



10 November 2023

Case 6/2023

FINAL DECISION

[.],

Appellant,

v

the Single Resolution Board

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

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FINAL DECISION

In Case 6/2023,

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

[.], a legal entity with headquarters in [.] represented by [.] with offices in [.] (hereinafter the “**Appellant**”)

v

the **Single Resolution Board** (hereinafter the “**Board**” or “**SRB**”),

(together referred to as the “**parties**”),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Luis Silva Morais (Vice-Chair), Marco Lamandini (Rapporteur), Kaarlo Jännäri and Helen Louri-Dendrinou

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 31 July 2023 (hereinafter the “**Contested Decision**”) amending the previous decision of 30 September 2022 remitted to the Board by the Appeal Panel with its decision of 10 May 2023 in case 7/2022. Both the Contested Decision and the previous decision of 30 September 2022 relate to the Appellant’s confirmatory application, by which the SRB was requested by the Appellant to reconsider its position in relation to its initial request and the SRB’s response thereto, concerning the access to documents in accordance with Article 90(1) SRMR and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereinafter “**Regulation 1049/2001**”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents³ (hereinafter “**Public Access Decision**”).
2. By its initial request originally filed on 25 May 2022 the Appellant requested the SRB to access certain documents [.] and its [.] subsidiary. In particular, the Appellant requested the following documents:

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

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

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

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

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

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

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

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

it had consulted the ECB in line with Article 4(4) of Regulation 1049/2001 and that the ECB had indicated that those documents should be directly requested from the ECB.

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

Please find enclosed the response of the Board in case 07/2022. With reference to Article 6(7) of the Appeal Panel’s Rules of Procedure, you now have the opportunity to file a rejoinder to the Board’s response within two (2) weeks, meaning 28 December 2022. However, in light of the end of the year period, and in the exercise of both its power to extend any deadline as appropriate (under Article 8 of the Rules of Procedure) and to give case management directions (under Article 11 of said Rules of Procedure) the Appeal Panel is ready to extend said deadline until 6 January 2023, cob.
12. The Appellant requested an extension of its deadline to file the rejoinder to 6 January 2023, and the extension was granted by the Appeal Panel. On 6 January 2023, the Appellant submitted its rejoinder to the Board’s response.
13. On 12 January 2023, the Board filed a motivated request for the extension of the deadline to file its reply to the Appellant’s rejoinder. The Appeal Panel granted the extension until the 6 February 2023. On that date, the Board submitted its reply to the Appellant’s rejoinder.
14. On 7 February 2023, the Appeal Panel invited both parties to inform the Appeal Panel whether they wished to discuss orally the case at a hearing to be held in Brussels or they waived their right to the hearing.
15. On 8 February 2023, the Appellant confirmed its intention to discuss orally the case at a hearing, explaining that, in the Appellant’s view, the hearing was necessary because of the Appellant’s rejoinder.

16. On 21 February 2023, the Secretariat of the Appeal Panel informed the parties that the hearing would be held in Brussels on 3 April 2023. Both parties confirmed their attendance to the hearing.
17. On 3 April 2023, the hearing was held in Brussels. Both parties appeared and presented oral arguments. Both parties reiterated their respective positions, adding further considerations of fact and law. The parties also answered questions from the Appeal Panel for the clarification of facts relevant for the just determination of the appeal.
18. After the hearing, on 3 April 2023, the Secretariat informed both parties that the Appeal Panel invited the parties, if they so wished, to deposit with the Appeal Panel Secretariat by 12 April 2023, the written text of their pleadings at the hearing (specifying that such text had to be the very same used as speaking notes by the counsels at the hearing).
19. Both parties deposited their pleadings at the hearing, the Board on 4 April 2023 and the Appellant on 12 April 2023. With the email submitting its speaking notes, the Appellant wrote that the Appellant “would appreciate an expeditious decision on its request for access to the file pertaining to the present proceedings (Article 41 of the Charter) as well as its request for a procedural order. The Appellant moreover submits that Article 20 of the Rules of Procedure of the Appeal Panel is illegal, because it is contrary to Article 85(4) and Article 85(10) SRMR and the penultimate paragraph of Article 263 TFEU. Article 85(4) is to be interpreted in the same way as Article 24 SSMR. Article 85(4) SRMR requires a review within a month after the appeal actually being lodged”.
20. On 18 April 2023, the Appeal Panel considered not necessary for the just determination of the appeal to order to the Board, as requested at the hearing by the Appellant, “that the SRB explains in detail how it proceeded when compiling its list of documents in the present case”. The Appeal Panel thus notified the parties that the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and Article 20 of the Rules of Procedure. Article 20 of the Rules of Procedure sets out that “when the Chair considers that the evidence is complete, the Chair shall notify the parties that the appeal has been lodged for the purposes of Article 85(4) of Regulation 806/2014”. The Appeal Panel noted that this provision of its Rules of Procedure, allows the Appeal Panel to grant to both parties, in the appeal proceedings before it (whose nature, role and effects are structurally and functionally different from those of the Administrative Board of Review of the ECB in the SSM pursuant to Article 24 of Regulation 1024/2013, referred to by the Appellant in its email of 12 April 2023) the possibility to prepare and file, after the appeal, written submissions (Article 6(5) for the Board’s response; Article 6(7) for the Appellant’s rejoinder and, then, for the Board’s reply). It also renders feasible to both parties, cumulatively in their interest and of due process, to exercise, if they so wish, their right to an oral hearing (Article 18). Both such procedural rights are in compliance with the principle of good administration and mirror also, in this specific context, the fundamental guarantees of fair trial. This provision – which in its content and normative grounds is comparable to corresponding provisions in the Rules of

