

STUDY

Requested by the ECON committee



# Stock take of the SRB's activities over the past years: What to improve and focus on?

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Banking Union Scrutiny



External authors:

Rosa María Lastra

Costanza A Russo

Marco Bodellini



Economic Governance Support Unit (EGOV)  
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# Stock take of the SRB's activities over the past years: What to improve and focus on?

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## Banking Union Scrutiny

### **Abstract**

This paper discusses from a legal perspective how, over the past years, the SRB has performed against the main goals it was supposed to accomplish, in light of the decisions taken so far (looking backwards) and points to some of the challenges ahead (looking forward). These include inconsistencies in the implementation of the BRRD/SRMR regime, in particular with regard to the 'dichotomy' between liquidation and resolution, the resulting fragmentation along national lines, the interpretation of the public interest test, and the complexity and inefficiency of the existing system of 'multi-layered' litigation. The ongoing work of the SSM and the SRM and the development of Banking Union need to continue to address the 'fault lines' in their design and provide for a better alignment of the triggers for resolution and liquidation and greater transparency on the outcome of resolution planning.

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### **AUTHORS**

Rosa María LASTRA  
Costanza A RUSSO  
Marco BODELLINI

### **ADMINISTRATOR RESPONSIBLE**

Marcel MAGNUS  
Jérôme DESLANDES  
Cristina DIAS

### **EDITORIAL ASSISTANT**

Matteo CIUCCI

### **LINGUISTIC VERSIONS**

Original: EN

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To contact Economic Governance Support Unit or to subscribe to its newsletter please write to:

Economic Governance Support Unit  
European Parliament  
B-1047 Brussels  
E-mail: [egov@ep.europa.eu](mailto:egov@ep.europa.eu)

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## LIST OF ABBREVIATIONS

<b>ABOR</b>	Administrative Board of Review
<b>AT1</b>	Additional Tier 1
<b>BRRD</b>	Bank Recovery and Resolution Directive
<b>CJEU</b>	Court of Justice of the European Union
<b>DG COMP</b>	European Commission – Directorate General for Competition
<b>EBA</b>	European Banking Authority
<b>ECA</b>	European Court of Auditors
<b>ECB</b>	European Central Bank
<b>ECSC</b>	European Coal and Steel Community
<b>ESAs</b>	European Supervisory Authorities
<b>ESCB</b>	European System of Central Banks
<b>ESM</b>	European Stability Mechanism
<b>ESMA</b>	European Securities Market Authority
<b>ESRB</b>	European Systemic Risk Board
<b>FDIC</b>	Federal Deposit Insurance Corporation
<b>FROB</b>	Fondo de Reestructuración Ordenada Bancaria
<b>FSAP</b>	Financial Sector Assessment Programme
<b>FSB</b>	Financial Stability Board
<b>G-SIB</b>	Global Systemically Important Bank
<b>ICSID</b>	International Centre for the Settlement of Investment Disputes
<b>IGA</b>	Intergovernmental Agreement
<b>IMF</b>	International Monetary Fund
<b>IRT</b>	Internal Resolution Team
<b>ITS</b>	Implementing Technical Standards
<b>LSI</b>	Less Systemic Institutions
<b>MREL</b>	Minimum Requirements for Own Funds and Eligible Liabilities
<b>NCA</b> s	National Competent Authorities
<b>NCB</b>	National Central Bank
<b>NRA</b> s	National Resolution Authorities
<b>RC</b>	Resolution College
<b>SRB</b>	Single Resolution Board
<b>SRF</b>	Single Resolution Fund

<b>SRM</b>	Single Resolution Mechanism
<b>SRMR</b>	Single Resolution Mechanism Regulation
<b>SSM</b>	Single Supervisory Mechanism
<b>TFEU</b>	Treaty on the Functioning of the European Union

## EXECUTIVE SUMMARY

This paper discusses from a legal perspective how the Single Resolution Board (SRB) has, over the past years, performed against the main goals it was supposed to accomplish, in light of the decisions taken so far (looking backwards) and points to some challenges ahead (looking forward).

Inconsistency and fragmentation along national lines still persist in the work of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), and a 'multi-layered' system of litigation adds to the complexity of the existing regime. The development of Banking Union needs to address these 'fault lines', ensure greater transparency and provide a better alignment of the triggers for resolution and liquidation.

The complexity of the current institutional design, where several authorities and institutions (national and European) with different backgrounds and functions are involved in the decision-making process might end up compromising the efficiency, effectiveness and consistency of the resolution regime.

The challenges ahead comprise the 'dichotomy' between resolution and liquidation, the need for a consistent interpretation of the concept of 'public interest', the need to align the resolution regime (under the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism (SRM) Regulation) with the state aid legal framework, and the need for greater transparency on the outcomes of resolution planning.

We recommend that more specific criteria on how to inform the choice between resolution and liquidation be developed, as well as a more coherent interpretation of the concept of 'public interest' from the perspective of financial stability. Aligning the provisions of the state aid framework with the provisions of the resolution regime in relation to public intervention is of paramount importance. This could remove the incentives to evade resolution in order to benefit from a publicly funded liquidation. As recommended by the International Monetary Fund (IMF) in its Euroarea Financial Sector Assessment Program (FSAP), we advocate the introduction of a financial stability exemption to the rigid application of the bail-in tool before the injection of public money can take place. This should in turn diminish the risk of litigation. We advocate the publication of a non-confidential version of the resolution plan to enhance the level of transparency and accountability of the SRB.

Finally, we also recommend a clear hierarchical system of claims to avoid investors resorting to a multiplicity of litigation strategies, which not only creates inefficiencies but also compromises legal certainty and predictability.



## 1. INTRODUCTION

This paper is divided into five sections, with two main parts: looking backwards and looking forward. Following this introduction, section 2 reviews the decisions adopted so far by the SRB concerning the submission to either resolution or liquidation of 'failing or likely to fail' institutions and critically discusses the complexity of the current institutional design. Section 3 examines the 'dichotomy' between resolution and liquidation and analyzes the concept of 'public interest', the interplay between the state aid regime and the resolution regime with regard to public intervention and the litigation cases arising from the resolution of Banco Popular. Section 4 examines the challenges faced by the SRB with resolution planning. Section 5 concludes.

## 2. LOOKING BACKWARDS

This section discusses from a legal perspective how the SRB, over the past years, has performed against the main goals it was supposed to accomplish, in light of the the decisions taken so far.

### 2.1 SRB Decisions

As of 18 March 2019, the SRB has made five decisions on resolution, regarding the fulfillment of the requirements requested by the legislation to submit a 'failing or likely to fail' institution to resolution (or liquidation):

- 1) Banco Popular Español S.A., adopted on 7 June 2017
- 2) Banca Popolare di Vicenza S.p.A., adopted on 23 June 2017
- 3) Veneto Banca S.p.A., adopted on 23 June 2017
- 4) ABLV Bank A.S., adopted on 23 February 2018
- 5) ABLV Bank Luxembourg S.A., adopted on 23 February 2018.<sup>1</sup>

In these cases, the SRB reached different conclusions as to whether the conditions for resolution were or were not met. Only with regard to Banco Popular Español S.A. did the SRB determine that the resolution procedure was in the public interest, whereas in all the other four cases, the public interest test was not met and therefore the 'failing or likely to fail' institutions have been submitted to insolvency proceedings according to their national laws.

