



19 June 2019

Case 21/2018

FINAL DECISION

[...],

Appellant,

v

the Single Resolution Board

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

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FINAL DECISION

In Case 21/18

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 1093/2010¹ (the “SRMR”),

[Appellant], represented by [lawyer], with address for service in [...] (hereinafter the “Appellant”)

v

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

(together referred to as the “Parties”),

THE APPEAL PANEL,

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

makes the following final decision:

Background of facts

1. This appeal relates to the SRB’s decision of 30 November 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 the Appellant’s initial requests 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 documents² (hereinafter “Regulation 1049/2001”), and the SRB’s decision of 9 February 2017 on public access to the Single Resolution Board documents³ (hereinafter “Public Access Decision”).
2. By the initial requests and the confirmatory application, the Appellant has requested access to several documents prepared or used by the Board in the context of the resolution of Banco Popular Español (hereinafter, “Banco Popular”) and more specifically the following:
 - (i) The internal or preparatory documents drafted by the SRB concerning the definitive Ex-Post Valuation report (hereinafter the “Ex-Post Valuation 2”);

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

- (ii) The communication between the SRB and the independent valuer Deloitte with respect to Ex-Post Valuation 2;
 - (iii) All the communication between the SRB and the European Commission with respect to the Ex-Post Valuation 2, in particular those regarding the decision not to proceed with such valuation and, if appropriate, requesting authorisation to do so;
 - (iv) The responses received from the European Commission in this sense, clarifying if appropriate the granting or not of such authorisation.
3. The SRB, with its initial response of 4 October 2018, refused access to the documents listed above under (i), (iii) and (iv) based on the exceptions of Article 4(2), second indent and Article 4(3) of Regulation 1049/2001. With regard to the documents listed above under (ii), the SRB granted full access (with the exception of limited personal data) to the SRB's letter of 2 August 2018 sent to Deloitte with respect to the Ex-Post Valuation 2. Regarding the documents access was denied to, the Appellant submitted a confirmatory application requesting the SRB to reconsider its position. The SRB rejected the confirmatory application with the Confirmatory Decision.
 4. The notice of appeal was filed on 27 December 2018 and notified to the Board on 11 January 2019. The language of the notice of appeal and of the appeal proceeding is English.
 5. On 8 February 2019, the Board, having requested and being granted by the Appeal Panel an extension of the period for filing its response in accordance with Article 6(4) of the Rules of Procedure, filed its response.
 6. On 8 March 2019, the Appellant, having requested and being granted by the Appeal Panel an extension of the period for filing its reply, filed its reply to the Board's response, confirming its intention to make oral representation at a hearing to be convened to discuss the case.
 7. On 22 March 2019 the Appeal Panel informed therefore the Parties that the hearing was scheduled in Brussels on 11 April 2019.
 8. On 26 March 2019, the Board requested however to postpone the hearing due to many concomitant submissions in cases pending before the Appeal Panel and the CJEU and in order to preserve unscathed its right of defence. On 29 March 2019, the Appeal Panel informed the Parties of the Board's request to postpone the hearing, that the request was accepted and consequently a new date will be communicated to the parties in due time.
 9. On 15 April 2019, the Appeal Panel ordered the Board, as a measure of inquiry weighing confidentiality against the right to an effective legal remedy, having regard also to Article 104 of the General Court's Rules of Procedure, (A) to deposit with the Appeal Panel's Secretariat by 10 May 2019 at the SRB premises, one or more numbered hardcopies of (i) The internal or preparatory documents drafted by the SRB concerning the definitive Ex-Post Valuation

report (hereinafter the “Ex-Post Valuation 2”); (ii) The communication between the SRB and the independent valuer Deloitte with respect to Ex-Post Valuation 2 (including the letter of the Board to Deloitte of 2 August 2018 already sent to the Appellant); (iii) All the communication between the SRB and the European Commission with respect to the Ex-Post Valuation 2, in particular those regarding the decision not to proceed with such valuation and, if appropriate, requesting authorisation to do so; (iv) The responses received from the European Commission in this sense, clarifying if appropriate the granting or not of such authorisation and (B) subject to the adoption of appropriate technological means and all necessary security measures, to allow remote access to the Appeal Panel Members *via* electronic devices to an electronic copy of the same for reading only. Upon request of the Board from 3 May 2019, on 6 May 2019, the original deadline for such deposit was postponed to 24 May 2019. On 24 May 2019 the Board deposited the requested confidential documents.

