



10 May 2023

Case 7/2022

FINAL DECISION

[.],

Appellant,

v

the Single Resolution Board

Christopher Pleister, Chair
Luis Silva Morais, Vice-Chair
Marco Lamandini, Co-Rapporteur
David Ramos Muñoz, Co-Rapporteur
Helen Louri-Dendrinou

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FINAL DECISION

In Case 7/2022,

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**”),

[.], a legal entity with headquarters in [.], represented by [.], [.], with offices 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), Luis Silva Morais (Vice-Chair), Marco Lamandini (Co-Rapporteur), David Ramos Muñoz (Co-Rapporteur) and Helen Louri-Dendrinou

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 30 September 2022 (hereinafter the “**Contested 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) 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 an initial request originally filed on 25 May 2022, the Appellant requested the SRB to access certain documents concerning [.], [.] (“[.]”) and its [.] subsidiary. In particular, the Appellant requested the following documents:

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

(i) “any document relating (directly or indirectly) to the [.] and/or parts of or officials from other parts of the [.] or other [.] or authorities in the [.] and/or [.] and/or its [.] subsidiary”;

(ii) “any document containing communications (directly or indirectly) with the [.] and/or [.] and/or parts of or officials parts of the [.] or other [.] or authorities in the [.]”;

(iii) “any document relating (directly or indirectly) to the [.], the facts referenced by the [.] and/or the factual findings in the [.] irrespective of whether such communications occurred before or after the [.]”;

(iv) “any document relating (directly or indirectly) to acts or omissions of the ECB, the SRB, the [.], the [.] or any other authority following the [.] or prior to the [.]”;

(v) “any document relating (directly or indirectly) to [.] regarding its role in relation to [.] and/or its [.] subsidiary, including without limitation any communication between the SRB and/or the ECB and [.] relating directly or indirectly to [.] and/ or its [.] subsidiary”;

(vi) “any other document relating (directly or indirectly) to [.] and/or its [.] subsidiary”.

3. With subsequent exchanges the Appellant and the SRB agreed (as wider discussed below) that the request to access documents under points (iv) and (vi) would have been treated in a separate proceeding from that for the requests for access under points i), ii), iii) and v).
4. The SRB therefore registered on 4 July 2022 the Appellant’s request under points (i), (ii), (iii) and (v) as an initial application in the proper sense of a request of access to (specifically) those documents under Regulation 1049/2001 and the Public Access Decision.
5. On 26 July 2022, the SRB responded as follows to such initial application: (a) as regards the Appellant’s requests under points (i) and (iii), the SRB identified the following documents as falling within the scope of the Appellant’s request: “[.]” and “[.] decision of 26 March 2021”, respectively. The SRB informed the Appellant that those documents were publicly available on the [.] website and the [.] website, respectively, and provided the relevant links; (b) as regards the Appellant’s request under point (ii), the SRB informed the Appellant that the SRB did not hold any documents that would correspond to the description given in the initial application; (c) as regards the Appellant’s request under point (v) above, the SRB identified the following documents as falling within the scope of the Appellant’s request: (i) one excel file dated of [.] related to [.] transactions; (ii) three excel files dated respectively

[.] related to the [.] Execution Financial Instrument; (iii) one excel file dated of [.] related to [.] Security portfolio; (iv) three excel files dated respectively of [.] related to the execution of financial instrument; (v) one excel file dated of [.] related to [.] summary; (vi) chain of emails relating to [.] dated of [.]. In this respect, the SRB informed the Appellant that all the documents from (i) to (vi) originate from the European Central Bank (ECB). The SRB also informed the Appellant that it had consulted the ECB in line with Article 4(4) of Regulation 1049/2001 and that the ECB had indicated that those documents should be directly requested from the ECB.

6. On 16 August 2022, the Appellant submitted a confirmatory application pursuant to Article 7(2) of Regulation 1049/2001. The Appellant requested, in particular, the SRB to disclose “[t]he six documents listed in [the Initial Response] under “Request under point (4)””. The Appellant also noted that “[i]t is inconceivable that no documents [under Point 1 of the Request] exist” since “point 1 covers any documents relating directly or indirectly to[.]”.
7. On 30 September 2022, the SRB adopted the Contested Decision, by which the Board confirmed the Initial Response in its entirety and supplemented it by the additional reasoning included in the Contested Decision in order to address the issues raised by the Appellant.
8. On 11 November 2022, the Appellant filed its notice of appeal, which was notified to the Board by the Appeal Panel’s Secretariat on 15 November 2022, informing the Board that the Notice of Appeal in this case was considered served as of that date.
9. On 18 November 2022, the Board requested an extension of the initial deadline to respond by three weeks, namely until 21 December 2022. The Appeal Panel decided to grant an extension of two weeks, namely until 13 December 2022.
10. On 13 December 2022, the Board submitted its response.
11. On 14 December 2022, the Appeal Panel’s Secretariat forwarded the Board’s response to the Appellant with the following communication:

Please find enclosed the response of the Board in case 07/2022. With reference to Article 6(7) of the Appeal Panel’s Rules of Procedure, you now have the opportunity to file a rejoinder to the Board’s response within two (2) weeks, meaning 28 December 2022. However, in light of the end of the year period, and in the exercise of both its power to extend any deadline as appropriate (under Article 8 of the Rules of Procedure) and to give case management directions (under Article 11 of said Rules of Procedure) the Appeal Panel is ready to extend said deadline until 6 January 2023, cob.
12. The Appellant requested an extension of its deadline to file the rejoinder to 6 January 2023, and the extension was granted by the Appeal Panel. On 6 January 2023, the Appellant submitted its rejoinder to the Board’s response.

13. On 12 January 2023, the Board filed a motivated request for the extension of the deadline to file its reply to the Appellant's rejoinder. The Appeal Panel granted the extension until the 6 February 2023. On that date, the Board submitted its reply to the Appellant's rejoinder.
14. On 7 February 2023, the Appeal Panel invited both parties to inform the Appeal Panel if they wished to discuss orally the case at a hearing to be held in Brussels or they waived their right to the hearing.
15. On 8 February 2023, the Appellant confirmed its intention to discuss orally the case at a hearing, explaining that, in the Appellant's view, the hearing was necessary because of the Appellant's rejoinder and argued that "in its rejoinder the SRB makes new false factual submissions" and that "it is not true that the Appellant agreed to exclude from the scope of the initial request the category concerning all documents relating directly and indirectly to [.] and its [.] subsidiary".
16. On 21 February 2023, the Secretariat of the Appeal Panel informed the parties that the hearing would be held in Brussels on 3 April 2023. Both parties confirmed their attendance to the hearing.
17. On 3 April 2023, the hearing was held in Brussels. Both parties appeared and presented oral arguments. Both parties reiterated their respective positions, adding further considerations of fact and law. The parties also answered questions from the Appeal Panel for the clarification of facts relevant for the just determination of the appeal.
18. After the hearing, on 3 April 2023, the Secretariat informed both parties that the Appeal Panel invited the parties, if they so wished, to deposit with the Appeal Panel Secretariat by 12 April 2023, the written text of their pleadings at the hearing (specifying that such text had to be the very same used as speaking notes by the counsels at the hearing).
19. Both parties deposited their pleadings at the hearing, the Board on 4 April 2023 and the Appellant on 12 April 2023. With the email submitting its speaking notes, the Appellant wrote that the Appellant "would appreciate an expeditious decision on its request for access to the file pertaining to the present proceedings (Article 41 of the Charter) as well as its request for a procedural order. The Appellant moreover submits that Article 20 of the Rules of Procedure of the Appeal Panel is illegal, because it is contrary to Article 85(4) and Article 85(10) SRMR and the penultimate paragraph of Article 263 TFEU. Article 85(4) is to be interpreted in the same way as Article 24 SSMR. Article 85(4) SRMR requires a review within a month after the appeal actually being lodged".
20. On 18 April 2023, the Appeal Panel, having considered not necessary for the just determination of the appeal to order to the Board, as requested at the hearing by the Appellant, "that the SRB explains in detail how it proceeded when compiling its list of documents in the present case" (and having consequently also considered that, therefore, there was no need to determine on the request for "access to the file" made at the hearing by the Appellant concerning the requested explanations of details, which were not deemed necessary by 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 Article 20 of the Rules of Procedure. Article 20 of the Rules of Procedure sets out that “when the Chair considers that the evidence is complete, the Chair shall notify the parties that the appeal has been lodged for the purposes of Article 85(4) of Regulation 806/2014”. This provision of the Rules of Procedure allows the Appeal Panel to grant to both parties, in the appeal proceedings before it (whose nature, role and effects are structurally and functionally different from those of the Administrative Board of Review of the ECB in the SSM pursuant to Article 24 of Regulation 1024/2013, referred to by the Appellant in its email of 12 April 2023) the possibility to prepare and file, after the appeal, written submissions (Article 6(5) for the Board’s response; Article 6(7) for the Appellant’s rejoinder and, then, for the Board’s reply). It also renders feasible to both parties, in their interest and of due process, to exercise, if they so wish, their right to an oral hearing (Article 18). Both such procedural rights are in compliance with the principle of good administration and mirror also, in this specific context, the fundamental guarantees of fair trial. This provision also grants to the Appeal Panel an appropriate and reasonable time limit (30 days from the date when the appeal is declared lodged) to adopt and draft the final decision.

Main arguments of the parties

21. The main arguments of the parties are briefly summarised below. It is specified that the Appeal Panel considered all arguments raised by the parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

Appellant

22. The Appellant argues, first, that the Contested Decision is manifestly incorrect where it asserts that the SRB does not have in its possession any documents falling within the scope of the request for access other than the documents listed by the SRB in the initial response and in the Contested Decision. Second, that the Contested Decision refers for certain documents the Appellant to the ECB without any legal basis for doing so. Third, that the Contested Decision is insufficiently reasoned. The Appellant asks therefore the Appeal Panel to remit the case to the Board.
23. As to the first ground of appeal, the Appellant notes that it had emphasized already in the confirmatory application dated 16 August 2022, that the scope of the request for access included, *inter alia*, all documents relating directly or indirectly to [.] and/or its [.] subsidiary. The Appellant argues that it is inconceivable that the SRB as the competent resolution authority with respect to [.] and its subsidiary has in its possession only a few documents relating directly or indirectly to [.] and/or its [.] subsidiary and that all of these documents originate from the ECB. The Appellant further argues that the Board does not deal with this point in the Contested Decision “in a comprehensible manner”. The Board merely asserts that it carried out a new search of documents. The SRB does not state clearly that it accepts that the scope of our request

comprises all documents relating directly or indirectly to [.] and its [.] subsidiary. Nor does the Board state clearly that the documents originating from the ECB are indeed the only documents relating directly or indirectly to [.] and/or its [.] subsidiary that the SRB has in its possession.

