Single
Resolution Board
Appeal Panel

28 June 2021

Case 1/2021

FINAL DECISION

[.],
Appellant,

v

the Single Resolution Board

Christopher Pleister, Chair
Marco Lamandini, Rapporteur
Luis Silva Morais, Vice-Chair
Eleni Dendrinou
Kaarlo Jännäri

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FINAL DECISION

In Case 1/2021,

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

[.], a legal entity with headquarters in [.], [.] (hereinafter the "Appellant")

v

the Single Resolution Board (hereinafter the "Board" or "SRB"),

(together referred to as the "Parties"),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Marco Lamandini (Rapporteur), Luis Silva Morais (Vice-Chair), Eleni Dendrinou, Kaarlo Jännäri**,**

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 18 February 2021 (hereinafter the "Confirmatory Decision") rejecting the Appellant's confirmatory application, by which the SRB was requested by the Appellant to reconsider its position in relation to its initial request and the SRB's response thereto, concerning the access to documents in accordance with Article 90(1) of SRMR and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereinafter "Regulation 1049/2001"), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents[3] (hereinafter "Public Access Decision").

2. By the initial request the Appellant requested access to the letter of the 6th of June 2017 sent by Banco Popular Español (hereinafter "Banco Popular") to the European Central Bank (hereinafter the "ECB") following the decision of the Appeal Panel in Joined Cases 44/17 and 7/2018. The request was rejected by the Board with initial decision adopted on 25 January 2021. The Appellant submitted a confirmatory application on 28 January 2021 which was rejected by the Board with the Confirmatory Decision.

[1] OJ L 225, 30.7.2014, p.1.
[2] OJ L 145, 31.5.2001, p. 43
[3] SRB/ES/2017/01.

3. The notice of appeal was submitted to the Board on 31 March 2021. The Chair appointed as rapporteur the Member Professor Marco Lamandini and the appeal was notified by the Secretariat to the Board on 9 April 2021.

4. On 13 April 2021 the Board requested an extension of two weeks for the filing of its response to the appeal, which was granted by the Appeal Panel on 16 April 2021.

5. On 6 May 2021 the Board submitted its response to the appeal.

6. On 11 May 2021, the Chair wrote to the Parties and granted, according to Article 6(7) of the AP Rules of Procedure, (i) two weeks to the Appellant to submit a reply to the Board's response. The Appeal Panel reserved any further procedural order(s) after the conclusion of such additional exchange of submissions between the Parties.

7. On 11 May 2021, the Appellant notified the Appeal Panel that it would not submit any reply to the Board's response and it also waived its right to make oral representation at a hearing.

8. On 21 May 2021, the Appeal Panel notified the Parties the following procedural order:

> *Dear Parties,*
>
> *The Appeal Panel has determined that, for the just determination of the appeal in case 1/21 it is necessary for the Appeal Panel to examine, under strict confidentiality vis-à-vis the Appellant:*
>
> *(1) the letter of the 6th of June 2017 sent by Banco Popular Español to the ECB, already examined by the Appeal Panel but in a different case and which needs, for reasons of procedural good order, to be deposited in this case to allow for a confidentially examination from the Appeal Panel also in this case; and*
>
> *(2) the ECB responses to the SRB request for consultation on the disclosure of such letter of the 6th of June 2017 following the decision of the Appeal Panel in Joined Cases 44/17 and 7/2018 and following the initial and confirmatory request of the Appellant; and*
>
> *(3) the written submissions of the parties in the case initiated by the Appellant against the ECB before the GCEU in case [.], if these documents are available to the SRB. If these documents are not available to the SRB, the SRB is kindly requested to inform the Appeal Panel Secretariat as soon as possible and the Appellant will be requested by the Secretariat to deposit such documents under strict confidentiality vis-à-vis the SRB.*
>
> *For this purpose, as a measure of inquiry weighing confidentiality against the right to an effective legal remedy at this stage of the proceedings, having regard also to Article 104 of the General Court's Rules of Procedure, the Appeal Panel orders the Board to deposit with the Secretariat of the Appeal Panel within **two weeks from the notice of this order** at the SRB premises, one or more numbered hardcopies of the above documents and subject to the adoption of appropriate technical means and all necessary security measures, to allow remote access to the Appeal Panel Members via electronic devices to an electronic copy of the same for reading only. Having regard also to Article 104 of the General Court's Rules of Procedure, the above documents deposited by one Party shall neither be communicated to the other Party nor shall be part of the file of these proceedings open to the access of the Appellant, corresponding exclusively to a mere element intended for comprehensive information and due diligence on the case on the part of the Appeal Panel.*

9. On 21 May 2021 the Appellant, in response to the procedural order, submitted an order of the General Court in Case [.] dated [.] setting the hearing concerning the oral phase of the proceeding before the General Court on [.]. The Appellant further argued the following: "with regard to the statement of the SRB concerning how disclosure of the letter would affect court proceedings, we would like to inform you that such proceedings have been effectively completed, except for the judgment, which is still pending. The court hearing in Case [.] has been held".

10. On 3 June 2021 the Board deposited the documents listed in point (1) and (2) of the procedural order and clarified that it is not in possession of those indicated at point (3) of the procedural order. The Board further noted in this respect that written submissions in a pending case cannot be disclosed to a third party without the authorization of the President of the General Court, having heard the parties.

11. Finally, on 8 June 2021 the Appeal Panel notified the Parties that, having examined the additional documents whose access was granted under strict confidentiality to the Appeal Panel and in light of the statements of both parties as to the pending Case [.], the Appeal Panel considered sufficient for the just determination of this appeal the documents deposited by the Board and by the Appellant following the procedural order and the public information available on the website of the Court of Justice concerning such case, and therefore the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and 20 of the Rules of Procedure.

Main arguments of the parties

12. 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

13. The Appellant seeks access to the letter of Banco Popular to the ECB of the 6th of June 2017 (hereinafter, the "BPE Communication") following a decision of the Appeal Panel in Joined Cases 44/17 and 7/18. The Appellant raises in this connection three pleas.

14. With the first plea, the Appellant submits that since the Appeal Panel already found in Joined Cases 44/17 and 7/18 that "there is a clear overriding public interest in [the] disclosure" [of the BPE Communication] and "it is hardly credible that, as the Board claims, its disclosure after one year [from resolution, as it was at the time of the Appeal Panel decision] may cause adverse market reactions or may affect the willingness of undertakings to openly communicate with the authorities in the future", the Board is under the obligation to amend its response in accordance with the decision of the Appeal Panel in Joined Cases 44/17 and 7/18. The Appellant further notes, in this respect, that despite the Appeal Panel's decision in Joined Cases 44/17 and 7/18 the Board has not yet published such BPE Communication. In the Appellant's view, in so doing, the Confirmatory Decision is in breach of Article 85(8)

SRMR (and the Appellant refers to the Appeal Panel's precedent in case 2/18, Appellant v Single Resolution Board)

15. With the second plea, the Appellant alleges that the Confirmatory Decision breaches Article 4(1)(a) fourth indent of Regulation 1049/2001, since it is hardly probable that the disclosure of the BPE Communication could affect the financial, monetary or economic policy of the Union. More specifically, the Appellant challenges the Board's conclusion, in the Confirmatory Decision, that the requested disclosure "would adversely affect the public interest in the smooth functioning of the system of prudential supervision" because it would run counter the principle of confidentiality of the supervisory file. In this connection, the Appellant notes that the finding of the judgment of the CJEU of 19 June 2018, Baumeister, C-15/16, EU:C:2018:464 (at paragraph 35) is not applicable in the instant case, because that case related to Directive 2004/39 (MiFID) and not to banks' prudential supervision and resolution. The Appellant further argues that currently almost 4 years have passed since the Banco Popular resolution.

16. With the third plea, the Appellant puts forward that the Confirmatory Decision breaches Article 4(2), second indent of Regulation 1049/2001, since there is an overriding public interest in the disclosure of the BPE Communication. In this connection the Appellant notes that, contrary to the Board's claim that disclosure would affect the equality of arms in court proceedings, disclosure would on the contrary realize the equality of arms because the SRB and the ECB know the content of the BPE Communication, whereas the Appellant does not (and this puts the Appellant at disadvantage).

17. The Appellant asks therefore the Appeal Panel to remit the case to the Board.

Board

18. The Board preliminarily notes that the BPE Communication is a third party document of the ECB, an EU institution, and of Banco Santander, the legal successor of BPE and that the ECB has repeatedly objected to the disclosure of the BPE Communication, as the document and its content form part of the administrative files of the ECB's supervisory activities. The Board further notes that the Appellant has requested access to this document from the ECB in the past, but the ECB refused to grant access.

19. Moreover, the BPE Communication is subject to litigation in various cases currently pending before the General Court, including in a case initiated by the Appellant against the ECB (case [.]). In the Board's view, in those cases the General Court can review, on the basis of Article 91(c) and 104 of its Rules of Procedure the document in order to exercise its power of review over the resolution. In this context, in the Board's view, requesting the BPE Communication from the SRB, while the proceedings dealing precisely with the issue of confidentiality of inter alia this document are pending before the General Court, is a clear usurpation of the proceedings before the General Court and risks rendering these proceedings moot.

20. Finally, the Board notes that a refusal to grant access to a certain document is justified already where the requirements laid down by only one of the exceptions provided for in Article 4 of Regulation 1049/2001 are met. In this case, in the Board's view, access to the BPE Communication was not granted on ground of two exceptions provided for in Article 4(1)(a)fourth indent and Article 4(2) second indent. The Board argues that the Appellant has failed to establish that neither of those exceptions apply.

21. More specifically, the Board first argues that the appeal is inadmissible in so far as it has as its objective the annulment of the Confirmatory Decision, because the Appeal Panel cannot annul but only remit the case to the Board.

22. On the merits, as to the first plea raised by the Appellant, the Board contests that it breached Article 85(8) SRMR and allegedly refused to comply with a binding decision of the Appeal Panel in Joined Cases 44/17 and 7/18 and notes that following the Appeal Panel decision and taking into account the consultation response received from the ECB the Board adopted an amended confirmatory decision in that case, providing additional detailed explanations as regards the assessment of the applicability of the exceptions provided in Regulation 1049/2001, taking into account the Appeal Panel guidance.

23. As to the second plea raised by the Appellant, the Board argues that it enjoys a wide discretion when considering whether access to a document may undermine the public interest to the effect of Article 4(1)(a)fourth indent of Regulation 1049/2001. The Board further notes that the exception laid down in Article 4(1)(a) is an absolute exception, whose applicability does not need to be balanced against any possible overriding public interest in disclosure. Finally, the Board refers to the reasoning developed by the CJEU in Baumeister in relation to Directive 2004/39 and holds that this is fully applicable in the situation before the Appeal Panel in the present proceedings.

24. As to the third plea, the Board argues that since the disclosure of the BPE Communication is sub judice in a pending case before the General Court (Case [.]), the BPE Communication is exempt from disclosure in accordance with the exception of Article 4(2) second indent and disclosure, in the Board's view, is not warranted by an overriding public interest, because the Appellant failed to show such interest and a possible interest in obtaining documents for the purposes of court proceedings constitutes, according to settled case-law of the Court of Justice, a private and not a public interest.

Findings of the Appeal Panel

25. The Appeal Panel preliminary notes that in previous decisions concerning the access to documents pertaining to the Banco Popular resolution, including in the decision rendered in Joined Cases 44/17 and 7/18 between the same parties, the Appeal Panel summarized the overriding principles that must guide in the determination of appeals concerning the SRB refusal to grant access to documents under Regulation 1049/2001 in the context of a bank resolution 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, EU:C:2017:540, paragraphs 60 and 61 and in particular judgment 4 June 2015, Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank, T-376/13, EU:T:2015:361, paragraph 20: "as the addressee of those decisions [denying access to documents], the applicant is therefore entitled to bring an action against them. (...)").

(b) As indicated by Article 85(3) SRMR, the Appeal Panel has 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. The Appeal Panel further noted that, although the regime of Article 90(4) SRMR is not relevant to the effect of the present appeal, Regulation 1049/2001 and the Public Access Decision must be interpreted taking into account also the special limitations set out in Article 90(4) SRMR in such a manner that they do not make each other devoid of purpose (this means that Regulation 1049/2001 and the Public Access Decision cannot grant access to documents for which access is expressly excluded by Article 90(4) SRMR).

(c) According to Regulation 1049/2001 "the purpose of [the] Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access" (recital 4) and "in principle, all documents of the institutions should be accessible to the public" (recital 11). Regulation 1049/2001 implements Article 15 TFEU which establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies (such right is also recognized as a fundamental right by Article 42 of the Charter of Fundamental Rights). However, certain public and private interests are also protected by way of exceptions and the Union institutions, bodies and agencies should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks (recital 11). Article 4 of Regulation 1049/2001 sets out these exceptions as follows:

> Article 4
>
> Exceptions
>
> 1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
>
> (a) the public interest as regards:
>
> - public security,
>
> - defence and military matters,

- international relations,

- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,

- court proceedings and legal advice,

- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

(d) In principle, exceptions must be applied and interpreted narrowly (see e.g. judgment 17 October 2013, Council v. Access Info Europe, C-280/11, EU:C:2013:671, paragraph 30). However, case-law on public access to documents in the administrative context (as opposed to case law on public access in the legislative context) suggests that a less open stance can be taken in the administrative context because “the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution” (see to this effect judgment 4 May 2017, MyTravel v. Commission, T-403/15, EU:T:2017:300, at paragraph 49; judgment 21 July 2011, Sweden v. Commission C-506/08 P, EU:C:2011:496, at paragraphs 87-88; judgment 29 June 2010, Commission v. Technische Glaswerke Ilmenau, C-139/07 P, EU:C:2010:376, paragraphs 60-61).

(e) Settled case-law permits Union institutions, bodies and agencies to rely in relation to certain categories of administrative documents (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, EU:C:2012:393; judgment 21 September 2010, Sweden and Others v. API and

Commission, C-514/07 P, EU:C:2010:541; judgment 27 February 2014, Commission v. EnBW, C-365/12 P, UE:C:2014:112; judgment 14 November 2013, LPN and Finland v. Commission, C-514/11 P and C-605/11 P EU:C:2013:738; judgment 11 May 2017, Sweden v. Commission, C-562/14 P EU:C:2017:356). Where the general presumption applies, the burden of proof is shifted from the institution to the applicant, who must be able to demonstrate that there will be no harm to the interest protected by the Regulation 1049/2001. This also means that the Union institutions, bodies or agencies are not required, when the general presumption applies, to examine individually each document requested in the case because, as the CJEU noted in LPN and Finland v. Commission, Joined Cases C-514/11P and C-605/11P (cited above, paragraph 68), "such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global". At the same time, though, settled case law clarifies that, since the possibility of relying on general presumptions applying to certain categories of documents, instead of examining each document individually and specifically before refusing access to it, would restrict the general principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation 1049/2001, "the use of such presumptions must be founded on reasonable and convincing grounds" (judgment 25 September 2014, Spirlea v. Commission, T-306/12, EU:T:2014:816, paragraph 52).

(f) When determining whether disclosure is prevented by the application of one of the relevant exceptions under Regulation 1049/2001, EU institutions, bodies and agencies enjoy in principle a margin of appreciation. Review is then limited, according to settled case law, to verifying whether procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers (see, among others, judgment 4 June 2015, Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank, T-376/13, EU:T:2015:361, paragraph 53; judgment 29 November 2012, Thesing and Bloomberg Finance v ECB, T-590/10, EU:T:2012:635, paragraph 43), 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, EU:C:2014:18, at paragraphs 79-81).

26. In light of these principles and of further guidance that could be inferred from the case-law of the CJEU, the Appeal Panel concluded in its decision in Joined Cases 44/17 and 7/18 referred to by both parties in their submissions that:

a) on one hand, when the request for access addressed to the SRB concerned the full text of the ECB FOLTF assessment, which had been disclosed in part, in a redacted version, because the ECB denied full access to it, justifying its position noting that this document if part of the supervisory file covered by professional secrecy obligation under Article 27 SSMR, 53 et seq CRD IV and 84 BRRD and full disclosure of the FOLTF assessment is prevented also by the exception referred to in Article 4(1)(a) first intent of Regulation 1049/2001 (financial, monetary or economic policy of the Union or a Member State), the Appeal Panel held that, in

principle, access to the documents received or exchanged with the ECB or the European Commission for internal use as part of the file and deliberations, could be legitimately refused by the SRB 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 as to the necessity of a disclosure in full of a document which had already been disclosed in redacted form. The Appeal Panel also noted that, although pursuant to Article 2(3), Regulation 1049/2001 applies to all documents held by an institution, "that is to say, documents drawn up or received by it and in its possession", in the Appeal Panel's view, the SRB could deny full access to the ECB FOLTF assessment because this was a document received by the SRB for internal use as part of deliberations and preliminary consultations to the effect of Article 4(3) of Regulation 1049/2001 and Article 4(3) of the Public Access Decision and no overriding public interest in disclosure was shown. The Appeal Panel further added that access to these documents should be requested directly to the ECB, by which the documents were drawn up and which holds them without having received them from another institution or agency for internal use or part of deliberations within the context of an inter-institutional cooperation framework. Direct request to the ECB, rather than an indirect access through the SRB, would prevent the circumvention of the special rules governing public access to ECB decisions (ECB Decision 2004/258). The Appeal Panel noted in this regard that the provisions of the ECB 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 (judgment 26 April 2018, Espirito Santo Financial v. European Central Bank, T-251/15, EU:T:2018:234, paragraph 40). It is therefore necessary that the ECB itself can assess whether or not a document drawn up by the ECB itself can be disclosed or not under the relevant ECB Decision on public access to documents. The Appeal Panel further noted that, in the opinion delivered on 17 December 2017, BaFin v Ewald Baumeister, C-15/16, EU:C: 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". In light of these principles, the Appeal Panel considered that the Board's denial of the full text of the FOLTF assessment was done in compliance with the applicable procedural rules, with the duty to state reasons and without a manifest error of assessment or a misuse of powers, but rather within the limits of the exercise by the Board of the margin of discretion which must be recognized to it according to settled case law (again, judgment 4 June 2015, Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank, T-376/13, EU:T:2015:361, paragraph 55).

b) On the other hand, the Appeal Panel concluded that the BPE Communication, which had not been disclosed in full or in part, had to be disclosed in its full text or in a duly redacted form, as deemed necessary and proportionate by the Board in the exercise of the margin of

discretion pertaining to the Board itself. The Appeal Panel came to such conclusion also noting that "the ECB's FOLTF assessment was confirmed and complemented by the assessment made by the board of directors of Banco Popular itself on 6 June 2017 that the institution was likely to fail (see, e.g. recital (36) of the Resolution Decision) and in the Appeal Panel's view this circumstance is also to be considered when determining to what extent public access has to be granted to the text of the ECB's FOLTF assessment and to all documents exchanged with the SRB related thereto". In so doing, as to the BPE Communication, the Appeal Panel concluded that the SRB decision not to grant access to such document should be remitted to the Board. The Board had objected that (i) this document was addressed to the ECB and the ECB had objected to its disclosure and justified its position, noting that it is covered by a general presumption of non-accessibility, since its disclosure would undermine the protection of the public interest under Article 4(1) c) of the Decision ECB/2004/3 in conjunction with the first indent of Article 4(2) and (ii) the Board, in turn, considered that also the exception under Article 4(1)(a) fourth indent (protection of the financial, monetary or economic policy) was relevant, because disclosure may cause adverse market reactions or may affect the willingness of undertakings to openly communicate with the authorities in the future. However, the Appeal Panel, having examined, under strict confidentiality, the full text of the BPE Communication concluded that the refusal to disclose it either in its full text or in a duly redacted form - as deemed necessary and proportionate by the Board in the exercise of the margin of discretion pertaining to the Board itself - was vitiated by manifest error in the application of the relevant exceptions under Regulation 1049/2001. In the Appeal Panel's view, there was a clear overriding public interest in its disclosure, in order to enable the persons concerned to ascertain a relevant fact for the understanding of the resolution decision adopted with regard to Banco Popular (such fact consisting of the factual circumstances ascertained by the credit institution itself leading to the credit institution's own assessment that it was indeed failing or likely to fail) and to enable the courts to exercise their power of review over the resolution. Although the BPE Communication was part of the supervisory file, the Appeal Panel further found that it was hardly credible that its disclosure after one year from the adoption of the resolution plan could cause adverse market reactions or affect the willingness of undertakings to openly communicate with the authorities in the future (such communications being mandated by the law: Article 81(1) Directive 2014/59/EU and Article 21.4 Spanish Law 11/2015). The Appeal Panel considered the statement by Advocate General Bot in the opinion delivered on 17 December 2017, BaFin v Ewald Baumeister, C-15/16, EU:C: C:2017:958, at paragraph 47, where he argued that the confidential treatment of information relating to supervised credit institutions so as not to render ineffective the provisions relating to professional secrecy may justify a legitimate restriction of the fundamental right of access to document, for the purpose of ensuring the proper functioning and stability for the system of supervision of financial markets. However, in the Appeal Panel's view, this reinforced protection of professional secrecy could not be such as to prevent interested parties from being able to access, in full or in a duly redacted version in compliance with the principles set out herein, a document which, in the Appeal Panel's view, is relevant to understand the reasons why the Resolution Decision was adopted in this specific case and courts from conducting an informed review on the

resolution, taking into account also the factual findings of the board of directors of the resolved credit institutions. In other terms, in the Appeal Panel's view, there is an overriding public interest in disclosure when the document relates to the findings by the credit institution itself on factual circumstances of fundamental relevance, which could potentially clarify why the resolution decision was adopted and could help in its review, also by courts (where necessary).

27. 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 the documents for which the Appeal Panel has requested confidential disclosure in the present proceedings and has come to the following conclusions.

(a) Admissibility of the appeal.

28. First, and contrary to the Board's exception that the appeal is inadmissible because it has as its objective the annulment of the Confirmatory Decision, the Appeal Panel notes that the Appellant requests, with its appeal, at paragraph 36, that "the Appeal Panel remit[s] the case to the Board". Despite some ambiguities in the language of the appeal in other parts of the said appeal (specifically at paragraph 5, where the sentence can be read "this appeal has as its object the annulment of the Contested Decision"), in the Appeal Panel view the final request raised by the Appellant is clear and fully in line with the scope of review granted by Article 85 SRMR to the Appeal Panel and therefore the appeal is admissible. Indeed, the purpose of the appeal, as ultimately requested in clear terms by the Appellant, is to obtain from the Appeal Panel that the case is remitted to the Board so that the Board amends the Confirmatory Decision and grants access to the BPE Communication. This is precisely the scope of the Appeal Panel's review, which does not purport the annulment of the appealed decision but either the confirmation of the appealed decision or the remittal of the case to the Board for the adoption of an amended decision, following the binding decision of the Appeal Panel.

(b) The first plea of the appeal: alleged breach of Article 85(8) SRMR

29. The Appellant claims that the Board, with the Confirmatory Decision, has breached Article 85(8) SRMR because it allegedly refused to comply with the binding decision of the Appeal Panel in Joined Cases 44/17 and 7/18. The Board argues, on the contrary, that in that case the Board adopted an amended confirmatory decision (which was communicated to the Appellant) and, whilst it did indeed decide not to disclose the BPE Communication, it provided additional detailed explanations as regards the assessment of the applicability of the exceptions provided in Regulation 1049/2001, taking into account the Appeal Panel guidance. In so doing, in the Board's view, the Board complied with the binding decision of the Appeal Panel in Joined Cases 44/17 and 7/18 by adopting an amended decision with additional justification as to why the BPE Communication cannot be disclosed. Similarly – and this is the relevant point in fact and in law in the instant case- with the Confirmatory Decision the Board conducted again an independent review of the initial response and duly took into

account also the guidance provided by the Appeal Panel in Joined Cases 44/17 and 7/18 and, considering the passage of time, again consulted the ECB to obtain its position. Taking all of this into account, the Board then adopted the Confirmatory Decision justifying in detail why access to the BPE Communication could not be granted.

30. Within this overall context, the Appeal Panel acknowledges, as a matter of principle, that once a confirmatory decision adopted under Regulation 1049/2001 is remitted to the Board by the Appeal Panel on ground of a manifest error in the application of one or more exceptions under Regulation 1049/2001 invoked by the same confirmatory decision (as it happened with the decision in Joined Cases 44/17 and 7/18), the Board may still adopt, following patterns of reasonability and if objectively justified, instead of an amended decision granting full or redacted access to the relevant document, an amended decision reiterating its refusal to disclose said document. This, however, provided that such amended decision and its conclusions (not to grant access to the requested document) are based on one or more different exception(s) under Regulation 1049/2001 than those originally invoked by the Board and/or on reasons other than those already found unwarranted by the binding Appeal Panel decision (different exceptions and reasons that had not been invoked as such by the Board in its previous confirmatory decision, due to any justified grounds or which concern new relevant developments that may have occurred subsequently to that initial decision).

31. In the instant case, the decision appealed in Joined Cases 44/17 and 7/18 concerned the same BPE Communication whose disclosure was also refused by the Confirmatory Decision and in both cases the Board relied, first of all, on the exception under Article 4(1)(a), fourth indent. On this exception, however, the Appeal Panel was already adamant in finding, with its decision in Joined Cases 44/17 and 7/18, that the refusal to disclose the BPE Communication either in its full text or in a duly redacted form (as deemed necessary and proportionate by the Board in the exercise of the margin of discretion pertaining to the Board itself) was vitiated by manifest error in the application of the exception under Article 4(1)(a) fourth indent of Regulation 1049/2001. Thus, in the Appeal Panel's view this exception cannot be validly reiterated by the Board again, based on the same reasons already considered insufficient by the Appeal Panel with the decision in Joined Cases 44/17 and 7/18, in the Confirmatory Decision, which is a subsequent decision under Regulation 1049/2001 between the same parties and concerning the same document.

32. Indeed, a similar Board's behaviour would contradict, in the Appeal Panel's view, the language and the finality of Article 85(8) SRMR and would circumvent and deprive of meaning the clear intention of the co-legislators that the Board be bound by the Appeal Panel decision, whose role is not consultative (as it would be, if the Appeal Panel had to render a non-binding opinion) but, in broad terms, final and adjudicatory within the strict limits of (i) first, a purely administrative (and, thus, clearly not judicial) nature of the review; (ii) second, a scope of review strictly confined to the matters expressly mentioned in Article 85 and 90 SRMR; and (iii) third, a binary choice of possible decisions as outcome of such review. This binary choice results from the fact that the Appeal Panel can only confirm the Board's decision or remit the case to the Board, but not replace the Board's decision with an Appeal Panel's

decision. The Appeal Panel has, furthermore, exercised its judgment and nuance on many occasions, where it has remitted the case to the Board, finding that its decision was vitiated by a manifest error of assessment as to the non-disclosure of the documents, but granting the possibility to disclose a redacted version of them. Following the same consistent pattern, it has never done so in the opposite sense, i.e., to indirectly substitute its judgment for that of the Board.

33. Moreover, in its decision in Joined Cases 44/17 and 7/18 between the same parties the Appeal Panel concluded that, in its view, it was hardly credible that the disclosure of the BPE Communication, in full or in redacted form, after one year (such was the time already elapsed at the date of adoption of the decision in Joined Cases 44/17 and 7/18) from the adoption of the resolution plan may cause adverse market reactions or may affect the willingness of undertakings to openly communicate with the authorities in the future, taking also into account the very fact that such communications from the supervised entities to the authorities are mandated by the law (Article 81(1) Directive 2014/59/EU and Article 21.4 Spanish Law 11/2015). The Appeal Panel concluded therefore that the exception of Article 4(1)(a), fourth indent (disclosure would undermine the protection of a public interest as regards the financial, monetary or economic policy of the Union or a Member State) could not be validly relied upon by the Board to refuse access to the BPE Communication. For the same reasons also the Confirmatory Decision, in the instant case, cannot be found as validly justifying its refusal to grant access to the BPE Communication on ground of the same exception under Regulation 1049/2001 and of specific arguments which simply reiterate those already dismissed and found unwarranted by the Appeal Panel decision in Joined Cases 44/17 and 7/18. This is even more so, if one considers that, at the time of this decision, four years have already lapsed from the time of adoption of the resolution decision and of the BPE Communication. The Appeal Panel recalls in this regard that Article 4(7) of Regulation 1049/2001 provides that "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".

34. The Board further argues that the refusal to grant the requested access to the BPE Communication is supported by the authority of a judgment of the Grand Chamber of the CJEU of 19 June 2018 (coincidently, the same date of the Appeal Panel decision in Joined Cases 44/17 and 7/18), in Case C-15/16, BaFin v Ewald Baumeister, EU:C:2018:464 and claims in particular that in the field of banking supervision (similarly to what the CJEU held in relation to Directive 2004/39/EC on markets in financial instruments) considerations relating both to effective implementation of the prudential supervision regime and the confidence that must exist between supervised entities and supervisors as to the protection of the confidential character of the information exchanged between them support a conclusion that, due to the confidential nature of the such information, the exception under Article 4(1)(a)fourth indent is relevant in a situation such as the present one, because disclosure may cause adverse market reactions or may affect the willingness of undertakings to openly communicate with the authorities in the future. The Board also refers, for an application in the banking sector, to Case C-594/16, Buccioni, EU:C:2018:717, paragraphs 27 and 28.

35. The Appeal Panel notes that the Baumeister judgment clarified, in reality, that Article 54(1) of Directive 2004/39 must be interpreted as meaning that 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 not constitute, unconditionally, confidential information that is covered, consequently, by the obligation to maintain professional secrecy laid down in that provision. The CJEU 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.

36. The principle that the obligation to maintain professionally secrecy cannot prevent competent authorities from disclosing confidential information not concerning third parties to persons directly concerned by the bankruptcy or compulsory liquidation of the credit institution was analysed in the judgment of 13 September 2018, in Case C-594/16, Enzo Buccioni v Banca d'Italia, EU:C:2018:717. Deferring here to the legal reasoning of the Court, it should however be pointed out that the situation in that case was not identical to the present one, but it involved a complaint by a private party affected by the compulsory liquidation of a bank (whilst this is the case of an investor affected by a bank resolution). The Court held that, in principle, the disclosure of confidential information pertaining to the supervisory file is 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, because "the needs of the proper administration of justice would be undermined if the applicant were obliged to bring civil or commercial proceedings in order to obtain access" to such confidential information. The Court concluded therefore, in paragraph 38, that supervisory authorities can exclude the obligation of professional secrecy under Directive 2013/36 when the request for disclosure relates to information in respect of which the applicant puts forward precise and consistent evidence suggesting that it is relevant for the purposes of civil or commercial proceedings which are under way or to be initiated.

37. In light of the foregoing, in the Appeal Panel's view, although the BPE Communication was an exchange between the supervised entity and the supervisor which was not public, it remains to be evaluated to the effect of the exception under Article 4(1)(a)fourth indent of Regulation 1049/2001 if its disclosure, as specified by the CJEU, 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. In the Appeal Panel's view, and naturally without prejudice to other findings that, in the context of a specific appeal, the Court might reach in the future, this does not correspond to the situation at stake, because in the instant case, (i) as already noted in the Appeal Panel's decision in Joined Cases 44/17 and 7/18 it is hardly credible that its disclosure may cause adverse market reactions or

affect the willingness of undertakings to openly communicate with the authorities in the future. Several years have lapsed since the communication was made, and the resolution scheme was adopted, and what was not considered a threat years ago should not be considered now. As per the willingness of undertakings to communicate, the argument remains unconvincing. Such communications are not voluntary and dependent on the entity's choice, but mandated by law (Article 81(1) Directive 2014/59/EU and Article 21.4 Spanish Law 11/2015). Conversely, the BPE Communication, with its finding [.], could shed some light on factual circumstances of fundamental relevance to understand the resolution decision, which could potentially clarify why the resolution decision was adopted, including why an FOLTF assessment was made by the ECB shortly after the credit institution was still considered solvent for purposes of extending emergency liquidity assistance, all of which could help in its review, also by courts where necessary.

38. From this point of view and contrary to the Board's conclusion, if anything the protection of the financial policy of the Union under article 4.1.a) fourth indent is better served, in the Appeal Panel's view, by a disclosure which may objectively show to shareholders and bondholders of Banco Popular affected by the resolution decision that such sudden resolution decision was adopted in a situation where the credit institution itself assessed and acknowledged that it was failing or likely to fail, and for what reasons. In this way, the disclosure would not adversely affect the proper functioning of the system for monitoring the activities of supervised entities nor the public interest but, on the contrary, would preserve public confidence in the supervisory and resolution framework, it would transparently show how the authorities came to the resolution decision and that the authorities are open and transparent as to a fundamental aspect of the resolution, and in this way fully accountable. If any concerns remained as to the possibility that the disclosure of some specific parts of the document could jeopardize said interests, this could be duly remedied by making a disclosure in a redacted form, making use of the margin of appreciation pertaining to it, as was already indicated in the original Appeal Panel decision in Joined cases 44/17.

39. Furthermore, it is not apparent that disclosure would affect the interest of the natural or legal person who provided that information. However, since the Board does not raise any argument in this respect, there is no need for the Appeal Panel to expand on this aspect.

40. This shows, in the Appeal Panel's view, that, in the instant case, the Confirmatory Decision, contrary to the Board's view, is not justified under Article 4(1)(a), fourth indent of Regulation 1049/2001.

41. However, this conclusion is not enough to support a finding of breach of Article 85(8) SRMR by the Confirmatory Decision, because, and decisively, in the instant case the Confirmatory Decision relies also on other exceptions under Regulation 1049/2001 and in particular on Article 4(2) second indent. Since such additional reasons were not raised nor discussed in the decision adopted by the Appeal Panel in Joined Cases 44/17 and 7/18 and in that case the exception under Article 4(2) second indent was not invoked by the Board, the Confirmatory Decision does not breach Article 85(8) SRMR. As specifically noted above and subject to the

qualifications also made above in paragraph 30, following a binding Appeal Panel's decision, the Board may still adopt, instead of a decision granting full or redacted access to the relevant document, also a decision reiterating its refusal to disclose said document provided that such decision is based on one or more different exception(s) under Regulation 1049/2001 than those originally invoked by the Board. This is precisely what happened in part in the instant case.

(c) The second plea of the appeal: alleged breach of Article 4(1)(a) fourth indent of Regulation 1049/2001

42. The foregoing already shows, however, that in the Appeal Panel's view the second plea of the Appellant has merit and is well founded.

43. Without the need to reiterate here the reasons already stated above, the Appeal Panel further notes that, having examined under confidentiality the BPE Communication, it disagrees with the Board's view not only that, in the factual circumstances of the instant case, disclosure is prevented by the limitation provided in Article 4(1)(a) fourth indent (protection of the financial, monetary or economic policy) (Confirmatory Decision, § 2.1.(i), p. 4) but also that "no meaningful partial access is possible without undermining the purpose of the protection of the financial, monetary or economic policy" (Confirmatory Decision, § 3, p. 5). Whilst it remains within the margin of appreciation of the Board to reasonably determine, first, if disclosure should be in full or in redacted form and, second, which parts of the documents need to be redacted, the Appeal Panel finds that, under Article 4(6) of Regulation 1049/2001 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 a redacted disclosure is in principle more proportionate and justifiable than a refusal to disclose the full document and that the reasons stated by the Confirmatory Decision to deny partial access are therefore vitiated by a manifest error, because in the Appeal Panel's view, a duly redacted disclosure of the BPE Communication would make even more unlikely that such disclosure could affect adversely the proper functioning of the system for monitoring the activities of supervised entities.

(*d) The third plea of the appeal: alleged breach of Article 4(2) second indent of Regulation 1049/2001*

44. As already noted, with the Confirmatory Decision the Board refused access to the BPE Communication also on ground of the exception under Article 4(2) second indent of Regulation 1049/2001 that disclosure would undermine the protection of court proceedings and legal advice, because there is a pending case before the General Court (Case [.]) which the Appellant initiated against the ECB, challenging the ECNB decision not to disclose, among others, also the BPE Communication. In the Board's view, "the integrity of proceedings pending before the General Court and the equality of arms between the parties could be seriously compromised if [the Appellant] were to benefit from privileged access to"

the BPE Communication, since such document has "a relevant link to the proceedings indicated above".

45. The Appellant claims, on the contrary, that the Confirmatory Decision breaches Article 4(2) second indent of Regulation 1049/2001 because the publication of the BPE Communication does not affect the equality of arms in court proceedings and there is an overriding public interest in disclosure.

46. The Appeal Panel notes that, according to settled case-law, in order for the exception to apply, it is necessary that the requested document, at the time of adoption of the decision refusing access to it, should have a relevant link with a dispute pending before the Courts of the European Union, and that such disclosure should compromise the principle of equality of arms and, potentially the ability of the institution concerned to defend itself in those proceedings (judgment of 15 September 2016, Philip Morris v Commission, T-796/14, EU:T:2016:483, paragraph 88).

47. As a general remark, it is clear that, normally, the exception intends to *prevent* any imbalance to the principle of equality of arms *against* the institution, agency or body, and not to *preserve* an imbalance *in favour* of said institution, agency or body, acquired as a result of its privileged access to the document. This seems to be what would happen in the present case, where the ECB is defending before the General Court its decision not to disclose the BPE Communication, having in fact the advantage of knowing the content of the BPE Communication, whilst the Appellant is challenging the ECB decision without knowing such content.

48. Nonetheless, and crucially, the Appeal Panel finds that, if there is pending before the General Court a case concerning the refusal to disclose the same document for which access is denied by the Confirmatory Decision, a confirmatory decision under Regulation 1049/2001 and/or an Appeal Panel's decision on review of such confirmatory decision would risk, (i) depriving the ability of the institution concerned to defend itself in those proceedings (considering that the institution's defence in those proceedings is precisely centred on its right not to disclose the relevant document) and at the same time (ii) depriving also such Court's proceedings of their intended purpose. In so doing, the Appeal Panel's decision would also inappropriately anticipate and , pre-empt the role of the General Court. It is also noted that the pending case before the General Court was initiated by the Appellant, who must have weighed the pros and cons of a decision rendered in a judicial venue. This means that preserving the equality of arms (which includes, according to settled case-law, the ability of the institution concerned to defend itself in those proceedings) also implies, at least in the very specific factual circumstances of the instant case, that where there are multiple avenues under Regulation 1049/2001 to access the same document and one of such avenues is already subject to a litigation before the General Court, any alternative avenue cannot be used in such a way as to frustrate the pending litigation. To avoid this, the latter authority can validly rely on the exception under Article 4(2), if it deems fit to do so.

49. In the Appeal Panel's view, therefore, the Board could validly rely, in the very specific factual circumstances of the instant case, on the exception under Article 4(2) of Regulation 1049/2001, because the disclosure of the BPE Communication could de facto frustrate the ECB ability to defend itself in the pending case before the General Court as to the BPE Communication, and would ultimately and unduly substitute the Board's assessment to that of the General Court in a situation where a dispute on the legality of the ECB' s decision was already pending, with the risk of rendering those proceedings moot. Consistently, the circumstance that both the written and oral stages of the proceedings before the General Court in Case [.] are now closed and the parties are waiting for the final judgment cannot change this conclusion.

50. For the reasons stated above, the Appeal Panel concludes that, although in its view the Confirmatory Decision could not validly rely on the exception under Article 4(1)(a) fourth indent of Regulation 1049/2001, at the time of its adoption it has validly relied on the exception under Article 4(2) because at the time Case [.] was (and is) still pending before the European courts and since a refusal to grant access to a certain document is justified already where the requirements laid down by only one of the exceptions relied upon by the Board are met, the case need not to be remitted to the Board.

51. It is thus necessary for the Appellant to wait for the judgment of the General Court before taking any further action concerning the disclosure of the BPE Communication.

On those grounds, the Appeal Panel hereby:

Dismisses the appeal.

Helen Louri-Dendrinou	Kaarlo Jännäri	Luis Silva Morais Vice-Chair

Marco Lamandini Rapporteur	Christopher Pleister Chair

For the Secretariat of the Appeal Panel: