



29 April 2019

Case 5/2019

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 5/19

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 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 decision of 18 December 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 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) any communications between the SRB and Banco Santander exchanged the months before Banco Popular’s resolution and related to the resolution of Banco Popular; (b) minutes of the Banco Popular auction; (c) the offer of Banco Santander for the acquisition of Banco Popular (including its date and value); (d) documents and communications between ECB and Banco Popular concerning the ELA, collaterals and the FOLTF assessment. In addition, the Appellant asked several questions with respect to alleged communication between the SRB

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

and Banco Santander before the Banco Popular resolution, including the participation of third persons (lawfirm [.....]) in the auction procedure.

3. In the initial response, the Board identified the following documents as falling into the scope of the Appellant's request for access to documents: (1) SRB letters of 24 May 2017 and 2 June 2017 to Banco Popular concerning request for information; (2) the documents received from Banco Popular in relation to the private sale process; (3) the cover letter submitted to the SRB in relation to the offer of Banco Santander by FROB and the certificate of FROB's Governing Committee; (4) the offer submitted by Banco Santander on 7 June 2017. The Board explained that the SRB could grant partial access to the documents listed above under (2) and (3). For those listed above under (1) and (4) access was denied and detailed justification for not granting access was provided. In respect to the additional questions posed by the Appellant, the Board informed the Appellant that questions fall outside the scope of the access to document framework under Regulation 1049/2011. In respect to documents and communications between ECB and Banco Popular concerning the ELA, collaterals and FOLTF assessment, the SRB noted that the ECB had responded to the Appellant's request on 18 October 2018 and her request was therefore dealt with by the competent institution. The Appellant submitted a confirmatory application requesting the SRB to reconsider its position. The SRB rejected the confirmatory application with the Confirmatory Decision which is the subject of the appeal in the instant case.
4. The notice of appeal was notified to the Board on 20 February 2019.
5. The Board submitted its response on 27 February 2019. The Appellant did not submit any further observations to the SRB's response.
6. On 11 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. The Appellant expressed an interest to participate in such a hearing but clarified that she could not afford the costs of the participation to such a hearing and asked to be reimbursed.
7. On 22 March 2019 the Appeal Panel wrote to the parties clarifying that the Appeal Panel cannot cover the Appellant's costs and that own costs are borne by each party. The Appeal Panel asked the Board to clarify whether the SRB could and would be willing to reimburse such costs and noted that, in any event, in order to avoid disproportionate costs and burdens for appellants, the hearing is not to be considered a compulsory requirement for the parties of the proceedings. Failure to attend will not be treated as a waiver or a withdrawal of the appeal and will not dispense the Appeal Panel from taking the absent party's written submissions into consideration. In response to the Appeal Panel's request, the Board clarified that it could not reimburse the Appellant's costs to attend the hearing.

8. The Appeal Panel further noted that, in this specific case, since in other parallel appeals related to access to documents concerning the Banco Popular resolution the appellants already confirmed that they would have attended, at their costs, the hearing and the Appeal Panel convened therefore such an hearing on 11 April 2019, if the Appellant were not able to participate to such an hearing, in order to minimise any possible negative effect on the Appellant for not being able to participate directly to such a hearing, the present appeal would have been declared lodged after the date of the hearing, so that the Appeal Panel could determine on this appeal having also had the chance to listen to the oral representations of other appellants in parallel cases.
9. In response to the Appeal Panel's clarification, the Appellant clarified that she appreciated the Appeal Panel's approach to such procedural matter and would not attend the hearing. To this purpose, both Parties confirmed in writing that they waived their right to an oral hearing. The hearing in parallel appeals was held on 11 April 2019 and the Appeal Panel heard oral representations made by the parties in those parallel appeals. Several arguments discussed by those parties at the hearing were quite similar to those discussed by the Parties in the present appeal.
10. On 12 April 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

11. 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

12. The Appellant challenges the Confirmatory Decision arguing that the requested documents do not fall under the exceptions of Article 4 of Regulation 1049/2001. In the first place, with regard to Article 4(1)(a) fourth indent, disclosure of such documents would not entail, in the Appellant's view, any risk for financial, monetary or economic policy as the resolution of Banco Popular has already been completed. The Appellant further challenges the applicability, in the instant case, of the exception of Article 4(2) first indent of Regulation 1049/2001, as the disclosure of the requested documents would in no way compromise, in the Appellant's view, the commercial interests of the Santander group, whilst it would allow to verify that the Banco Popular resolution was adopted and implemented in a lawful manner. Finally, the Appellant argues that the SRB cannot rely, in the instant case, on the exception of

Article 4(2) third indent of Regulation 1049/2001 (protection of inspection, investigation and audit activities), because, otherwise, all actions undertaken by the SRB could never be monitored nor questioned, if access to the relevant documents cannot be obtained. The Appellant also claims that there is an overriding public interest in the disclosure of the requested documents because the resolution of Banco Popular was the first under the SRMR and to verify if the SRMR was correctly applied is of great importance for all European citizens.

Board

13. The Board primarily argues that the appeal is inadmissible, as the Appellant has failed to sufficiently specify the grounds of the appeal.
14. On the merits, the Board first argues that the Appeal Panel, in its previous decisions, already confirmed the correctness of the position taken by the SRB concerning the non-disclosure of the documents requested by the Appellant as to those related to the requests for information and the offer submitted for Banco Popular. As regards the documents received from Banco Popular concerning the private sales process, the SRB argues that it fully complied with the Appeal Panel's decisions by disclosing a non-confidential version of these documents together with the cover letter submitted to the SRB by FROB in relation to the offer of Banco Santander and the certificate of FROB's Governing Committee. The Board further notes that the non-disclosure of certain parts of the requested documents is still required for the protection of financial, monetary or economic policy, according to Article 4(1)(a) fourth indent of Regulation 1049/2001 because disclosing those parts could compromise the methodology used by the SRB for the resolution of credit institutions and might give rise to unfounded speculations. The Board further argues that the protection of commercial interests according to Article 4 (2) first indent of Regulation 1049/2001 prevents the disclosure of those parts of requested documents that refer to Banco Popular's financial data and position in the market, as such disclosure would undermine the commercial interests of the Santander group. The Board additionally refers to the exception of Article 4(2) third indent of Regulation 1049/2001 on the protection of investigations. Finally, the Board argues that the Appellant could not identify an overriding public interest in the meaning of Article 4 of regulation 1049/2001 that would justify the disclosure of the information falling within the above-mentioned exceptions.

Findings of the Appeal Panel

15. The Appeal Panel preliminarily notes that, although this appeal could be better specified in arguing its pleas, its content, in the instant case, can nonetheless be considered sufficient to allow the Board and the Appeal Panel to understand the claims raised by the Appellant. The Appeal Panel considers that it must take into account the facts that this appeal is filed without the legal assistance of any law firm, that no legal assistance is required under the Rules of Procedure to have access to the Appeal Panel and, in the instant case (unlike in case 22/18, an

appeal filed by the same Appellant dismissed as inadmissible with the Appeal Panel's decision of 28 February 2019), the Appellant endeavoured to clarify as much as she could her claims that the use of the exceptions provided for in Regulation 1049/2001 by the Board is contested. The Appeal Panel considers therefore that, under these circumstances, the appeal is deemed admissible.

16. As to the merits, 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 of 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).

17. Also in light of the GCEU judgment of 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, EU:T:2018:234, the Appeal Panel decisions of 19 June 2018 further clarified that:
- (a) the Appeal Panel did not deem necessary to require the Board to make an integral disclosure of the requested documents and conceded that in the specific assessment of the relevant parts of the relevant documents, which could be redacted under the relevant exceptions recognised by Regulation 1049/2001, the Board retains a margin of discretion (in particular in respect of the assessment whether disclosure would undermine the public interest under Article 4(1)(a) of Regulation 1049/2001), provided that the Board complies with its obligation to state the reasons in such a way that effective judicial review can be conducted;
 - (b) the SRB was entitled to blank out those specific data and information that, on careful and reasonable examination, could objectively raise actual concerns either of financial stability or of protection of commercial interests. The Appeal Panel pointed out that, in this respect, in the specific assessment of the relevant parts which should not be disclosed, the Board has to duly consider that: (i) exceptions to public access are to be interpreted narrowly, (ii) Article 4 of the Public Access Decision must be interpreted in conformity with Regulation 1049/2001 and cannot create broader exceptions to the disclosure obligation than what provided for in Article 4 of Regulation 1049/2001, and (iii) refusal to disclose must be supported by a specific finding that the disclosure of such part of the document would actually undermine a protected interest in a credible scenario and must be substantiated in such a way, so to enable interested parties to challenge the correctness of those reasons and courts to conduct their review (see on this point again judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55).
 - (c) the SRB assessment, of which parts of the relevant documents could not be disclosed under the relevant exceptions provided for by Regulation 1049/2001 was done to a large extent in compliance with the applicable procedural rules, with the duty to state reasons and without a manifest error of assessment or a misuse of powers, and thus within the limits of the exercise by the Board of the margin of discretion which must be recognized to it according to settled case law (again, judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55). The Appeal Panel further considered that the SRB, in stating the reasons justifying its partial denial of access, could legitimately take account also of possible future behaviours (e.g. risk of unwarranted market speculation), provided that they are not purely hypothetical but reasonably foreseeable in a credible scenario and sufficiently specific (the need of protection must be genuine).

- (d) Nonetheless, some denial to access or redactions in the non-confidential version of some of the relevant documents, in the Appeal Panel's view, went beyond these limits and required therefore further disclosure by the Board.
18. For the just determination of this appeal, the Appeal Panel considered all arguments raised by the Appellant in this appeal, also in light of the previous decisions adopted by the Appeal Panel on 28 November 2017 (in cases 38 to 43/17), 23 March 2018 (in case 2/18), 19 June 2018 (in cases 44 to 57/17, 1 and 7/18) and 27 February 2019 (in cases 3/18, 14/18, 15/18 and 22/18, this latter concerning the same Appellant). The Appeal Panel – to the extent that parallels may be drawn with the instant case - also considered the most recent CJEU judgments on access to documents pertaining to financial supervision of 19 June 2018, *BaFin v Ewald Baumeister*, case C-15/16, EU:C:2018:464, of 13 September 2018, *Enzo Buccioni*, C-594/16, EU:C:2018:717, 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.
19. The Appeal Panel notes, to the effect of the just determination of the present appeal, that in its previous decisions of 28 November 2017 and 19 June 2018 the Appeal Panel has held, i.a., that:
- (a) Access to the communication made by Banco Popular on 6 June 2017, declaring the non-viability of the entity 2016 could be granted with some redactions as specified by the Appeal Panel; following the Appeal Panel's decisions of 19 June 2018, the Board published a non-confidential version of this document on 31 October 2018;
 - (b) Access to the documents received from Banco Popular in relation to the private sale process could be granted, with some proportionate redactions as specified by the Appeal Panel; following the Appeal Panel's decisions of 19 June 2018, the Board published a non-confidential version of these documents on 31 October 2018;
 - (c) Denial to access the full text of the FOLTF assessment and of the ECB and SRB communications and exchanges on this regard was duly justified in compliance with the applicable rules, with the duty to state reasons and without any manifest error of assessment or misuse of powers;
 - (d) Denial to access the offer submitted by Banco Santander on 7 June 2017 and the SPA signed with FROB was duly justified in compliance with the applicable rules, with the duty to state reasons and without any manifest error of assessment or misuse of powers, also considering that other documents relating to the sale process (Sale Process Letter, Appendix 1 – draft sale and purchase agreement) were disclosed and the content of such offer and SPA can be inferred from the Sale Process and the Resolution Decision;

- (e) Access to requests of information from SRB and exchanges with Banco Popular could be legitimately refused by the Board and no overriding public interest in disclosure was found;
 - (f) Access to the documents received or exchanged with the ECB, FROB, the European Commission for internal use as part of the file and deliberations could be legitimately refused by the Board and no overriding public interest in disclosure was found;
 - (g) Access to the documents presented to the Board and the minutes of the Board that dealt with the situation of Banco Popular could be legitimately refused by the Board and no overriding public interest in disclosure was found.
20. Based upon the foregoing, which, in the Appeal Panel's view, clearly shows the principles and the precedents which must guide in the determination of the present appeal, the Appeal Panel finds that the Confirmatory Decision is in line with the previous findings of the Appeal Panel and with the applicable provisions of Regulation 1049/2001.
21. With the publication of the documents made by the Board on 31 October 2018 and with the disclosures made specifically to the Appellant in the proceedings leading to the Confirmatory Decision, the Appellant has been granted access to the non-confidential version of the FOLTF assessment made by the ECB; the SRB letter dated 4 June 2017 and the draft presentation Jefferies/Arcano 'Hippocrates Resolution Process Considerations' of June 2017, including most parts of Lazard presentation (appendix to the draft presentations of Jefferies/Arcano); the cover letter submitted to the SRB in relation to the offer of Banco Santander by FROB and the certificate of FROB's Governing Committee, with the exception only of limited personal data.
22. As to the remaining documents for which access was denied, the Confirmatory Decision offers specific justifications, which comply with the applicable provisions of Regulation 1049/2001 and in line with the Appeal Panel's previous decisions. These reasons are also within the limits of the margin of discretion which must be recognized to the Board in the assessment of the risk of occurrence of one or more of the situations which justify the use of the exceptions to public access to documents under Regulation 1049/2001, in compliance with the principles set out above and in conformity with settled case law (again, judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 55).
23. The Appeal Panel refers, in this respect, to the specific reasons stated by the Board in paragraphs 4.1. to 4.4. of the Confirmatory Decision, which, in the Appeal Panel's view, offer sufficient and specific justification, in conjunction with the relevant exceptions under Regulation 1049/2001, for the Board's denial of access, in whole or in part, of the relevant documents. Such reasons comply with the principles stated above and, in the Appeal Panel's

view, do not show any manifest error of assessment and were stated in a sufficiently specific manner.

24. The Appeal Panel further refers to its previous decisions of 28 November 2017 and 19 June 2018 as regards:
- (a) The redactions justified in the FOLTF assessment made by the ECB and documents related thereto;
 - (b) The non-disclosure of requests of information from SRB and exchanges with Banco Popular, and more specifically the SRB letters of 24 May 2017 and 2 June 2017 and the binding offer submitted by Banco Santander on 7 June 2017 (requested by the Appellant in case 20/18).
25. The Appeal Panel finally notes, as to the requests for information directed by the Appellant to the Board, that requests for information (as opposed to requests to access to documents) fall outside the scope of Regulation 1049/2001 and that 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 Appeal Panel Secretariat :