24. The Appellant further notes that there is, in its view, “incontrovertible evidence” as to the existence of relevant documents which were not included in the list prepared by the SRB. These documents include (a) the documents published on the SRB’s website with respect to the [.] and its [.] subsidiary, (b) the ECB’s failing or likely to fail- assessment and related documents, including without limitation documents pertaining to the consultation process preceding the SRB’s decision, (c) documents in connection with [.] between the SRB, the SRB and [.], (d) a chain of emails between the SRB and the ECB dated [.] following the [.] which was included as part of a list of documents in a separate request for access to documents made to the European Central Bank (ECB), (e) the correspondence between the SRB and [.] as well as its [.] subsidiary, (f) the email correspondence associated with the SRB’s role as competent resolution authority with respect to [.] and its subsidiary and specifically the events in [.]. The Appellant further believes that “it is inconceivable also that the SRB never had any communications directly or indirectly with the [.] and/or other [.]” and that “it is moreover manifestly not true that the SRB does not have in its possession any documents relating directly or indirectly to the [.]. This is impossible already because the SRB was involved in litigation in front of the General in which this aspect played a significant role”.
25. As to the second and third grounds of appeal, the Appellant notes that with the Contested Decision the Board does not rely on any exceptions to the obligation to disclose documents. The Board’s position is that it has in its possession only (a) documents which are already publicly available, namely, the decisions of the [.] and of the [.] and (b) documents originating from the ECB. With respect to the latter, the SRB refers the Appellant to the ECB.
26. The Appellant further argues that the SRB’s approach is, in its view, particularly unacceptable because the General Court in its judgment of [.] has held that the SRB adopted a reviewable decision with external effect whereas the ECB’s activities preceding the SRB’s decision pursuant to Art. 18 SRMR constitute mere preparatory steps with respect to the SRB’s final decision. In the Appellant’s view, the allocation of roles is thus that the SRB primarily deals with the Appellant.
27. The Appellant also argues that the Board failed to consider the relevance of the access regime pursuant to Art. 42 of the Charter of the Fundamental Rights of the European Union.
28. In its rejoinder, the Appellant reiterates the pleas raised with the notice of appeal and discusses certain points arising from the Board’s response which in the opinion of Appellant required further observations by the Appellant. In particular, the Appellant argues in the rejoinder that

with the response the Board no longer argues that the documents listed in the Contested Decision include all documents relating directly or indirectly to [.] and its subsidiary. The Board now argues for the first time that the Appellant's request did not include such documents (i.e., all documents relating directly or indirectly to [.] and its subsidiary), yet it claims that the argument is manifestly unfounded.

29. At the hearing, the Appellant has discussed in detail the meaning of the exchange of emails with the SRB concerning the six points which summarized in the initial request of 25 May 2022, the requested documents and has insisted that, whilst points 4 and 6 were left aside to be processed independently from points 1, 2, 3 and 5 (the Appellant notes however in this connection that it “did not consent to points 4 and 6 not being processed or its processing being delayed”), no modification of points 1, 2, 3 and 5 was agreed. In this context, the Appellant has asked for the first time at the hearing a procedural order by the Appeal Panel “that the SRB explains in detail how it proceeded when compiling its list of documents in the present case” and the Appellant has also requested “access to the file” noting that “it will be interesting to verify how the SRB actually proceeded when compiling the list of documents”. The Appellant has further noted that “one point which the Appellant would like to verify in particular is whether the SRB included emails and other electronic communication, including so called off-channel communication by means of text messages and messenger-services in its determination of the relevant documents”. As to the second ground, the Appellant has argued at the hearing that, as noted in the Appellant's rejoinder, the Board seeks to reinterpret its referral to the ECB as a denial of access and this is an attempt to change subsequently the substance of SRB's decision because “it would have made no sense for the SRB to refer the Appellant to the ECB if it was clear that in any case access could not be granted”. The Appellant further argues that “the obligation to consult [with the ECB] moreover confirms that the responsibility to disclose lies with the entity who has the document in its possession and not another institution or body”.

Board

30. The Board preliminarily argues that the first ground is ineffective because, in its view, the Appellant agreed to split its request for documents in two different requests and the purpose of splitting that request was precisely to treat the very broad request to access “any other document relating (directly or indirectly) to [.] and/or its [.] subsidiary”, separately from the request to access documents falling under the initial application as delimited by the SRB in agreement with the Appellant. In other words, the Board argues that since “the scope of the Contested Decision and, therefore, of the present appeal, coincides with the scope identified in the initial application of the Appellant, as clarified and agreed upon by the Appellant, the latter's allegations based on an alleged broader scope which, in fact, is the object of a different request, are and can only be purely and simply ineffective”.
31. The Board also argues that the first ground is unfounded, because, according to the Board, the Appellant “brings literally no evidence” to support its statements nor does it put forward any reason why certain alleged “communications” should exist or why it is not true that the SRB

has no documents relating to the [.] other than the [.] of 26 March 2021, as indicated in the initial response. In the Board's words, moreover, "also the Appellant's allegation that the [.] would have played a role in litigation in which the SRB would have been involved is completely unsubstantiated (which litigation? which role?) and, even more importantly, irrelevant to the effect of assessing the existence of documents in possession of the SRB".

32. As to the second ground, the Board argues that the documents at stake are classified by the ECB as "ECB classified" because they are part of the ECB's supervisory file. For that reason, and in the absence of the ECB's consent to disclose them, the SRB could only refuse their disclosure. Moreover, the documents concerned were received from the ECB for internal use by the SRB and therefore, they were provided in the context of the SRB's internal decision making. Therefore, disclosure of those documents would be also prevented by the application of the exception under Article 4(3) of Regulation No 1049/2001 and Article 4(3) of the Public Access Decision. As a result of the consultation and the absence of the ECB's consent to disclose the documents, the SRB suggested an efficient way forward for the Appellant by addressing and inviting him to request the documents directly from the ECB.
33. The Board notes in this regard that the Appellant had submitted in parallel a request of access to documents to the ECB with the same scope. The Board further notes that, as confirmed by the Court of Justice, the regime governing access to ECB's documents is not Regulation 1049/2001 but rather Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents ("**Decision 2004/258**"). Thus, in the Board's view, where a request is made for access to ECB's documents, the solutions adopted under the case-law on Regulation 1049/2001 cannot be adopted by applying that case-law automatically by analogy given that the ECB is not bound by that regulation. The Board argues that "such referral, as the Appeal Panel has rightly acknowledged [in previous cases], avoids the circumvention of the relevant rules regarding access to ECB's documents".
34. As to the third ground, the Board argues that the Appellant's complains that the Contested Decision is insufficiently reasoned is inadmissible because it "only includes general remarks regarding an alleged lack of reasoning without actually putting forward any legal reasoning as to why or how those alleged missing or unclear explanations could affect the validity" of the Contested Decision. The Board further argues that the allegation of lack of reasoning is unfounded.
35. With the reply to the Appellant's rejoinder the Board reiterates and further expands the arguments already raised with the response.
36. At the hearing the Board has insisted that the SRB (i) correctly determined the scope of the Appellant's request (and in this connection the Board considered in detail the exchanges of emails with the Appellant from the initial request of 25 May 2022 and their meaning), (ii) could refer the Appellant to the ECB in relation to the documents originating from the ECB (submitting that the "Appellant's argument raises a false debate" because " the Contested

Decision, by which the SRB did not grant access to the documents identified and invited the Appellant to request that access to the ECB is a refusal” and “the Court of Justice has already established that, in order to qualify a decision as a decision to refuse access, the reason relied upon to refuse that access does not matter”) and (iii) sufficiently explained to the Appellant the scope and the referral “in light of all the exchanges between the institution and the applicant” in line with the European courts’ case-law.

Findings of the Appeal Panel

37. The Appeal Panel preliminarily notes that in previous decisions concerning public access to documents the Appeal Panel stated the overriding principles that must guide in the determination of appeals concerning the SRB’s refusal to grant access to documents under Regulation 1049/2001 as follows:
- (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, ECLI: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, ECLI: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 no competence to hear appeals against a decision of the Board referred to in Article 90(4) SRMR. The Appellant can therefore not rely, at least in an appeal before the Appeal Panel, on the right to access the SRB’s file on the basis of Article 90(4) SRMR. The Appeal Panel must therefore determine if the Appellant is entitled to access the requested documents, in whole or in part, having regard solely to Regulation 1049/2001 and to the Public Access Decision. As to the Public Access Decision, the Appeal Panel notes that it implements Regulation 1049/2001 by adopting “practical measures” to this aim and must therefore be interpreted and applied so as to ensure its full consistency with 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 Treaty on the Functioning of the European Union (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.

- (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, ECLI: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, ECLI:EU:T:2017:300, at paragraph 49; judgment 21 July 2011, *Sweden v. Commission* C-506/08 P, ECLI:EU:C:2011:496, at paragraphs 87-88; judgment 29 June 2010, *Commission v. Technische Glaswerke Ilmenau*, C-139/07 P, ECLI: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 (in state aid, mergers, cartels, infringement and court proceedings) 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, ECLI:EU:C:2012:393; judgment 21 September 2010, *Sweden and Others v. API and Commission*, C-514/07 P, ECLI:EU:C:2010:541; judgment 27 February 2014, *Commission v. EnBW*, C-365/12 P, ECLI:EU:C:2014:112; judgment 14 November 2013, *LPN and Finland v. Commission*, C-514/11 P and C-605/11 P ECLI:EU:C:2013:738; judgment 11 May 2017, *Sweden v. Commission*, C-562/14 P ECLI: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, ECLI: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. 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, ECLI:EU:T:2015:361, paragraph 53; judgment 29 November 2012, *Thesing and Bloomberg Finance v ECB*, T-590/10, ECLI:EU:T:2012:635, paragraph 43), and provided that the actual viability of judicial review in respect of decisions is ensured (see to this effect in light of judgment 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, ECLI:EU:C:2014:18, at paragraphs 79-81).

38. Having in mind these principles and precedent hereby re-stated, the Appeal Panel has carefully examined the pleas raised by the Appellant and the arguments of the Board in response and has come to the following conclusions.

(a) Admissibility considerations

39. The appeal is itself admissible. However, among the grounds raised in the Appeal the Appellant also includes the “failure to consider the relevance of other access regimes”, and this because, in its initial request for access, the Appellant stated that “*our request is not limited to any specific legal basis. We request access to the above documents based on any applicable legal basis including without limitation any applicable right of access to the file, Regulation (EC) No 1049/2001, the SRB's Public Access Decision (SRB/EES/2017/01), and the principle of compensation of damages by means of restitution in kind*”.
40. Article 85 SRMR, which provides for the Appeal Panel competence to review the Board’s decisions, expressly refers to Article 90(3)SRMR, which, in turn, contemplates the right of access to documents under Article 1049/2001, to the exclusion of other rights of access, e.g., access to the file. Therefore, considerations of right to access to documents other than the right to access under Regulation 1049/2001 must be deemed inadmissible for purposes of the present appeal.

(b) The first ground of appeal.

41. By the first ground of the appeal, the Appellant argues that the Board’s claims about the limited number of documents in its possession are manifestly incorrect, because the request refers, *inter alia*, to “all documents relating directly or indirectly to [.] and/or its [.] subsidiary”, and, from this standpoint, the Board does not deal with the request in a “comprehensible manner”.
42. The essence of the first ground of appeal lies in the parties’ disagreement about the scope of the request of access to documents, in light of the last part of point (i) of said request. The Appellant relies on the text of the initial request; the Board on the context, given by the subsequent exchanges of communications between the parties.

43. The Appellant bases its argument on the fact that the text of the initial request of access, point (i), referred to “*any document relating (directly or indirectly) to the [.] and/or parts of or officials from other parts of the [.] or other [.] or authorities in the [.] and/or [.] and/or its [.] subsidiary*”

(i) *The importance of a contextual interpretation.*

44. The Appellant argues that the request encompasses, first, any document relating (directly or indirectly) to the [.] and/or parts of or officials from other parts of the [.] or other [.] or authorities in the [.], and, second and separately, any document relating to [.] and/or its [.] subsidiary. The Appellant accused the Board of making, in its response, a “visual argument” by highlighting some parts of the request, at the expense of others, in the following way: “*any document relating (directly or indirectly) to the [.] and/or parts of or officials from other parts of the [.] or other [.] or authorities in the [.] and/or [.] and/or its [.] subsidiary*”.

45. Yet, after the initial request, of 25 May 2022, the parties exchanged several communications. To be precise, the communications took place between the SRB Access to Documents team (hereinafter “**A2D team**”), and the Counsel of the Appellant, who also represented the Appellant in these proceedings.

46. On 1 June 2022, the Board replied to the Appellant’s initial request as follows:

Before proceeding with the registration of the initial application, we will kindly ask you for a clarification on the scope. In your application, under point 4 and 6 it is stated that “any document relating (directly or indirectly) to acts or omissions of the ECB, the SRB, the [.], the [.] or any other authority following the [.] or prior to the [.], and “any other document relating (directly or indirectly) to [.] and/or its [.] subsidiary”.

Could you please specify the documents that you are requesting?

We would be grateful if you could clarify the scope at your earliest convenience so as we can follow up with the necessary administrative steps.

47. In his reply to this request for clarification, on 17 June 2022, the Appellant, through its Counsel stated:

“thank you for your response. You merely request a further specification without stating that the current request creates issues for you. Is your problem that the SRB has a very large number documents which is covered by our request? If this is not the problem then we would appreciate an explanation what the problem is. Our request for access is intentionally comprehensive. The SRB is well aware of the underlying events and thus of the context. Any request can in principle be reformulated more narrowly, i.e. with a more limited scope. This is not to say that the scope should indeed be limited in response to queries by the SRB. You do not even say in your email that a more narrow scope is necessary, let alone why this should be the case”.

48. To this, the SRB’s A2D team replied on 20 June 2022:

We take good note of your email. However, in order to process with your application, pursuant to Article 6(2) of Regulation 1049/2001, more detailed information on the documents which you seek to obtain shall be provided to the SRB.

Indeed, under points 4 and 6 of your application it is stated that “any document relating (directly or indirectly) to acts or omissions of the ECB, the SRB, the [.], the [.] or any other authority following the [.] or prior to the [.], and “any other document relating (directly or indirectly) to [.] and/or its [.] subsidiary”. The above points does not allow the SRB to have sufficient clarity regarding the scope of your application and therefore cannot be processed it at this stage.

We would like to point out that your initial application received on 25 May, is considered as one application and handled as such. By consequence, the time limit of 15 working days for handling it will not start running prior to the receipt of the requested clarifications.

Finally, various documents concerning the actions taken in respect of [.] can be found here: [.] We thank you in advance for your understanding.

49. To this the Appellant, through its Counsel, replied on 21 June2022:

thank you for your email below. You do not explain in your email what aspect is not clear for you. Your reference to point 6 is particularly unclear because you do not object to point 1 which contains the same language. As regards point 4 we confirm that the reference to acts or omissions following and prior to the [.] is meant not merely in a purely temporal sense but is meant to denote a substantive connection. We do not know, however, whether this was your issue because you do not explain what is unclear for you.

We emphasize that we do not accept your position on the point in time when the deadline under the public access rules starts. Regulation 1049/2001 does not contain any rule to the effect that the processing of requests may be delayed on the grounds that parts of it are allegedly unclear. In our opinion, provision 6 subsection 2 of the SRB Public Access Decision is illegal because it is inconsistent with Regulation 1049/2001.

It is in any case improper to delay the processing of a request if the SRB accepts that parts of the request for access are sufficiently clear so that they could be processed.

50. This was followed by a reply by the SRB’s A2D team, on 23 June 2022 stating as follows:

Thank you for your mail of 21 June 2022.

The issue at stake regarding your request under points 4 and 6 relates to the existence of a very high number of documents as these points touch upon the actions taken in relation to [.]. For this reason, we requested clarification regarding the scope of these points 4 and 6. Pursuant to Article 6(3) of Regulation 1049/2001 “ In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

In this context, the SRB would appreciate finding a “fair solution” regarding the scope of points 4 and 6 as stated in your initial application.

Your initial application received on 25 May, is considered as one application and treated as such. Based on your reply of 21 June, it seems that you would prefer that the SRB split your application.

For procedural reasons the SRB would need to receive your explicit confirmation of such a split which will allow us to prepare two separate responses. Upon receipt of your confirmation we shall register the initial application 1 as described below and process the request accordingly.

We suggest treating your application(s) as detailed below:

Initial application 1: points 1, 2, 3 and 5 which do not require clarification:

“any document relating (directly or indirectly) to the [.] and/or parts of or officials from other parts of the [.] or other [.] or authorities in the [.] and/or [.] and/or its [.] subsidiary,

any document containing communications (directly or indirectly) with the [.] and/or [.] officials and/or parts of or officials parts of the [.] or other [.] or authorities in the [.],

any document relating (directly or indirectly) to the [.], the facts referenced by the [.] and/or the factual findings in the [.] irrespective of whether such communications occurred before or after the [.],

any document relating (directly or indirectly) to [.] regarding its role in relation to [.] and/or its [.] subsidiary, including without limitation any communication between the SRB and/or the ECB and [.] relating directly or indirectly to [.] and/ or its [.] subsidiary...”

Initial application 2: points 4 and 6 for which we would propose to find a “fair solution”:

“any document relating (directly or indirectly) to acts or omissions of the ECB, the SRB, the [.], the [.] or any other authority following the [.] or prior to the [.]

any other document relating (directly or indirectly) to [.] and/or its [.] subsidiary.”

For the initial application 2, we would wait for your response on which documents you are specifically requesting with a view to finding a fair solution.

We hope that this solution would be acceptable from your side.

51. To this, the Appellant, through its Counsel, replied on 1 July 2022, as follows:

Dear Sir or Madam

we agree that the requests with which you have no problem should be processed independently of the two items with which you have a problem. If this requires that you treat the two items with which you have a problem as a separate request then please do so. We will separately revert on the two items with which you have a problem.

Kind regards

52. The Appeal Panel sought clarification through questions during the hearing, and it confirmed that there was no subsequent follow-up or exchange between the parties to clarify or circumscribe the scope of the request.

