be considered, to the extent necessary for the just determination of this appeal, where this decision shows the findings of the Appeal Panel. It is also specified that: (i) the Appeal Panel considered every argument raised by the Parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision; (ii) the Appeal Panel considered both the arguments supporting the original appeal against the Confirmatory Decision and those raised by the Appellants in respect of the Revised Confirmatory Decision during the proceeding.

Appellants

13. The Appellants ask that the Confirmatory Decision be vacated and remitted and seeks access to a version of the Valuation 1 Report without five specific redactions, still present in the version disclosed by the Board on 31 October 2018, and namely (a) the identity of the author of the "capital plan assessment and credit risk potential impact" on page 2, section 1.2., indent e); (b) the final sentence of the first paragraph of page 3; (c) the final sentence of paragraph 2 of page 3; (d) the redaction in the final paragraph of page 3; (e) the footnote with two asterisks on pages 4 and 5.

14. Such access is sought by the Appellants because, in the Appellants' view, the Appellants, reading the redacted version of the Valuation 1 Report published on 31 October 2018, cannot (i) challenge its content judicially in a proper way, because alleged key elements still remain unknown; (ii) check if the adjustments made by the SRB incur eventually in an arithmetic error; (iii) understand the reasons, if any, that could explain why the conclusions of the Valuation 1 Report and the Valuation 2 Report are supposedly contradictory (since the Appellants refer that the SRB states that the Banco Popular was a solvent entity with problems of liquidity, and that Deloitte states that Banco Popular was insolvent and in a current bankruptcy state); (iv) compare accurately the adjustments made by the SRB with the ones made by Deloitte in order to have an elementary knowledge of why the resolution decision was taken.

15. The Appellants moreover question that the redacted information may originate from the ECB and argue that the Board did not provide appropriate and specific reasons, in the Revised Confirmatory Decision, to explain why the redaction of the 5 parts (whose redaction is contested by the Appellants) would be justified under the exceptions provided for in Article 4 of Regulation No. 1049/2001 invoked by the Board. The Appellants further insist that the Appeal Panel should also annul the Confirmatory Decision, because there is no clear indication in the Revised Confirmatory Decision that the original Confirmatory Decision is now deprived of legal effects.

Board

16. The Board argues that it has now granted, taken into account the guidance provided by the Appeal Panel in the context of other cases, access to additional parts of the Valuation 1 Report, but that the redaction of the 5 parts whose redaction is contested by the Appellants was justified by the application of the exceptions of Article 4(1)(a) fourth indent ("the financial, monetary or economic policy of the Union or a Member State") and Article 4(2) first indent ("commercial interests") of Regulation 1049/2001 and the corresponding provisions of the Public Access Decision (SRB/ES/2017/01).

17. In its response after the adoption of the Revised Confirmatory Decision the Board further adds, on the first plea raised by the Appellants, that only the Revised Confirmatory Decision has now legal effects, because – as expressly stated in the Revised Confirmatory Decision, on page 1 – it amends and replaces the Confirmatory Decision; therefore, claims of the Appellants that the Confirmatory Decision needs to be formally "vacated and remanded" should be dismissed as this decision at present only exists in form of the Revised Confirmatory Decision. On the second plea of the Appellants, the Board further argues that the information contained on pages 3 and 5 of the Valuation 1 Report contains sensitive data and figures concerning the ECB's solvency assessment of the ELA provisions and information on adjustments. The Board further notes that this information is highly confidential and mainly originates from the ECB which, in its capacity as banking supervisory authority, objected to its disclosure. The Board further argues that the few remaining redactions in the non-confidential version of the Valuation 1 Report published by the SRB do not hamper a comprehensive understanding of the assessment carried out by the SRB.

Findings of the Appeal Panel

18. The Appeal Panel preliminary notes that in its previous decisions rendered on 28 November 2017 and 19 June 2018, it was held that the following overriding principles, hereby restated for all relevant purposes, should guide in the assessment of the requests of access to documents related to the Banco Popular resolution:

(a) The right of access is a transparency tool of democratic control of the European institutions, bodies and agencies and is available to all EU citizens irrespective of their interests in subsequent legal actions (see for instance judgment 13 July 2017, *Saint-Gobain Glass Deutschland*, C-60/15, EU:C:2017:540, paragraphs 60 and 61 and in particular judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 20: "*as the addressee of those decisions* [denying access to documents], *the applicant is therefore entitled to bring an action against them.* (...)"). In the present case, however, the Appellants also submit that they have been affected by the Resolution Decision and access to the documentation denied by the SRB is sought in order to exercise their right to an effective judicial protection in respect of the Banco Popular resolution before the General Court of the European Union.

(b) To the effect of this appeal, the Appellants are subject to the regime for access to documents set out by Article 90(1) of the SRMR together with Regulation 1049/2001. As indicated by Article 85(3) SRMR, the Appeal Panel has no competence to hear appeals against a decision of the Board referred to in Article 90(4) SRMR. The Appellant can therefore not rely, in this appeal, on the right to access the SRB's file on the basis of Article 90(4) SRMR.

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

> Article 4
>
> Exceptions
>
> 1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
>
> (a) the public interest as regards:
>
> - public security,
>
> - defence and military matters,
>
> - international relations,
>
> - the financial, monetary or economic policy of the Community or a Member State;
>
> (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
>
> 2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
>
> - commercial interests of a natural or legal person, including intellectual property,
>
> - court proceedings and legal advice,
>
> - the purpose of inspections, investigations and audits,
>
> unless there is an overriding public interest in disclosure.
>
> 3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
>
> Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
>
> 4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

(d) In principle, exceptions must be applied and interpreted narrowly (see e.g. judgment 17 October 2013, *Council v. Access Info Europe*, C-280/11, EU:C:2013:671, paragraph 30). However, case-law on public access to documents in the administrative context (as opposed to case law on public access in the legislative context) suggests that a less open stance can be taken in the administrative context because "*the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution*" (see to this effect judgment 4 May 2017, *MyTravel v. Commission*, T-403/15, EU:T:2017:300, at paragraph 49; judgment 21 July 2011, *Sweden v. Commission* C-506/08 P, EU:C:2011:496, at paragraphs 87-88; judgment 29 June 2010, *Commission v. Technische Glaswerke Ilmenau,* C-139/07 P, EU:C:2010:376, paragraphs 60-61).

(e) Settled case-law permits Union institutions, bodies and agencies to rely in relation to certain categories of administrative documents on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by Regulation 1049/2001 (see to this effect judgment 28 June 2012, *Commission v. Edition Odile Jacob,* C-404/10, EU:C:2012:393; judgment 21 September 2010, *Sweden and Others v. API and Commission,* C-514/07 P, EU:C:2010:541; judgment 27 February 2014, *Commission v. EnBW*, C-365/12 P, UE:C:2014:112; judgment 14 November 2013, *LPN and Finland v. Commission,* C-514/11 P and C-605/11 P EU:C:2013:738; judgment 11 May 2017, *Sweden v. Commissio*n, C-562/14 P EU:C:2017:356). Where the general presumption applies, the burden of proof is shifted from the institution to the applicant, who must be able to demonstrate that there will be no harm to the interest protected by the Regulation 1049/2001. This also means that the Union institutions, bodies or agencies are not required, when the general presumption applies, to examine individually each document requested in the case because, as the CJEU noted in *LPN and Finland v. Commission,* Joined Cases C-514/11P and C-605/11P (cited above, paragraph 68), "*such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global*". At the same time, though, settled case law clarifies that, since the possibility of relying on general presumptions applying to certain categories of documents, instead of examining each document individually and specifically before refusing access to it, would restrict the general principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation 1049/2001, "*the use of such presumptions must be founded on reasonable and convincing grounds*" (judgment 25 September 2014, *Spirlea v. Commission*, T-306/12, EU:T:2014:816, paragraph 52).

(f) When determining whether disclosure is prevented by the application of one of the relevant exceptions under Regulation 1049/2001, EU institutions, bodies and agencies enjoy in principle a margin of discretion (due to the open-textured nature of at least some of the relevant exceptions). Review is then limited, according to settled case law, to verifying whether procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers (see, among others, judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 53; judgment 29 November 2012, *Thesing and Bloomberg Finance v ECB*, T-590/10, EU:T:2012:635, paragraph 43); in any event, the actual viability of judicial review must be ensured (see to this effect in light of judgment 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

19. Also in light of the GCEU judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234, the Appeal Panel decisions of 19 June 2018 further clarified, with specific reference to requests of access to the Valuation 1 Report, that:

(a) the Appeal Panel did not deem necessary to require the Board to make an integral disclosure of the Valuation 1 Report and conceded that in the specific assessment of the relevant parts of the Valuation 1 Report, which could be redacted under the relevant exceptions recognised by Regulation 1049/2001, the Board retains a margin of discretion (in particular in respect of the assessment whether disclosure would undermine the public interest under Article 4(1)(a) of Regulation 1049/2001), provided that the Board complies with its obligation to state the reasons in such a way that effective judicial review can be conducted;

