



15 April 2020

Case 9/2019

FINAL DECISION

██████████,
Appellant,
v
the Single Resolution Board

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

TABLE OF CONTENTS

Background of facts 3

Appellant 5

Board 6

Findings of the Appeal Panel 6

Tenor 14

FINAL DECISION

In Case 9/19

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010¹ (the “SRMR”),

██████████ represented by Mr. Bernardo M. Cremades and Ms. Sandra Cajal Martin of the lawfirm Cremades & Asociados, with address for service in Calle Goya, 18, second floor, 28001 Madrid, España (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), Helen Louri-Dendrinou and Kaarlo Jännäri,
makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 30 October 2019 (hereinafter the “Confirmatory Decision”) rejecting the Appellant’s confirmatory application, by which the SRB was requested by the Appellant to reconsider its position in relation to its initial request and the SRB’s response thereto, concerning the access to documents in accordance with Article 90(1) of SRMR and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereinafter “Regulation 1049/2001”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents³ (hereinafter “Public Access Decision”).
2. By the initial request of 10 July 2019 the Appellant requested access to the following documents: a) Reports and/or other information related to the internal investigation or measures undertaken by the SRB in relation to the information leaks relating to the Banco Popular situation that took place on 23 and 31 May 2017 (hereinafter, the “Investigation Documents”); (ii) the letter sent by Banco Santander to the SRB in April and May 2017 on

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

the acquisition of Banco Popular in the context of resolution, in particular the letter containing a copy of any agreement of the Board of Banco Santander on the acquisition of Banco Popular under resolution; (iii) a copy of any other offer submitted by Banco Santander in advance, in particular within the deadline set by FROB. With the initial response the Board informed the Appellant that with respect to the Investigation Documents under point (i), no documents were found that could be disclosed. Moreover, to the extent that the Appellant's request related to internal emails and internal correspondences, the Board informed the Appellant that such communications were covered by the exception of Article 4(3), second subparagraph, of Regulation 1049/2001 (protection of decision-making process). With respect to the documents under points (ii) and (iii) the Board informed the Appellant that it did not hold any documents that would correspond to the description in the Appellant's initial request. Thus, the Board informed the Appellant that it was not in the position to handle the request. The Appellant submitted a confirmatory application requesting the SRB to reconsider its position. The SRB rejected the confirmatory application with the Confirmatory Decision which is the subject of the appeal in the present case, confirming the reasons already given with the initial decision and adding, as to the Investigation Documents, that no disclosure could be made also based on the exceptions of Article 4(2) second and third indent in addition to Article 4(3), second sub-paragraph.

3. On 12 December 2019 the Appellant filed an appeal against the Confirmatory Decision. The language of the appeal is Spanish, and the Secretariat of the Appeal Panel asked to the European Commission Translation Office a translation into English.
4. The notice of appeal was notified by the Appeal Panel Secretariat to the Board on 14 January 2020 and the Board was granted two weeks, in accordance with Article 6(4) of the Rules of Procedure to submit its response.
5. On 27 January 2020 the Board asked for an extension of the deadline to respond to the appeal, in accordance with Article 6(4) of the Rules of Procedure. The extension was granted.
6. On 11 February 2020 the Board submitted its response.
7. On 26 February 2020 the Appellant filed its reply to the Board's response.
8. On 28 February 2020 the Secretariat informed the Parties that the hearing was scheduled in Brussels on 30 March 2020, unless both parties agreed to waive their right to make oral representation at a hearing to discuss the case. Both Parties expressly waived their right to a hearing.
9. On 9 March 2020, the Appeal Panel ordered the Board, as a measure of inquiry weighing confidentiality against the right to an effective legal remedy, having regard also to Article 104 of the General Court's Rules of Procedure, (A) to deposit with the Appeal Panel's Secretariat within a set deadline at the SRB premises, one or more numbered hardcopies of all internal emails and internal correspondences, as well as of any reports or other internal documents if

any, representing the Investigation Documents or related to the Investigation Documents and (B) subject to the adoption of appropriate technological means and all necessary security measures, to allow remote access to the Appeal Panel Members *via* electronic devices to an electronic copy of the same for reading only. The Board deposited the requested confidential documents.