53. Thus, the initial request of access should be read in light of subsequent communications, where (i) the Board sought clarification of the scope of the request; (ii) the Appellant objected to a request for clarification that did not indicate what was the problem of lack of clarity; (iii) the Board sought clarification again with regard to the meaning of “*any document relating (directly or indirectly) to acts or omissions of the ECB, the SRB, the [.], the [.] or any other authority following the [.] or prior to the [.]*”, and the meaning of “*any other document relating (directly or indirectly) to [.] and/or its [.] subsidiary*”; (iii) the Appellant clarified that the language of point 6 was the same as the language in point 1, and the language in point 4 of “following” and “prior” denoted a substantive connection; (iv) then, the Board indicated that certain points gave rise to a very large number of documents, and proposed to split the request into two; (v) the Appellant accepted, saying that they would separately revert on the two items that were problematic for the Board; and (vi) the Appellant did not revert with further indications.
54. In light of this, the key issue is whether the last part of point (i) of the request, taking into consideration the subsequent exchanges of communications, should be interpreted as encompassing any document relating to [.] and/or its [.] subsidiary, without any further qualification (broader meaning), or whether it should encompass documents relating to [.] and/or its [.] subsidiary, in connection with [.] or other [.] (specific meaning).
55. The Appeal Panel concludes that the request should be interpreted in its more specific meaning, whereby the request under point (i) would not encompass any document in relation to [.] and/or its subsidiary in [.]. The purely textual interpretation suggested by the Appellant, based on the use of *and/or* before the reference to “[.] and/or its subsidiary” disregards the parties’ subsequent exchanges of communication with the purpose of clarifying and handling the request and would also make, essentially, devoid of purpose the agreed handling in a separate proceedings of the request under point (vi), which refers to “any other document relating (directly or indirectly) to [.] and/or its [.] subsidiary”. The exchanges between the parties were divided into two steps: first, a request for clarification; and, second, a request to reach a fair solution, accepted by the Appellant in light of such exchanges as comprehensively described *supra*.
- (ii) The legal framework for processing requests for access: precision and large volumes of documentation.*
56. The legal framework to interpret these communications is Article 6 of Regulation 1049/2001 and the European Courts’ case-law that interprets such Regulation. Article 6 of Regulation 1049/2001, which deals with applications, includes two relevant provisions.
57. First, Article 6(2) deals with issues of “precision” as follows:

If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

58. Second, Article 6(3) deals with long documents, and large numbers of documents as follows:
- In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution”.
59. In the present case, the Board complied with both provisions, as analysed in the following sequence.
- (iii) The requirement of “precision” and the Board’s request for clarification.*
60. First, when the problem is one of “precision”, it is the duty of the institution or agency to seek clarification from the applicant, in order to better define the scope of the inquiry. According to the judgment of 22 May 2012, *Internationaler Hilfsfonds v Commission*, T-300/10, ECLI:EU:T:2012:247, paragraph 84:
- it is clear from the wording of that provision, and in particular from the use of the verbs ‘ask’ and ‘assist’, that the mere finding that the application for access was insufficiently precise, whatever the reasons, must lead the addressee institution to make contact with the applicant in order to define as closely as possible the documents requested. It is thus a provision which, in the area of public access to documents, constitutes the formal transcription of the principle of sound administration, which is one of the guarantees afforded by the EU legal order in administrative procedures (Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 107). The duty of assistance is thus fundamental to ensure the effectiveness of the right of access defined by Regulation No 1049/2001.
61. In that case, the Court held (in paragraphs 85 and 86) that the Commission had not complied with this duty because:
- (85) In the present case, it does not appear from the documents before the Court that, in accordance with the provisions of Article 6 of Regulation No 1049/2001 and the principle of sound administration, the Commission asked the applicant to define more precisely the documents requested in the initial application and the confirmatory application, before adopting the contested decision.
- (86) Next, in any event, the Commission cannot argue that it told the applicant of the allegedly too general and imprecise character of its application for unlimited access, in a letter of 20 July 2010. It must be held that, whatever its content, that letter was not sent to the applicant following the initial application or the confirmatory application, before the adoption of the contested decision, but at a date subsequent to the latter. Consequently, that letter is clearly not relevant for the purposes of ruling on the legality of the contested decision.
62. In a similar manner, in judgment of 19 November 2014, *Ntouvas v European Centre for Disease Prevention and Control (ECDC)*, T-223/12, ECLI:EU:T:2014:975, paragraph 46, the Court held that, since the applicant “was not invited by the ECDC to clarify his request, the ECDC cannot seek to rely on the allegedly vague nature of the applicant’s request”.
63. Conversely, in judgment of the General Court of 12 December 2018, *Deutsche Umwelthilfe eV v Commission*, T-498/18, ECLI:EU:T:2018:913 paragraph 64, the Court held that the

Commission had fulfilled its duty by contacting the applicant and seeking clarification, while it simultaneously tried to find documents fitting the description.

64. In the present case, the Board got in contact with the Appellant on June 1, 2022 in order to seek clarification, and again on June 20, 2022 to reiterate its request for clarification. It appears that the Board fulfilled its duty under Article 6(2) of Regulation 1049/2001, in trying to circumscribe the broad request to a more specific meaning.
65. Furthermore, in cases where the institutions and agencies interpreted the applicants' relatively broad requests in the way they saw reasonable, without consulting the applicants themselves, the Courts did not automatically find that such institutions and bodies breached their duties, but focused instead whether the interpretation itself was reasonable. For example in *Viasat v Commission*, T-734/17, ECLI:EU:T:2020:123, the applicant requested access to:

any information submitted by Inmarsat plc, [Inmarsat Ventures Ltd] and/or any of its affiliates, at the occasion of its participation in the EU tender completed on 13 May 2009 by Commission Decision 2009/449/EC on the selection of operators of pan-European systems providing mobile satellite services (MSS) [(OJ 2009 L 149, p. 65)], and [to] any exchange of information between Inmarsat and the [Commission] during the tender following the initial bid and until the final award decision, and [to] any post-award communications

66. In that case, the applicant alleged that:

the Commission interpreted the scope of its request for access narrowly and unreasonably in so far as it refers to 'post-award communications' by limiting it to the correspondence exchanged between that institution and Inmarsat relating to the period between the adoption of the selection decision on 13 May 2009 and its publication on 12 June 2009, whereas the request referred to all correspondence relating to the selection procedure at issue which had been exchanged between the Commission and Inmarsat from the date of the contested decision until 'today'.

67. Yet, the Commission alleged that:

"The Commission submits that the request for access to 'post-award communications' was sufficiently precise in that it concerned documents relating to the selection procedure at issue and that it could not reasonably concern all communications until 'today', in particular since that procedure ended in 2009 with the publication of the selection decision. Any other interpretation would be unreasonable and inconsistent, especially since, from March and May 2017, the applicant had specifically requested access to other documents which were drawn up after June 2009 and in which Inmarsat participated as a selected operator of mobile satellite services (MSS)".

68. And the General Court held that:

(25) it does not appear that the Commission's interpretation of the scope of the request for access in the present case is vitiated by an error of assessment, is unreasonable or that the wording of that request obliged the Commission to contact the applicant prior to the adoption of the contested decision in order to define more precisely the documents requested in both the initial request for access and the confirmatory application for access. Furthermore, it is clear that none of the five pleas in law put forward by the applicant in support of its claims alleges infringement of Article 6(2) of Regulation No 1049/2001, or of the principle of sound administration, or an error of assessment as to the scope of the request for access to the documents requested.

69. Thus, in that case, despite the presence of a broad reference in the end of the request to “any post-award communications”, the Commission was held by the Court to have correctly circumscribed the scope of the request only to those communications relating to the concerned entity’s participation in the tender.

70. In the present case, after the Board contacted the Appellant, it obtained a clarification about the fact that the Appellant was interested in documents by the ECB, the SRB, the [.], the [.] or any other authority that had a “substantive connection” with the [.]. It seems that the Board interpreted, in a way similar to that of the Commission in *Viasat*, that there also had to be a substantive connection between the documents requested and the categories defining such documents in each point of the request, notably the [.], treasury and other authorities, the [.], or the [.]. This conclusion was further corroborated by the agreement reached with subsequent exchanges with the Appellant that the documents requested under point (vi) of its initial request, and namely “any other document relating (directly or indirectly) to [.] and/or its [.] subsidiary” would have been handled in a separate proceedings, as it will be further discussed below.

(iv) The potentially high number of documents, the agreement on a “fair solution”, and the split of the request of access.

71. Indeed, there were subsequent communications between the parties, which helped shape the request in a decisive manner.

72. In a *second step* the Board stated that the full request would give rise to a very high number of documents, and it proposed a split of the request, consisting in leaving to be dealt at a subsequent stage:

(iv) “any document relating (directly or indirectly) to acts or omissions of the ECB, the SRB, the [.], the [.] or any other authority following the [.] or prior to the [.]”;

and

(vi) “any other document relating (directly or indirectly) to [.] and/or its [.] subsidiary.”

73. The proposal was clear as to its rationale, i.e., to help deal with a potentially very high number of documents, as well as to its content and nature: the more specific requests, which gave rise to a more manageable number of documents, would proceed, and the broader requests, which would give rise to a very high number of documents, would wait, to be dealt with at a subsequent stage.

74. The second group of documents, to be dealt with at a subsequent stage, included the request for “(vi) any other document relating to [.] and/or its subsidiary”. Thus, if the parties agreed to exclude this broader group of documents, and to put it in stand-by, subject to further

precision, it would make no sense to include this group as part point (i), which refers to the [.], the treasury department, or other [.] authorities or authorities in the [.] and/or [.] and/or its [.] subsidiary. This interpretation would be inconsistent with (and would make devoid of purpose) the Board’s express proposal to split the request to help deal with the very large number of documents (accepted by the Appellant), and it would be inconsistent with the Appellant’s reply that they would “separately revert on the two items”. If one such item was already included in the request, there would be nothing to revert on.

75. The Appellant, upon questioning by the Appeal Panel, expressly clarified that it did not further revert to clarify the two items that constituted the part of the request of access formulated more broadly. It made a confirmatory application and then appealed the Contested Decision which is the confirmatory decision, but did not follow up on the more general part of the request, like it said it would.
76. Finally, the Appeal Panel finds that the solution described above was “fair” because the Board did neither impose on the Appellant a disproportionate burden, nor acted unreasonably, in light of the case-law that has interpreted Article 6 (3) of Regulation 1049/2001. In its judgment of 6 December 2001, *Council v Hautala*, C-353/99 P, ECLI:EU:C:2001:661, paragraph 30, the Court of Justice stated that:

The Court of First Instance also applied the principle of proportionality correctly when, in paragraph 86 of the contested judgment, in response to the Council’s argument based on the excessive administrative burden which would be entailed by an obligation to ensure partial access to the documents it holds, it reserved the possibility of safeguarding the interests of good administration in particular cases.

77. The Court reiterated this idea in its judgment of 2 October 2014, *Strack v Commission*, C-127/13 P ECLI:EU:C:2014:2250, paragraph 27, holding that, in exceptional circumstances:

it flows from the principle of proportionality that the institutions may, in particular cases in which the volume of documents for which access is applied or in which the number of passages to be censured would involve an inappropriate administrative burden, balance the interest of the applicant for access against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration.