#### 2.1.1. Banco Popular

The decision to resolve Banco Popular Español S.A. is the only resolution action taken by the Single Resolution Board so far. On 6 June 2017, the European Central Bank (ECB) decided that the bank was 'failing or likely to fail' and on June 7, the SRB decided to submit the institution to resolution.<sup>2</sup> The SRB and the Spanish National Resolution Authority considered that the resolution action was in the public interest as it would protect all depositors and ensure financial stability in Spain and Portugal.<sup>3</sup> The resolution action, based on a provisional valuation of the assets and liabilities of Banco Popular, performed by Deloitte,<sup>4</sup> was a combination of a write down and the conversion of capital instruments

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<sup>1</sup> For a detailed analysis of the cases see Lastra, R. – Olivares-Caminal, R. – Russo, C. (2017).

<sup>2</sup> See SRB, (2017b).

<sup>3</sup> *Ibid.*

<sup>4</sup> See Deloitte, (2017); see also Lastra, R. – Olivares-Caminal, R. (2018).

with the sale of business tool, as a consequence of which the new shares were sold to Banco Santander S.A. for the price of EUR 1.<sup>5</sup>

### 2.1.2. Banca Popolare di Vicenza and Veneto Banca

On 23 June 2017, the ECB decided that both Banca Popolare di Vicenza and Veneto Banca were 'failing or likely to fail' as they repeatedly breached supervisory capital requirements.<sup>6</sup> Consequently, the two banks were submitted to liquidation under the Italian insolvency law on the basis of the lack of public interest for resolution, as decided by the SRB. The SRB's decision was grounded on the consideration that the functions performed by the two banks (deposit-taking, lending activities and payment services) were not deemed to be critical since they were provided to a limited number of third parties and could be replaced in an acceptable manner and within a reasonable timeframe. Therefore, their failure was not considered likely to result in significant adverse effects on financial stability, particularly due to their limited financial and operational interconnections with other financial institutions. Two days after the SRB's decision, the Commission approved state aid measures in order to facilitate the liquidation of the two institutions and to avoid a 'serious impact on the real economy'.<sup>7</sup>

### 2.1.3. ABLV Bank and ABLV Bank Luxembourg

On 23 February 2018, the ECB concluded that both ABLV Bank A.S. (parent company) and ABLV Bank Luxembourg S.A. (subsidiary) were 'failing or likely to fail' since there were objective elements to support a determination that the two institutions would, in the near future, have been unable to pay their debts and other liabilities.<sup>8</sup>

The SRB in turn considered that, given the particular characteristics of the two banks and their specific financial and economic situation, resolution action was not necessary in the public interest. This conclusion was based on the following grounds: a) the functions performed by the banks - deposit-taking, lending activities and payment services - were not critical since their discontinuance would have led neither to the disruption of services that were essential to the real economy of Latvia and Luxembourg nor to the disruption of financial stability in Latvia, Luxembourg or in other Member States; and b) the failure of the banks was not likely to result in significant adverse effects on financial stability in Latvia, Luxembourg or in other Member States taking into account, in particular, the low financial and operational interconnections with other financial institutions. Therefore, it was decided that the banks would not be submitted to resolution. The two decisions were addressed to the National Resolution Authorities in Latvia and Luxembourg, the Financial and Capital Market Commission and the Commission de Surveillance du Secteur Financier, respectively, which proceeded to implement them in accordance with the national law.<sup>9</sup> However, on 9 March 2018, the Tribunal de Commerce de

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<sup>5</sup> See SRB, (2017b).

<sup>6</sup> See ECB, (2017); the ECB's decision was surprising also in light of the fact that both banks were already issuing bonds with Italian State guarantees under article 32.4(d)(ii) of the BRRD on the grounds of being considered as solvent.

<sup>7</sup> See European Commission, (2017a) and European Commission, (2017b). In its decision, the Commission seems to have relied considerably on the assessment made by the Bank of Italy on the negative consequences of the credit crunch. According to the Bank of Italy, (point 49 of the Commission's decision), the atomistic liquidation without public support can cause relevant losses 'to non-professional and non-protected customers, as well as the sudden termination of credit relationships for both households and SMEs. This would lead to the disorderly wind down of the institutions, causing disturbance in the economy, especially at local level... The credit crunch could hit around 55,000 firms for an aggregated shortfall of ca. 22bn, without taking into consideration the second round effects'.

<sup>8</sup> SRB, (2018c); SRB, (2018d).

<sup>9</sup> *Ibid.*

Luxembourg decided 'to refuse the request to place ABLV Bank Luxembourg S.A. in liquidation' and appointed two external administrators.<sup>10</sup>

## 2.2 Complex institutional design

The institutional design of the Banking Union is complex, due to the involvement in the decision-making process of several authorities and institutions (both national and European) with different backgrounds and core functions. The SSM, the first pillar of the Banking Union, allocates supervisory functions between the ECB and the National Competent Authorities (NCAs); symmetrically, the SRM, namely the second pillar of the Banking Union, requires the collaboration between the SRB and the National Resolution Authorities (NRAs). In turn, both the institutions and authorities within the SSM, and the ones within the SRM, are meant to closely cooperate with each other in order to guarantee the soundness of the banking system, on the assumption that 'supervision and crisis management are part of a seamless process'.<sup>11</sup>

The ECB works together with the European Banking Authority (EBA) and shares macro-prudential responsibilities with the European Systemic Risk Board (ESRB). It also interacts with other European entities, notably the European Stability Mechanism (ESM). Finally, the role of the ECB in early intervention needs further clarification.<sup>12</sup>

While Article 114<sup>13</sup> of the Treaty on the Functioning of the the European Union (TFEU) was the only available legal basis to establish the SRB, it could be argued that this has contributed to institutional complexity. This legal basis is controversial and has been criticised by some as inadequate in light of the *Meroni* doctrine.<sup>14</sup> In the *Meroni* judgment of 1958,<sup>15</sup> the Court of Justice of the European Union (CJEU) declared inadmissible under EU law the delegation of discretionary powers to bodies that are not established under the (now defunct) European Coal and Steel Community (ECSC) Treaty. New bodies with discretionary powers can only be established by the Member States by a transfer of competences in the way of a Treaty amendment but not by normal secondary legislation. Therefore, the *Meroni* doctrine requires a basis in primary law for authorities with discretionary powers.<sup>16</sup> Although the establishment of the three European Supervisory Authorities (ESAs) was also based on Article 114 TFEU, the establishment of an SRM, including a Single Resolution Fund (SRF), is substantially different from the ESAs.<sup>17</sup> This complexity derives from a relatively different balances of competence between

<sup>10</sup> See Reuters, 'Court rules Latvian bank ABLV may keep Luxembourg branch', 10 March 2018, available at <https://uk.reuters.com/article/uk-latvia-bank-luxembourg/court-rules-latvian-bank-ablv-may-keep-luxembourg-branch-idUKKCN1GM0HQ>.

<sup>11</sup> Lastra, R. (2015), 366.

<sup>12</sup> See letter by Danièle Nouy to the European Parliament of 24 January 2018 <[https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter180125\\_Lamberts\\_Urtasun.en.pdf?476e748bf9f81e84e8d2d3c96f14635](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter180125_Lamberts_Urtasun.en.pdf?476e748bf9f81e84e8d2d3c96f14635)> "[T]here is a significant overlap between the early intervention measures in Article 27(1) of the Bank Recovery and Resolution Directive (BRRD) and the "regular" supervisory measures in Article 16 of the SSM Regulation, meaning that a number of measures could be adopted either as early intervention or as supervisory measures." "From the ECB's perspective, such amendments to the legal framework for early intervention would be crucial in ensuring a clear escalation ladder of supervisory action and enhancing the role early intervention could play as a crisis prevention measure."

<sup>13</sup> Art 114 allows the EU to adopt measures for the approximation of national provisions laid down by law, regulation or administrative action aiming at the establishment and functioning of the Internal Market.

<sup>14</sup> Lastra, R. (2015).

<sup>15</sup> Case C-9/56 and 10/56, *Meroni v High Authority* [1957/1958] ECR 133.

<sup>16</sup> Under *Meroni* and *Romano*, the CJEU's two main concerns were the attribution of discretionary powers to an entity not foreseen in the Treaty and the absence of judicial review of its acts.

<sup>17</sup> In this context, the recent judgment of the European Court of Justice in a case on the implementing powers of the European Securities Market Authority (ESMA) – in relation to the UK challenge against the short-selling prohibition powers of ESMA – may be relevant [Case C-270/12, 22-01-2014] by providing a 'mellowing' of the *Meroni* doctrine and perhaps opening up new possibilities. See <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-01/cp140007en.pdf>. The word 'mellowing' is used by Pelkmans, J. – Simoncini, M. (2014).

ESAs, the SSM and the SRB. In the case of the SRB, the decision making process involves the Council and the Commission.<sup>18</sup>

A further layer of complexity arises from the fact that the ‘failing or likely to fail’ assessment can be made by both the ECB and the SRB. Under article 18 of SRMR, the assessment of the ‘failing or likely to fail’ condition has to ‘be made by the ECB, after consulting the Board’. Article 18 of the SRMR also states that such an assessment can be made by the SRB itself ‘after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of that information, does not make such an assessment’. The reason why the legislation assigns this important function to both the ECB and the SRB likely rests on the need to have in place a reactive system allowing resolution to start when either the supervisory authority or the resolution authority (and not necessarily both) find that an institution is ‘failing or likely to fail’. As regards the use of the SRF resources, the SRM Regulation is complemented by an Intergovernmental Agreement (IGA) between Member States that participate in the SSM on the transfer and mutualisation of contributions into the SRF.<sup>19</sup> During the build-up period of the SRF, bridge financing is available from national sources, backed by bank levies, or from the ESM, in accordance with agreed procedures. The SRB is the owner of the SRF and is responsible for its administration under the delegated acts adopted by the European Commission.<sup>20</sup> The SRF is financed through contributions by the financial institutions which are subject to the SRM. The target size of the Fund should be at least 1% of covered deposits in the banking system of the participating Member States. During the ten-year initial build-up period of the Fund, the contributions of the financial institutions shall be raised at the national level and flow into ‘national compartments’ of the SRF, which shall be used only for the resolution of banks in the respective Member State. This means that during the build-up period, the SRF consists of national compartments. These national compartments shall be gradually merged. While the cost of resolving banks would mainly come from the ‘national compartments’, during the first years this national share would gradually decrease as the contribution from other countries’ compartments increases.

As discussed below, the interaction with competition authorities and DG Comp (European Commission – Directorate General for Competition) further complicates the institutional design. The level of complexity affecting the system is rather clear and even more evident if compared to the US system where most of the activity in the area of resolution is performed by one agency, the Federal Deposit Insurance Corporation, (FDIC), with competences in the areas of resolution and deposit insurance (the second and third pillars of banking union).<sup>21</sup>

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<sup>18</sup> For instance, if the SRB considers that all the resolution conditions are met, it will adopt a resolution scheme and transmit such a scheme to the European Commission. The Commission can then (1) either endorse the resolution scheme within 24 hours, or object to it, and/or (2) propose to the Council within 12 hours that it should object to the resolution scheme. This means that the Council will only be involved in considering a resolution plan if the European Commission submits such request. If any objections to the scheme are raised, the SRB shall have eight hours to adjust its resolution scheme. And if no objections are expressed by the European Commission or the Council, the scheme enters into force 24 hours after it has been transmitted to the Commission. See also Article 16(5) SRMR. The 24-hour long period given to the Commission to object the decision of the SRB is also important to ensure compliance with the *Meroni doctrine* (*Meroni v High Authority* [1957 & 1958] ECR 133 Case 9/56).

<sup>19</sup> The Intergovernmental Agreement (IGA) on the Transfer and Mutualisation of Contributions to the Single Resolution Fund was signed on 21 May 2014. The rationale for establishing this SRF on the basis of a separate IGA instead of secondary legislation based on TFEU was due to concerns about the legality of this latter method. See [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/140190.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/140190.pdf). See <http://www.europarl.europa.eu/news/en/newsroom/content/20140109IPR32201/html/MEPs'-statement-on-the-work-on-the-single-resolution-mechanism-for-banks>. Ferran, E. (2014) states: “The high political salience of burden sharing risks helps also to explain the bifurcated approach to the establishment of the SRF, which is effected in part by means of the SRM Regulation (working in conjunction with the BRRD) and in part by the SRF-IGA”. Ferran also points out that certain passages in the IGA “are designed to insulate the arrangements from the type of legal challenge that the ESM (also established by an intergovernmental agreement) faced”.

<sup>20</sup> See articles 64(3) and 70(1) of the SRM Regulation.

<sup>21</sup> See Ferran, E. (2014).

### 3. LOOKING FORWARD – CHALLENGES AHEAD

The SRB faces a number of challenges going forward, including a 'dichotomy'<sup>22</sup> between resolution and liquidation, the interpretation of the concept of 'public interest', the interplay between the state aid legal framework and the resolution regime with regard to public intervention and a multi-layered system of litigation, as exemplified by the claims against the Banco Popular's resolution decision.

#### 3.1 The 'dichotomy' between resolution and liquidation

The current SRMR/BRRD regime is based on the 'dichotomy' of resolution *vis-à-vis* liquidation. Such a 'dichotomy', along with fragmented national insolvency regimes (that coexist with the EU rules), create inconsistencies in the implementation of the resolution schemes, paving the way to multi-layered litigation as further discussed below. If a bank is 'failing or likely to fail', the default option is its submission to a winding-up proceeding (liquidation) according to the national law of the State where the institution is established. However, if its submission to liquidation is deemed to be able to (mainly) endanger the stability of the system, then, on the grounds that there is a public interest to protect, such an institution needs to be resolved instead.<sup>23</sup>

The *discrimen* between these two alternative options is the presence of a public interest to safeguard, or a lack thereof. And the underlying rationale is that resolution is deemed to be more effective in meeting such public interest. Public interest in this context seems to be principally connected with the need to maintain financial stability, or in negative terms, to avoid instability. Thus, resolution authorities have been given the difficult task of ascertaining *ex ante* whether the crisis of a given bank and its ensuing liquidation create financial instability.<sup>24</sup> When this is the case, the resolution authorities are supposed to submit such a bank to resolution instead of liquidation.<sup>25</sup> This is a complex task and the European Court of Auditors (ECA) has underlined that in many resolution plans drafted by the SRB there is neither substantial discussion on the reasons why liquidation is not considered a credible solution, nor on the reasons why the SRB thinks that liquidation cannot achieve the resolution objectives.<sup>26</sup> Accordingly, and with a view to reducing the risk of litigation, more specific criteria on how to inform the choice between the two procedures might be particularly helpful. In this vein, the determination of some thresholds above which the public interest is presumed (and therefore resolution should be adopted) could provide the system with more legal certainty. Obviously, such thresholds would reduce the discretion of the resolution authorities, since they would be in this way guided in their choice. The advantage would be to know well in advance what should be the crisis management procedure to apply in case of a failing or likely to fail condition. A similar approach has been developed by the Bank of England, that 'considers that provision of fewer than around 40,000 to 80,000 transactional bank accounts (accounts from which withdrawals have been made nine or more times within a three-month period) is generally likely to indicate that a modified insolvency would be appropriate'.<sup>27</sup> Such thresholds could also be designed to be only indicative. Nevertheless, their determination could still

<sup>22</sup> During his presentation of the FSAP Euro Area findings at Queen Mary University of London (QMUL) – Centre for Commercial Law Studies (CCLS), Mr Atilla Arda used the expression "false dichotomy" to indicate how the relation between liquidation and resolution is often fluid; see Arda, A. (2019). Recent cases (*id est* Banco Popular, Veneto Banca and Banca Popolare di Vicenza) have shown that the two procedures are more similar than normally understood.