10. On 10 May 2019 the Appeal Panel informed the parties that the hearing was re-scheduled on 4 June 2019.
11. The hearing was held in Brussels at the SRB premises on 4 June 2019. The Parties appeared and presented oral arguments. At the hearing the Appellant clarified that it intended to narrow down its original requests and the Appeal Panel asked questions to both Parties and agreed with them that, after the hearing, the Appeal Panel would have issued a procedural order with questions to the Parties, in order to receive a written statement from the Appellant on its final requests with the appeal and from the Board on a clarification of facts relevant for the just determination of the appeal.
12. On 5 June 2019, the Appeal Panel issued such procedural order and asked the Parties to submit by the close of business of 11 June 2019, the following:
 - 1) As to the Appellant: a written statement reflecting the Appellant’s limitation of its original appeal with regard to the requested access to documents, as declared by the Appellant at the hearing; The Appeal Panel requested that such statement should precisely specify the documents whose access is still sought by the Appellant (the Appeal Panel understanding, at the hearing, being that the Appellant intended to limit its appeal to the access to (1) the European Commission authorization or denial of authorization, if any, of the Board’s decision to instruct Deloitte not to carry out the ex post definitive valuation and (2) the communication from Deloitte to the Board containing a draft or final ex post valuation, if any);
 - 2) As to the Board: a written answer to the following questions: (a) Has the European Commission adopted and sent to the Board a decision to the effect of authorizing or not authorizing the Board to instruct Deloitte not to carry out the ex-post definitive valuation? (b) has Deloitte sent to the Board from June 2017 to August 2018 a draft or final ex-post valuation?

13. Both Parties timely submitted the requested statements, which were eventually notified to the other Party by the Secretariat.

14. The Appellant stated that:

2. This party hereby confirms that it narrows down the scope of the documents requested and, accordingly, submits the following answers in response to the above questions of the members of Appeal Panel of the Single Resolution Board.

3. The appellant only requests two sets of documents:

(i) Assessment by the independent evaluator:

4. This party requests access to any economic assessment (including, and not limited to, provisional assessments, drafts, final drafts, conclusions or final reports) concerning a definitive ex-post valuation of Banco Popular of the independent expert transmitted or communicated, by any means whatsoever (including, but not limited to, email, fax, courier, in hand, etc.), to the Single Resolution Board.

(ii) Authorization of the Commission:

5. This party requests access to any documents of the European Commission communicated or transmitted to the SRB by any means whatsoever (including, but not limited to, email, fax, courier, in hand, etc.):

(i) containing an authorization by the European Commission to the Single Resolutions Board not to carry out an ex-post definitive valuation, or alternatively,

(ii) any document containing a decision of the European Commission refusing to grant an authorization to the Single Resolutions Board to carry out an ex-post definitive valuation.

15. The Board stated that:

1. Answer to Question (a):

The Board does not hold in its possession a European Commission decision to the effect of authorizing or not authorizing the Board to instruct Deloitte not to carry out the ex post definitive valuation.

2. Answer to Question (b):

The Board does not hold in its possession a draft or final ex-post valuation 2 from Deloitte from the period between June 2017 and August 2018.

For the sake of completeness and as also mentioned during the oral hearing on 4 June 2019, it is noted that the Appellant on 4 May 2018 submitted to the SRB an initial application under the public access regime for access to, inter alia, the definitive valuation 2. The SRB has replied to this request on 19 June 2018 indicating that such document is not in the possession

of the SRB and recalling that Regulation 1049/2001 applies only to existing documents. The Appellant has not further pursued this.

16. On 13 June 2019, 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

17. 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, in the section of this decision devoted to the findings of the Appeal Panel. It is also specified that 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.

Appellant

18. The Appellant preliminarily notes that, in response to its request for access to the Ex-Post Valuation 2 of May 2018, the Board stated that such document does not exist [...] the Board further clarified on 31 July 2018 that such Ex-Post Valuation 2 would not be carried out [...]. This was formally confirmed with a Board's decision adopted on 14 September 2018. The Appellant lodged an application for annulment of such decision before the General Court (in case T-599/18).
19. The Appellant further notes that with the initial request access was sought to a number of documents concerning the Ex-Post Valuation 2. The Appellant clarified, however, that the present appeal concerns specifically only the following documents: (i) the communications between the SRB and the European Commission, in particular the authorization to the SRB not to adopt a definitive ex-post valuation; and (ii) the communications between the SRB and Deloitte, in particular any document containing a draft or final version of the Ex-Post Valuation 2. The Appellant specifies that the ultimate aim of this appeal is to ascertain whether the European Commission approved the above-mentioned decision of the Board not to conduct a definitive Ex-Post Valuation 2 of Banco Popular and whether, in this context, Deloitte had submitted a draft or conclusions of the Ex-Post Valuation 2 to the SRB or not.
20. The Appellant contests the Confirmatory Decisions raising five pleas. With the first plea, the Appellant submits that the Confirmatory Decision breaches the right to a fair trial, as there is precise and consistent evidence that the requested documents are essential for the Appellant's right of defence. The Appellant submits that legal proceedings have been initiated against the SRB before the General Court in cases T-628/17 and T-599/18 and that in case T-599/18, the Appellant has raised two pleas in which it is put forward that the European Commission has not authorized the decision to not carry out the Ex-Post Valuation 2. In addition, if the decision

on part of the SRB were meant to conceal the conclusions of the independent expert, this could amount to a misuse of power.