Procedure of other bodies of appeal within the European System of Financial Supervision (namely, of the Joint Board of Appeal of the ESAs) – also grants to the Appeal Panel an appropriate and reasonable time limit (30 days from the date when the appeal is declared lodged) to adopt and draft the final decision.

21. On 10 May 2023, the Appeal Panel adopted its decision in case 7/2022. Whilst the Appeal Panel rejected the first and second ground of appeal, it upheld in part the third ground of appeal and remitted the case to the Board finding in particular that the statement of reasons justifying the denial of access to the documents received by the ECB was insufficient. The Appeal Panel held specifically that:

“(…), this Appeal Panel has also held in previous precedents that the denial of access by the Board should nonetheless be justified in any given case through a sufficient statement of reasons, and that those reasons must make reference to the pertaining exceptions to public access and must justify the refusal of access based on one of those exceptions, including in cases where a document was requested from a third party. In case 46/17 the exceptions related to the fact that the documents were received from, or exchanged with the ECB. Yet, in that case the justification offered was that the documents requested had been shared for purposes of internal use as part of the file and deliberations according to Article 4(3) of Regulation 1049/2001 and Article 4(3) of the Public Access Decision, and that no overriding public interest in disclosure was shown by the Appellant.

In its submissions before the Appeal Panel, the Board clarified that the documents at stake (i) were classified by the ECB as “ECB classified” because they are part of the ECB’s supervisory file and (ii) were received from the ECB for internal use by the SRB only, and therefore they were provided in the context of the SRB’s internal decision making to the effect of the exception under Article 4(3) of Regulation No 1049/2001 and Article 4(3) of SRB’s Decision on Public on Public Access.

However, such reasons were not expressly stated in the Contested Decision, nor in the initial response. Thus, the Board did not “disclose in a clear and unequivocal fashion the reasoning followed”, i.e., not only that the documents originated with the ECB, but that such documents were shared in the context of internal deliberations, pursuant to Article 4 (3) of the Public Access Regulation and the Public Access Decision.

Therefore, the third ground of appeal needs to be upheld, specifically in respect of the insufficient content of the statement of reasons of § 2.2. of the Contested Decision as regards the justifications and exceptions relied on by the Board in consultation with the ECB to deny access to the documents originating from the ECB.

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

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

22. [.]

23. On 31 July 2023, the Board adopted the Contested Decision.

24. On 12 September 2023, the Appellant has filed an appeal against the Contested Decision, noting that “the present appeal is lodged solely for the purpose of ensuring judicial review”

and its purpose “is solely to obtain a decision by the Appeal Panel which, according to the view expressed by the SRB in cases [...] and [...] would be the final decision of the Appeal Panel”.