(b) the SRB was entitled to blank out those specific data and information that, on careful and reasonable examination, could objectively raise actual concerns either of financial stability or of protection of commercial interests. The Appeal Panel pointed out that, in this respect, in the specific assessment of the relevant parts which should not be disclosed, the Board has to duly consider that: (i) exceptions to public access are to be interpreted narrowly, (ii) Article 4 of the Public Access Decision must be interpreted in conformity with Regulation 1049/2001 and cannot create broader exceptions to the disclosure obligation than what provided for in Article 4 of Regulation 1049/2001, and (iii) refusal to disclose must be supported by a specific finding that the disclosure of such part of the document would actually undermine a protected interest in a credible scenario and must be substantiated in such a way, so to enable interested parties to challenge the correctness of those reasons and courts to conduct their review (see on this point again judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55).

(c) the SRB assessment, of which parts of the Valuation 1 Report could not be disclosed under the relevant exceptions provided for by Regulation 1049/2001 was done to a large extent

in compliance with the applicable procedural rules, with the duty to state reasons and without a manifest error of assessment or a misuse of powers, and thus within the limits of the exercise by the Board of the margin of discretion which must be recognized to it according to settled case law (again, judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55). The Appeal Panel further considered that the SRB, in stating the reasons justifying its partial denial of access, could legitimately take account also of possible future behaviours (e.g. risk of unwarranted market speculation), if not purely hypothetical but reasonably foreseeable in a credible scenario and sufficiently specific (the need of protection must be genuine).

(d) Nonetheless, some redactions in the non-confidential version of the Valuation 1 Report of 2 February 2018, in the Appeal Panel's view, went beyond these limits. The Appeal Panel held that this was the case, for instance, with the redaction in the Valuation Report 1 of the columns referring to potential adjustments (low and high) and of the ensuing re-expressed amounts as of 31.3.2017, on pages 4 and 5 as well as the redaction of the amount of deposit outflows exceeded in a single day on 12, 16, 22, 23 and 31 May 2017 and 1 June 2017 in the first paragraph of page 8 and the description of the actions taken by the supervised entity and their outcome in the third paragraph on page 8.

20. For the just determination of this appeal, the Appeal Panel carefully reviewed the non-confidential version of the Valuation 1 Report of 31 October 2018 against the non-redacted, confidential version of the same (that the Appeal Panel had ordered the Board to make confidentially accessible to the Panel in previous cases). The Appeal Panel in particular examined individually each of the 5 contested redactions, in light of the reasons stated (i) by the Appeal Panel in its previous decisions (more specifically those of 19 June 2018, in the findings relating to the assessment of the redactions to the Valuation 1 Report made available on 2 February 2018) and (ii) by the SRB with the Revised Confirmatory Decision in support of the redactions to the Valuation 1 Report made available on 31 October 2018. The Appeal Panel further considered all the arguments raised by the Appellants in this appeal, comparing in a thorough manner the non-confidential version of the Valuation 1 Report with the confidential version of the same. The Appeal Panel – to the extent that parallels may be drawn with the instant case - also considered the most recent CJEU judgments on access to documents pertaining to financial supervision of 19 June 2018, *BaFin v Ewald Baumeister*, case C-15/16, EU:C:2018:464, of 13 September 2018, *Enzo Buccioni*, C-594/16, EU:C:2018:717, and of 13 September 2018, *UBS Europe v DV*, C-358/16, EU:C:2018:715 in light of the legal corollaries arising from these cases in addition to previous case law already quoted.

21. Based upon the foregoing the Appeal Panel finds, on the first plea raised by the Appellants, that the Revised Confirmatory Decision amended and replaced the Confirmatory Decision and therefore only the Revised Confirmatory Decision can at present be deemed to have legal effects vis-à-vis the Appellants. The Appeal Panel further notes that, for reasons of procedural economy, which also benefited the Appellants, these Appellants were granted the possibility

to extend their appeal, in the instant case, against the Revised Confirmatory Decision and they explicitly did so. Whilst the Appellants have therefore an actual interest that the Appeal Panel decides whether to confirm or remit the Revised Confirmatory Decision to the Board and thus determines if the 5 contested redactions have been duly justified in accordance with the Regulation No. 1049/2001, in the Appeal Panel's view the Appellants do not have any actual interest anymore that an Appeal Panel decision be adopted with regard to the Board's Confirmatory Decision which, as such, is at present devoid of legal effects and has been replaced by the appealed Revised Confirmatory Decision.