21. With the second plea, the Appellant argues that the Confirmatory Decision breaches Article 4(3) of Regulation 1049/2001. According to the Appellant, the requested documents are not internal documents within the meaning of such Article because Article 4(3) of Regulation 1049/2001 draws a clear distinction – with regard to the need to protect the decision-making process – between the time before the decision has been adopted and once the decision has been issued. The Appellant also argues that the Board fails to provide any justification as to how the disclosure of the requested documents could undermine the SRB’s decision-making process and fails to consider that there is an overriding public interest in disclosure. The Appellant refers in this respect to the Opinion of Advocate General Bobek on 12 June 2018, *Enzo Buccioni v Banca d’Italia*, C-594/16, EU:C:2018:425, paragraph (86), where it is suggested that “once a credit institution goes bankrupt, the overall balance of interests starts to shift. The (ongoing) imperative to protect those interests of confidentiality will have to be balanced against two additional and newly emerging interests: first, there will be the (private) interests of those who have been harmed by the winding up of the credit institution, especially to allow them to claim damages. Second, there is also the legitimate (public) interest in knowing what went wrong, in order to establish whether the credit institution went bankrupt simply through its own actions or, whether that could at least have been partially caused by the supervising authority”.
22. With the third plea, the Appellant argues that the Confirmatory Decision breaches Article 4(2) of Regulation 1049/2001 in as much as it fails to explain how the documents relate to court proceedings and would undermine the position of the Board in such court proceedings and that it fails to consider that there is an overriding public interest in the disclosure. The Appellant refers, also in this context, to the *Buccioni* case and its finding that confidential information relating to a credit institution that has been declared bankrupt or has been liquidated may be disclosed only in the context of civil or commercial proceedings that have already been initiated. In the Appellant’s view, this should *a fortiori* apply in proceedings before EU courts concerning acts of EU bodies.
23. With the fourth plea, the Appellant argues that the Confirmatory Decision breaches the duty to state reasons, as it fails to provide adequate justifications for applying the exceptions to the right of access to documents provided for by Regulation 1049/2001.
24. With the fifth plea, the Appellant argues that the Confirmatory Decision breaches the principle of proportionality as it denies access to the requested documents in their entirety, without exercising any balancing of the public interests at stake.
25. These allegations were complemented during the oral hearing, where the Appellant focused its attention in showing that any authorisation (or refusal to grant such authorisation) by the European Commission and any assessment by Deloitte could be considered neither documents

susceptible of affecting legal proceedings (as they constituted neither legal advice nor written pleadings) nor internal documents. The Appellant stated that, in any event, the exceptions alleged by the Board were not absolute exceptions, but relative exceptions, and thus that a balance of interests was needed. For these purposes, it relied on case-law such as *Enzo Buccioni v Banca d'Italia*, C-594/16, EU:C:2018:717 or *UBS Europe v DV*, C-358/16, EU:C:2018:715. Upon questioning by the members of the Appeal Panel on the extent to which these cases could be used in the present context, the Appellant acknowledged that the applicable rules in those cases may have been different from the ones in the present case, but the Court's approach could still well be followed at the level of principle. In its turn for rebuttal, on the Board's allegation that the Appellant had changed its original request to different documents the Appellant alleged that it was not possible to state the documents with precision if the Board refused to disclose them or acknowledge their existence. The Appellant also alleged that, although its claim for disclosure was to be used in individual proceedings to challenge the Board's actions, its position was no different from that of other parties, which wished to understand how the decision was made in order to decide whether the acts were challengeable.

Board

26. The Board preliminarily notes that the documents requested by the Appellant in the present case relate to pending proceedings before the General Court of the European Union, first in case T-628/17, where the Appellant raised a number of pleas in connection with the Ex-Post Valuation 2 and the role played by the European Commission and secondly, in case T-599/18 that constitutes an action against the decision of the SRB not to proceed with the Ex-Post Valuation 2. In the same context, the Appellant asked the General Court to order, as a means of inquiry, to deposit in case T-599/18 the same documents related to the exchanges between the Board and the European Commission on the decision not to carry out the definitive Ex-Post Valuation.
27. The Board further argues that the appeal is inadmissible as far as it has the objective to annul the Confirmatory Decision, because under Article 85(8) SRMR, the Appeal Panel cannot annul a Board decision but only confirm or remit it to the Board. The Board further argues that the appeal is partially inadmissible as far as it relates to new documents not requested with the initial and confirmatory applications, such as the "conclusions or drafts sent by the independent expert (Deloitte) to the SRB concerning the definitive ex-post valuation of Banco Popular".
28. On the merits, the Board argues that, as to the first, plea, the Appellant has not provided precise and consistent evidence, as required by settled case-law, why the non-disclosure of requested documents would prevent the Appellant from initiating legal proceedings. The Board notes that the fundamental right to an effective judicial protection under Article 47 of the Charter of Fundamental Rights is duly respected, if access to documents is granted to an extent that enables the Appellant to initiate legal proceedings in an effective manner. The

Appellant was indeed able to start legal proceedings before the General Court. The Board further notes that the right of defence under Article 41(2) or 47 of the Charter have a different foundation from the right of access to documents decided in these proceedings, and its proper forum are the proceedings before the General Court. The Board notes that, according to settled case-law, the interest in obtaining documents for the purposes of court proceedings is a private interest and does not represent an overriding public interest.