25. On 20 September 2023, the appeal was notified to the Board.
26. On 22 September 2023, the Board requested an extension of the initial deadline to respond by four weeks, namely until 3 November 2023.
27. On 27 September 2023, the Appeal Panel, having duly considered the reasons put forward by the Board as specified also by the detailed reference to the pending cases listed in the footnotes 2 and 3 of the request for extension, granted the extension required. The Appeal Panel further noted that, in light of the quite targeted content of the appeal, and of its clear connection, acknowledged by the appellant, with a case pending before the General Court of the European Union currently in the written phase of the proceedings, it wished to ensure an expedite conclusion of this appeal. To this end, the Appeal Panel invited the parties to inform the Secretariat by the close of business of 28 September 2023: A) whether they could agree to submit their reply and rejoinder, if any, within the term of one week from the notice of the response (the Appellant) and from the notice of the reply (the Board); and B) whether they could anticipate at that stage of the proceedings if they wished to waive their right to an oral hearing. The Appeal Panel concluded however, pondering the safeguard of procedural rights of the parties against its overall considerations oriented towards streamlining the sequence of procedural acts, that, should one party consider that the decision to waive its right to a hearing could only be taken at the end of the written phase of these proceedings, the Appeal Panel would have acted accordingly.
28. On 28 September 2023, both parties responded that they could not preventively waive their procedural rights at that stage of the procedure. However, the Appellant, in spite of such stated position of not waiving at this stage of the procedure its right to a possible hearing, recalled that, in its view, Article 85(4) SRMR prescribes a decision by the Appeal Panel within one month after the appeal has been lodged and, in the Appellant’s view, the appeal must be considered lodged “when it is actually submitted and not at some later time” and this cannot be changed by the Rules of Procedure. The Appellant further noted that in its view “the full month for the entire procedure is not necessary in the present case” because “the present procedure (which is about a mere technical matter and does not require any substantive assessment or review of factual information) could be completed within a very short period of time. The Appellant further noted that “so far it does not see any need for further exchanges of written pleadings or an oral hearing” but “the Appellant however would have to review the response of the SRB before being able to say so definitely and also reserves its rights as to any unforeseen circumstances”.
29. On 30 October 2023, the Board submitted its response.

30. On 31 October 2023, the Appeal Panel forwarded to the Appellant the Board's response and, following the previous exchanges of 27 and 28 September 2023 and always in the same spirit of an expedite conclusion of this appeal, invited both parties to inform the Secretariat by the close of 3 November 2023, if they intended to waive their right to an oral hearing and if they also agreed not to submit any further written observations. If so, the Appeal Panel informed that the Chair would declare the appeal lodged to the effect of Article 20 Rules of Procedure shortly after confirmation by both parties of the above.
31. On 3 November 2023, the Board informed that (i) it would not submit any further written submission if the Appellant does not submit a Rejoinder; (ii) at this stage, it would also consider an oral hearing unnecessary. The Appellant in turn informed that it considered an oral hearing or a further exchange of written pleadings not necessary, noting also that this should obviously not be misconstrued as an agreement with any of the statements of the Board.
32. On 6 November 2023, the Secretariat of the Appeal Panel notified the parties that the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and Article 20 of the Rules of Procedure.

Main arguments of the parties

33. 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

34. In essence, the Appellant asks the Appeal Panel whether it confirms its precedents that state that, if a Board's decision on access to documents under Regulation 1049/2001 is remitted to the Board only on specific parts, while other grounds of appeal concerning other parts of the same decision are rejected, a further appeal before the Appeal Panel against the subsequent decision (Contested Decision) that implements the Appeal Panel decision must be limited to the 'new' parts, on which the case was remitted, while an appeal against the parts of the decision that were found lawful and confirmed would be inadmissible before the Appeal Panel (leaving, in any event, open the possibility of an appeal before European Courts).
35. The Appellant explains that the Board has suggested in cases pending before the General Court of the European Union [...] that, if a Board's decision is remitted and thus the Board is called to adopt a new amended decision, only the new amended and final decision of the Appeal Panel after one or more additional appeals is subject to judicial review and that,

based on this position, the Appellant would have to obtain a further decision of the Appeal Panel in respect to the Contested Decision in order to be able to submit this matter to the Union courts.

36. The Appellant further notes that it considers the SRB's position expressed in [...] erroneous and acknowledges that the Appeal Panel has adopted a different position in published cases. The Appellant notes that it understands the Appeal Panel's view to be that the decision of the Appeal Panel dated 10 May 2023 is subject to judicial review as regards the grounds of appeal which the Appeal Panel did not uphold.
37. The Appellant further clarifies that this appeal "should not be confused with the case in which an appellant asks the Appeal Panel to examine whether its guidance in a prior decision was properly implemented" (i.e., in the present context, the requirement to amend the statement of reasons in paragraph 2.2. as required pursuant to the Appeal Panel decision dated 10 May 2023).
38. At the same time, in order to obtain a further decision of the Appeal Panel in order to be able to submit this matter to European Union courts, the Appellant submits with this appeal "the same grounds of appeal as in case 7/22 and incorporates by reference the entirety of its submissions in that case".