10. On 7 April 2020 the Appeal Panel notified the Parties that the Chair considered that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and 20 of the Rules of Procedure.

Main arguments of the parties

11. The main arguments of the parties are briefly summarised below. However, in order to avoid unnecessary duplications, more specific arguments raised by the Parties, if any, may be considered, to the extent necessary for the just determination of this appeal, where this decision shows the findings of the Appeal Panel. It is also specified that the Appeal Panel considered every argument raised by the Parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

Appellant

12. The Appellant challenges the Confirmatory Decision arguing, in the first place, that, since the request was grounded also on paragraph 4 of Article 90 SRMR, the Board, by responding to the request only under the access to documents regime (Article 90(1) SRMR and Regulation 1049/2001) has incorrectly motivated the responses, thereby breaching Article 41(2) of the Charter of Fundamental Rights of the European Union. Moreover, the Appellant argues that since Article 90(4) SRMR foresees a broader access to documents than paragraph (1), the SRB should have applied the former as it provides for more restrictive or limited exceptions for access to documents than Article 4 of Regulation 1049/2001.
13. The Appellant further claims that the Board has applied Article 4 of Regulation 1049/2001 in an incorrect manner, because the exceptions claimed by the Board are not applicable, and in particular the Board did not interpret the exceptions of Article 4 in a restrictive manner, as it should have, did not identify how the protected interest is specifically and actually undermined by the requested disclosure and did not balance the exceptions relied upon with the public interest. The Appellant offers, in this regard, a detailed analysis of the reasons stated by the Board to rely upon the exceptions under Article 4(2)(second indent), Article 4(2)(third indent) and Article 4(3) respectively. The Appellant's plea refers, in particular, to the refusal to grant access to the Investigation Documents, because for the documents requested under letter (ii) and (iii) of the request for documents (as specified above in paragraph 2 of this decision), the Board stated that it does not hold such documents. The Appellant raises doubts about this statement of the Board and quotes a press article published on 25 October 2019 which mentions a meeting of the board of directors of Banco Santander.

14. The Appellant also claims that the Board's refusal to disclose certain parts of the requested documents violates the provision of professional secrecy under Article 88 SRMR, in light of the case-law of the CJEU
15. Finally the Appellant claims that the Board erred in not identifying an overriding public interest in the disclosure of the requested documents and that such overriding public interest in the instant case can be identified in the interest (i) to ensure compliance of the SRB activities with the applicable legal requirements, (ii) to give the shareholders of Banco Popular the possibility to verify whether their rights were affected by the public statements and the leaks relating to the Banco Popular resolution and (iii) to ensure to the shareholders of Banco Popular an effective judicial protection and right of defence, in particular under Articles 41, 42 and 47 of the Charter.
16. With its reply, the Appellant further reiterates and expands on all the pleas and arguments already raised, and replied with specific factual and legal observations to each of the arguments raised by the Board with its response. In this context the Appellant also argues that the response of the Board as to the applicability of Articles 88 and 91 and recital 116 and 117 SSMR is out of focus.

Board

17. The Board argues, in the first place, that the appeal is inadmissible as to the plea referring to the applicability, in the instant case, of Article 90(4) SRMR, and refers to the Appeal Panel decision in case 47/17 with the same Appellant.
18. The Board further argues that as to the documents referred to under letters (ii) and (iii) in the initial request, the Board stated that it does not hold such documents and the Appellant has not provided any evidence that contradicts this statement.
19. As to the Investigation Documents and the request to access the same under Regulation 1049/2001 and Article 90(1) SRMR, the Board argues that the Board correctly applied the exceptions of Article 4 of Regulation 1049/2001, and provided a comprehensive overview of the legal assessment conducted and of the methodology applied in the specific case. The Board clarifies further why Article 4(3) and Article 4(2)(second indent) and Article 4(2)(third indent) are correctly relied upon in the specific circumstances of the case, even after the resolution decision has been taken. The Board also argues that it has not identified any overriding public interest in the sense of Article 4 of Regulation 1049/2001 to disclose the Investigation Documents failing under the abovementioned exceptions.
20. As to the plea on non-compliance with Article 88 SRMR, the Board argues that it did not rely on the provisions of Article 88 SRMR to support its refusal to grant access to the Investigation Documents.