<sup>23</sup> See Bodellini, M. (2018).

<sup>24</sup> See Wojcik, K. (2016), 98, arguing that such an assessment involves a significant degree of discretion.

<sup>25</sup> See Ringe, G. (2016), 5, on the consensus that traditional bankruptcy procedures are not appropriate to deal with failing global banks; see also Guynn, R. (2012), 137-140, on how bankruptcy intervention erodes the bank's value exacerbating losses for creditors.

<sup>26</sup> See ECA, (2017), 23.

<sup>27</sup> See Bank of England, (2018), 5.

provide some clearer indication of what 'public interest' concretely means and when such a criterion can actually be met.

In a similar vein, the IMF has underlined that the alignment of concepts such as 'solvency', 'financial stability' and 'public interest', as well as their meaning would provide greater consistency in the implementation of the the resolution regime.<sup>28</sup> Even though so far the two options (resolution *vis-à-vis* liquidation) have been considered as two alternative procedures to activate in different scenarios in light of the presence or absence of 'public interest', looking back at some recent cases we can argue differently.

The submission of a 'failing or likely to fail' bank to resolution is meant to achieve one or more resolution objectives: i) to ensure the continuity of critical functions, ii) to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline, iii) to protect public funds by minimising reliance on extraordinary public financial support, iv) to protect depositors and investors; and v) to protect client funds and client assets. The balanced consideration of these different and potentially conflicting objectives can be seen as 'the public interest' that the resolution authorities as well as the new regime are required to protect. However, the cases of Banco Popular in Spain and of Veneto Banca and Banca Popolare di Vicenza in Italy showed that in practical terms the dividing line between liquidation and resolution can be very thin.

Banco Popular was resolved on the assumption that its liquidation would have not been able to meet the public interest to the same extent as resolution. Consequently, its shares and its Additional Tier 1 (AT1) instruments were written down, its Tier2 instruments were converted into shares and these new shares were sold to Santander for only EUR 1. But the successful execution of this resolution scheme was possible only because Santander decided to purchase Banco Popular (for EUR 1) and take on the considerable mismatch between the assets and liabilities of the resolved entity. To comply with the capital requirements rules, in the following months, Banco Santander had to raise more than EUR 7 billion to fill the gap.

In contrast, Veneto Banca and Banca Popolare di Vicenza were wound up according to the Italian banking insolvency law on the grounds that resolution was not considered to be needed to meet the public interest. This was justified by the SRB on the assumption that the winding up of the two banks under the Italian insolvency law was regarded as equally apt to reach the resolution objectives. However, the liquidation of these two banks did not affect the stability of the system, because the State intervened by providing an extraordinary amount of public resources. Italy granted a large package of state aid measures, in the form of a) cash injections of about EUR 4.785 billion to Intesa San Paolo; and b) State guarantees of a maximum of about EUR 12 billion, notably on Intesa's financing of the liquidation mass.<sup>29</sup>

The main difference between the Spanish case and the two Italian cases does not concern the procedure (resolution or liquidation), but rests on the existence, or lack thereof, of a private player willing to buy the ailing banks.<sup>30</sup> No private player was found in the two Italian cases with the result that the insolvency burden could only be borne by the State (along with shareholders and

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<sup>28</sup> See IMF, (2018), 27.

<sup>29</sup> See European Commission, (2017b); see also Lastra, R. – Olivares-Caminal, R. – Russo, C. (2017), 17.

<sup>30</sup> See Santander, (2017), where it is said that the amount raised through the issuance of new shares 'will support the acquisition of Banco Popular, which is expected to deliver a return on investment of 13-14% by 2020'.



subordinated creditors). Therefore, the public intervention was probably seen (at least by the Commission) as needed in order to avoid financial instability and a serious disturbance in the economy.<sup>31</sup> Thus, the authorities controversially opted for a publicly funded liquidation, possibly because in case of resolution, the involvement of the SRF and the injection of public resources would have required the previous application of bail-in to at least 8% of the bank's liabilities (and in the case of the SRF's intervention, the provision of its resources could not exceed the limit of 5% of the bank's liabilities). These strict requirements do not apply in the event of a winding-up, with the only requisite to comply being – according to the Commission's Banking Communication 2013 – that shareholders and subordinated creditors bear the losses before the use of public money takes place.

The outcome of the two alternative procedures is substantially equivalent and the real *discrimen* does not appear to lie in the presence or absence of a public interest but rather in the source of money employed to bear the cost of insolvency in order to maintain financial stability. Thus, when a private market solution is not available and the strict application of bail-in is considered socially and politically unacceptable, the authorities might prefer liquidation over resolution.

### 3.2 Interpretation of 'public interest'

The correct interpretation of the concept of 'public interest' is a challenge for all the institutions and authorities involved in the crisis management process.

In the context of the new SRMR/BRRD regime the concept of 'public interest' plays a very significant role. A number of elements suggest that in practical terms the 'abstract' and 'vague' concept of 'public interest' is primarily identified with the concept of 'financial stability'.

#### 3.2.1. 'Public interest' and resolution

Public interest is the element upon which the decision of the resolution authorities as to whether to resolve or to liquidate a 'failing or likely to fail' institution is based. The new rules clearly state that the default option in the case of a 'failing or likely to fail' institution is its submission to winding-up according to the law of the Member State where such institution is based.<sup>32</sup> However, if liquidation is not deemed to be able to achieve the resolution objectives, then the authorities should resolve the institution.

Article 32(5) of BRRD and Article 18(5) of SRMR specify that 'a resolution action shall be treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives ... and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent'. The two provisions link the public interest with the achievement of one or more resolution objectives on the assumption that it might be sometimes impossible to reach all of them. In this scenario, it seems that what the resolution authorities mainly contemplate to inform their decision is the ability of the liquidation procedure to negatively affect the stability of the system.

Recital 45 of the BRRD ranks the objectives of the resolution procedure: i) ensure the continuity of critical functions, ii) avoid adverse effects on financial stability, iii) protect public funds by minimising

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<sup>31</sup> See European Commission, (2017a).

<sup>32</sup> Namely article 32 of BRRD and Article 18 of the SRMR.

reliance on extraordinary public financial support to failing institutions and iv) protect covered depositors, investors, client funds and client assets.<sup>33</sup> It is not a coincidence that the continuity of critical functions and the avoidance of adverse effects on financial stability are listed before the protection of public funds.<sup>34</sup> It follows that, although the broad meaning of public interest relates to the simultaneous achievement of one or more resolution objectives, based on the grounds that there might be cases where ‘market discipline and financial stability cannot be achieved simultaneously’,<sup>35</sup> then the public interest should be identified primarily with the maintenance of financial stability, which in turn might require the use of public resources.<sup>36</sup>

### 3.2.2. ‘Public interest’ and bail-in

Additionally, public interest is also used as a ‘cap’ to limit the application of the bail-in tool when this might negatively impact the stability of the financial system in the Member States concerned or in the rest of the Union.<sup>37</sup> Under article 44(3) of the BRRD, resolution authorities are given the power to exempt some liabilities from the application of bail-in, when the use of this tool is likely to create financial instability.<sup>38</sup> Once again, the public interest is associated with the stability of the financial system.<sup>39</sup>

### 3.2.3. ‘Public interest’ and Government financial stabilisation tools

A reinforced version of public interest also justifies the application of the two Government financial stabilisation tools, namely the public equity support tool and the temporary public ownership tool, mentioned in articles 56, 57 and 58 of the BRRD. These tools can only be applied by National Governments (subject to the authorisation of the Commission) in particularly serious situations when the crisis of a bank can undermine the financial stability of the system as a whole. Additionally, they can be used only after the application of the bail-in tool to at least 8% of the bank’s liabilities.<sup>40</sup> In practice, these situations could be either the crisis of a large bank or a systemic crisis. Such interpretation seems to be confirmed by Recital 57 of the BRRD, which states that the Commission when considering the Government stabilisation tools, in light of Article 107 TFEU, should also assess whether ‘there is a very extraordinary situation of a systemic crisis justifying resorting to those tools ...’.