Board

39. The Board contests the admissibility of the appeal under Article 85(3) SRMR.
40. First, in the Board's view, Article 85(3) SRMR only provides for a single appeal against decisions listed therein. Otherwise, there is a risk of a vicious circle of perpetual appeals that would create legal uncertainty and could amount to an unjustified restriction of Article 47 of the Charter of Fundamental Rights of the EU, as well as of the Appellant's right to an effective remedy before the Court of Justice of the EU. The Appeal Panel also acknowledges the existence of that risk. In addition, the Board considers that the reference by the Appellant to the judgment of the General Court of 5 August 2003, joined cases T-116/01 and T-118/01, *P&O European Ferries and Others v. Commission*, is not applicable to the case at hand and cannot, therefore, support the admissibility of the appeal because, in its view, the Contested Decision is not a "new" decision that would address a specific subject matter for the first time. Instead, the sole purpose of the Contested Decision is to amend the (already existing) confirmatory decision in accordance with Article 85(8) SRMR. The Contested Decision deals with exactly the same subject-matter as the confirmatory decision and the findings of the Appeal Panel's decision that justified the remittal of the confirmatory decision to the SRB.
41. Second, the Board submits that this appeal is in any case inadmissible since it violates Article 5(4) of the Rules of Procedure, as well as the case-law on Article 76(1)(d) of the Rule of Procedure of the General Court, because the Appellant failed to state why the appeal is admissible under Article 85(3) of Regulation 806/2014, as well as the grounds on which

that appeal is based. In fact, in the Board’s view, in the present case the Appellant limited itself to submit “*the same grounds of appeal as in case 7/22 and incorporates by reference the entirety of its submissions in that case.*” The Appellant does not mention, however, that the Appeal Panel’s decision dismissed most of the grounds submitted by the Appellant in the first appeal. Yet, the Appellant does not explain how or why the Appeal Panel should change its view in this second appeal as regards those grounds to declare the latter well-founded and remit the case to the SRB.

42. Only for the case that the Appeal Panel considers the appeal to be admissible, the Board submits several observations on the merits showing that, in its view, the appeal is without merit and asks the Appeal Panel, should it consider the appeal admissible, to confirm the Contested Decision.

Findings of the Appeal Panel

43. The Appeal Panel preliminarily notes that in previous decisions concerning public access to documents the Appeal Panel addressed already the issue of the admissibility of an appeal against the amended decision adopted by the Board following a remittal by the Appeal Panel.
44. Among others, with its decision of 19 June 2019 in case 18/2018, the Appeal Panel reasoned for instance as follows:

20. (...) In its decisions of 23 February 2018 in case 2/18 and of 28 February 2019 in case 3/18, the Appeal Panel had already the opportunity of clarifying for all due purposes that the Appeal Panel’s decision to remit a case to the Board, in the Appeal Panel’s view, is functionally similar to the annulment of a Union measure by the CJEU, because, as set out in Article 85(8) SRMR, when the Appeal Panel remits the case to the SRB, “the Board shall be bound by the decision of the Appeal Panel and it shall adopt an amended decision regarding the case concerned”. This indicates, in the Appeal Panel’s view, that the amended decision is, as such, a new decision that must be in full compliance with the Appeal Panel’s decision, as it is also the case, ‘mutatis mutandis’ when a decision of a Union agency is annulled by the CJEU and the Union agency wishes to replace such act which has been annulled with a new one in order to comply in good faith with the annulment judgment.

21. This means that, in the Appeal Panel’s view, the appeal filed against the Revised Confirmatory Decision is an appeal against a different decision from the one appealed by the same Appellant in case 52/17 and the fact that the Appeal Panel adopted a decision in case 52/17 does not prevent, as such, the Appellant from initiating a new appeal seeking the remittal to the Board under Article 85(8) also of the Revised Confirmatory Decision. Such proceedings do not have the same subject-matter (for a similar finding, albeit in the judicial context, see judgment of 5 August 2003, joined cases T-116/01 and T-118/01, P& O European Ferries and Others v. Commission, ECLI:EU:T:2003:217, rejecting the plea of res judicata in respect of an earlier judgment pronouncing annulment in new proceedings seeking to annul the decision taken to comply with that judgment).