22. On the second plea, the Appeal Panel finds that in its previous decisions of 19 June 2018 it showed redactions to the Valuation 1 Report which, in the Appeal Panel's view, were not justified, stated the principles that govern the matter and finds now that the majority of the 5 contested redactions in the non-confidential Valuation 1 Report published on 31 October 2018 are in line with the previous findings of the Appeal Panel. For these redactions the Board, with the Revised Confirmatory Decision, offered further justifications. In this, the Board acted not only in compliance with the previous Appeal Panel's decisions but also within the limits of the margin of discretion which must be recognized to the Board in the assessment of the risk of occurrence of one or more of the situations which justify the use of the exceptions to public access to documents under Regulation 1049/2001 according to the principles set out above and in conformity with settled case law (again, judgment 4 June 2015, *Versorgungswerk der Zahnärtzekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55).

23. The Appeal Panel refers, in this respect, to the specific reasons stated by the Board in paragraph 2 of the Revised Confirmatory Decision, which, in the Appeal Panel's view, offer a sufficient and specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the non-disclosure of the redacted parts of the Valuation 1 Report in page 3. Such reasons comply with the principles stated above and, in the Appeal Panel's view, do not show any manifest error and were stated in a sufficiently specific manner.

24. The Appeal Panel further notes that, in its direct examination of the non-confidential version of the Valuation 1 Report made in order to verify if the invoked justifications could be considered genuine, the Appeal Panel could directly ascertain that the first redaction on page 3 refers to information originating from the ECB and is mostly justified by the need to keep confidential the ELA assessment made by the ECB itself. The reasons specifically stated by the ECB as originator of the information to object to the disclosure of such information are clearly stated as such on page 4 of the Revised Confirmatory Decision and the Appeal Panel does not find any manifest error of assessment or misuse of powers in these reasons, which are, in the Appeal Panel's view, expression of the margin of discretion in the assessment of the exception under Article 4(1)(a) fourth indent of Regulation No 1049/2001 which must be recognized to the Board and the ECB according to settled case law.

25. Also the redaction of the reference to supervisory data and inspections in the middle of page 3 is, in the Appeal Panel's view, justified, in compliance with settled case law, which

recognizes the need that exchange of information and cooperation in any supervisory activities are not compromised by a lack of confidence between authorities that the information they exchange will not remain confidential. In turn, the redaction of the amount in the final paragraph on page 3, in the Appeal Panel's view, appears to be sufficiently justified by the Board making use of the margin of discretion which is granted to it under Regulation 1049/2001 in assessing under Article 4(2), first indent whether disclosure would undermine the protection of commercial interests. The Board sufficiently stated its reasons in this respect and the Appeal Panel cannot find any manifest error in such reasons, since the redacted amount refers to adjustments on the Banco Popular balance sheet, also related to goodwill and non-protected deferred tax assets in case of negative profitability, for which the Appeal Panel cannot currently rule out with certainty that the disclosure of this amount, if read out of the specific context in which these adjustments were calculated, may still lead to speculations to the detriment of the relevant credit institution (such credit institution being now Banco Santander following the merger by absorption of Banco Popular in Banco Santander, whereby the latter has acquired, by universal succession, all of the assets and liabilities of Banco Popular).

26. On the contrary, for the additional redactions (i) on page 2, section 1.2. indent e) and (ii) in the footnote with two asterisks on page 4-5, the Appeal Panel fails to see how the disclosure of such redacted parts could undermine the protection of any relevant public interest (and even more so, if one considers, specifically as regards these aspects, the time which has now lapsed from the adoption of the resolution decision, differently from what happens as regards the aspects covered *supra* in paras. 24 and 25, for which the time lapsed so far did not make yet unreasonable the relevant redactions). Regarding these redactions the Appeal Panel finds that the Board, with the Revised Confirmatory Decision, did not fully comply with the duty to state reasons and with the Appeal Panel decisions of 19 June 2018.

On these grounds, limited to para. 26 above, the Appeal Panel hereby,

remits the case to the Board.

Helen Louri-Dendrinou

Kaarlo Jännäri

Luis Silva Morais
Vice-Chair

Marco Lamandini
Rapporteur

Christopher Pleister
Chair