



## EUROPEAN COMMISSION

Directorate-General for Financial Stability, Financial Services and Capital Markets Union

Director-General

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*By registered letter with acknowledgment of receipt*

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SPAIN

*Advance copy by email*

Dear Sir,

**Subject: Your application for access to documents – Ref GestDem No 2017/4009**

I refer to your letter dated 04/07/2017 in which you made a request for access to documents, registered on 07/07/2017 under the above-mentioned reference number.

You request access to:

- i. Copy of any assessment, decision or proposal related to Article 18(4) and (5) of Regulation (EU) No 806/2014<sup>1</sup> ("SRMR") concerning Banco Popular Español S.A. ("Banco Popular");
- ii. Copy of the Commission decision or proposal referred to in Article 18(7) SRMR concerning Banco Popular;
- iii. Copy of any assessment, decision or proposal regarding Article 27 SRMR and the delegated act adopted by the European Commission on the basis of Article 44(11) of Directive 2014/59/EU<sup>2</sup> ("BRRD"), following the procedure referred to in Article 18(7) SRMR, concerning Banco Popular;
- iv. Copy of any relevant communication regarding the exchange of information referred to in Article 18(10) SRMR concerning Banco Popular;
- v. Copy of the independent report, whether provisional or definitive, prepared by the firm *Deloitte and Touch Limited* (or otherwise) in accordance with Article 20 SRMR,

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<sup>1</sup> 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 (OJ L 225, 30.7.2014, p. 1–90).

<sup>2</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190–348).

including all the information taken into consideration by said independent expert as required by sub-sections 5, 6, 7 and 8 of Article 20 SRMR, concerning Banco Popular;

- vi. Copy of any other report issued by a third party that might have been taken into consideration by the Single Resolution Board ("SRB"), the European Commission, the European Central Bank, the European Council and the national authorities for the SRB Decision No. SRB/EES/2017/08, concerning Banco Popular;
- vii. Copy of any assessment, proposal, decision or relevant document regarding the implementation of the general principles established in Article 22 SRMR along with any assessment, proposal, decision, or relevant document regarding the implementation of Articles 21, 24, 25 26 and 27 SRMR, concerning Banco Popular;
- viii. Copy of any records, minutes or reports prepared by the European Commission in relation to the SRB Decision No. SRB/EES/2017/08, concerning Banco Popular.

The Commission identified the following documents as falling within the scope of your request:

1. As regards request (i) above:
  - a. The assessment of the conditions pursuant to Article 18(4) SRMR ("failing or likely to fail") conducted by the European Central Bank ("ECB"), (Ref. Ares(2017)3674684);
  - b. The decision concerning the adoption of a resolution scheme in respect of Banco Popular adopted by the SRB on 7 June 2017 and transmitted to the Commission pursuant to Article 18(7) SRMR (SRB Decision No: SRB/EES/2017/08), (Ref. Ares(2017)3649816);
2. As regards request (ii) above, Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (notified under document C(2017) 4038) (OJ L 178, 11.7.2017, p. 15);
3. As regards request (iii) above, no documents were found that would correspond to the description given in that request and we refer to the decision below for further details;
4. As regards request (iv) above, no documents were found that would correspond to the description given in that request and we refer to the decision below for further details;
5. As regards request (v) above, four documents related to the valuation of the assets and liabilities of Banco Popular, which were prepared in accordance with Article 20 SRMR and were submitted to the Commission together with the aforementioned resolution scheme, namely:
  - a. Valuation Report for the purpose of Article 20(5)(a) SRMR of 5 June 2017 by the SRB (Ref. Ares(2017)3649934);

- b. Valuation Report of 6 June 2017 by an independent valuer (Ref. Ares(2017)3650010);
  - c. Addendum to the Valuation Report of 6 June 2017 by an independent valuer (Ref. Ares(2017)3650100);
  - d. Appendices to the Valuation Report of 6 June 2017 by an independent valuer (Ref. Ares(2017)3650178);
6. As regards request (vi) above, no documents were found that would correspond to the description given in that request and we refer to the decision below for further details;
  7. As regards request (vii) above, no documents were found that would correspond to the description given in that request and we refer to the decision below for further details;
  8. As regards request (viii) above, there are no specific documents to provide you with, unless further clarified by you. We refer to the decision below for further details.

**Procedure:**

The document listed under point 1(a) above originates from a third party (the ECB). The originator of the documents has been consulted in accordance with Article 4(4) of Regulation (EC) No 1049/2001<sup>3</sup>, with a view to assessing whether an exception in paragraph 1 or 2 of Article 4 of Regulation 1049/2001 is applicable.

The ECB has objected to the disclosure of the full text of document 1(a) (the assessment of "failing or likely to fail") and has justified its position as follows:

*"[U]nder the ECB's regime for public access to documents, access to the confidential versions of the FOLFT assessments cannot be granted (in full or partial) since this document and its contents are part of an administrative file which is covered by a general presumption of non-accessibility under Article 4(1)(c) ("the confidentiality of information that is protected as such under EU law") of Decision ECB/2004/3 on public access to ECB documents.*

*The ECB is bound by a general duty of professional secrecy in the area of banking supervision. The professional secrecy requirements (set out in Article 27 of the SSM Regulation, Article 53 et seq of the Capital Requirements Directive IV (CRD IV) and Article 84 of the EU Bank Recovery and Resolution Directive (BRRD) prevent the ECB from disclosing information received, the assessment thereof, as well as any steps taken with respect to an individual credit institution. Disclosure of confidential information related to the supervision of individual credit institutions by a competent authority is only permitted in the cases expressly mentioned in CRD IV and BRRD. As a result, access to the FOLTF document in the administrative file cannot be granted"*

The documents listed under points 1(b) and 5 above originate from a third party (the SRB). The originator of the documents has been consulted in accordance with Article 4(4) of

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<sup>3</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43–48).

Regulation 1049/2001, with a view to assessing whether an exception in paragraph 1 or 2 of Article 4 of Regulation 1049/2001 is applicable.

The SRB has objected to the disclosure of the full text of document 1(b) (the resolution scheme) that it sent to the Commission and has justified its position as follows:

*"After careful consideration, we consider that the disclosure of the full text of the Resolution Decision is prevented by exceptions to the right of access to documents laid down in Article 4 of Regulation 1049/2001 and the [SRB's] Public Access Decision<sup>4</sup>. Furthermore, the SRB is bound by confidentiality obligations under Union law, including Article 88 of Regulation 806/2014, which prevent it from disclosing bank-specific information that is not publicly available.*

*It should be noted in this respect that the parts of the Resolution Decision that have not been published contain information the disclosure of which would undermine the protection of the public interest as regards the financial or economic policy of the Union, the policy relating to the resolution of credit institutions and the stability of the financial system of the Union. In particular, sections of the Resolution Decision referring to elements of resolution planning and the choice of the resolution strategy as well as considerations relating to the assessment of the conditions for resolution could give rise to adverse market reactions. Disclosing elements of the Resolution Decision that refer to Banco Popular Español's financial data as well as its particular position in the market, would also undermine the protection of the commercial interests of Banco Popular Español and its purchaser.*

*Taking into account these considerations, we concluded that disclosure of the full text of the Resolution Decision in this case would not be possible as it is prevented by the applicable exceptions to the right of access to documents as explained above (i.e. Article 4(1)(a)(first, second and third indent) and Article 4(1)(c) and Article 4(2) of the [SRB's] Public Access Decision).*"

The SRB has also objected to the disclosure of the documents listed under point 5 (the valuation reports) that it sent to the Commission and has justified its position as follows:

*"[T]he valuation reports contain information, such as financial data, information on the position of Banco Popular in the market, information on certain asset classes etc., which include not only individual business secrets but also highly sensitive market information without a specific "owner". We consider that disclosure of such elements could give adverse market reactions and would therefore undermine not only the protection of the entity's business secrets, but also the public interest as regards the financial and economic policy of the Union, the policy relating to the resolution of credit institutions and the stability of the Union's financial system."*

#### **Decision:**

Having examined the documents requested under the provisions of Regulation 1049/2001 regarding public access to documents, I am pleased to inform you that:

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<sup>4</sup> Decision of the executive session of the Board of 9 February 2017 on public access to the Single Resolution Board documents (SRB/ES/2017/01), available at: [https://srb.europa.eu/sites/srbsite/files/srb-es-2017-01\\_decision\\_public\\_access\\_to\\_the\\_srb\\_documents.pdf](https://srb.europa.eu/sites/srbsite/files/srb-es-2017-01_decision_public_access_to_the_srb_documents.pdf).

As regards the document listed under point 1(a) above,

- a non-confidential version of the assessment of the conditions pursuant to Article 18(4) SRMR ("failing or likely to fail") has been published by the ECB on its website. You can access it online through the following link: [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.2017\\_FOLTF\\_ESPOP.en.pdf](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.2017_FOLTF_ESPOP.en.pdf)

As regards the document listed under point 1(b) above,

- a notice concerning the adoption of the resolution scheme by the SRB has been published in the Official Journal of the European Union (OJ C 222, 11.7.2017, p. 3). You can access it online through the following link: [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1500460740759&uri=CELEX:52017XX0711\(01\);](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1500460740759&uri=CELEX:52017XX0711(01);)
- a non-confidential version of the resolution decision has been published by the SRB on its website. You can access it online through the following link: <https://srb.europa.eu/en/content/banco-popular>.

As regards the document listed under point 2 above,

- this document has been published in the Official Journal of the European Union (OJ L 178, 11.7.2017, p. 15). You can access it online through the following link: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017D1246>.

However, as regards the full text of document 1(a), the full text of document 1(b) and the documents listed under point 5 above, after taking into account the respective opinions of the ECB and the SRB, I regret to inform you that:

Access to the full text of document 1(a), to the full text of document 1(b) and to the documents listed under point 5 cannot be granted, as public disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Union or of a Member State within the meaning of the fourth indent of Article 4(1)(a) of Regulation 1049/2001. In addition, the disclosure of the concerned documents would undermine the protection of commercial interests of a natural or legal person within the meaning of the first indent of Article 4(2), of Regulation 1049/2001 and there is no overriding public interest in disclosure. The detailed reasons are explained below.

Article 4(1)(a), fourth indent, of Regulation 1049/2001 provides that: "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of (...) [t]he public interest as regards (...) the financial, monetary or economic policy of the Community or a Member State*".

Article 4(2), first indent, of Regulation 1049/2001 stipulates that: "*[t]he 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, unless there is an overriding public interest in disclosure*".

The Commission's assessment after taking into account the respective opinions of the ECB and the SRB outlined above is that public disclosure, at this stage, of the full text of document 1(a), the full text of document 1(b) and the documents listed under point 5, would undermine the protection of the public interest as regards the financial and economic policy of the Union within the meaning of the fourth indent of Article 4(1)(a) of Regulation 1049/2001. In particular, the concerned documents contain highly sensitive financial data pertaining to the Union banking sector, the disclosure of which could cause adverse market reactions, posing risk to financial stability within the Union. Public disclosure, at this stage, could cause spill-over effects that would negatively affect the financial position of other credit institutions throughout the Union.

In addition to the above, the disclosure of the full text of document 1(a), the full text of document 1(b) and of the documents listed under point 5 would undermine the protection of the commercial interests of Banco Santander S.A. ("Banco Santander") and its shareholders within the meaning of the first indent of Article 4(2) of Regulation 1049/2001. The aforementioned financial data, in particular, the information on the position of Banco Popular in the market, as well as data on its assets and liabilities, constitute sensitive commercial information of Banco Santander as the purchaser of Banco Popular. Public disclosure of this information, at this stage, would undermine the protection of the legitimate commercial interests of Banco Santander with regard to its competitive position in the banking market.

We have not identified any overriding public interest in the disclosure of these requested documents. It must be noted that, pursuant to the case-law of the Court of Justice, it is for the applicant to show that there is an overriding public interest to justify the disclosure of the concerned documents. The Court of Justice has acknowledged that a possible interest in obtaining documents for the purposes of court proceedings constitutes a private and not a public interest.

We have also considered whether partial access could be granted to these documents pursuant to Article 4(6) of Regulation 1049/2001. I am pleased to inform you that those parts of documents 1(a) and 1(b) that are not subject to the exceptions detailed above is herewith granted in form of the non-confidential versions of these documents. Please refer to the first and third indent above for information on how to access these documents.

However, as regards partial access to the documents listed under point 5, these documents fall entirely under the aforementioned exceptions under Regulation 1049/2001, as it is impossible to disclose any of their parts without undermining the protection of the public interest as regards the financial and economic policy of the Union or the protection of commercial interests of a natural or legal person. Partial access could therefore not be granted.

As regards the documents listed under points 3, 4, 6 and 7 above, I regret to inform you that:

No documents were found that would correspond to the description given in the relevant requests.

We have not identified any assessment, decision or proposal regarding Article 27 SRMR and the delegated act adopted by the Commission on the basis of Article 44(11) BRRD, following the procedure referred to in Article 18(7) SRMR, other than the documents listed under points 1(b) and 2. Please refer to the relevant sections above for further details on those documents.

We have also not identified any relevant communication between the Commission and the SRB regarding an exchange of information pursuant to Article 18(10) SRMR.

We have also not identified any other report issued by a third party (i.e. any other party apart the Commission, the SRB, or the ECB) that was taken into consideration by the Commission, other than the documents listed under points 1(a), 1(b), and 2. Please refer to the relevant sections above for further details on those documents. Please also note that the Commission can only identify any such documents that it took into consideration itself. The Commission cannot make any representation as to the consideration of any other party.

We have finally not identified any assessment, proposal, decision or relevant document regarding the implementation of the general principles established in Article 22 SRMR, along with any assessment, proposal, decision, or relevant document regarding the implementation of Articles 21, 24, 25, 26 and 27 SRMR, other than the documents listed under points 1(b) and 2. Please refer to the relevant sections above for further details on those documents.

As regards the documents listed under point 8 above, I would like to note that:

Article 6(1) of Regulation 1049/2001 requires that applications are made in a sufficiently precise manner to enable the Commission to identify the document. Therefore, at this stage, there are no specific documents to provide you with, unless further clarified by you in accordance with Article 6(2) of Regulation 1049/2001.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/282  
B-1049 Bruxelles

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,



Olivier Guersent  
Director General