29. As to the second plea, the Board notes, in the first place, that it already disclosed to the Appellant the existing Board's communication with Deloitte. As to the communication with the European Commission, the Board argues that communications between institutions are encompassed by the exception under Article 4(3) of Regulation 1049/2001 to the extent that they are opinions for internal use. The Board further argues that, in determining the applicability of one of the exceptions, the Board enjoys a large degree of discretion, and that, in accordance with settled case-law, there is "*a general presumption that any obligation to disclose during [court] proceedings opinions in the meaning of the second subparagraph of Article 4(3) of Regulation 1049/2001, would seriously undermine the institution's decision-making process*" (judgment of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, para 114). On this basis, the Board argues that, considering the relevant proceedings currently pending before the General Court, any communication with the European Commission with respect to the Ex-Post Valuation 2 is covered by the above mentioned general presumption. The Appellant, in the Board's view, failed to rebut this presumption and did not substantiate the existence of an overriding public interest in disclosure.
30. As to the third plea, the Board argues that the integrity of the proceedings pending before the General Court and the equality of arms between the parties could be seriously compromised if the Appellant were to benefit from access to the requested documents, because the disclosure would put into the public domain internal legal opinions on a highly sensitive decision currently discussed in the ongoing litigation before the General Court. Moreover, in the Board's view, the Appellant failed to show the existence of an overriding public interest in disclosure.
31. As to the fourth plea, the Board argues that the Confirmatory Decision provided detailed explanations on the assessment of the applicability of the exceptions provided in Regulation 1049/2001 and addressed each aspect raised by the Appellant in its confirmatory application. Moreover, in the Board's view, the Appellant, failed to rebut the general presumption of confidentiality of documents containing opinions for internal use.
32. As to the fifth plea, the Board argues that it considered whether partial access could be granted, as evidenced by the detailed reasoning of the Confirmatory Decision, but concluded that no further partial access was possible without undermining the purpose of the exceptions under Regulation 1049/2001 relied on by the Board in the instant case.

33. These allegations were complemented during the oral hearings, where the Board alleged that the Appellant had changed the scope of the appeal, by requesting different documents depending on the occasion. With regard to the exchanges of communications with Deloitte, the Board alleged that it had fully complied by disclosing the corresponding letter. As to the communications with the European Commission, the Board differentiated between a communication such as the formal endorsement of a Board decision, which is not internal, and the other communications, where disclosure may hinder decision-making proceedings, and impair equality of arms in court proceedings. Focusing on the applicable rules, the Board focused on the *erga omnes* principle, applicable in disclosure rules such as Regulation 1049/2001, by which documents had to be publicly disclosed, and thus disclosure had to be justified by a public interest, not what the Board considered to be the private interest of a party in annulment proceedings, as it was the only interest present in the case at hand. Upon questioning by the members of the Appeal Panel the Board insisted that discussions and exchanges before the final decision had to be considered internal deliberations. In its rebuttal the Board argued that the Appellant could not rely upon case-law such as *Buccioni* and *UBS*, as the legal provisions relied upon were different.

Findings of the Appeal Panel

34. The Appeal Panel preliminarily notes that the Board asked the Appeal Panel to stay the case waiting for the judgment of the General Court in the pending cases between the same parties. The Appeal Panel finds however that, as it will be further clarified below, the issues discussed by the parties before the General Court are different from those at stake in the instant case. Therefore, there is no need for the Appeal Panel to wait for the determination of the General Court on those issues to reach a just determination of this appeal, as its issues are different. Furthermore, the Appeal Panel decision in the instant case shall not affect nor jeopardise neither party's position and defence before the General Court.
35. The Appeal Panel further notes that in its previous decisions rendered on 28 November 2017 and on 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 Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 20: “as the addressee of those decisions [denying access to documents], the applicant is therefore entitled to bring an action against them. (...)”).

- (b) To the effect of this appeal, the Appellant is subject to the regime for access to documents set out by Article 90(1) of the SRMR together with Regulation 1049/2001. As indicated by Article 85(3) SRMR, the Appeal Panel has no competence to hear appeals against a decision of the Board referred to in Article 90(4) SRMR.
- (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 9 September 2008, *MyTravel v. Commission*, T-403/05, EU:T:2008:316, at paragraph 49; judgment 21 July 2011, *Kingdom of Sweden v. Commission* C-506/08 P, EU:C:2011:496, at paragraphs 87-88; judgment 29 June 2010, *Commission v. Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 60-61).
- (e) Settled case-law permits Union institutions, bodies and agencies to rely in relation to certain categories of administrative documents on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by Regulation 1049/2001 (see to this effect judgment 28 June 2012, *Commission v. Edition Odile Jacob*, C-404/10, EU:C:2012:393; judgment 21 September 2010, *Sweden and Others v. API and Commission*, C-514/07 P, EU:C:2010:541; judgment 27 February 2014, *Commission v. EnBW*, C-365/12 P, UE:C:2014:112; judgment 14 November 2013, *LPN and Finland v. Commission*, C-514/11 P and C-605/11 P EU:C:2013:738; judgment 11 May 2017, *Sweden v. Commission*, C-562/14 P EU:C:2017:356). Where the general presumption applies, the burden of proof is shifted from the institution to the applicant, who must be able to demonstrate that there will be no harm to the interest protected by the Regulation 1049/2001. This also means that the Union institutions, bodies or agencies are not required, when the 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 appreciation (due to the open-textured nature of at least some of the relevant exceptions, it being also clear that the width of such margin of appreciation is not the same with regard to the monetary or financial stability exception, than it is with regard to internal proceedings or court proceedings exceptions). Review is then limited, according to settled case law, to verifying whether procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers (see, among others, judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 53; judgment 29 November 2012, *Thesing and Bloomberg Finance v ECB*, T-590/10, EU:T:2012:635, paragraph 43); in any event, the actual viability of judicial review must be ensured (see to this effect in light of judgment 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

36. For the just determination of this appeal, the Appeal Panel also considered – to the extent that parallels may be drawn with the instant case - among others the most recent CJEU judgments on access to documents pertaining to financial supervision of 19 June 2018, *BaFin v Ewald Baumeister*, case C-15/16, EU:C:2018:464, of 13 September 2018, *Enzo Buccioli*, C-594/16, EU:C:2018:717, of 13 September 2018, *UBS Europe v DV*, C-358/16, EU:C:2018:715, of 12 March 2019, *De Masi and Varoufakis v ECB*, EU:T:2019:154 and of 13 March 2019, *Espirito Santo Financial Group v ECB*, case T-730/16, EU:T:2019:161 in light of the legal corollaries arising from these cases in addition to previous case law already quoted.
37. The Appeal Panel further recalls that in its decisions of 28 November 2017 and of 19 June 2018, it stated that the SRB could deny access documents for internal use as part of deliberations and preliminary consultations to the effect of Article 4(3) of Regulation 1049/2001 and Article 4(3) of the Public Access Decision if no overriding public interest in disclosure is shown by the Appellant, as it happened to be in those cases.
38. Likewise, the Appeal Panel stated in its decisions of 28 November 2017 and 19 June 2018 that access to the documents received or exchanged with the ECB or the European Commission for internal use as part of the file and deliberations could be legitimately refused by the Board according to Article 4(3) of Regulation 1049/2001 and 4(3) of the Public Access Decision if no overriding public interest in disclosure was shown, as it happened to be in those cases. The Appeal Panel referred to this effect also to the Opinion of Advocate General Bot of 12 December 2017 *BaFin v Ewald Baumeister*, C-15/16, EU:C:2017:958, where the Advocate General Bot concluded, at paragraph 49, that the requirement of trust which must exist between national supervisory authorities means “that the exchange of information between them must be reinforced by the guarantee of confidentiality attaching to the information which they obtain and hold in the context of supervisory tasks”.

39. At the same time, the Appeal Panel has constantly acknowledged in its past decisions concerning access to documents related to the Banco Popular resolution that in its assessment - to ensure the functionality of the Board and to respect the role and division of tasks provided for by the SRMR and Regulation 1049/2001 - the Appeal Panel must certainly verify if the Board complied with all relevant substantive and procedural rules, properly stated its reasons and did not incur in any manifest error, but cannot substitute its opinion for that of the Board where the applicable legal provisions grant a margin of appreciation to the Board, which means that, on issues where the assessment of the facts may render to different interpretations, e.g. the impact of certain disclosures on decision-making or legal proceedings to the effect of the exceptions to access to documents under Regulation 1049/2001, the Board's margin of appreciation must be also respected by the Appeal Panel, unless there is a specific reason not to do so.
40. The above state the principles and precedents that provide the interpretative background. Yet, aside from principles, context matters especially in the present proceedings, where the Appellant has made a request for disclosure partly as an instrument to its proceedings before the General Court, and the Board has requested a stay of the present proceedings until such proceedings before the General Court are finished. Therefore, as to the Appellant's request to access the communications between the SRB and the European Commission and in particular the authorization of the European Commission to the SRB not to adopt the definitive Ex-Post Valuation 2, if any, the Appeal Panel also carefully examined the action for annulment lodged by the Appellant before the General Court in case T-599/18 (within the limits of the documentation attached by the Appellant to the appeal), to better appraise the context in which the Appellant is seeking access to such documents originating from the European Commission in respect to the decision not to perform the Ex-Post Valuation 2.
41. The examination of the aforesaid documents shows that the context of this appeal is the Appellant's challenge before the General Court of the validity of the decision adopted by the Board to not have the independent expert perform the Ex-Post Valuation 2. The Appellant has challenged this as a violation of Article 20(11) SRMR, which requires that an Ex-Post Valuation 2 is performed as soon as possible, once the independent expert has provided only a provisional valuation to the effect of Article 20 SRMR. In the Appellant's view, there is no discretion for the Board to have the Ex-Post Valuation 2 duly performed in accordance and to the effects of Article 20 SRMR. In this context, the Appellant questions whether the European Commission authorized the Board not to perform such Ex-Post Valuation 2 or endorsed the Board's decision.
42. The Appeal Panel further notes that the Board's view on the matter of the requirement of an Ex-Post Valuation 2 is shown [...].
43. It is not the role of the Appeal Panel to determine the validity of the decision of the Board not to have the independent expert perform the Ex-Post Valuation 2 nor to assess the positions taken by the Appellant and the Board before the General Court. This is why, as stated above,

there is no reason to stay the present appeal, as the matters decided herein (disclosure of documents) are different from the matters decided before the Court (the validity of the Board's actions). The Appeal Panel can only consider the arguments of the parties in this respect to the more limited effect of determining their relevance for the question on access to documents that falls within its remit.

44. The Appeal Panel notes, in this respect, that the Appellant, in case T-599/18 submits that if the European Commission has not authorized or has not endorsed the Board's decision not to perform the Ex-Post Valuation 2, this would amount to a violation of the constitutional limits to delegation of powers existing within the EU according to the *Meroni* case-law (judgment of 6 April 1962, *Meroni v High Authority*, C-21/61 EU:C:1962:12) because, under Article 20(15), the Ex-Post Valuation 2 is an integral part of the Resolution Decision which must be endorsed by the European Commission.
45. It is not the role of the Appeal Panel to determine whether the *Meroni* case-law was respected or not by the Board decision not to perform the Ex-Post Valuation 2. In the Appeal Panel's view, the *Meroni* case-law needs to be understood in light of the most recent judgment of 22 March 2014, *United Kingdom v European Parliament and Council*, C-270/12, EU:C:2014:18, where the Court of Justice expressly accepted that European agencies, like ESMA, but also the SRB, can be delegated powers provided that such delegation is subject to certain limits, which make their exercise amenable to judicial review in the light of the objectives established by the delegating authority (compare paragraphs 44 to 50 of the judgment). The Appeal Panel considers that the power to apply rules to specific factual situations does not necessarily amount to a discretionary power implying policy choices in the sense of the *Meroni* case-law. Union agencies like the SRB, when endowed with rules-based powers of direct intervention, by necessity must assess how facts and circumstances relate to (and fall within) the relevant rules to the effect of the adoption of individual decisions. Were it not the case, such agencies would not be able to contribute meaningfully to the achievement of their role within the Union. Such individual decisions are then entirely subject to judicial review.
46. The SRMR takes account of the *Meroni* case-law by requiring that the resolution decision is adopted through a resolution scheme prepared and transmitted by the Board and endorsed by the European Commission and that the valuation under Article 20 is an integral part of the resolution decision. Yet, this concerns the resolution decision itself, while there is no express provision in the SRMR dealing with a decision *not to* perform the Ex-Post Valuation 2, and thus it is unclear what role should be conferred upon the European Commission, if any, in this respect.
47. It is in this particular context, and based upon the principles mentioned above, and in line with its previous findings referred to above, that the Appeal Panel must consider in the instant case the right of access to documents, under Regulation 1049/2001, and its relationship with the right of judicial protection under article 47 of the Charter of Fundamental Rights of the European Union, and with other disclosure provisions analysed in relevant case-law discussed

by both parties, to ascertain whether the documents which disclosure is requested in the appeal fall within one, or more, of the exceptions under Regulation 1049/2001 and whether there is an overriding public interest in the disclosure of the requested documents.

48. It is in light of the context outlined above, and of the arguments raised by the Board and by the Appellant, that the Appeal Panel carefully reviewed, for the just determination of this appeal, all the documents whose access was refused by the Confirmatory Decision and whose confidential disclosure to the Appeal Panel was ordered in the instant case with the procedural order of 15 April 2019. Furthermore, in order to double-check the correctness of the results of its direct examination of such documents, the Appeal Panel also requested the Board to answer in writing two questions whose answer is relevant, in the Appeal Panel's view, for the just determination of this appeal. These completed the factual background for the following conclusions.

(i) The right of access to documents under Regulation 1049/2001, and its relationship with the right of judicial protection and other disclosure provisions

49. The Appellant's first plea argues that the Contested Decision undermines its rights under article 47 of the Charter of Fundamental Rights. It argues that, as an affected party by the resolution of Banco Popular, it has the right to know what has happened, which, in its view, includes the right of understanding why the Ex-Post Valuation 2 was not carried out and whether the European Commission granted or not authorization for not carrying out the Ex-Post Valuation 2. The Board, for its part, argues that a decision of the Appeal Panel on public access to documents follows different principles and constitutional goals than those underlying a person's right of defence or right to effective legal protection guaranteed by Articles 41(2) and 47 of the Charter. Therefore, a relevant point is whether the evaluation of the right of access to documents can take into consideration the right of judicial protection.

50. As a first consideration, Article 90 of the SRMR differentiates between the right of access to documents under Regulation 1049/2001 (under Article 90 (1)), and the right of person's subject to the decision to access the file (under Article 90 (4)). Only the former is subject to a decision by the Appeal Panel (Article 90 (3)). Thus, the Appeal Panel cannot evaluate the right of the party subject to the proceedings, as such party, but only the right of access to documents by the general public.