Findings of the Appeal Panel

21. The Appeal Panel notes, in the first place, that, as already clarified in case 47/17, a case brought by the same Appellant, the first plea raised by the Appellant - consisting in alleging that the Board should have applied Article 90(4) SRMR, which contemplates a broader access to documents than Article 90(1) and Regulation 1049/2001 - is inadmissible. Article 85(3) SRMR does not grant to the Appeal Panel the competence to hear appeals against a decision of the Board referred to in Article 90(4). Thus, it is also precluded to the Appeal Panel the possibility to determine whether the Board should, or should not, act under Article 90(4) SRMR in the present circumstances and therefore to consider whether the Board omitted to apply, or violated, Article 90(4) SRMR. Any such claims fall within the exclusive competence of the General Court.
22. As regards the request to access (1) the letter sent by Banco Santander to the SRB in April and May 2017 on the acquisition of Banco Popular in the context of resolution, in particular correspondence containing a copy of any resolution of the board of directors of Banco Santander concerning the acquisition of Banco Popular in the context of a resolution; (2) a copy of any other offer submitted by Banco Santander in advance, in particular within the deadline set by FROB (24:00 CET on 6 June 2017). With the regard to the latter (a copy of any other offer) the Appellant understands that as part of the resolution proceedings, Banco Santander submitted its final offer for BPE at 03:12 on 7 June 2017 (documents listed respectively under letters (ii) and (iii) in the initial request).
23. As to the documents referred to in the previous paragraph, the Appeal Panel's view is as follows. It is not disputed between the Parties that the Board informed the Appellant that the documents requested do not exist or are not in the possession of the SRB. According to settled case-law, once a European institution, body or agency asserts that a document does not exist, it is not obliged to create a document which does not exist (CJEU, judgment of 11 January 2017, *Typke v. Commission*, C-491/15 P, EU:C:2017:5 at para 31). Furthermore, the institution, body and agency can rely on a rebuttable presumption that, indeed, the document does not exist (GCEU, judgment 23 April 2018, *Verein Deutsche Sprache v. Commission*, T-468/16, EU:T:2018:207). The Appellant did attempt to reverse such rebuttable presumption in the instant case with respect to the documents requested under letter (iii) of the initial request (and namely a copy of any other offer submitted by Banco Santander in advance within the deadline set by FROB of 24:00 CET on 6 June 2017). To this purpose the Appellant attached to the appeal an article, authored by David Cabrera, published on Vozpopuli, 25 October 2019. The Appeal Panel duly pondered in its entirety the content of such article. It concludes, however, that it does not provide any evidence that, in fact, there was an offer submitted by Banco Santander before the (already disclosed) one which was accepted in the context of the Banco Popular resolution. Nor does it provide evidence that such an offer, if any, was communicated by FROB to the SRB. The Appeal Panel finds therefore that the Appellant did not prove that the requested documents exist, contrary to the assertion of the Board.

24. The Appeal Panel further notes that, according to settled case-law, once an institution, body and agency asserts that a document is not in its possession, it is not obliged to provide explanations as to why it does not hold such document (judgment of 11 June 2015, T-496/13, *McCullough v Cedefop*, EU:T:2015:374, paragraph 50).
25. As to the Investigation Documents and the Appellant's request for access to such documents, the Appeal Panel, before delving into the merits and assess whether the Board's decision to refuse access to such document is in compliance with Regulation 1049/2001, finds appropriate, also for the sake of consistency, to refer to its previous decisions (all accessible at www.srb.europa.eu), where it recalled and restated the overriding principles which guide its assessment of the requests of access to documents related to the Banco Popular resolution in compliance with settled case-law of the CJEU, comprehending, *inter alia*, the following key principles:
- (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) 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.

- (c) In principle, exceptions must be applied and interpreted narrowly (see e.g. judgment 17 October 2013, *Council v. Access Info Europe*, C-280/11, EU:C:2013:671, paragraph 30). However, case-law on public access to documents in the administrative context (as opposed to case law on public access in the legislative context) suggests that a less open stance can be taken in the administrative context because “*the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution*” (see to this effect judgment 9 September 2008, *MyTravel v. Commission*, T-403/05, EU:T:2008:316, at paragraph 49; judgment 21 July 2011, *Kingdom of Sweden v. Commission* C-506/08 P, EU:C:2011:496, at paragraphs 87-88; judgment 29 June 2010, *Commission v. Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 60-61).
- (d) Settled case-law permits Union institutions, bodies and agencies to rely in relation to certain categories of administrative documents on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by Regulation 1049/2001 (see to this effect judgment 28 June 2012, *Commission v. Edition Odile Jacob*, C-404/10, EU:C:2012:393; judgment 21 September 2010, *Sweden and Others v. API and Commission*, C-514/07 P, EU:C:2010:541; judgment 27 February 2014,

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

- (e) When determining whether disclosure is prevented by the application of one of the relevant exceptions under Regulation 1049/2001, EU institutions, bodies and agencies enjoy in principle a margin of appreciation (due to the open-textured nature of at least some of the relevant exceptions, it being also clear that the width of such margin of appreciation is not the same with regard to the monetary or financial stability exception, than it is with regard to internal proceedings or court proceedings exceptions). Review is then limited, according to settled case-law, to verifying whether procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers (see, among others, judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 53; judgment 29 November 2012, *Thesing and Bloomberg Finance v ECB*, T-590/10, EU:T:2012:635, paragraph 43); in any event, the actual viability of judicial review must be ensured (see to this effect in light of judgment 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

26. For the just determination of this appeal, the Appeal Panel also considered – to the extent that parallels may be drawn with the instant case - among others the most recent CJEU judgments on access to documents pertaining to financial supervision of 19 June 2018, *BaFin v Ewald Baumeister*, case C-15/16, EU:C:2018:464, of 13 September 2018, *Enzo Buccioni*, C-594/16, EU:C:2018:717, of 13 September 2018, *UBS Europe v DV*, C-358/16, EU:C:2018:715, of 12 March 2019, *De Masi and Varoufakis v ECB*, EU:T:2019:154 and of 13 March 2019, *Espirito*

Santo Financial Group v ECB, case T-730/16, EU:T:2019:161 in light of the legal corollaries arising from these cases in addition to previous case law already quoted.

27. The Appeal Panel further recalls that in its decisions of 28 November 2017 and of 19 June 2018, it stated that the SRB could deny access documents for internal use as part of deliberations and preliminary consultations to the effect of Article 4(3) of Regulation 1049/2001 and Article 4(3) of the Public Access Decision if no overriding public interest in disclosure is shown by the Appellant, as it happened to be in those cases.
28. Likewise, the Appeal Panel stated in its decisions of 28 November 2017 and 19 June 2018 that access to the documents received or exchanged with the ECB or the European Commission for internal use as part of the file and deliberations could be legitimately refused by the Board according to Article 4(3) of Regulation 1049/2001 and 4(3) of the Public Access Decision if no overriding public interest in disclosure was shown, as it happened to be in those cases. The Appeal Panel referred to this effect also to the Opinion of Advocate General Bot of 12 December 2017 *BaFin v Ewald Baumeister*, C-15/16, EU:C:2017:958, where the Advocate General Bot concluded, at paragraph 49, that the requirement of trust which must exist between national supervisory authorities means “that the exchange of information between them must be reinforced by the guarantee of confidentiality attaching to the information which they obtain and hold in the context of supervisory tasks”.
29. At the same time, the Appeal Panel has constantly acknowledged in its past decisions concerning access to documents related to the Banco Popular resolution that in its assessment - to ensure the functionality of the Board and to respect the role and division of tasks provided for by the SRMR and Regulation 1049/2001 - the Appeal Panel must verify with all due care if the Board complied with all relevant substantive and procedural rules, properly stated its reasons and did not incur in any manifest error of assessment, but cannot substitute its opinion for that of the Board where the applicable legal provisions grant a margin of appreciation to the Board. This means that, on issues where the assessment of the facts may render to different interpretations, e.g. the impact of certain disclosures on decision-making or legal proceedings to the effect of the exceptions to access to documents under Regulation 1049/2001, the Board’s margin of appreciation must be also respected by the Appeal Panel, unless there is a specific and prevailing reason not to do so.
30. The above state the principles and precedents that provide the interpretative background. Yet, aside from these, and without prejudice to the aforementioned principles, context matters especially in the present proceedings, where the Appellant has made a request for disclosure of the Investigation Documents partly as an instrument to its proceedings before the General Court, specifically Case T-523/17 brought against the SRB, which is a case concerning the leaks of 23 and 31 May 2017, which in the Appellant’s view are also considered by the Investigation Documents.

31. It is in this particular context, and based upon the principles mentioned above to be read in light of such context and all its implications, and in line with its previous findings referred to above, that the Appeal Panel must consider in the instant case the right of access to documents, under Regulation 1049/2001, and its relationship with the rights under the Treaties and the Charter of Fundamental Rights of the European Union, and with other disclosure provisions analysed in relevant case-law discussed by both parties, to ascertain whether the Investigation Documents for which disclosure is sought in the appeal fall within one, or more, of the exceptions under Regulation 1049/2001 invoked by the SRB (Article 4(2) (second indent), Article 4(2)(third indent) and Article 4(3) of Regulation 1049/2001) and whether there is an overriding public interest in the disclosure of the requested documents.
32. Accordingly, it is, in light of the context outlined above, and of the arguments raised by the Board and by the Appellant, that the Appeal Panel carefully reviewed under confidentiality, for the just determination of this appeal, the Investigation Documents whose access was refused by the Confirmatory Decision and whose confidential disclosure to the Appeal Panel was ordered in the instant case with the procedural order of 9 March 2020. This examination completed the required comprehensive factual background for the following conclusions.
33. As to the Investigation Documents, the Appeal Panel, on the one hand, notes that the Board did not deposit with the Appeal Panel any document pertaining to internal investigations, if any, concerning a statement made by the Chair of the SRB in an interview published on Bloomberg on 23 May 2017. The Board showed loyal cooperation and complete, confidential disclosure to the Appeal Panel in all past cases where such a confidential disclosure has been ordered. Therefore, the Appeal Panel's necessary deduction from the Board's procedural behaviour in this case, is that the Board's denial of the Appellant's request of access to documents pertaining to "internal investigation or measures undertaken by the SRB in connection with the information leaks regarding the BPE *that occurred on 23 May 2017*" (emphasis added) was justified by the fact that such investigation or measures, and therefore internal documents relating thereto, did not take place and therefore no Investigation Documents related thereto exist. The Appeal Panel drew a similar inference from the SRB response to its questions in case 21/18 of June 2019 as to the non-existence of an alleged decision from the European Commission. If this is the case, as the Appeal Panel believes, then the same principles stated above in respect to the documents requested by the Appellant under points (ii) and (iii) of its initial request and confirmatory application do apply also in respect to the Investigation Documents concerning the alleged leak of 23 May 2017.
34. On the other hand, the Appeal Panel notes that the Board deposited with the Appeal Panel, in response to the request of Investigation Documents under the procedural order of 9 March 2020, (solely) an email from the compliance team of 18 August 2017 and a previous email of 10 August 2017 informing the compliance team of the Reuters' article of 31 May 2017. Such emails offer the SRB's internal assessment of the Reuters' article and of its content to the effect of possible compliance checks on the occurrence of leaks from the SRB team working on the Banco Popular resolution. They illustrate the background of facts, cast doubts about

the reliability of the quotes to an “EU official” (“alto cargo comunitario”) mentioned in the Reuters’ article, specify the internal rules and practices in place to prevent leakages and conclude that the Reuters’ article did not offer enough elements to conclude that existing controls did not work properly nor sufficient grounds to further investigate the matter. Instead, it perspires from this material, and thus from the Investigation Document, that the SRB’s assessment is that the Chair of the SRB never said what the alleged source of the Reuters’ article (the EU official) is said to have reported to the journalist.

35. The Appeal Panel considers that according to settled case-law (judgment of 7 September 2017, C-331/15 P, *French Republic v. Carl Schlyter*, EU:C:2017:639 at 45-46) the concept of investigation, under EU law, must be interpreted taking into account inter alia its usual meaning as well as the context in which it occurs (judgment of 3 October 2013, *Inuit Tapiriit Katanami and Others*, C-583/11 P, EU:C:2013:625, at 50) but, in principle, may include any structured and formalised procedure that has the purpose of collecting and analysing information in order to enable the institution or agency to take a position in the context of its functions. It may well be, therefore, that the Investigation Documents to and from the compliance team meet these (quite ample) criteria and are to be considered, legally speaking, an investigation to the effect of Regulation 1049/2001.
36. The Appeal Panel also considers that, upon careful and confidential inspection of these Investigation Documents, it cannot agree with the Board that these documents, if disclosed, could specifically and actually undermine the interest protected by the exception laid down by Article 4(2) and 4(3).
37. According to the case law referred to before, the crucial factor is not whether a certain procedure is covered by the concept of “investigation”, or other concepts applicable under article 4 (2) and (3) Regulation 1049/2001, but whether disclosure of the document requested “could specifically and actually undermine the interest protected by an exception laid down in that article” (judgment of 7 September 2017, C-331/15 P, *French Republic v. Carl Schlyter*, EU:C:2017:639 at 61). In this light, the Appeal Panel recalls that, once an exception under Article 4(2) and/or 4(3) is raised, it is the Board that must provide a convincing explanation as to how access to that specific document could harm the interests protected by the alleged exceptions (again judgment of 7 September 2017, C-331/15 P at 61, with reference to judgment of 27 February 2014, *Commission v EnBW*, C-365/12P, EU:C:2014:112, at 64).
38. In the case at hand, such explanations are, in the Appeal Panel view, too vague to reach that threshold of justification, and inconsistent with the actual content of the relevant Investigation Documents. It is hard to see, for the Appeal Panel, how the disclosure of the Investigation Documents confidentially examined by the Appeal Panel could undermine the protection of the purpose of inspections, investigations and audits. It would rather make transparent the outcome of the same, showing to the European citizens (interested in accessing such documents) that ex-post controls were timely performed, also to ensure compliance by the SRB with Articles 88 and 91 SRMR, to the extent possible in the circumstances due to the

scarcity of available information and due to the doubtful accuracy of the Reuters article and its quote of an “EU official” source. It would also show that, in compliance with Articles 88 and 91 SRMR, internal safeguards are in place to prevent leakages and that the Chair of the SRB denied of having said what the alleged source of the Reuters article referred to her.

39. For the same reason the Appeal Panel does not agree with the Board’s conclusion that the disclosure of these Investigation Documents may seriously undermine the institution's decision-making process. The Investigation Documents do not reflect any internal decision, but rather summarize the outcome of an internal assessment of an event, which is external to, and different from, the decision-making process of the Board or of the SRB: the *ex post* compliance checks on alleged leaks before the adoption of a decision (which, by the way, do not find any failure in the decision making process).
40. In turn, the Appeal Panel does not consider that, in the instant case (and unlike other Appeal Panel’s precedents, where the factual circumstances called for a different determination) the requested disclosure of the Investigation Documents as confidentially shown to the Appeal Panel would undermine the protection of court proceedings and legal advice.
41. The Appeal Panel is well aware of the fact that there is a case pending between the Parties before the General Court, concerning the alleged leaks of 23 and 31 May 2017. The Appeal Panel further considers that, in principle, the exception of Article 4(2) third indent could be raised to cover not only pleadings but also other documents, even though they were not drawn up in the context of pending court proceedings, provided that their disclosure could actually and specifically compromise the principle of equality of arms and, potentially, the ability of the agency to defend itself in those proceedings (judgment of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, para. 88).
42. Nevertheless the Appeal Panel, upon careful inspection of the Investigation Documents, does not identify any actual and specific element that potentially interferes with the Board’s ability to defend itself in those proceedings and/or may jeopardise the equality of arms in such proceedings.
43. In the Appeal Panel’s view, therefore, the Investigation Documents must be disclosed, with minor redactions concerning the names (and other related personal details) of the persons (being part of the SRB compliance team) who sent or received the emails representing the Investigation Documents.

On those grounds, the Appeal Panel hereby

remits the case to the Board with respect to the Investigation Documents.

Helen Louri-Dendrinou

Kaarlo Jännäri

Luis Silva Morais
Vice-Chair

Marco Lamandini
Rapporteur

Christopher Pleister
Chair

For the Secretariat of the Appeal Panel: