COURT OF JUSTICE
OF THE EUROPEAN UNION

1952 - 2022

PRESS RELEASE No 90/22
Luxembourg, 1 June 2022

Judgments of the General Court in Cases T-481/17 | *Fundación Tatiana Pérez de Guzmán el Bueno and SFL* v *SRB,* T-510/17 | *Del Valle Ruiz and Others* v *Commission and SRB*, T-523/17 | *Eleveté Invest Group and Others* v *Commission and SRB*, T-570/17| *Algebris (UK) and Anchorage Capital Group* v *Commission* and T-628/17 | *Aeris Invest* v *Commission and SRB*

The actions seeking annulment of the resolution scheme in respect of Banco Popular and/or the Commission decision endorsing that scheme are dismissed in their entirety

Banco Popular Español, SA ('Banco Popular') was a Spanish credit institution under direct prudential supervision by the European Central Bank (ECB). On 7 June 2017, the Single Resolution Board (SRB) adopted a decision concerning a resolution scheme in respect of Banco Popular [1] ('the resolution scheme'). On the same day, the European Commission adopted Decision 2017/1246 [2] endorsing that scheme.

Prior to the adoption of the resolution scheme, a valuation of Banco Popular was carried out, comprising two reports which are annexed to the resolution scheme, namely a first valuation ('valuation 1'), dated 5 June 2017 and drafted by the SRB, and a second valuation ('valuation 2'), dated 6 June 2017, drafted by an independent expert. The purpose of valuation 2 was, inter alia, to estimate the value of Banco Popular's assets and liabilities, to inform the decision to be taken on the shares and instruments of ownership to be transferred and to enable the SRB to determine what constituted commercial terms for the purposes of the sale of business tool. Also on 6 June 2017, the ECB, after consulting the SRB, carried out an assessment as to whether Banco Popular was failing or was likely to fail, [3] in which it took the view that, given the liquidity problems which Banco Popular was facing, the latter would probably not be in a position, in the near future, to pay its debts or other liabilities as they fell due. [4] On the same day, Banco Popular's Board of Directors informed the ECB that it had reached the conclusion that the institution was likely to fail.

In the resolution scheme, the SRB considered that Banco Popular fulfilled the conditions for the adoption of a resolution scheme, [5] that is to say that it was failing or was likely to fail, that there were no other measures that

[1] Decision SRB/EES/2017/08 of the Executive Session of the SRB of 7 June 2017, concerning the adoption of a resolution scheme in respect of Banco Popular Español SA.

[2] Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (OJ 2017 L 178, p.15).

[3] In accordance with the second subparagraph of Article 18(1) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1) ('the SRM Regulation'). Article 18 of that regulation concerns the resolution procedure.

[4] In accordance with Article 18(1)(a) and (4)(c) of Regulation No 806/2014.

[5] In accordance with Article 18(1) of Regulation No 806/2014.

could have prevented its failure within a reasonable time frame and that resolution action in the form of a sale of business tool [6] was necessary in the public interest. The SRB exercised its power to write down and convert Banco Popular's capital instruments [7] and ordered that the resulting new shares were to be transferred to Banco Santander for the price of €1.00.

The actions were designated as 'test cases' representing approximately 100 actions brought by natural and legal persons who owned capital instruments in Banco Popular before the resolution. The actions sought the annulment of the resolution scheme and/or Decision 2017/1246, together with compensation.

By its five judgments delivered by the Third Chamber, Extended Composition, the General Court dismisses the applicants' actions in their entirety. The present cases provide the Court, for the first time, with the opportunity to rule on the lawfulness of a decision concerning a resolution scheme adopted by the SRB.

Findings of the Court

In the first place, the Court states that **an action may be brought against a resolution scheme adopted by the SRB**, without there being any requirement that an action must also be brought against the Commission decision endorsing that scheme, with the result that, once it is endorsed by the Commission, such a scheme produces legal effects and constitutes an act against which an independent action for annulment may be brought.

In the second place, as regards the **scope of its review**, the Court considers that, since the decisions which the SRB is required to adopt in the context of a resolution procedure are based on highly complex economic and technical assessments, the Court must carry out a limited review. However, the Court considers that, even in the case of complex assessments such as those made by the SRB in the present case, the EU Courts must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but also review whether that evidence constitutes all the relevant information which must be taken into account in order to assess a complex situation and whether that information is capable of supporting the conclusions drawn from it.

In the third place, the Court examines the applicants' arguments in the light of the Charter of Fundamental Rights of the European Union.

First, the Court holds that, although the shareholders and creditors of an institution which is the subject of a resolution action may rely on the **right to be heard** in a resolution procedure, the exercise of that right may be subject to limitations. In that regard, the Court states that the procedure for the resolution of Banco Popular pursued an objective of general interest, namely the objective of ensuring the stability of the financial markets, capable of justifying a limitation on the right to be heard. Thus, in the context of the procedure for the resolution of Banco Popular, the absence of a provision requiring the shareholders and creditors of the entity concerned to be heard, and the failure to hear the applicants, constitute a limitation on the right to be heard which is justified and necessary in order to meet an objective of general interest and respects the principle of proportionality. Such hearings would have undermined the objectives of the protection of the stability of financial markets and the continuity of the entity's critical functions, as well as the requirements of speed and effectiveness of the resolution procedure.

Second, the Court states, as regards the **right to property**, inter alia, that Banco Popular was failing or was likely to fail and that there were no alternative measures capable of preventing that situation. Accordingly, the decision to write down and convert Banco Popular's capital instruments in the resolution scheme does not constitute an excessive and intolerable interference impairing the very substance of the applicants' right to property, but must be regarded as a justified and proportionate restriction of their right to property.

Third, in respect of the **right of access to the file**, the Court finds that, during the administrative procedure which

[6] In accordance with Article 24(1)(a) of Regulation No 806/2014.

[7] In accordance with Article 21 of Regulation No 806/2014.

led to the adoption of the resolution scheme, the fact that (i) valuation 2 was not communicated by the SRB and (ii) the SRB and the Commission did not disclose the documents on which they relied does not constitute an infringement of that right. Certain information held by the SRB, contained in the resolution scheme, in valuation 2 and in the documents on which the SRB relied, is covered by professional secrecy and is confidential. The Court therefore finds that, after the adoption of the resolution scheme, the applicants do not have a right to receive communication of all of the file on which the SRB relied.

In the fourth place, the Court rejects the plea of illegality alleging that the relevant provisions of the SRM Regulation [8] infringe the principles relating to the **delegation of powers**, stating that it is necessary for an EU institution, namely the Commission or the Council, to endorse the resolution scheme with regard to its discretionary aspects in order for the scheme to produce legal effects. The EU legislature thus conferred on an institution the legal and political responsibility for determining the European Union's resolution policy, thereby avoiding an 'actual transfer of responsibility', [9] without having delegated autonomous power to the SRB.

In the fifth place, as regards **valuations 1 and 2**, the Court indicates that, in view of the urgency of the situation, the SRB could rely on valuation 2 in order to adopt the resolution scheme. Given the time constraints and available information, some uncertainties and estimates are inherent in any provisional valuation, and the reservations expressed by an expert who carried out that valuation cannot mean that it was not 'fair, prudent and realistic'. [10] Furthermore, the Court observes that valuation 1, which was aimed at determining whether Banco Popular was failing or was likely to fail, in order to establish whether the conditions for initiating a resolution procedure or for the write-down or conversion of capital instruments had been met, became obsolete following the assessment carried out by the ECB on 6 June 2017 that Banco Popular was failing or was likely to fail.

In the sixth place, the Court finds that the SRB and the Commission did not make a manifest error of assessment in finding that the conditions laid down in Article 18(1) of the SRM Regulation for the adoption of a resolution scheme had been satisfied.

First, the Court states that the **insolvency of an entity** is not a condition for a finding that it is failing or is likely to fail and, therefore, is not a condition for the adoption of a resolution scheme. The fact that an entity is balance sheet solvent does not mean that it has sufficient liquidity, that is to say that it has funds available to settle its debts or other liabilities as they fall due. The Court therefore holds that the SRB and the Commission did not make a manifest error of assessment in finding that Banco Popular was failing or was likely to fail. It also notes that the resolution scheme was validly adopted irrespective of the reasons which led Banco Popular to be failing or to be likely to fail.

Second, the Court finds that the applicants have not established that there were alternative measures to resolution and that the SRB and the Commission did not make a manifest error of assessment in finding that there was no other reasonable prospect that alternative private sector measures or supervisory action would prevent the failure of Banco Popular within a reasonable time frame.

Third, the Court states that the SRB and the Commission did not make a manifest error of assessment in finding that the resolution action was necessary and proportionate in light of the public interest objectives pursued.

In the seventh place, the Court rejects the plea alleging that the **Commission did not examine the resolution scheme before endorsing it**, stating that the Commission designates a representative entitled to participate in meetings of executive sessions and plenary sessions of the SRB as a permanent observer, and that its representative is entitled to participate in the debates and have access to all documents. Thus, the Commission, having participated in several meetings with the SRB, had been associated with the various phases leading to the adoption of the resolution scheme, had access to the preliminary drafts of that scheme and had participated in the

[8] Articles 18, 21, 22 and 24 of the SRM Regulation.

[9] Within the meaning of the judgment of 13 June 1958, *Meroni* v *Haute Autorité*, (9/56).

[10] Under Article 20(1) of the SRM Regulation.

preparation of those drafts.

In the eighth place, the Court rejects the plea regarding the **infringement of the** Commission's **obligation to state reasons**. The Court states that, when the Commission endorsed the resolution scheme in Decision 2017/1246, it was entitled, in order to justify the adoption of that scheme, to limit itself to providing a statement of reasons indicating that it agreed with the content of that resolution scheme and the reasons put forward by the SRB.

In the ninth place, the Court rejects the arguments regarding the **irregularity of the sale procedure**. It confirms, inter alia, the lawfulness of the SRB's decision to request the national resolution authority to contact only the institutions which had participated in the procedure for the private sale of Banco Popular. That authority is entitled to solicit particular potential purchasers. [11]

In the tenth and last place, the Court, in the present case, rules out **non-contractual liability** on the part of the SRB and the Commission. In that regard, the Court notes that the applicants have not demonstrated that the SRB or the Commission acted unlawfully. It has not been demonstrated that the SRB or the Commission disclosed confidential information on the implementation of a resolution procedure in respect of Banco Popular and, consequently, there can be no finding that they infringed the principle of confidentiality or the obligation of professional secrecy.

Furthermore, the applicants have not demonstrated a causal link between the unlawful conduct of the SRB and the Commission, even if that conduct had been established, and Banco Popular's liquidity crisis, and therefore between that unlawful conduct and the alleged damage.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

The full text of the judgments (T-481/17, T-510/17, T-523/17, T-570/17 and T-628/17) is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ✆ (+352) 4303 3355

[11] According to the second subparagraph of Article 39(2) of 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 2014 L 173, p. 190).