51. This, however, does not mean that considerations of judicial protection are completely irrelevant when deciding over the right of access to documents. In prior decisions, such as those in cases 38 to 44/17, the Appeal Panel held that judicial protection, enshrined in Article 47 of the Charter, was a relevant criterion when assessing the right of access to documents under Regulation 1049/2001 (see *inter alia* paras. 32 case 42/17, or 35, case 41/17). This is possible without transforming the general right of access into the affected party's (private) right of access because access to justice not only has the 'private' dimension associated to a specific party's right, but also the public dimension, which enables control of the actions of

institutions, bodies and agencies, i.e. judicial accountability, which sits alongside democratic accountability. In this dimension, democratic and judicial accountability reinforce each other, and are both relevant to shape the right of access to documents and the overall SRB's legitimacy.

52. The second consideration that needs to be addressed concerns the similarities and differences between the right of access to documents alleged by the Appellant, and the exceptions relied upon by the Board, both regulated by Regulation 1049/2001, and other rights to disclosure and their corresponding exceptions regulated elsewhere. This is a relevant issue to the extent that both the Appellant and the Board rely upon cases such as the judgment of 13 September 2018 in *Enzo Buccioni v Banca d'Italia*, C-594/16, ECLI:EU:C:2018:717, and judgment of 13 September 2018 in *UBS Europe SE and Alain Hondequin and Others v DV and Others*, C-358/16, ECLI:EU:C:2018:715 (hereafter: *Buccioni* and *UBS*). The Appellant is correct in pointing that both cases have in common with the present one that in them a private party requested access to internal documents by supervisory institutions, and those institutions alleged that their internal communications constituted an interest that trumped over the party's request. The Board, however, is correct in pointing that both cases differ from this case in that in them both the access to documents and its exceptions were subject to specific provisions, such as Article 53 of Directive 2013/36 (Capital Requirements Directive, or CRD IV), and Article 54 of Directive 2004/39 (MiFID I), which means that any parallels need to be drawn with caution. That dissimilarity, however, does not need to play to the disadvantage of the right of access. The focus of Article 53 CRD, and Article 54 MiFID is to protect the confidentiality of the communications between supervisory authorities, which means that the exceptions to such confidentiality (including the right of access) need to be interpreted strictly (see, e.g. *Buccioni* para. 37, or *UBS*, para. 41). Conversely, the focus of Regulation 1049/2001 is the right to access of documents, which means that it is the exceptions to it that need to be interpreted strictly. Still, besides the validity of precedents, the specific decision often hinges upon matters of detail.

(ii) Whether the documents which disclosure is requested in the appeal fall within one, or more, of the exceptions under Regulation 1049/2001

53. The second point is argued in detail by the Appellant in its first and second pleas. In the Appeal Panel's view, the issue of whether the documents fall into one or more exceptions, is clear in case of Article 4 (3) (internal documents) and more complex in case of Article 4 (2) (protection of court proceedings).
54. Regarding the former, the Appellant's position is that the documents requested are not "internal documents" in the sense of Article 4 (3) of Regulation 1049/2001, because they are communications between authorities. Yet, Article 4 (3) *expressly* refers to "*a document, drawn up by an institution for internal use or received by an institution*", and to "a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution", while Article 4 (4) states that: "As regards third-party documents, the

institution shall consult the third party”. Thus, the fact that a document is sent from one party or institution to another does not affect its nature as “internal”. What matters is its use in the decision-making process (see *inter alia* Appeal Panel decision in case 44/17).

55. Regarding the latter, the Appellant’s position is that the Board (i) fails to specifically explain how the requested documents relate to court proceedings, (ii) fails to specifically explain how disclosing the documents will undermine the protection of court proceedings, and (iii) denies the existence of an overriding public interest in disclosure. The Board addresses these arguments in the same order. The first one is easier to establish, since the Appellant itself has grounded the relevance of this appeal in the existence of proceedings before the General Court. Thus, the “link” with proceedings must be considered proven. The third factor (“overriding public interest”) will be considered separately.
56. Thus, the remaining factor is whether “*disclosure of those documents, even though they were not drawn up in the context of pending court proceedings, should compromise the principle of equality of arms and, potentially, the ability of the institution concerned to defend itself in those proceedings*” (judgment of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, para. 88). On this, the Appeal Panel, having carefully reviewed the content of the confidential documents whose disclosure was ordered on 15 April 2019 acknowledges that there is some merit in the Board’s concern that their disclosure to the other party may potentially interfere with the Board’s ability to defend itself in those proceedings.

(iii) Whether there is an overriding public interest in the disclosure of the requested documents

57. It becomes therefore of fundamental importance to ascertain whether or not there is an overriding public interest in the disclosure of the documents.
58. In the Appeal Panel’s view, considering the relevance of a resolution decision in respect of a significant credit institution in the European Union, it is important that the Board and the European Commission act as transparently as possible in the exercise of the powers conferred upon them by the SRMR. This should be the case, in particular when exercising powers or adopting decisions which are not expressly provided for in the SRMR, but which are considered by the Board necessary to ensure a proper implementation consistent with its overarching principles and finalities. Knowing whether the European Commission authorized or endorsed the Board’s decision not to perform the Ex-Post Valuation 2 may be relevant to understand how such Board’s decision interacts with the *Meroni* case-law.
59. However, with its written answers to the Appeal Panel’s questions the Board has now clarified (and the Appeal Panel acknowledges that the Board’s statement is not contradicted by the internal documents whose confidential disclosure was ordered by the Appeal Panel on 15 April 2019, which the Appeal Panel carefully reviewed) that the European Commission has not issued any authorization, nor any endorsement of the Board’s decision not to perform the

Ex-Post Valuation 2. Such a statement, in the Appeal Panel's view, fully satisfies the public interest in the disclosure of the relevant interactions between the Board and the European Commission with regard to the former's decision to not order an Ex Post Valuation 2, in light of the *Meroni* case-law, because it clarifies that there is no authorization or endorsement issued by the European Commission nor refusal to grant an authorization of the Board's decision. Furthermore, it must be also stressed that this finding is, in the Appeal Panel's view, fully consistent with the narrowed down scope of the final requests for documents as specified by the Appellant with its written answer to the Appeal Panel questions of 5 June 2019 – the Appellant limited indeed its request for access to:

any documents of the European Commission communicated or transmitted to the SRB by any means whatsoever (including, but not limited to, email, fax, courier, in hand, etc.):

- (i) *containing an authorization by the European Commission to the Single Resolutions Board not to carry out an ex-post definitive valuation, or alternatively,*
- (ii) *any document containing a decision of the European Commission refusing to grant an authorization to the Single Resolutions Board to carry out an ex-post definitive valuation.*

60. This results in the inadmissibility of the current appeal, with regard to the decision by the European Commission granting or refusing to grant an authorization to the Board, as requested by the Appellant. It is settled case-law that once a European institution, body or agency asserts that a document does not exist, it is not obliged to create a document which does not exist (CJEU, judgment of 11 January 2017, *Rainer Typke v. Commission*, C-491/15 P, EU:C:2017:5 at para 31) and the institution, body and agency can rely on a rebuttable presumption that, indeed, the document does not exist (GCEU, judgment 23 April 2018, *Verein Deutsche Sprache v. Commission*, T-468/16, EU:T: 2018:207).
61. At the same time, the statement also results in the dismissal of the appeal to the extent that it might be interpreted as a request for disclosure of the internal exchanges of communication between the Board and the European Commission. The statement indicating that there is no document with a formal authorization or endorsement by the Commission clarifies that there is no overriding public interest to the effect of Articles 4(2) and 4(3) of Regulation 1049/2001 in the disclosure of the internal documents of the Board that may have led to the final decision by the Board to not conduct an Ex Post Valuation 2. Such internal documents, to this effect, include internal exchanges with the European Commission, which do not amount in any event to any authorization or endorsement of the Board's decision not to perform the Ex-Post Valuation 2.
62. Likewise, as to the communications between the SRB and Deloitte, in particular concerning any document containing a draft or final version of the Ex-Post Valuation 2, the Appeal Panel notes that the Board, with its written answers to the Appeal Panel's questions, has now clarified (and the Appeal Panel also acknowledges that this is not contradicted by the internal

documents whose confidential disclosure was ordered by the Appeal Panel on 15 April 2019, and which the Appeal Panel carefully reviewed) that ‘*the Board does not hold in its possession a draft or final ex-post valuation 2 from Deloitte from the period between June 2017 and August 2018.*’. Such a statement, in the Appeal Panel’s view, fully satisfies the Appellant’s call for transparency because it dispels any doubts about whether the Board might have kept secret an Ex-Post Valuation 2 draft or final text which could have contradicted the results of the provisional valuation. This proves not to be the case.

63. This results in the inadmissibility of the appeal in what concerns the request for disclosure of “a draft or final ex-post valuation 2 from Deloitte”. As noted above, according to settled case-law, once a European institution, body or agency asserts that a document does not exist, it is not obliged to create a document which does not exist (CJEU, judgment of 11 January 2017, *Rainer Typke v. Commission*, C-491/15 P, EU:C:2017:5 at para 31) and the institution, body and agency can rely on a rebuttable presumption that, indeed, the document does not exist (GCEU, judgment 23 April 2018, *Verein Deutsche Sprache v. Commission*, T-468/16, EU:T:2018:207).
64. At the same time, this results in the dismissal of the appeal to the extent that the request for disclosure may extend to the internal communications prior to the Board’s decision not to conduct a final Ex Post Valuation 2. Such exchanges do not involve any provisional, draft or final Ex Post Valuation 2, and the Appeal Panel finds that there is no public interest in their disclosure, which may justify overriding the exceptions that apply in the present case.
65. On those grounds, the Appeal Panel hereby:

Dismisses the appeal

David Ramos Muñoz

Kaarlo Jännäri

Luis Silva Morais
Vice-Chair

Marco Lamandini
Rapporteur

Christopher Pleister
Chair

For the Appeal Panel Secretariat: