



**11 April 2019**

Case 12/2018

# **FINAL DECISION**

[...]

**Appellant,**

**v**

**the Single Resolution Board**

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

**TABLE OF CONTENTS**

**Background of facts** ..... 3  
**Findings of the Appeal Panel** .....4  
**Tenor** .....9

## FINAL DECISION

In Case 12/18

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010<sup>1</sup> (the “SRMR”),

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

v

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

(together referred to as the “Parties”),

### THE APPEAL PANEL,

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

makes the following final decision:

### Background of facts

1. This appeal relates to the SRB decision of 10 July 2018 (hereinafter the “Confirmatory Decision”) rejecting 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) of SRMR and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> (hereinafter “Regulation 1049/2001”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents<sup>3</sup> (hereinafter “Public Access Decision”).
2. By the initial request and the confirmatory application, the Appellant requested access to the definitive valuation according to Article 20(11) SRMR (hereinafter the “Definite Valuation 2 Report”), the valuation for the purposes of assessing whether shareholders and creditors would have received better treatment if Banco Popular had entered into normal insolvency procedure according to Article 20(16) SRMR (hereinafter “Valuation 3”) and documents that justify and motivate the FOLTF Assessment made by the European Central Bank (hereinafter the “FOLTF Assessment”).

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<sup>1</sup> OJ L 225, 30.7.2014, p.1.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43

<sup>3</sup> SRB/ES/2017/01.

3. The notice of appeal was notified to the Board on 09 August 2018.
4. The Board submitted its response on 23 August 2018.
5. On 12 September 2018, the Appeal Panel adopted and notified the Parties of the following procedural direction:

“Following the adoption of its 19 June 2018 decisions (which you can access at the following link <https://srb.europa.eu/en/content/cases>) the Appeal Panel, notes that these decisions relate also to the document[s] requested by you in the pending appeal 12/2018 referring to the Banco Popular resolution case.

In light of past practice, showing that the adoption by the SRB of a revised confirmatory decision is likely to occur and an Appeal Panel decision in respect to the confirmatory decision, in the circumstances, would not speed up the requested access to documents, the Appeal Panel determined to stay the pending case 12/2018, until the date of implementation by the Board of the Appeal Panel's decisions of 19 June 2018.”

6. Nevertheless, on 17 September 2018, the Appellant filed a response to the SRB's response on the merits of the case.
7. On the 7 November 2018, the Appeal Panel notified the Parties the following procedural direction:

‘’ On 31 October 2018 the SRB, following the Appeal Panel's decisions adopted on 19 June 2018, published in the SRB's Public Register of Documents at <https://srb.europa.eu/en/public-register-of-documents/192> non-confidential version of the following documents:

1. The Valuation 1 Report;
2. The Valuation 2 Report;
3. The 2016 Resolution Plan;
4. The 2017 Liability Data Report;
5. The 2017 Critical Functions Report;
6. The Documents received from Banco Popular about the private sale process as referred to in Recital (30) and (31) of the Resolution Decision;
7. The Resolution Decision.

At the same time, the Board adopted new Revised Confirmatory Decisions in cases: 44-54/18, 56/17, 1/18, 7/18 decided by the Appeal Panel on 19 June 2018.

Based upon the foregoing, the Appeal Panel, having considered that the appeals in the present cases: 12/18 was stayed until the Appeal Panel's decisions of 19 June 2018 were implemented and for reasons of procedural economy it is now necessary to take into account all potential effects of the publication of the documents listed above in the pending appeal, invites:

e) the Appellant to file with the Appeal Panel's Secretariat at: SRB-Appeal-Panel@srb.europa.eu, within one week from the date of receipt of this procedural order, a statement clarifying whether the Appellant is satisfied with the documents published by the Board on 31 October 2018 and the appeal is thus withdrawn or the Appellant insists on the continuation of the appeal, in whole or in part;

f) should the Appellant insist on the continuation of the appeal, the Board to adopt, in respect of the Appellant, revised confirmatory decision in light of the new disclosures made by the Board on 31 October by 30 November 2018;

g) should the Appellant insist on the continuation of the appeal (i) the Appellant to extend, for reasons of procedural economy, its appeal to the revised confirmatory decisions and to submit, to this effect, its written submissions with respect of the revised confirmatory decision with the Secretariat by 31 December 2018; (ii) the Board to submit its response to the Appellant's written submission with the Secretariat by 31 January 2019; (iii) the Appellant to submit its reply to the SRB response by 15 February 2019.

h) In case the Appellant insists on the continuation of the appeal, both parties to clarify whether they consider necessary to make oral representations at a hearing that will take place in Brussels at the SRB's premises or they waive the right to such a hearing.

The Appeal Panel reserves all determinations and shall inform the parties on the date of a possible hearing, if any, after the completion of the exchanges of submissions indicated above.”

8. On 30 November 2018, in line with the instruction provided by the Appeal Panel, the Board amended and replaced the Confirmatory Decisions in light of the Appeal Panel's decisions of 19 June 2018 and of the publication of documents on 31 October 2018 and adopted the Revised Confirmatory Decision. With the Revised Confirmatory Decision the Board granted access to the non-confidential version of the Valuation 3 Report, informed that after careful assessment of the legal framework, the SRB considers that, in light of the circumstances of the resolution of Banco Popular, it is not necessary for an ex-post Definitive Valuation 2 Report as referred to in Article 20(11) SRMR to be prepared, since carrying out such valuation could not have an impact on the concluded sale of Banco Popular to Banco Santander that determined the market price of Banco Popular as an entity in an open, fair and transparent process. As regards the FOLTF Assessment documents (minutes and documents analysed), the Board informed that its position, as expressed in the Confirmatory Decision, remained unchanged. The Appeal Panel granted to the Parties appropriate terms to submit their observations in respect to the Revised Confirmatory Decision.
9. The Appellant did not file any observations within the deadline.
10. On 31 January 2019, the SRB filed a letter asking the Panel to dismiss the appeal.
11. On 6 March 2019, the Appeal Panel sent a direction to the Appellant allowing the Appellant to submit its observations by 13 March 2019 as follows:

We refer to the pending appeal in case no. 12/18, where the Appellant has challenged the Confirmatory Decision adopted by the Board on 15 June 2018. With such Board's decision the

Appellant was refused access to the Definitive Valuation 2 Report, the Valuation 3 and the FOLTF assessment.

The Appeal Panel notes that the Board submitted its response in English on 23 August 2018, which was then notified to the Appellant in its Spanish version on 7 September 2018; on 12 September 2018 the Appeal Panel notified to the parties Procedural Order no. 1 to stay the case until the implementation by the Board of the Appeal Panel's decisions adopted in similar cases on access to documents relating to the Banco Popular resolution on 19 June 2018. Such implementation took place on 31 October 2018.

On 7 November 2018, the Appeal Panel further notified the parties the following Procedural Order no. 2:

“Dear Sirs,

On 31 October 2018 the SRB, following the Appeal Panel decisions adopted on 19 June 2018, published in the SRB's Public Register of Documents at <https://srb.europa.eu/en/public-register-of-documents> a public version of the following documents:

- 1.- the Valuation 1 Report;
- 2.- the Valuation 2 Report;
- 3.- The 2016 Resolution Plan;
- 4.- The 2017 Liability Data Report;
- 5.- The 2017 Critical Functions Report;
- 6.- The Documents received from Banco Popular about the private sale process as referred to in Recital (30) and (31) of the Resolution Decision;
- 7.- The Resolution Decision.

At the same time, the Board adopted new Revised Confirmatory Decisions in the cases decided by the Appeal Panel on 19 June 2018.

Based upon the foregoing, the Appeal Panel, having considered that the appeal in the present case was stayed until the Appeal Panel's decisions of 19 June 2018 were implemented and for reasons of procedural economy it is now necessary to take into account all potential effects of the publication of the documents listed above in the pending appeal, invites:

- a) the Appellant to file with the Secretariat, within one week from the date of receipt of this procedural order, a statement clarifying whether the Appellant is satisfied with the documents published by the Board on 31 October 2018 and the appeal is thus withdrawn or the Appellant insists on the continuation of the appeal, in whole or in part;
- b) should the Appellant insist on the continuation of the appeal, the Board to adopt, in respect of the Appellant, a revised confirmatory decision in light of the new disclosures made by the Board on 31 October by 30 November 2018;
- c) should the Appellant insist on the continuation of the appeal (i) the Appellant to extend, for reasons of procedural economy, its appeal to the revised confirmatory decision and to submit, to this effect, its written submissions with respect of the revised confirmatory decision with the Secretariat by 31 December 2018; (ii) the Board to submit its response to the Appellant's written submission

with the Secretariat by 31 January 2019; (iii) the Appellant to submit its reply to the SRB response by 15 February 2019;

d) in case the Appellant insist on the continuation of the appeal, both parties to clarify whether they consider necessary to make oral representations at a hearing in Brussels at the Appeal Panel premises or they waive the right to such an hearing.

The Appeal Panel reserves all determinations and shall inform the parties on the date of a possible hearing, if any, after the completion of the exchanges of submissions indicated above.”

Although the Appellant submitted a reply to the Board’s response on 17 September 2018, and the Board adopted on 30 November 2018 a Revised Confirmatory Decision, the Appellant – departing from the directions of Procedural Order no. 2 – has not yet made any submissions as required by Procedural Order no. 2 and has not therefore express any clear position on the continuation of the appeal and its extension to the Amended Confirmatory Decision.

The Appeal Panel further notes that the Amended Confirmatory Decision replaced the Confirmatory Decision taken by the Board before the Appeal Panel’s decisions of 19 June 2018 and that the Appeal Panel has already determined, with its precedent decisions, on public access to the FOLTF assessment.

Considering Procedural Order no. 2 and, further, that the Appellant’s original statements of grounds (as required under Article 5(4)(b) RoP) against the Confirmatory Decision are hardly addressing specifically the reasons why the Appellant may still consider that the Amended Confirmatory Decision should be remitted to the Board by the Appeal Panel, the Appeal Panel deems appropriate to hereby issue a direction to the Appellant, according to, and with the effects of, Article 14 of its Rules of Procedure whereby the Appellant is required to file with the Secretariat of the Appeal Panel, within one week from the receipt of the present direction, written submissions complementing the appeal and clearly stating:

(1) whether the Appellant is satisfied with the documents published by the Board on 31 October 2018 and the appeal is thus withdrawn or the Appellant insists on the continuation of the appeal, in whole or in part;

(2) should the Appellant insist on the continuation of the appeal, if the Appellant wish to extend, for reasons of procedural economy, its appeal to the Revised Confirmatory Decision and, in the affirmative,

(3) the specific reasons why the Appellant is challenging the Amended Confirmatory Decision adopted by the Board on 30 November 2018.

The Board is then granted two weeks from the date of such Appellant’s submissions, if any, to respond.

The Appeal Panel informs the Appellant that, failure to comply with this direction, may justify that the Appeal Panel adopts an order to dismiss the appeal under Article 14(1) RoP and that the Appellant is hereby given notice of this possible outcome, in accordance with Article 14(2), so that the Appellant has also an opportunity to make representations against the making of such an order.

12. The Appellant failed to respond to such directions of the Appeal Panel.

## **Findings of the Appeal Panel**

13. The Appeal Panel finds that the Appellant failed to comply with the directions of the Appeal Panel, which, in procedural terms, is a manifestation of lack of interest in the continuance of the appeal.
14. It is important to understand that the present case does not arise from an initial request for disclosure of documents. It forms part of a third round of appeals, which follow the cases that gave rise to a series of Appeal Panel decisions for instance those of 28 November 2017, and 19 June 2018. In these prior decisions, the Appeal Panel already considered numerous arguments on document disclosure, remitting the cases to the Board, whenever the Board's arguments did not justify a lack of disclosure, and confirming the Board's interpretation whenever the arguments so justified.
15. Following these appeals, the Board has been issuing revised confirmatory decisions, where it disclosed numerous extra documents. These included the Revised Confirmatory Decision in the present case, which replaced the First Confirmatory Decision. Therefore, only the Revised Confirmatory Decision can have legal effects vis-à-vis the Appellant.
16. Therefore, the existence of a Revised Confirmatory decision by the Board, and a decision by the Appeal Panel made it necessary for the Appellant to clarify its position in light of these developments. The Appeal Panel tried to facilitate the Appellant and all parties by granting the Appellant the possibility to extend its appeal to the Revised Confirmatory decision, without having to file a new appeal. However, the Appeal Panel cannot presume the Appellant's intent to extend the appeal, because the Appellant still needed to explain what *exactly* were the additional disclosures requested, and why. The Appeal Panel gave the Appellant a procedural direction to invite him to express his intent. He failed to do so.
17. Article 14(1) of the Appeal Panel Rules of Procedure states that "where a party has, without reasonable excuse, failed to comply with a direction of the Appeal Panel or a provision of these rules, the Appeal Panel may, where that party is the appellant, dismiss the appeal wholly or in part".
18. The Appeal Panel further notes that, in accordance with Article 14(2) of the Appeal Panel Rules of Procedure, the direction sent by the Appeal Panel to the Appellant on 6 March 2019 clearly and unequivocally stated that "The Appeal Panel informs the Appellant that, failure to comply with this direction, may justify that the Appeal Panel adopts an order to dismiss the appeal under Article 14(1) RoP and that the Appellant is hereby given notice of this possible outcome, in accordance with Article 14(2), so that the Appellant has also an opportunity to make representations against the making of such an order".
19. The Appeal Panel considers therefore that the directions given by the Appeal Panel in compliance with Article 14 of the Appeal Panel Rules of Procedure were not duly complied with by the Appellant, despite the Appellant was granted a reasonable opportunity to do so. Therefore, the appeal must be decided and dismissed in accordance with Article 14 of the Appeal Panel Rules of Procedure.

On those grounds, the Appeal Panel hereby

**Dismisses the appeal in accordance with Article 14 of the Appeal Panel Rules of Procedure.**

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David Ramos Muñoz

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Kaarlo Jännäri

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Luis Silva Morais  
Vice-Chair

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Marco Lamandini  
Rapporteur

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Christopher Pleister  
Chair

For the Secretariat of the Appeal Panel :