78. Thus, the key element that stands out from court practice is the use of the principle of proportionality as a yardstick to assess not only the burden for the institution or agency, but especially the course of action adopted by the institution or agency on the face of such burden. In particular, a unilateral balancing of interests by the institution or agency is allowed in exceptional circumstances. Instead, the preferred solution is to contact the applicant to try to reach an agreed solution, which may consist in circumscribing the scope of the request, or otherwise making it more manageable.
79. Thus, the cases where the Courts found that the Commission or an agency had acted unlawfully are entirely different from the present one. In the present case the Board did not flatly refuse to grant access to the documents (the problem in the judgment of 13 April 2005,

Verein für Konsumenteninformation, T-2/03, ECLI:EU:T:2005:125) nor did it refuse to make an individual examination of the documents (the problem in judgment of 23 September 2020, *Basaglia v Commission*, T-727/19, ECLI:EU:T:2020:446, where the Commission made a random sampling of documents) nor did it unilaterally exclude documents (the problem in judgment of 15 December 2021, *Breyer v European Research Executive Agency (REA)*, T-158/19 ECLI:EU:T:2021:902).

80. Instead, the Board approached the Appellant several times, trying first to define the scope of the request more precisely, and, second, agreeing to split the request into two groups. First, the Board would search for the documents that were defined more specifically, and where the search parameters gave rise to a more manageable number of documents; second, the Board would proceed with the request that was defined more generically, and where the search parameters gave rise to a higher number of documents. Upon its acceptance of this solution, the Appellant was left with the sole burden of reverting back to give some further specification about the groups of documents more broadly defined, including that of any documents relating to [.] and/or its [.] subsidiary, and the Appellant did not comply with it, despite it was not an excessive or disproportionate burden.
81. Thus, the Appeal Panel finds that the Board did comply with its duties under Article 6(3) of Regulation 1049/2001 also in light of the principle of proportionality, as interpreted by the case-law of European Courts. In light of the facts of the case, it was fair for the Board to proceed with the examination of points (i), (ii), (iii) and (v) of the request, leaving aside points (iv) and (vi) to be clarified at a subsequent stage, which meant putting in stand-by the request for any documents relating to [.] and/or its [.] subsidiary (not having a substantive connection with “the [.] and/or parts of or officials from other parts of the [.] or other [.] or authorities in the [.]”, as specified under point (i) of the access request).
82. This conclusion has also a clear procedural implication. The fair solution reached between the Appellant and the Board consisted in splitting the request into two tracks, pertaining to the two groups of documents to the Board, as it said it would, to provide any further clarification, described above. The second track, pertaining to the group of documents defined more broadly, was put in stand-by, but cannot be disregarded, and the Board still has the duty to examine them for purposes of disclosure as soon as the Appellant reverts to the Board, as it said it would, to provide the further clarification it agreed to provide.
83. Thus, once the Appellant reverts to the Board, the Appellant and the Board may reach a fair solution with the Appellant that tries to circumscribe the more general request, but the Appellant should not be forced to make a subsequent application for the second group of documents, in line with the Court's holding in *Breyer* at paragraph 36.

(v) The statements relating to the non-existence of documents.

84. The above considerations provide the context to assess the Board's statement that:

no documents could be identified - other than the document entitled “[.]” and already mentioned under Section 2 of the Initial Response – that would correspond to the description given in your application.

85. In light of the parties’ exchanges, this statement was understood in the sense that the Board did not have in its possession any other documents relating to the [.] and/or parts of or officials from other parts of the [.] or other [.] or authorities in the [.] relating to [.] and/or its subsidiary.
86. The Appellant objects that the Board’s statement is manifestly incorrect because it is inconceivable that the SRB as the competent resolution authority with respect to [.] and its subsidiary has in its possession only a few documents relating directly or indirectly to [.] and/or its [.] subsidiary.
87. Thus, the Appellant’s objection is exclusively based on the understanding that the search comprised any documents relating to [.] and/or its [.] subsidiary. As stated above, this is not what results from a contextual interpretation of the parties’ exchanges.
88. As repeatedly stated by the Appeal Panel, in light of the case-law of European Courts, 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 (judgment of 11 January 2017, Rainer Typke v. Commission, C-491/15 P, ECLI:EU:C:2017:5 at paragraph 31) and that institution, body and agency can rely on a rebuttable presumption that, indeed, the document does not exist (judgment 23 April 2018, Verein Deutsche Sprache v. Commission, T-468/16, ECLI:EU:T:2018:207).
89. To contest the Board's assertion that it did not have the documents, the Appellant relied on the standard in judgment of 23 April 2018, Verein Deutscher Sprache v Commission, T- 468/16 ECLI:EU:T:2018:207, where the General Court held that the presumption of veracity could be rebutted by pertinent and consistent evidence to the contrary. Yet, all the evidence adduced by the Appellant referred to documents relating to [.] and/or its [.] subsidiary, which is not pertinent to rebut the presumption. The Appellant offered no evidence relating to documents relating to [.], [.], or authorities in the [.].
90. Finally, the Appellant stated that “it is inconceivable that the SRB never had any communications directly or indirectly with the [.] and/or other [.] authorities” and also that “it is moreover manifestly not true that the SRB does not have in its possession any documents relating directly or indirectly to the [.]. This is impossible already because the SRB was involved in litigation in front of the General Court in which this aspect played a significant role”.
91. However, in the Appeal Panel’s view this statement is not sufficiently clear nor precise. The Appellant does not indicate why it is “inconceivable” that the Board did not have any communications with [.], given that the Failing or Likely to Fail (FOLTF)

assessment by the ECB or the Board does not require coordination with [.], nor an assessment by the ECB or the Board about the legality of the actions of those authorities: what originated the situation of illiquidity giving rise to the FOLTF assessment is not relevant for purposes of such assessment, as held by General Court judgments of [.]. Thus, with no need for coordination between the Board and [.] (nor an expectation of it) an absence of communications with [.] is plausible and reasonable.

92. As to the [.], it does not seem “impossible”, in the Appeal Panel’s view, for the Board to not have any documents relating to it. This [.], in any event, took place after the FOLTF assessment, and could not affect the decision by the ECB or the Board. Furthermore, the Appellant’s statement is insufficiently clear to provide plausible evidence against the Board’s statement. The Appellant does not specify what is the litigation in front of the court nor does it indicate what aspect, if any, of the [.], played a significant role in it.
93. For all the reasons stated above, the first ground of appeal is dismissed.

(c) The second ground of appeal.

94. By the second ground of appeal, the Appellant argues that there is no legal basis for the Board’s position that it can refer the Appellant to the ECB as regards documents originating from the ECB. The Appellant refers to Article 4(4) of Regulation 1049/2001 and argues that Article 4(4) provides for consultations with the third party as regards third-party documents “with a view to assessing whether an exception in paragraph 1 or 2 [of the same Article 4] is applicable”, but does “not permit a decision to the effect that the documents which another person also has in its possession be obtained from such other person”. In the Appellant’s view, moreover, “referring an applicant to another institution instead of dealing with a request for access directly flies in the faces of Article 7 of Regulation 1049/2001 that applications shall be handled promptly”. According to the Appellant, requests for access would be “systematically delayed if this approach was tolerated”. The Appellant adds that the Board’s approach “is particularly unacceptable” in the instant case, because the General Court in case [.] concluded that the SRB has the primary responsibility of dealing with the Appellant.
95. The Board submits that the Appellant’s arguments are unfounded. The Board recalls, in the first place, Article 88(1) SRMR which explicitly provides that the SRB is prohibited from disclosing confidential information received from a competent authority, unless there is the express and prior consent of the authority which provided the information. In the second place, Article 4(1)(c), Article 4(4) and Article 4(3) of the SRB Public Access Decision. In particular, Article 4(3) expressly provides that “the SRB shall refuse disclosure of a document drawn up or received from the ECB for internal use or for the exchange of views even after a decision is adopted unless there is an overriding interest in disclosure”. The Board further notes that

the documents at stake are “ECB classified” because they are part of the ECB supervisory file.

96. The Appeal Panel recalls that it has addressed the issue of requests for access to documents originating from the ECB and in possession of the SRB in previous cases. For example, in case 46/17, at paragraphs 47-48 of its decision of 19 June 2018, the Appeal Panel held that access to the documents received from, or exchanged with the ECB 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 Article 4(3) of the Public Access Decision, and that no overriding public interest in disclosure was shown by the appellant. Although, Article 2(3) of Regulation 1049/2001 sets out in general terms that access to documents under Regulation 1049/2001 applies to all documents held by an institution, including documents “received by it and in its possession”, the Appeal Panel held in several occasions that the SRB could deny access to the documents originating from ECB because, in those cases, those documents were received by the SRB from the ECB for internal use as part of deliberations and preliminary consultations. In that context, the Appeal Panel held that access to those documents should be requested directly to the ECB.
97. The ECB is subject to a separate access to document regime set out in Decision 2004/258 (ECB 2004/3), as amended after the adoption of Council Regulation (EU) No 1024/2013 of 15 October 2013 establishing the SSM by ECB Decision of 21 January 2015. Decision 2004/258 in its more recent amendment has been adopted pursuant to, and in compliance with, recital (59) of Regulation (EU) No 1024/2013 and of Article 15(3) TFEU.
98. A comparative examination of the most relevant provisions of the Decision 2004/258 and of Regulation 1049/2001 confirms the existence of specific provisions, duly tailored for the access to documents originated by the ECB.

ECB Decision 2004/3 (2004/258/EC) consolidated text	Regulation 1049/2001
<p style="text-align: center;"><i>Article 1</i></p> <p style="text-align: center;">Purpose</p> <p>The purpose of this Decision is to define the conditions and limits according to which the ECB shall give public access to ECB documents and to promote good administrative practice on public access to such documents.</p>	<p style="text-align: center;"><i>Article 1</i></p> <p style="text-align: center;">Purpose</p> <p>The purpose of this Regulation is:</p> <p>(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,</p> <p>(b) to establish rules ensuring the easiest possible exercise of this right, and</p> <p>(c) to promote good administrative practice on access to documents.</p>

<p style="text-align: center;"><i>Article 4</i></p> <p style="text-align: center;">Exceptions</p> <p>1. The ECB shall refuse access to a document where disclosure would undermine the protection of:</p> <p>public interest as regards:</p> <p>the confidentiality of the proceedings of the ECB's decision-making bodies, the Supervisory Board or other bodies established pursuant to Regulation (EU) No 1024/2013,</p> <p>the financial, monetary or economic policy of the Union or a Member State,</p> <p>the internal finances of the ECB or of the NCBs,</p> <p>protecting the integrity of euro banknotes,</p> <p>public security,</p> <p>international financial, monetary or economic relations,</p> <p>the stability of the financial system in the Union or in a Member State,</p> <p>the Union's or a Member State's policy relating to the prudential supervision of credit institutions and other financial institutions,</p> <p>the purpose of supervisory inspections,</p> <p>the soundness and security of financial market infrastructures, payment schemes or payment service providers;</p> <p>privacy and the integrity of the individual, in particular in accordance with Union legislation regarding the protection of personal data;</p> <p>confidentiality of information that is protected as such under Union law.</p> <p>2. The ECB shall refuse access to a document where disclosure would undermine the protection of:</p> <p>the commercial interests of a natural or legal person, including intellectual property,</p> <p>court proceedings and legal advice,</p> <p>the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.</p> <p>3. Access to a document drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and NCBs, NCAs or NDAs, shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.</p> <p>Access to documents reflecting exchanges of views between the ECB and other relevant authorities and bodies shall be refused even after the decision has been taken, if disclosure of the document would seriously undermine the ECB's effectiveness in carrying out its tasks, unless there is an overriding public interest in disclosure.</p>	<p style="text-align: center;"><i>Article 4</i></p> <p style="text-align: center;">Exceptions</p> <p>1. The institutions shall refuse access to a document where disclosure would undermine the protection of:</p> <p>(a) the public interest as regards:</p> <ul style="list-style-type: none"> - public security, - defence and military matters, - international relations, - the financial, monetary or economic policy of the Community or a Member State; <p>(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.</p> <p>2. The institutions shall refuse access to a document where disclosure would undermine the protection of:</p> <ul style="list-style-type: none"> - commercial interests of a natural or legal person, including intellectual property, - court proceedings and legal advice, - the purpose of inspections, investigations and audits, <p>unless there is an overriding public interest in disclosure.</p> <p>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.</p> <p>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,</p>
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<p>4. As regards third-party documents, the ECB shall consult the third party concerned with a view to assessing whether an exception in this Article is applicable, unless it is clear that the document shall or shall not be disclosed.</p> <p>As regards requests for access to European Systemic Risk Board documents, Decision ESRB/2011/5 of the European Systemic Risk Board of 3 June 2011 on public access to European Systemic Risk Board documents (⁶), adopted on the basis of Article 7 of Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board (⁷), shall apply.</p> <p>5. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.</p> <p>6. The exceptions as laid down in this Article 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 unless specifically provided otherwise by the ECB's Governing Council. In the case of documents covered by the exceptions relating to privacy or commercial interests, the exceptions may continue to apply after this period.</p>	<p>unless there is an overriding public interest in disclosure.</p> <p>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.</p> <p>5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.</p> <p>6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.</p> <p>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.</p>
<p style="text-align: center;"><i>Article 5</i></p> <p style="text-align: center;">Documents at the NCBs</p> <p>Documents that are in the possession of an NCB and have been drawn up by the ECB as well as documents originating from the EMI or the Committee of Governors may be disclosed by the NCB only subject to prior consultation of the ECB concerning the scope of access, unless it is clear that the document shall or shall not be disclosed.</p> <p>Alternatively the NCB may refer the request to the ECB.</p>	<p style="text-align: center;"><i>Article 5</i></p> <p style="text-align: center;">Documents in the Member States</p> <p>Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.</p> <p>The Member State may instead refer the request to the institution.</p>
<p style="text-align: center;"><i>Article 6</i></p> <p style="text-align: center;">Applications</p> <p>1. An application for access to a document shall be made to the ECB in any written form, including electronic form, in one of the official languages of the Union and in a sufficiently precise manner to enable the ECB to identify the document. The applicant is not obliged to state the reasons for the application.</p>	<p style="text-align: center;"><i>Article 6</i></p> <p style="text-align: center;">Applications</p> <p>1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The</p>

<p>2. If an application is not sufficiently precise, the ECB shall ask the applicant to clarify the application and shall assist the applicant in doing so.</p> <p>3. In the event of an application relating to a very long document or to a very large number of documents, the ECB may confer with the applicant informally, with a view to finding a fair solution.</p>	<p>applicant is not obliged to state reasons for the application.</p> <p>2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.</p> <p>3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.</p> <p>4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.</p>
<p style="text-align: center;"><i>Article 7</i></p> <p style="text-align: center;">Processing of initial applications</p> <p>1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 20 working days from the receipt of the application, or on receipt of the clarifications requested in accordance with Article 6(2), the Director-General Secretariat of the ECB shall either grant access to the document requested and provide access in accordance with Article 9 or, in a written reply, state the reasons for total or partial refusal and inform the applicant of their right to make a confirmatory application in accordance with paragraph 2.</p> <p>2. In the event of total or partial refusal, the applicant may, within 20 working days of receiving the ECB's reply, make a confirmatory application asking the ECB's Executive Board to reconsider its position. Furthermore, failure by the ECB to reply within the prescribed 20 working days' time limit for handling the initial application shall entitle the applicant to make a confirmatory application.</p> <p>3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, or if the consultation of a third party is required, the ECB may extend the time limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.</p> <p>4. Paragraph 1 shall not apply in case of excessive or unreasonable applications, in particular when they are of a repetitive nature.</p> <p style="text-align: center;"><i>Article 8</i></p> <p style="text-align: center;">Processing of confirmatory applications</p> <p>1. A confirmatory application shall be handled promptly. Within 20 working days from the receipt of such application, the Executive Board shall either grant access to the document requested and provide access in accordance with Article 9 or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the ECB shall inform the applicant of the remedies open to them in accordance with Articles 263 and 228 of the Treaty.</p>	<p style="text-align: center;"><i>Article 7</i></p> <p style="text-align: center;">Processing of initial applications</p> <p>1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.</p> <p>2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.</p> <p>3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.</p> <p>4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.</p> <p style="text-align: center;"><i>Article 8</i></p> <p style="text-align: center;">Processing of confirmatory applications</p> <p>1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a</p>

<p>2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the ECB may extend the time limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.</p> <p>3. Failure by the ECB to reply within the prescribed time limit shall be considered to be a negative reply and shall entitle the applicant to institute court proceedings and/or submit a complaint to the European Ombudsman, under Articles 263 and 228 of the Treaty, respectively.</p>	<p>complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.</p> <p>2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.</p> <p>3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.</p>
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99. In previous cases, the Appeal Panel also held that an indirect access (disregarding the ECB's opposition to disclosure) to the documents originating from the ECB through the Board, which received them for internal use would undermine the interinstitutional cooperation between the ECB and the Board, and would allow a possible circumvention of the specific rules governing public access to ECB documents in the Decision 2004/258, which require the assessment (i) by the ECB itself on whether the (ii) specific exceptions from disclosure set out in the Decision 2004/258 apply. The Appeal Panel considered, in line with the express recognition in recital (3) of the Decision 2004/258, that the provisions of the Decision 2004/258 are meant to protect the independence of the ECB and of the National Central Banks and the confidentiality of certain matters specific to the performance of the ECB's tasks, safeguarding at the same time the right of access (and referred to judgment 26 April 2018, *Espirito Santo Financial v. European Central Bank*, T-251/15, ECLI:EU:T:2018:234, paragraph 40).
100. The Appeal Panel further noted that, in his opinion of 17 December 2017, *BaFin v Ewald Baumeister*, C-15/16, ECLI:EU:C: 2017:958, 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" and at paragraph 51 that "even if the sensitivity of certain information held by the supervisory authorities is sometimes not evident at the outset, its disclosure may disturb the stability of the financial markets".
101. More recently, in case 1/21 the Appeal Panel also considered the implications in this context of the judgment of the Court in *Baumeister* (judgment of 19 June 2018, *BaFin v Ewald Baumeister*, C-15/16, ECLI:EU:C:2018:464) and concluded that, in the Appeal Panel's view, the *Baumeister* judgment clarified that not necessarily all information relating to the supervised entity and communicated by it to the competent authority, and all statements of that authority in its supervision file, including its correspondence with other bodies, do constitute, unconditionally, confidential information that is covered, consequently, by the

obligation to maintain professional secrecy. The Court of Justice held indeed that only information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interest of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of supervised entities is to be so classified. The Court further acknowledged that the passage of time is a circumstance that is normally liable to have an influence on the analysis of whether the conditions governing the confidentiality of the information concerned are satisfied at a given point in time. The Appeal Panel further recalled that in its judgment of 13 September 2018, *Enzo Buccioni v Banca d'Italia*, C-594/16, ECLI:EU:C:2018:717 the Court held that, in principle, the disclosure of confidential information pertaining to the supervisory file may be allowed to persons directly affected by the insolvency and that this right is not limited to disclosures made in the context of civil or commercial proceedings which have been already initiated.

102. The above considerations reflect the need to reconcile (i) the regime of public access under Regulation 1049/2001; (ii) the specificities of confidential information, produced in the context of financial supervision, including in the case of interinstitutional cooperation; and (iii) the particular features of documents from the ECB, which is a Treaty institution, subject to special treatment under Article 15(3) TFEU, and with its own specific access regime.
103. The Court of Justice, in *Baumeister*, sought to reconcile (i) and (ii) (public access and the treatment of confidential information in the context of supervision). It did so by acknowledging that the effective cooperation between authorities required “*that both the supervised entities and the competent authorities can have confidence that the confidential information provided will, in principle, remain confidential*” (*Baumeister* at paragraph 31, citing judgment of 12 November 2014, *Altmann and Others*, C-140/13, ECLI:EU:C:2014:2362, paragraph 31), and by acknowledging that the framework permitted the authorities, when sharing information (in the form of documents or otherwise), could indicate at the time of communicating that such information cannot be disclosed without their agreement (*Baumeister* para 37, citing former Article 58 MiFID I). Thus, the protection of confidentiality not only entailed a constraint to share, but also a degree of control on what information is shared, a principle also acknowledged in paragraph 44.
104. Thus, what transpires from *Baumeister* it is that, in the context of institutions subject to strict confidentiality rules (which include the Board and the ECB) interinstitutional cooperation is relevant in and of itself, and can justify keeping confidential the information shared between authorities, and/or subjecting the sharing of such information to the express consent of the authority originating the information. Besides Article 4(4) of Regulation 1049/2001, which provides for “consultation”, Article 4(5) contemplates the possibility of a more exacting regime, whereby “*A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.*” Thus, interinstitutional cooperation may be endangered not only by the disclosure of a document, but by the risk of disclosure, including the loss of control over the final decision over whether, and how to share that information, under conditions that may entail a breach of confidentiality rules.

105. Indeed, the Memorandum of Understanding (MoU) between the Single Resolution Board and the European Central Bank in Respect of Cooperation and Information Exchange⁴ contemplates the principles indicated above, and a consent-only rule, similar to Article 4(5) above. Paragraph 13 of said MoU states that:

13.1 The Participants recognise that mutual trust can only be preserved if information can flow with confidence in both directions.

13.2 Any confidential information requested or received by the Participants will be exchanged in compliance with relevant Union law, and will be used exclusively for lawful purposes and only in relation to the exercise by the Participants of their respective duties and tasks.

13.3 The Participants will exchange confidential information and will preserve the confidentiality of the information exchanged. In this regard, the Participants will keep confidential all information obtained in accordance with Union law or under this MoU from the other Participant, directly or indirectly, if the information communicated has been qualified as confidential by the sending Participant or is related to an issue of a confidential nature. The Participants will ensure that all persons under their responsibility dealing with or having access to confidential information are bound by the obligation of professional secrecy in accordance with the general principle of professional secrecy stated in Article 339 of the Treaty on the Functioning of the European Union and in compliance with relevant Union law.

13.4 Prior to any disclosure of confidential information received from the other Participant to a third party, the Participant considering disclosure will seek to (a) obtain the express agreement in writing of the originating Participant to disclose the confidential information, (b) ensure that the disclosed confidential information, including personal data, will be used by the third party solely for the purposes for which the originating Participant gave its agreement, and (c) ensure that the third party is subject to professional secrecy requirements, including data protection requirements, equivalent to those applicable to them by the relevant Union law. For the purposes of this Paragraph 13 the Commission, National Resolution Authorities as well as National Competent Authorities are not considered to be third parties.

106. Thus, in light of the need for information to flow freely and in confidence between the two institutions, both the ECB and the Board “request each other”, in the language of Article 4(5) of the Regulation 1049/2001, to obtain each other’s consent before disclosing any confidential information.

107. Point (iii), i.e., the special status of the ECB, strengthens the above considerations, due to both the ECB’s special regime of access to documents, and the special relevance that confidential information has for the ECB. As acknowledged above, access to ECB documents is regulated under a specific regime, under Decision 2004/258. Such regime is specific for the ECB, as permitted by Article 15 TFEU, which also dispenses separate treatment to the Court of Justice and the European Investment Bank, unlike, e.g., the Commission and its agencies, which are subject to the access to documents regime in full. Furthermore, as clarified by the recitals of the Decision 2004/258 this is the consequence of the special importance of the ECB

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https://www.srb.europa.eu/system/files/media/document/mou_with_the_single_resolution_board_on_cooperation_and_information_exchange_2018_.pdf

independence, a concept duly recognised by the Treaties and by the European courts (see to this effect judgment of 26 February 2019, *Ilmārs Rimšēvičs and ECB v Republic of Latvia*, C-202/18 and C-238/18, ECLI:EU:C:2019:139).

108. Aside from its separate treatment, confidential information has a special significance for the ECB, as the institution entrusted with monetary stability and prudential supervision. This results in a regime, under its Decision 2004/258, which, as the brief comparison above shows, is special in its provisions, including the exceptions to disclosure. The treatment of such exceptions is not analogous. For example, the list of absolute exceptions under Article 4(1)(a) of Decision 2004/258 is much longer than the list under Regulation 1049/2001. Furthermore, exceptions that are treated as absolute exceptions under Article 4(1)(a) of Decision 2004/258, such as the “confidentiality of the proceedings of the ECB's decision making bodies, the Supervisory Board or other bodies established pursuant to Regulation (EU) No 1024/2013”, or “the Union's or a Member State's policy relating to the prudential supervision of credit institutions and other financial institutions,” or “the purpose of supervisory inspections,” would be treated as *relative* exceptions under Article 4(2) of Regulation 1049/2001, which protects “the purpose of inspections, investigations and audits (...) unless there is an overriding public interest in disclosure”.
109. Thus, not only the expectation that information shared in a context of interinstitutional cooperation will be kept confidential continues to apply, as acknowledged in *Baumeister*, and as agreed in the SRB-ECB MoU. In addition, there is the expectation that the specific framework of access to ECB documents and its specificities will not be circumvented by asking another institution agency or body for the information shared by the ECB in a context of confidentiality.
110. In this sense, a decision refusing disclosure by the Board is subject to an appeal before the Appeal Panel, according to Article 90(3) SRMR, but this provision expressly refers to “*Decisions taken by the Board under Article 8 of Regulation (EC) No 1049/2001*”, and makes no mention to ECB Decision 2004/258 or other access regimes. If the Board refused disclosure because the ECB had refused disclosure based on some of the exceptions under ECB Decision 2004/258, the Appeal Panel would lack a clear competence for review, and if it did reviewed the decision, this could be seen as an indirect and *binding* review of an ECB act, which would go against the system of non-binding review by the Administrative Board of Review (ABoR), under Article 24 of Regulation 1024/2013 (SSM Regulation), and Article 263(5) TFEU, which constitutes the basis for such non-binding review. The resulting uncertainty could further undermine interinstitutional cooperation.
111. In light of the foregoing, the Appeal Panel finds, in the instant case, that the decision of the Board, with the Contested Decision, to refer the Appellant to the ECB for the access to the documents originating from the ECB is justified and did not deprive the Appellant of the possibility to have its application for access to the documents originating from the ECB handled promptly.

112. The Appeal Panel notes that both Regulation 1049/2001 and the Public Access Decision require that the SRB, as regards third-party documents, consult the third party with a view to assessing whether an exception from disclosure is applicable, unless it is clear that the document shall or shall not be disclosed (Article 4(4) of Regulation 1049/2001). More specifically, the Public Access Decision, under Article 4(4) provides that:

“As regards third party documents, the SRB shall consult with the third party with a view to assessing whether an exception in this Article is applicable, unless it is clear that the document shall or shall not be disclosed. In particular, in case of third party documents that are classified as confidential, the SRB shall seek to obtain the express agreement in writing of the originating third party, prior to disclosure of such document”

113. In the instant case, as the Board noted in its submissions, the ECB, being duly consulted, informed the SRB that the documents originating from the ECB were classified as confidential and, therefore, did not grant to the SRB the permission to disclose with its express agreement such documents to the Appellant.

114. The SRB identified the documents originating from the ECB and informed the Appellant of such identification with its initial response of 26 July 2022, by which the SRB also informed the Appellant that the SRB had consulted the ECB in line with Article 4(4) and “in its reply to this consultation by the SRB, the ECB has requested that these documents should be directly requested from the ECB”. This shows, in the Appeal Panel’s view, that the Appellant was put in the position to file an application for access to those documents under the ECB Decision 2004/258 after 3 weeks from the date of the registration of its initial application at the SRB (on 4 July 2022).

115. It is unclear whether the Appellant in fact filed such an application to the ECB after 26 July 2022. The Board insisted in its written submissions that the Appellant has done so and, being further questioned by the Appeal Panel at the hearing, the Board reiterated that, according to informal exchanges with the ECB, it would result that there is a pending request for documents of the Appellant at the ECB which the SRB believes is concerning the same documents originating from the ECB addressed by the Contested Decision. The Appellant, instead, did not take an explicit position on this in its written submissions, yet questioned by the Appeal Panel at the hearing insisted that, whilst it is true that there is a pending Appellant’s application at the ECB, this request for access to documents relates to other documents, different from those originating from the ECB and identified by the SRB in the initial response and in the Contested Decision.

116. Thus, nothing prevented the Appellant, once received the SRB’s initial response of 26 July 2022, to submit an application for the documents originating from the ECB directly to the ECB under the Decision 2004/258. The handling of the request by the ECB would have implied therefore a delay, compared to the Appellant’s expectations of a direct handling of the initial request from the Board, of only a few weeks, and thus, in the Appeal Panel’s view, still a handling reasonably promptly in the given circumstances. Even so, the promptness of

the processing should not be measured by adding up the time of the application before the Board and the application before the ECB, since these are separate applications.

117. Furthermore, the possibility to refer a request for access to another institution is contemplated under Regulation 1049/2001, Article 5, Article 5 of the Public Access Decision, and Article 5 of Decision 2004/258. These provisions contemplate this in cases where the documents are held by authorities from Member States. Other provisions, such as Article 4(4) of Regulation 1049/2001 and Article 4(4) of the Public Access Decision contemplate the consultation with the third parties that shared the documents “*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*”. Furthermore, as indicated above, Article 4(5) contemplates the possibility of subjecting disclosure to a party’s express consent, and this is what the Board and ECB agreed in their MoU.
118. Yet, the present case is *not* one where the Board chose to apply Article 5 *instead of* Article 4(4) of the Regulation, but *in addition to* it. In the Appeal Panel’s view, the need for express consent, as under Article 4(5) would be justified in light of the circumstances. Notwithstanding, the Board would have complied with Article 4(4) of the Regulation because it expressly consulted the ECB. As a result of those consultations, the Board refused access to documents *and* referred the Appellant to the ECB. The language of Article 4(4) does not prohibit a solution like this. Nor does the spirit of the provision. The Board may have considered that disclosure of a document shared for purposes of internal deliberations only is not possible without endangering the system of interinstitutional cooperation. The ECB, if asked directly, might reconsider its position if the decision to balance the right to access with the interests protected by confidentiality is left to it, and the Courts reviewing its decisions, but not to other parties, such as the Board.
119. This case must be distinguished from other cases of access to third-party documents from other EU institutions, such as the one analysed in the judgment of the Court of 18 July 2017, *Commission v Breyer*, C-213/15 P ECLI:EU:C:2017:563. In that case the Commission was requested to disclose the written pleadings of a Member State in an adversarial proceeding against the Commission, and the Court of Justice dismissed the Commission’s objection on grounds that Article 15 (3) TFEU exempted the Court of Justice from the regime of access to documents. Yet, the problem was that the Commission objected to the scope of application of the Public Access Regulation, arguing that the concept of “*all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union*” did not apply to documents in the context of proceedings before the Court of Justice. In this case the Board does not argue that the Public Access Regulation does not apply to the documents in its possession shared by the ECB. It argues that, after consulting with the ECB, the ECB refused sharing the documents, and that the request must be directly made to the ECB itself.
120. In *Commission v Breyer*, the risk of circumventing the specific rules of the Courts was vague and remote (*Commission v Breyer* at paragraph 45) and, in the given circumstances of that

case, could be duly accounted for by means of the exception under Article 4(2) on the protection of court proceedings and legal advice (*Commission v Breyer* at paragraphs. 53-54), i.e., there was no friction between the general regime of Regulation 1049/2001 and the specific rules of the Court of Justice. Yet, the situation is quite different in this case, where the comparison above between Article 4 and ff. of Decision 2004/258 and the Public Access Regulation shows that the specific framework of ECB access to documents could be easily undermined if the request is considered exclusively under Regulation 1049/2001.

121. Conversely, other court precedents show that certain circumstances may call for an application of Regulation 1049/2001 in a way consistent with other, specific legislation. In its judgment of 3 May 2018, *Malta v Commission*, T-653/16, ECLI:EU:T:2018:241, the General Court annulled a Commission decision granting access to Greenpeace to documents that had been facilitated by Malta to the Commission within the framework of Regulation 1224/2009, which prohibited disclosure without the express consent of the Member State facilitating the information (see *Malta v Commission*, paragraphs 143-146). In the present case, the confidentiality rules applicable in banking supervision and resolution, the special regime of the ECB Decision 2004/258, and the Memorandum of Understanding between the Board and the ECB call for an arrangement where consent is sought before sharing information.
122. Finally, the alternative solution, i.e., to find that the Board, after consulting with the ECB, should decide on disclosure on its own, and solely on the basis of Regulation 1049/2001, regardless of the ECB's consent, would not lead to more disclosure overall. In such scenario, the ECB could perceive each instance where a document is shared with the Board, as a risk of a breach of confidentiality, and refrain from freely exchanging information, or from sharing documents that are particularly sensitive. The Court of Justice acknowledged in *Baumeister* both the prerogative of an authority sharing documents in the context of interinstitutional cooperation to refrain from sharing such documents, and the risk that this results in suboptimal cooperation if confidentiality is not protected.
123. In conclusion, the option of refusing to share the documents, while referring the request to the ECB is, in the Appeal Panel's view, reasonable and appropriate in the specific case of the documents originating from the ECB in the ECB/SRB relationship. In this context, the referral from the SRB to the ECB, on the one hand, prevents the possible circumvention of the specific provisions of the Decision 2004/258 as to the assessment of the exceptions to the public access to the documents originating from the ECB and, on the other hand, whilst it terminates the proceedings before the SRB with a denial of access, it leaves completely open the possibility of a different outcome and assessment directly by the ECB in the proceedings which may be initiated immediately thereafter before it under the ECB Decision 2004/258.
124. Thus, the second ground of appeal is dismissed.

(c) The third ground of appeal.

125. The Appellant also complains that the confirmatory decision is insufficiently reasoned. The Appellant's reasons, which the Appellant develops in paragraphs 24 and ff. of the appeal, are treated jointly with the argument that the Board should have treated the request of access to documents as a request to access any document relating to [.] and/or its [.] subsidiary, dealt with on the first ground of this appeal.
126. The Appeal Panel recalls that, in accordance with settled case-law, the duty to state reasons pursuant to Article 296 TFEU has a fundamental importance, as acknowledged *inter alia* in judgment of 21 November 1991, *Hauptzollamt München v Technische Universität München*, C-269/90, ECLI:EU:C:1991:438, paragraph 14. Through the duty to state reasons the court (and in the present appeal, the Appeal Panel) can verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.
127. The duty to state reasons is particularly important in the prudential and resolution context, as acknowledged by the General Court, in its judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg v ECB*, T-122/15, ECLI:EU:T:2017:377 paragraph 122-124 and the case-law cited and in its more recent judgment of 6 October 2021, *UkrSELHOSPROM VERSOBANK v ECB*, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 385-387. The obligation to state reasons laid down in Article 296 TFEU is an essential procedural requirement, as distinct from the questions whether the reasons given are correct, which goes to the substantive legality of the contested measure. In that vein, first of all, the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the courts, to provide the person concerned with sufficient information to ascertain whether the decision may be vitiated by an error enabling its validity to be challenged. Furthermore, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.
128. First, the Appeal Panel must analyse the statement under point 2.1. of the Contested Decision that “no documents could be identified [...] that would correspond to the description given in your application”, together with the statements that “the scope of the right of access, as defined therein, only applies to existing documents”, that “the SRB is not compelled to create a document that does not already exist in order to address a specific request for public access”, and that “once an institution asserts that a document does not exist, it is presumed

not to exist unless the applicant can rebut that claim by providing relevant and consistent evidence” the sufficiency of that statement must be interpreted also in light of the context of the exchanges of communications between the parties. As indicated on the first ground, the Board approached the Appellant twice to clarify the scope of the request, and, then, to agree to a “fair solution” consisting in processing separately the request of access the documents that were more precisely defined, and the request of access the documents that were more broadly defined, and that could give rise to a higher number of documents, which comprised any documents relating to [.] and/or its [.] subsidiary. This separate treatment was acknowledged by the Appellant in its email of July 1, 2022, where, through its lawyer, the same lawyer as in the present proceedings, the Appellant stated that *“we agree that the requests with which you have no problem should be processed independently of the two items with which you have a problem. If this requires that you treat the two items with which you have a problem as a separate request then please do so. We will separately revert on the two items with which you have a problem”*.

129. In light of this context, the Board's statement that it did not have in its possession documents corresponding to the description was sufficiently clear. The Appeal Panel notes that, for the avoidance of doubt, the Board stated, in the response to the initial application, that *“The date of registration of your Initial Application is due to the intermediate clarification requests sent to you by the SRB on 1 June, 20 June and 23 June 2022, respectively. After receiving your response on 1 July 2022 the SRB could split your Initial Application in two separate requests and could register accordingly”*. Thus, the Board indicated that it was the split request the one that it was processing.
130. As analysed under the first ground, the split was a reasonable solution, agreed on by the Appellant, which simply did not revert on the more broadly defined groups of documents. The Appellant had no difficulty understanding the rationale for the Board's statement that it did not have documents of the said description. It simply disagreed with the Board about the scope of documents to be analysed.
131. Second, the Appeal Panel must analyse the statement under point 2.2. of the Contested Decision that *“with regard to third-party documents, such third party shall be consulted with a view to assessing whether the exceptions in Article 4(1) and/or (2) of Regulation (EC) No 1049/2001 are applicable, unless it is clear that the documents shall or shall not be disclosed. The ECB was hence consulted and asked that it is directly requested to provide the documents under point (4) above. In the Initial Response the Head of the SRB Secretariat hence referred you to the ECB”*. For the reasons discussed in section (b) of this decision, the Appeal Panel has found that the Board's refusal to disclose the documents while referring the request to the ECB does not raise an issue of substantive legality, because in this context, the referral from the Board to the ECB, on the one hand, prevents the possible circumvention of the specific provisions of the Decision 2004/258 as to the assessment of the exceptions to the public access to the documents originating from the ECB and, on the other hand, whilst it terminates the proceedings before the Board with a denial of access, it leaves open the possibility of a

different outcome and assessment directly by the ECB in the proceedings which may be initiated immediately thereafter before it under the ECB Decision 2004/258.

132. However, this Appeal Panel has also held in previous precedents that the denial of access by the Board should nonetheless be justified in any given case through a sufficient statement of reasons, and that those reasons must make reference to the pertaining exceptions to public access and must justify the refusal of access based on one of those exceptions, including in cases where a document was requested from a third party. In case 46/17 the exceptions related to the fact that the documents were received from, or exchanged with the ECB. Yet, in that case the justification offered was that the documents requested had been shared for purposes of internal use as part of the file and deliberations according to Article 4(3) of Regulation 1049/2001 and Article 4(3) of the Public Access Decision, and that no overriding public interest in disclosure was shown by the Appellant.
133. In its submissions before the Appeal Panel, the Board clarified that the documents at stake (i) were classified by the ECB as “ECB classified” because they are part of the ECB’s supervisory file and (ii) were received from the ECB for internal use by the SRB only, and therefore they were provided in the context of the SRB’s internal decision making to the effect of the exception under Article 4(3) of Regulation No 1049/2001 and Article 4(3) of SRB’s Decision on Public on Public Access.
134. However, such reasons were not expressly stated in the Contested Decision, nor in the initial response. Thus, the Board did not “disclose in a clear and unequivocal fashion the reasoning followed”, i.e., not only that the documents originated with the ECB, but that such documents were shared in the context of internal deliberations, pursuant to Article 4 (3) of the Public Access Regulation and the Public Access Decision.
135. Therefore, the third ground of appeal needs to be upheld, specifically in respect of the insufficient content of the statement of reasons of § 2.2. of the Contested Decision as regards the justifications and exceptions relied on by the Board in consultation with the ECB to deny access to the documents originating from the ECB.

On those grounds, and within the limits set out above, the Appeal Panel hereby:

Remits the case to the Board to duly amend the statement of reasons of paragraph 2.2. of the Contested Decision.

Helen Louri-Dendrinou
SIGNED

David Ramos Muñoz
Co-Rapporteur

Luis Silva Morais
Vice-Chair

SIGNED

SIGNED

Marco Lamandini
Co-Rapporteur

Christopher Pleister
Chair

SIGNED

SIGNED

For the Secretariat of the Appeal Panel:

[.]

SIGNED