22. The Board contends first, that, in so doing, this would create room for a vicious circle of permanent requests for reviews by the Appeal Panel of the same Board decision and its subsequent

amendments and that this would create legal uncertainty and jeopardise the right recourse to the Court of Justice.

23. In the Appeal Panel's view, considering the margin of appreciation pertaining to the Board's assessment on the merits, it is not to be expected within such normative context that a Board decision adopted to comply with the Appeal Panel decision should constitute the basis for an endless cycle of appeals, as somehow evidenced by the actual contours of the last cycle of appeals related with the matter at stake. The risk of circular reviews is thus minimal. Conversely, the possibility of an appeal against a revised confirmatory decision can be relevant to point to unintended non-compliance of the Board when implementing the decision of the Appeal Panel, or to clarify the Panel's view as regards the nature of the revision requested of the Board. Accordingly, this minor iteration, far from hindering legal certainty and the Appellant's rights, on the contrary tends to enhance both. It also appears an efficient and proportionate way to settle in advance, if possible, differences between the parties and an effective tool to ensure an even more timely compliance with the terms of the Appeal Panel decision. Thus, if the scenario is one where the parties disagree as to whether an Appeal Panel decision has been properly complied with, and the alternatives are (i) to only be able to seek recourse before the GCEU to enforce an Appeal Panel decision, or (ii) to also be able to seek a second Appeal Panel decision, where the Panel can also clarify any issue left open in the previous decision, the second option appears to be a more balanced and efficient use of resources, one that, far from leading to a perpetuation of litigation, may decisively contribute to filter unnecessary judicial litigation in the interest of due process. Such positive outcome is especially highlighted if one considers that the Appellants would, in any event, still have open the possibility to have recourse before the GCEU to challenge the Appeal Panel decision after the first or second appeal.

24. At the same time, the Appeal Panel finds that Article 90(3) SRMR refers to "decisions taken by the Board under Article 8 of Regulation (EC) No. 1049/2001" and the wording of the provision does not exclude those decisions which have been taken in order to comply with a previous Appeal Panel decision remitting the case to the Board. In the case at hand, the right to an effective judicial remedy is not jeopardised by such an interpretation. On the contrary, what this interpretation does is grant the Appellant the very same procedural guarantees that are granted by Article 90(3) with respect to the original confirmatory decision also with respect to the subsequent amended confirmatory decisions.

25. The Board also contends that its interpretation of Articles 85 and 86 SRMR would be in line with Article 24 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential Case 18/18 10 supervision of credit institutions ("SSMR"). In the Appeal Panel's view this argument cannot be accepted, because the power of review conferred upon the Appeal Panel is different (and works differently) from the one conferred upon the Administrative Board of Review by Article 24 SSMR. Suffice to note that, unlike the Single Resolution Board, the Supervisory Board of the SSM, when preparing the new draft decision to be submitted to the ECB Governing Council, is not bound by the ABoR's decision. Article 24(7) SSMR expressly clarifies that: "The Supervisory Board shall take into account the opinion of the Administrative Board of Review and shall promptly submit a new draft decision to the Governing Council. The new draft decision shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision". This means that, in the SSM context, it would be contradictory to allow for a further review by the ABoR of the new draft of a final decision prepared by the Supervisory Board, since such draft decision, and the final decision adopted by the Governing Council of the Bank, are legally free to derogate from the ABoR's opinion. Conversely, the opposite is true in the SRM context, and a possible review by the Appeal Panel of the Board's amended decision adopted

upon remittal appears to be, as already noted, the most cost-efficient and timely way to ensure effective compliance with the Appeal Panel's decision, as required by its binding nature.

26. This means that the appeal against an amended decision adopted by the Board upon remittal by the Appeal Panel is, in principle, admissible, although – as already held by the Appeal Panel in its decision of 23 February 2018 in case 2/18 - the actual grounds for such an appeal must be assessed separately and strictly in light of the specific terms of the compliance by the Board to the first decision by the Appeal Panel. This means that the appeal can only concern those documents for which the Appeal Panel has remitted the case to the Board and cannot extend, as a de novo review, to all other documents or parts thereof for which the Appeal Panel decision of 19 June 2018 found that the Board had acted in compliance with Regulation 1049/2001, that its decision was adopted respecting the applicable procedural rules and the duty to state reasons, and had stated accurately the facts without incurring in any manifest error of assessment or of misuse of powers. This strict assessment, on the part of the Appeal Panel, of the grounds of an appeal against an amended decision adopted by the Board upon remittal by the Appeal Panel, as characterized supra, effectively ensures a consistent narrowing of any hypothetical successive cases brought by an appellant and the corresponding closing of any litigation cycles, as highlighted by recent cases dealt with by the Appeal Panel.

27. The Appeal Panel further notes that an appeal, as the one in the instant case, cannot challenge de novo the Revised Confirmatory Decision as to the documents for which the Appeal Panel has remitted the case to the Board. Since the Revised Confirmatory Decision subject to the appeal was adopted following the Appeal Panel's decision in case 52/17, claiming an integral disclosure of such documents would disregard that the Appeal Panel already determined, in its previous decision in case 52/17, that the Board was not obliged to make an integral disclosure and that a disclosure with redaction would also comply with Regulation 1049/2001. In the Appeal Panel's view, the reiteration of a request for integral disclosure of documents, Case 18/18 11 which was already dismissed, is inadmissible, due to the authority of the Appeal Panel's decision rendered in case 52/17 in this respect. The Appellant cannot reiterate before the Appeal Panel requests that were already dismissed by the decision the compliant implementation of which is sought by the Appellant.

45. The Appeal Panel adopted this view in cases where it found that the Board's position of refusing access even in part to documents of the Banco Popular resolution case was incorrect, but that nonetheless the consequence should not be the full disclosure of such documents, since some of such documents, or parts of them, were subject to exceptions under Regulation 1049/2001. The Appeal Panel provided some guidance on partial disclosure, while acknowledging that some leeway should be granted to the Board in determining the actual content of such partial disclosure. Thus, subsequent cases allowed the Appeal Panel to provide more specific clarification on whether its guidance had been properly implemented. Most often, the Board had adequately implemented the Appeal Panel's decisions, while occasionally, as in case 18/2018, some further disclosures were indicated by the Appeal Panel. There was no instance where any appellant required to be clarified more than once, thus ensuring ultimately an efficient closure of all relevant issues concerning public access to documents.
46. The Appeal Panel knows that, for different reasons, both parties disagree with the conclusions reached by the Appeal Panel on this specific issue.

47. The Appellant believes (see to this effect [..]) that the decision of the Appeal Panel remitting a case to the Board is binding only upon the Board and within the limits of the identified defects of the original decision which need to be rectified by the Board. Any other statement constitutes a non-binding obiter dictum which is not binding either on the applicant or the Board.
48. The Board believes that, if an amended decision adopted by the Board after the Appeal Panel has remitted back the original decision (the Contested Decision is in the present appeal such an amended decision), is appealed (again) by the same appellant, the Appeal Panel should review such amended decision in its entirety, irrespective of whether the grounds of appeal brought by the Appellant have already been brought in the first appeal and of whether the Appeal Panel had held that only part of the original decision was to be rectified. In that sense, the Board acknowledges the Appeal Panel's considerations in its decision of 23 March 2018, case 2/18, paragraph 16 to the effect that "*the actual grounds for [the second appeal] must be assessed separately and strictly in light of the specific terms of the compliance by the Board to the first decision by the Appeal Panel*". Nevertheless, the Board disagrees and considers, in particular, that declaring inadmissible the grounds already submitted (and dismissed) in the first appeal would limit the power of the General Court to exercise a full judicial review of the SRB's decision object of that first appeal and second appeal. The General Court would not be able to examine the discussion on the merits of the grounds that the Appeal Panel carried out in the first appeal since the Appeal Panel's decision in the second appeal, which – in the Board's view – would be the decision reviewed by the General Court, would only declare those grounds inadmissible based on the authority of the (previous) Appeal Panel's decision (and which will not be the object of the General Court's review). The SRB considers that that limitation of the judicial review available to the General Court would be contrary to Article 47 of the Charter and to the Appellant's right to an effective remedy before the Court of Justice of the EU.
49. The Board therefore considers that the Appeal Panel should instead undertake a review of the Contested Decision in its entirety and, where the grounds presented by the Appellant have already been discussed (and dismissed) by the Appeal Panel, the latter should dismiss those grounds again based on the same reasons that served to dismiss them in the first instance. Only in this way, in the Board's view, the General Court would be able to exercise a full review of the Contested Decision and the merits of all grounds presented by the Appellant before the Appeal Panel.
50. The positions of the Appeal Panel and of both parties on this issue are currently under the scrutiny of the General Court [..]. The Appeal Panel wishes first, as a matter of principle, to clearly state that in future cases it will immediately and fully conform its practice to the findings of the European courts in those cases, once a final decision on this point of law shall be reached. The novelty of the issue means that a clarification from the European courts will be most welcome and of great value for the Appeal Panel.

51. As long as the European courts have not otherwise determined on this matter, the Appeal Panel finds, that, in the current context, it must confirm and restate its previous findings. If a Board decision is appealed before the Appeal Panel, and this remits the case only in part because it upholds only one or more grounds of appeal concerning only a part of the original decision and dismisses the others concerning other parts of the original decision, and the Board adopts an amended decision rectifying the part of the original decision for which the Appeal Panel upheld one or more grounds of appeal, any subsequent appeal must focus on the new parts of the decision. This new appeal will swiftly enable the correction of any unintended non-compliance of the Board when implementing the decision of the Appeal Panel, or to clarify the Panel's view as regards the nature of the revision requested of the Board. Accordingly, the Appeal Panel does not decide the same issue twice, as it would happen if the Appeal Panel would determine again on the same grounds of appeal raised against the part of the original decision for which it already dismissed those grounds of appeal; any subsequent revision of those grounds is a matter for European Courts. In other words, in those cases where an Appeal Panel's decision remits to the Board a decision only in part, and dismisses the other grounds of appeal, an appeal for the grounds that were raised and dismissed in the first appeal is inadmissible, as those grounds concern the parts of the amended decision which simply reiterate the parts of the original decision, and were not found unlawful by the first decision.
52. This is precisely what the Appellant does in the present appeal. With its original appeal the Appellant had contested the Board's decision in its entirety, and that because:
- (a) the Board had stated that it does not have in its possession any documents falling within the scope of the request for access other than the documents listed by the Board in the initial response and in the confirmatory decision (notably, the Appellant contested that, in its view, there was "incontrovertible evidence" as to the existence of relevant documents which were not included in the list prepared by the SRB, including (i) the documents published on the SRB's website with respect to [...] and its subsidiary, (ii) the ECB's failing or likely to fail assessment and related documents, including without limitation documents pertaining to the consultation process preceding the SRB's decision, (iii) documents in connection with the litigation in front of the General Court and Court of Justice between the SRB and [...] (iv) a chain of emails between the SRB and the ECB (...) which was included as part of a list of documents in a separate request for access to documents made to the European Central Bank (ECB), (v) the correspondence between the SRB and [...] as well as its [...] subsidiary, (vi) the email correspondence associated with the SRB's role as competent resolution authority with respect to [...] and its subsidiary (...)) and
 - (b) the Board had referred the Appellant to the ECB as to the documents originating from the ECB.
53. The Appeal Panel held with its decision of 10 May 2023 that the grounds of appeal related to point (a) above should be dismissed because the Appellant did not offer any evidence that more documents were in the possession of the Board. Therefore, the Appellant was

unsuccessful in its challenge to the Board's statements that the documents were not in the Board's possession, and its arguments were unfounded. Thus, this part of the original decision, regarding the list of documents found, was correct, and was maintained in the subsequent, Contested Decision.

54. As to the grounds of appeal related to point (b), the Appeal Panel dismissed in part the ground of appeal. However, the Appeal Panel upheld the ground of appeal as to the insufficient statement of reasons of the specific part of the original Board's decision which referred the Appellant to the ECB and only for this specific reason the Appeal Panel remitted the case to the Board.
55. The Contested Decision implements the Appeal Panel's decision and reiterates for an ample part the same content of the original decision. Yet it offers a new and more complete statement of reasons concerning the denial of access of documents originating from the ECB. The Appellant clearly states, however, in the present case that its appeal "should not be confused with the case in which an appellant asks the Appeal Panel to examine whether its guidance in a prior decision was properly implemented" (i.e., in the present context, the requirement to amend the statement of reasons in paragraph 2.2. as required pursuant to the Appeal Panel's decision dated 10 May 2023).
56. In the Appeal Panel's view it is thus apparent that, in the instant case, the part of the Contested Decision which reiterates the content of the original decision on the identified list of documents is simply confirmatory of the original decision and that if the Appellant disagreed with the Appeal Panel's decision of 10 May 2023 on this part of the original decision and wished to take the matter to the review of the General Court according to Article 86 SRMR and 263 TFEU, it should do so by bringing an application for annulment of the Appeal Panel's decision (together with the original Board's decision). [.]
57. The Appeal Panel notes that in the judgment of the General Court of 4 March 2015 in *UK v ECB* it was stated as follows:

59 It is settled case-law that an action for the annulment of a decision which merely confirms a previous decision not contested within the time-limit for bringing proceedings is inadmissible (order of 21 November 1990 in *Infortec v Commission*, C-12/90, ECR, EU:C:1990:415, paragraph 10, and judgment of 11 January 1996 in *Zunis Holding and Others v Commission*, C-480/93 P, ECR, EU:C:1996:1, paragraph 14). The purpose of that case-law is to prevent an applicant from being able, indirectly, to challenge the legality of a decision which he did not contest in good time and which has accordingly become definitive.

60 However, according to that case-law, a decision is a mere confirmation of an earlier decision where it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the person to whom the earlier measure was addressed (judgment of 26 October 2000 in *Ripa di Meana and Others v Parliament*, T-83/99 to T-85/99, ECR, EU:T:2000:244, paragraph 33; see order of 7 December 2004 in *Internationaler Hilfsfonds v Commission*, C-521/03 P, EU:C:2004:778, paragraph 47 and the case-law cited).

58. In the Appeal Panel's view, after thoroughly conferring the elements at stake, the Contested Decision does not contain any new factors as to the list of documents identified by the Board as compared with the original decision. This is a consequence of the fact that the Appeal Panel decision of 10 May 2023 confirmed this part of the original Board's decision, rejecting the Appellant's arguments. The Contested Decision is therefore a confirmatory decision as to the part thereof concerning the list of documents. The fact that the Appellant could bring an application for annulment against the Appeal Panel's decision of 10 May 2023 on that count does not violate, in the Appeal Panel's view, the Appellant's right to an effective judicial remedy nor creates an undue burden as regards access to the Union courts. Quite on the contrary, it allows the Appellant the timeliest access to the European courts on the content of the original Board's decision that was found lawful by the Appeal Panel, as soon as the Appeal Panel decision was adopted.
59. Conversely, the Appeal Panel notes that the Contested Decision is not a confirmatory decision (*only*) in the part where, following the Appeal Panel's guidance, it adopts a new statement of reasons concerning the documents originating from the ECB.
60. However, the Appellant is not challenging that part of the decision. The Appellant has not raised in the present proceedings any new grounds of appeal in respect of this part of the Contested Decision and its statement of reasons, nor has contended that the Board has not complied with the Appeal Panel's guidance. On the contrary, the Appellant, on one hand, has limited itself to reiterating the same grounds of appeal already raised against the original Board's decision also against the Contested Decision and, on the other hand, it has specifically clarified that its appeal "should not be confused with the case in which an appellant asks the Appeal Panel to examine whether its guidance in a prior decision was properly implemented" (i.e., in the present context, the requirement to amend the statement of reasons in paragraph 2.2. as required pursuant to the Appeal Panel's decision dated 10 May 2023). This means that the Appellant is not challenging in the present appeal the new statement of reasons adopted by the Contested Decision with respect to the documents originating from the ECB and, for the reasons stated above, in the Appeal Panel's view this renders the appeal inadmissible.
61. Furthermore, on this the Appeal Panel also sides with the Board where it argues that the appeal violates Article 5(4) Rules of Procedure, as well as the case-law on Article 76(1)(d) of the Rule of Procedure of the General Court (see order of the General Court of 18 September 2018, T 664/17, *eSlovensko v Commission*, EU:T:2018:559, para. 29), because the Appellant neither indicates in any coherent and intelligible manner in the notice of appeal why this appeal is admissible, nor does it explain how the grounds of appeal raised in the previous appeal may lead the Appeal Panel to declare that the new part of the Contested Decision, and thus the new statement of reasons concerning the documents originating from the ECB, may be considered well-founded, thus remitting the case back to the Board.

On those grounds, the Appeal Panel hereby:

Dismisses the appeal as inadmissible.

Helen Louri-Dendrinou
SIGNED

Kaarlo Jännäri
SIGNED

Luis Silva Morais
Vice-Chair
SIGNED

Marco Lamandini
Rapporteur
SIGNED

Christopher Pleister
Chair
SIGNED

For the Secretariat of the Appeal Panel:

Esther Brisbois

SIGNED