



11 April 2019

Case 3/2019

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 3/19

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**], with 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, Kaarlo Jännäri,

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 12 February 2019 (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 documents² (hereinafter “Regulation 1049/2001”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents³ (hereinafter “Public Access Decision”).
2. By the initial request, the Appellant requested access to the following: (a) entry record (date and time) of the offer made by Banco Santander in a sealed envelope for the acquisition of Banco Popular and (b) the entry record of the document no. 2017/C79/00S005566 where the executive committee of the Bank of Spain decides not to oppose to Banco Popular’s acquisition by Banco Santander. The Board, in its initial response, explained that the SRB is not in possession of such documents. The Appellant submitted a confirmatory application.

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

The SRB rejected the confirmatory application with the Confirmatory Decision which is the subject of the appeal in the present case.

3. The notice of appeal was notified to the Board on 18 February 2019.
4. The Board submitted its response on 15 March 2019. The Appellant did not submit any further observations to the SRB's response.
5. On 18 March 2019, the Appeal Panel asked the parties if they considered necessary to discuss the case in a hearing or if they intended to waive their right to an oral hearing according to the Rules of Procedure. Both Parties confirmed in writing that they waived their right to an oral hearing.
6. On 27 March 2019 the Appeal Panel, having considered the submissions of both Parties, their waiver of their right to make oral representations at an hearing and having also concluded, in light of the particular circumstances of the case, that it was not necessary to convene on own initiative such hearing to deliberate on the appeal, 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

7. 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 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

8. The Appellant challenges the Confirmatory Decision arguing that he cannot understand how the SRB could claim that it is not in possession of the requested documents when one of them (and specifically the document 2017/C79/00S005566 where the executive committee of the Bank of Spain decides not to oppose to Banco Popular's acquisition by Banco Santander) is published on the SRB's website. The Appellant further argues that, although the auction procedure was done in accordance with Spanish law, the SRB must have supervised it, so as to ensure that it was carried out in accordance with national and European law, considering that the Board is "responsible for the proper execution of the resolution". In the Appellant's view, the SRB should have at its disposal all documents related to the resolution procedure or should at least be in a position to request such documents from the other institutions involved.

Board

9. The Board argues that the auction procedure was carried out in Spain and that the SRB has provided access to the documents that it received from FROB relating to that process; the Board asserts that it does not possess a document showing the entry record of the document emanating from the Bank of Spain as published on the SRB website by 19 March 2018 (see under: <https://srb.europa.eu/en/public-register-of-documents/all>). Furthermore, the Board argues that the Appellant did not bring forward any substantiated arguments or evidence to rebut the assertion of the Board that such document does not exist. In the Board's view, according to Article 2(3) of Regulation 1049/2001, documents which the SRB does not hold do not fall within the scope of such Regulation. Furthermore, according to the Board, there is no obligation under Regulation 1049/2001 to create a document that does not exist and mere requests for information neither fall within the scope of Regulation 1049/2001 nor under the scope of competence of the Appeal Panel under Articles 85 (3) and 90 SRMR.

Findings of the Appeal Panel

10. The Appeal Panel preliminarily notes that in its previous decisions rendered on 28 November 2017 and 19 June 2018 (all accessible at www.srb.europa.eu), it recalled the overriding principles, hereby restated, which 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) As indicated by Article 85(3) SRMR, the Appeal Panel has only competence to hear appeals against a decision of the Board referred to in Article 90(3) SRMR and Regulation 1049/2001.
 - (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).

- (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. 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 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 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 the judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

11. The Appeal Panel further held in its decisions of 28 February 2019 in cases 14/18 and 15/18 that, although the definition of ‘document’ to the effect of Regulation 1049/2001 must not be interpreted restrictively, as it is clearly shown by the wide encompassing wording of Article 3, letter a) of Regulation 1049/2001. That provision considers as ‘document’ “*any content*” “*whatever its medium*” “concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere”. That provision also specifies that such content can either be written or stored in electronic form (simply) recorded in any visual or audio-visual way. Yet, once a European institution, body or agency asserts that a document does not exist, according to settled case law, it 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), and it is not obliged to create a document which does not exist (CJEU, judgment of 11 January 2017, *Typke v. Commission*, C-491/15 P, EU:C:2017:5 at para 31).
12. In the instant case the Board has clarified that (i) the auction procedure was carried out in Spain and that the SRB has provided access to the documents that it received from FROB relating to that process, and (ii) the Board does not hold any document showing the time of reception of the offers in a sealed envelope by the competent national authority (FROB).
13. Regarding the document 2017/C79/00S005566 by which the Executive Committee of the Bank of Spain decides not to oppose to Banco Popular’s acquisition by Banco Santander, which is published in a redacted version on the SRB’s website, the SRB in its confirmatory decision stated that it does not possess any other document showing the entry record of the document emanating from the Bank of Spain as published on the SRB website (see under: <https://srb.europa.eu/en/public-register-of-documents/all>).
14. The Appeal Panel notes that, as specified in Article 2(3) of Regulation 1049/2001, the scope of the right of access is limited to the “documents held by an institution, that is to say documents drawn up or received by it and in its possession”. As already pointed out above, once a European institution, body or agency asserts that a document does not exist, according to settled case-law, 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). The Appellant failed to rebut such presumption that the requested documents are not in possession of the SRB. Furthermore, the institution, body or agency is not obliged to create a document which does not exist (CJEU, judgment of 11 January 2017, *Typke v. Commission*, C-491/15 P, EU:C:2017:5 at para 31).

15. The Appeal Panel finally notes that any claim that the institution, body or agency which has not the possession of a document, should request such document to other authorities to the purpose of meeting a request of access to documents falls outside the scope of Regulation 1049/2001. Moreover, the Appeal Panel's competence to hear appeals concerning access to documents is limited by Article 85(3) and 90(3) SRMR to the review of confirmatory decisions adopted by the Board according to Regulation 1049/2001 and cannot transcend such limits.

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 Secretariat of the Appeal Panel :