### 3.2.4. ‘Public interest’ and precautionary recapitalisation

In a similar vein, ‘public interest’ also allows for the application of the so-called precautionary recapitalisation under article 32(4) of the BRRD.<sup>41</sup> The ECB has defined precautionary recapitalisation, as ‘the injection of own funds into a solvent bank by the state when this is necessary to remedy a serious disturbance in the economy of a Member State and preserve financial stability. It is an exceptional

<sup>33</sup> Recital 45 of BRRD and Recital 58 of SRMR, even though similar, use a different wording.

<sup>34</sup> Accordingly see SRB, (2017b), 4, where it is clearly stated that the SRB’s mission is to ensure ‘an orderly resolution of failing banks with minimum impact on the real economy, the financial system, and the public finances of participating Member States and beyond’.

<sup>35</sup> See Biljanovska, B. (2016), 105-106.

<sup>36</sup> See Dewatripont, M. (2014), 34, 37.

<sup>37</sup> See Recital 72 and Recital 83 of the BRRD.

<sup>38</sup> This is confirmed by Recital 4 of the Commission Delegated Regulation (EU) 2016/860 of 4 February 2016 specifying further the circumstances where exclusion from the application of write-down or conversion powers is necessary under Article 44(3) of Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms. It states that ‘The decision to use the bail-in tool (or other resolution tools) should be taken to achieve the resolution objectives in Article 31(2) of Directive 2014/59/EU. In the same vein, those resolution objectives should also inform the decisions regarding the use of the tool, including the decision to exclude a liability or class of liabilities from the application of bail-in in a given case’.

<sup>39</sup> See Bodellini, M. (2018), 377.

<sup>40</sup> See Tröger, T. (2015), 590, arguing that the fact that such stabilisation tools can be used only after the application of bail-in at least to 8% of the liabilities may have destabilising effects by accelerating ‘the ride to Armageddon’. Interestingly, the Author suggests that the extent to which bail-in is used should be subject to a systemic exception.

<sup>41</sup> See Olivares-Caminal, R. – Russo, C. (2017).



measure that is conditional on final approval under the European Union state aid framework. It does not trigger the resolution of the bank'.<sup>42</sup> This means that precautionary recapitalisation can take place when a bank, although needing to be recapitalised, is not deemed to be 'failing or likely to fail'. The underlying assumption justifying the public intervention is that the capital shortfall of such a bank could quickly deteriorate as a consequence of 'a serious disturbance in the economy' of a member state and, then, create financial instability.<sup>43</sup> Therefore, it is not a tool to use during the resolution of a failing bank. This means that this instrument can be used without the need for resolving the bank with the strict application of the bail-in tool.

### 3.2.5. Criteria to define 'public interest'

In the context of bank crisis management, financial stability is the main component of public interest, that is a public good *per se* that must be considered by the institutions involved.<sup>44</sup> We advocate the adoption of more specific criteria to facilitate the consistent interpretation of the concept of 'public interest' as well as its coherent application by the authorities in order to reduce the risk of litigation. These criteria could take the form of quantitative thresholds above which the 'public interest' is presumed and therefore resolution should be adopted in case of 'failing or likely to fail' condition. As mentioned earlier in this study, the Bank of England 'considers that provision of fewer than around 40,000 to 80,000 transactional bank accounts (accounts from which withdrawals have been made nine or more times within a three-month period) is generally likely to indicate that a modified insolvency would be appropriate'.<sup>45</sup> Such an approach could be adopted also with regard to different indicators, such as amount of assets, amount of protected deposits, amount of liabilities held by other financial institutions and so on.

## 3.3 Interplay between state aid and resolution regimes with regard to public intervention

Misalignments between the state aid regime rules and the BRRD/SRMR regime rules on public intervention give Member States incentives to avoid resolution. The provision of public resources can incoherently take place more easily in the context of liquidation than in resolution. This can lead to inefficient and ineffective solutions. Therefore, we advocate the alignment of the state aid regime with the rules of the BRRD/SRMR regime with regard to public intervention.

### 3.3.1. State aid regime

The EU rules on state aid – the other side of the coin of the competition regime – limit the possibility for a Member State to intervene in the banks' rescue by using public money.<sup>46</sup> The rationale behind this limitation is rooted in the need to ensure that firms established in different member states can equally compete among each other without relying on public resources. However, this general rule is subject to a few exceptions. Article 107 TFEU states that any state aid is incompatible with the internal market,<sup>47</sup>

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<sup>42</sup> ECB, (2016).

<sup>43</sup> See Bodellini, M. (2017), 155-162.

<sup>44</sup> See Arner, D. (2007), 72, who defines financial stability as 'the primary target in preventing financial crises and reducing the severe risks of financial problems which do occur from time to time'; see Andenas, M. – Chiu, I. (2013), 342–343, defining it as a general policy objective that should guide regulators and policymakers.

<sup>45</sup> See Bank of England, (2018).

<sup>46</sup> See Dewatripont, M. (2014), 40, pointing out that the EU is 'the only jurisdiction in the world with State Aid Control policies'.

<sup>47</sup> Article 107(1) TFEU provides for a general prohibition of any aid granted by a Member State: 'save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by

unless it qualifies as one of the narrow exceptions set out in Article 107(2) TFEU,<sup>48</sup> or unless it has been approved by the Commission for one of the reasons set out in Article 107(3) TFEU.<sup>49</sup> In relation to the banking sector, the most conceivable justification to allow public intervention, according to Article 107(3)(b) TFEU, has been ‘... to remedy a serious disturbance in the economy of a Member State’. In other words, the primary goal of remedying a serious disturbance in the economy of a member state can be achieved also by using public resources.

Between 2008 and 2011, the Commission adopted six communications to clarify the criteria to use in assessing the compatibility of state aid with the provisions of the TFEU.<sup>50</sup> Then, in 2013, in light of the adoption of the new regulatory architecture, namely the Banking Union and the new bank resolution regime, the Commission published the 2013 Banking Communication,<sup>51</sup> also providing for the application of the ‘burden sharing’ mechanism<sup>52</sup> to subordinated creditors and requesting the adoption of a restructuring plan to be approved before obtaining the aid.<sup>53</sup> Accordingly, state aid can be given only if equity and subordinated debt holders are involved in absorbing the losses through the conversion and/or the write down of their instruments. However, the Commission has also always stressed that its main goal in the state aid authorisation process in the banking sector is to ensure financial stability.<sup>54</sup> For this reason, it also has the power to exclude the application of the burden sharing mechanism when this ‘would endanger financial stability or lead to disproportionate results’.<sup>55</sup>

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favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market’.

<sup>48</sup> Article 107(2) provides that ‘the following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and, (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point’.

<sup>49</sup> Article 107(3) of the TFEU establishes that ‘the following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; and, (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission’.

<sup>50</sup> These are the so-called ‘Crisis Communications’: 1) Communication from the Commission of 25 Oct. 2008 on the application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (‘2008 Banking Communication’), O.J. 2008, C 270/8; 2) Communication from the Commission of 15 Jan. 2009 on the recapitalization of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (‘Recapitalization Communication’), O.J. 2009, C 10/2; 3) Communication from the Commission of 26 March 2009 on the treatment of impaired assets in the Community financial sector (‘Impaired Assets Communication’), O.J. 2009, C 72/1; 4) Communication of the Commission of 19 Aug. 2009 on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the state aid rules (‘Restructuring Communication’), O.J. 2009, C 195/9; 5) Communication from the Commission of 7 Dec. 2010 on the application, from 1 Jan. 2011, of state aid rules to support measures in favour of financial institutions in the context of the financial crisis (‘2010 Prolongation Communication’), O.J. 2010, C 329/7; 6) Communication from the Commission of 6 Dec. 2011 on the application, from 1 Jan. 2012, of state aid rules to support measures in favour of financial institutions in the context of the financial crisis (‘2011 Prolongation Communication’), O.J. 2011, C 356/7.

<sup>51</sup> Communication from the Commission of 30 July 2013 on the application, from 1 August 2013, of state aid rules to support measures in favour of banks in the context of the financial crisis (‘Banking Communication’), O.J. 2013, C 216/1.

<sup>52</sup> See European Parliament, (2017), 3, stressing that burden sharing ‘means that the costs of a bank rescue should be minimised by the contributions from shareholders, creditors (through voluntary liability management exercises and a coupon and dividend ban), managers as well as the bank itself (for instance through the sale of assets and various cost reductions)’.

<sup>53</sup> See Lo Schiavo, G. (2014), 442, arguing that ‘burden sharing entails that the aid shall be limited to the minimum necessary and that the beneficiary undertakes the required level of ‘own contribution’ in order to receive the State aid’.

<sup>54</sup> See Micossi, S. – Bruzzone, G. – Casella, M. (2014), 4,

<sup>55</sup> 2013 Banking Communication (point 45). Hadjiemmanuil, C. (2016), 100, argues that the 2013 Banking Communication ‘is framed in terms sufficiently flexible for enabling the approval of almost every conceivable solution by way of exception’.

### 3.3.2. Resolution regime

According to the SRMR/BRRD regime, public intervention in the resolution procedure can take place only after a substantial application of the bail-in tool, affecting at least 8% of the bank's liabilities. As a consequence, the creditors most likely to be affected by the bail-in tool (before the injection of public resources can take place) are not only the subordinated creditors, as under the Banking Communication 2013, but also more senior creditors.

### 3.3.3. The issues arising from misalignments between the two regimes

The two regimes (the BRRD/SRMR resolution regime and the state aid regime, according to the Banking Communication 2013) have misalignments in regard to the conditions for the use of public money in the event of a bank crisis. The Commission and the SRB seem to have a different understanding of the meaning of 'financial stability' and, in general, of the concept of 'public interest'.<sup>56</sup>

The two regimes are based on different rationales. The primary goal of DG Comp is to ensure the fair competition between firms established in different member states, and in turn protect the integrity and well-functioning of the EU internal market. In doing so, the Commission assesses whether the provision of state aid measures can unfairly advantage a firm to the detriment of others. Nevertheless, considering the peculiarities of the banking sector, the Commission is also supposed to take into account the risk to financial stability arising from a bank's failure. As a consequence, the Commission is requested to strike a balance between these two legitimate but potentially conflicting objectives when it decides whether or not to authorise public intervention.

The 2013 Banking Communication only provides for burden sharing as a precondition for obtaining state aid. This is different from what is provided under the BRRD/SRMR regime whose rationale is to make possible the effective resolution of banks, thereby allowing for the continuation of their critical functions, avoiding negative effects on financial stability and protecting depositors and investors, without using taxpayers' money. Under the resolution regime, the use of public money can occur only after a strict application of the bail-in tool has taken place (*id est* at least to 8% of the bank's liabilities).<sup>57</sup> The Commission's DG Comp thus uses the concepts of 'financial stability' and 'public interest' as the basis to authorise or deny state aid measures, whereas, the SRB considers financial stability to be the main component of that 'public interest' that, in turn, should be the *discrimen* between resolution and liquidation.

A different understanding of these concepts helps explain the inconsistency between the decision of the SRB to submit Veneto Banca and Banca Popolare di Vicenza to liquidation on the grounds of the lack of public interest and the following decision by the Commission to authorise Italy to provide state aid measures for conducting an orderly liquidation of the two banks. Their submission to liquidation is due to the fact that the SRB found that there was no public interest to safeguard through their resolution, namely the risk of creating adverse effects on financial stability. By contrast, the Commission must have found that the use of public money was needed to orderly manage the two banks' liquidation according to point 65 of the 2013 Banking Communication, since otherwise the insolvency proceedings could have negatively affected the stability of (at least) the banks' main territories of business. In addition to this inconsistency, in these two cases, financial stability was preserved not

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<sup>56</sup> On this point, the IMF is of the view that the alignment of concepts such as 'solvency', 'financial stability' and 'public interest', as well as of their meaning would help unify the regime; see IMF, (2018), 7.

<sup>57</sup> See articles 56, 57 and 58 of the BRRD.

because of the effectiveness of the insolvency proceedings under the Italian law but because of the use of a large amount of public resources.

These misalignments create incentives to prefer liquidation – with the provision of taxpayers' money – over resolution.<sup>58</sup> They are also a departure from the Financial Stability Board's Key Attributes on Effective Resolution Regimes which expressed a broad disapproval of the use of public funds.<sup>59</sup> The risk of a more relaxed approach to the provision of public funds in liquidation (as opposed to resolution) reinforces the need to align the two regimes (state aid Framework and BRRD/SRMR) in relation to the conditions for public intervention.

The wish to avoid the politically and socially burdensome application of the bail-in tool, which can negatively affect many retail investors as well as depositors (with deposits over EUR 100,000), is an incentive for national authorities to prefer (a publicly funded) liquidation over resolution. Retail investors might not have a clear understanding of the risks embedded in bonds and other debt instruments and, additionally, they might have bought such debt instruments before the introduction of bail-in into the legal system.

Since national insolvency laws vary across Member States this can result in a differential treatment of creditors depending on where the procedure takes place.<sup>60</sup> The unacceptable outcome is that some creditors might be better off in liquidation compared to what they would receive in the case of resolution, even if the aggregate cost (for the State) is higher. This also creates an uneven playing field for banks' funding costs.<sup>61</sup> Highlighting these shortcomings, the IMF recommended the introduction of an administrative bank liquidation tool to be assigned to the SRB. Such a tool could reduce fragmentations along national lines arising from different domestic insolvency regimes and thereby increase the effectiveness of the EU legal framework through legislative harmonisation.<sup>62</sup>

The IMF is of the view that solutions based on a less stringent application of the burden sharing requirements, namely the ones which can be adopted in a liquidation procedure according to the 2013 Banking Communication should be restricted.<sup>63</sup> This approach should be balanced with the introduction of a financial stability exemption allowing for the disapplication of the rule providing that at least 8% of the bank's liabilities have to be bailed-in before the use of public resources is permitted. This exemption should be granted in cases of either Eurozone-wide or country-wide crisis subject to some conditions. After all the SRM has been designed to deal with idiosyncratic events. Such a financial stability exemption is necessary since under the current BRRD/SRMR regime the only flexible option is the so-called 'precautionary recapitalisation'. However, precautionary recapitalisation can take place only when the institution in question is solvent and not when flexibility is really needed, namely during a system-wide crisis when banks are typically undercapitalised.<sup>64</sup>

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<sup>58</sup> In a similar vein see SRB, (2017d), 5, where it is underlined that 'other crisis cases in 2017 also revealed the need to take a broader look at the overall regulatory framework, in particular the interplay between the Bank Recovery and Resolution Directive (BRRD), the national insolvency regimes and the rules regarding State Aid and whether incentives are set correctly'.

<sup>59</sup> See FSB, (2011), where the Board has recommended the implementation of these principles into the domestic laws in order to 'resolve financial institutions in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions'. The Financial Stability Board's main objective is therefore to allow the orderly resolution of banks without impacting the public finances as was the case in the past with bail-outs. But in so doing, the resolution authorities should also pursue the aim to avoid the creation of 'severe systemic disruption'.

<sup>60</sup> See IMF, (2018), 7.

<sup>61</sup> *Ibid.*, 27.

<sup>62</sup> *Ibid.*, 7.

<sup>63</sup> *Ibid.*, 7.

<sup>64</sup> *Ibid.*, 27.

### 3.4 'Multi-layered' Litigation

One of the challenges facing the SRB going forward is the multi-layered system of litigation, given the multiplicity of authorities and the duality of legal regimes at the national and European level involved in the resolution and insolvency process. If not streamlined, this multi-layered system of litigation will lead to: i) a multiplicity of claims - with associated significant costs (legal and economic); ii) legal uncertainty, and iii) can potentially render the resolution process less efficient and reliable creating an inefficient allocation of resources. We recommend a clear hierarchical systems of claims to avoid investors resorting to all types of litigation strategies, which not only creates inefficiencies but also compromises legal certainty and predictability. The change we propose can only happen by level 1 legislation (at the EU level) and is thus beyond the competence of the SRB. However it is a challenge for the SRB since its decisions will set in motion this multi-layered litigation.

At stake in the bank resolution process is the interaction between the public interest and the private interests of investors (shareholders and bondholders). The latter need to be protected by adequate guarantees (e.g., the right to be heard) and such guarantees cannot be sacrificed on the altar of financial stability. Given the link between supervision and resolution and the role of the ECB in early intervention, we should briefly review the growing complexity of the litigation system in both supervisory and resolution cases.

The ECB, as an EU institution, is only subject to the jurisdiction of the CJEU. Though the ECB has been taken to national courts in a number of occasions, the ECB has always successfully alleged lack of jurisdiction.<sup>65</sup> It would lead to havoc if ECB actions could be challenged in 19 national courts or in other courts. The CJEU stated in *Foto-Frost* (para 15): 'Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty'.<sup>66</sup>

This is in line with the doctrine of supremacy of EU Law over national law, developed by the CJEU since the case *Van Gend en Loos* in 1963 where it clearly stated that 'the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited field'.<sup>67</sup>

Article 35 of the European System of Central Banks (ESCB) Statute and the corresponding TFEU provision, namely Art. 271 (d) (fulfilment of obligations by National Central Banks NCBs) give exclusive jurisdiction to the CJEU on ECB monetary matters, in line with the exclusive competence the ECB has in the sphere of monetary policy of the eurozone in accordance with Art. 3(1)(c) TFEU.

In the area of prudential supervision, the interplay between NCBs/NCAs and the ECB in the SSM may make for a division of competences which, in an actual case, may be hard to decipher.<sup>68</sup> In matters related to SSM operations the issue is whom to address for review when, upon instruction by the ECB, a national authority adopted an act, and which laws to apply: is the CJEU to interpret and apply national law that the ECB has applied by virtue of Article 4.3 SSM Regulation? And what about when the ECB is

<sup>65</sup> Zilioli, C. (2016), 171-284,

<sup>66</sup> Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* EU:C:1987:452

<sup>67</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1 (Judgment of the Court of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Reference for a preliminary ruling: Tariefcommissie – Netherlands).

<sup>68</sup> <https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/>.

confronted with national law that is inconsistent with EU law (a manifestly incorrect transposition of a directive), or that is absent (non-implementation of the directive)?<sup>69</sup>

Those who would like to see an ECB decision in the area of prudential supervision reviewed have two tracks to follow: i) Request administrative review from the Administrative Board of Review of the ECB (ABoR) and thereafter challenge the resulting second decision by the ECB in court; ii) go to Court directly, bearing in mind that only the CJEU can judge the ECB.<sup>70</sup>

Though administrative review may be fast, cheap and independent, it does not amount to judicial scrutiny. As acknowledged, decisions of the SSM, SRM and ESAs have review mechanisms with similarities and differences: the ABoR of the ECB, Appeal Panel of the Single Resolution Board, Joint Board of Appeal of the ESAs. ABoR proceedings are part of a second decision making procedure and the opinion of ABoR will be known to the applicant and to the ECB but not to the outside world (unless challenged in Court).<sup>71</sup>

With regard to the administrative and judicial review of SRB cases, decisions of the SRB may be challenged before the Appeal Panel of the SRB or before the CJEU. The competence of the Appeal Panel of the SRB is determined by Article 85(3) of the SRM Regulation Only the decisions of the SRB referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) of the SRM Regulation can be the subject of an appeal before the Appeal Panel. If the contested decision is not included in the list of the decisions referred to in Article 85(3) of the SRM Regulation, the appeal will not be admissible.<sup>72</sup> Any natural or legal person, including resolution authorities, may appeal in accordance with Article 85(3) SRM Regulation.<sup>73</sup>

All decisions of the SRB that are not appealable before the Appeal Panel, pursuant to Article 86(1) SRM Regulation, can be challenged before the CJEU. This includes, for instance, decisions concerning resolution action in respect of a credit institution. Furthermore, decisions taken by the Appeal Panel may be also challenged before the CJEU. Member States and the Union institutions, as well as any natural or legal person, when the SRB decision is addressed to that person, or is of direct and individual concern to that person, in accordance with Article 86(2) SRM Regulation and Article 263 TFEU, may appeal to the CJEU.

In the case of Banco Popular,<sup>74</sup> the bank's failure was dealt by the ECB, the SRB and Fondo de Reestructuración Ordenada Bancaria (FROB), the Spanish resolution authority. Banco Popular in 2017 became the first bank to be resolved by the SRB and the ECB pursuant to the new EU resolution framework, and which was sold under that framework to Santander for EUR 1 and though it is hailed as a textbook 'good case' of resolution (since no public funds were compromised), the extent of litigation has been substantial (as exemplified in the appendix below), with administrative review and claims pending before the Spanish Courts of Justice, the CJEU and International Centre for the Settlement of Investment Disputes (ICSID). Indeed, when Banco Santander purchased Banco Popular it raised its

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<sup>69</sup> Smits, R. (2017).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> See <https://srb.europa.eu/en/node/41>.

<sup>74</sup> See <https://srb.europa.eu/en/content/banco-popular>. See Appendix - List of Claims Against Banco Popular. The Appendix deals only with Banco Popular cases, though there have been also cases concerning ABLV Bank AS and ABLV Bank Luxembourg S.A. See Della Negra, F. – Smits, R. (2019); as stated in section 3.3, actions have been put forward the SRB and the ECB decisions, namely: 1) Case T-280/18: ABLV Bank vs SRB (pending); 2) Case T-281/18: ABLV Bank vs ECB (pending); 3) Case T-282/18: Bernis and others vs SRB (pending); 4) Case T-283/18: Bernis and others vs ECB (pending).



provisions for litigation in anticipation of claims by shareholders and bondholders. There have also been complaints raised in front of the Spanish competition authority (Comisión Nacional de los Mercados y Competencia).

In terms of investor-State arbitration, in 2017 a group of Mexican investors explored litigation options over the failure of Banco Popular, which included a request for arbitration by ICSID presented by GBM Global, Sociedad Anónima de Capital Variable, Fondo de Inversión de Renta Variable et al., against the Kingdom of Spain in January 2018 for violation of the 2006 Bilateral Investment Treaty between Mexico and Spain.<sup>75</sup>

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<sup>75</sup> See <https://www.italaw.com/sites/default/files/case-documents/italaw9932.pdf>.

## 4. RESOLUTION PLANNING: WHERE TO, WHERE FROM?

The main rationale for resolution preparedness was the need to ensure the orderly failure of a financial institution and to exclude the use of public funds unless in extraordinary circumstances.

The EU legal framework related to resolution planning has been introduced for the first time with the BRRD. Article 10 and Article 12 of the BRRD entrust the competent resolution authority to draw up resolution plans at individual (art 10) or group level (art 11). While cooperation duties are established among resolution and other competent authorities, the BRRD also required the EBA to draft Regulatory Technical Standards after consulting with the ESRB.<sup>76</sup>

However, with the enactment of the SRMR the development of those plans became an operational objective of the SRB, and was immediately considered among the Board's priorities in their 2016 Working Plan<sup>77</sup>. Today, the EBA and the SRB are the main bodies responsible for developing the applicable regulatory framework, whereas the SRB and NRAs are those in charge of the drafting and the implementation of those plans. The EBA issues technical standards (ITS) for resolution plans. The latest set of ITS issued relate to the procedures, standard forms and templates for the provision of information for the purpose of drawing up a resolution plan and to the eligibility of institutions for simplified obligations in the context of recovery planning, resolution planning and resolvability assessments<sup>78</sup>. In December 2018 the EBA issued an updated version of the ITS related to the provision of information.<sup>79</sup> The SRB in turn drafts the actual plan and so far has published policies on MREL and a template related to Critical Functions<sup>80</sup>. The SRB has also developed templates for reporting requirements.<sup>81</sup> The SRB approach to Public Interest assessment is expected to be published in 2019.<sup>82</sup>

As the process of resolution planning starts with recovery planning, the SRB cooperates with the SSM/ECB as well. According to the SRB<sup>83</sup>, the final aim would be to harmonise some of the data reporting for both supervisory and resolution purposes.<sup>84</sup> In this respect, some progress has been made. The SRB elaborated their Liability Data Report and the relevant taxonomy in collaboration with the EBA.<sup>85</sup> In addition, 'An integrated Data Point Model (DPM) and an integrated XBRL taxonomy covering both the minimum data set as defined by the EBA ITS and the additional data points as defined by the SRB are provided to contain and avoid duplicate reporting by institutions under the SRB jurisdiction'.<sup>86</sup> According to the EBA, this would avoid banking institutions to be subjected to duplicate reporting.<sup>87</sup>

<sup>76</sup> In October 2018, the Commission finally implemented the latest set of EBA technical standards into Regulation 2018/1624. See COMMISSION IMPLEMENTING REGULATION (EU) 2018/1624 of 23 October 2018 laying down implementing technical standards with regard to procedures and standard forms and templates for the provision of information for the purposes of resolution plans for credit institutions and investment firms pursuant to Directive 2014/59/EU of the European Parliament and of the Council, and repealing Commission Implementing Regulation (EU) 2016/1066, in OJ L 277/1 of 7.11.2018

<sup>77</sup> SRB, (2015), 10.

<sup>78</sup> Both available here <https://eba.europa.eu/regulation-and-policy/recovery-and-resolution/implementing-technical-standards-on-procedures-forms-and-templates-for-resolution-planning>

<sup>79</sup> This is available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1624>

<sup>80</sup> "The SRM developed a common approach to enhance consistency in the identification of critical functions in resolution plans. The approach consists of a standardised template (i.e. the Critical Functions Template) with a common set of indicators and assessment fields, and associated guidance for institutions (these two documents are published on the SRB's website), complemented by policy guidance for use within the SRM.". See <https://srb.europa.eu/en/content/critical-functions-srb-approach>

<sup>81</sup> Available here: <https://srb.europa.eu/en/content/reporting>

<sup>82</sup> As stated here <https://srb.europa.eu/en/content/critical-functions-srb-approach>

<sup>83</sup> SRB, (2016), 21.

<sup>84</sup> For the views of the industry on this, see EBA, (2018), 36 under "Information already available to the competent authorities".

<sup>85</sup> <https://srb.europa.eu/en/content/liability-data-report>

<sup>86</sup> <https://srb.europa.eu/en/node/528>

<sup>87</sup> See EBA (2018), Par 29



Over the years, great progress has been made in the area. Resolution preparedness is an essential component of effective resolution<sup>88</sup> and in line with this spirit the SRB has identified a meaningful cycle of resolution planning.

Normally, the process starts with the Internal Resolution Team (IRT)<sup>89</sup> drafting the resolution plan, followed by the consultation of the ECB or NCA which includes a determination of the firm's Minimum Requirements for Own Funds and Eligible Liabilities (MREL), then the plan is submitted to the SRB's board for approval. The approved version is finally communicated to the bank.

In terms of actual content of the plan, the SRB divides the required information into several headings,<sup>90</sup> and the plan should also include the preferred resolution strategy, whether a multiple or a single point of entry. The resolvability assessment is made upon the identification of the bank critical functions as well as the credibility and feasibility of a possible wind down under national insolvency proceedings.

This will in turn assist in two important determinations included in the plan: the one on the existence of possible impediments to resolvability and the one on individual MREL. In both cases, the work of the SRB, with the strong support of the EBA, is progressing fast<sup>91</sup> and deserves a word of praise given the inherent difficulties that such a new body will inevitably face.

However challenges remain. The resolution plans for all the banks under the SRB remit were completed only at the beginning of 2019;<sup>92</sup> the timeframe for recovery and resolution is not harmonised; and overall, the resolution planning process of the SRB does not seem to have reached the desired advance stage. This has been highlighted by the EU Court of Auditors in their 2017 special Report on the SRB<sup>93</sup> and the SRB has repeatedly admitted in their working plans, as well as in their speeches before the ECON committee, that progress still needs to be made in certain specific areas, such as the operationalisation of resolution strategies and, in particular, the identification and removal of impediments to resolvability.<sup>94</sup>

The ECA depicts a particularly unfavourable picture of the SRB in relation to resolution plans. They had access to a sample of plans and their final evaluation was that there was a 'limited compliance' of the sampled resolution plans with the Single Rulebook, that there is poor communication with the relevant stakeholders, and that 'the resolution plans themselves did not meet more than a minority of the criteria applied'<sup>95</sup> by the Court on the basis of the Single Rulebook requirements. This paper also

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<sup>88</sup> See Recital (25) BRRD.

<sup>89</sup> IRTs are the main fora via which the SRB and NRAs cooperate in performing resolution activities (resolution planning and preparation of resolution schemes) at expert level. IRTs are composed of staff of the SRB and of the relevant NRAs, and are headed by coordinators appointed from the SRB's senior staff." See SRB (2016), 1.4.3

<sup>90</sup> Namely: (1) Strategic business analysis; (2) Preferred Resolution Strategy; (3) Financial and Operational Continuity in Resolution; (4) Information and Communication plan; (5) Conclusion of the Resolvability Assessment; (6) Opinion of the bank in relation to the resolution plan. See SRB, (2016), 19-20.

<sup>91</sup> See for instance on critical functions: SRB, (2017); and on the SRB policy and report on critical functions: <https://srb.europa.eu/en/content/critical-functions-report>. A full list of relevant acts from the Commission is available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A240406\\_10](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A240406_10).

<sup>92</sup> According to what Ms König briefly mentioned in a speech in Dublin ("Now that we have resolution plans in place for all of our institutions, the work of the SRB has also begun to focus on fine-tuning each plan so that it is truly ready to be sprung into action at short notice. In this context operational continuity has been considered one of the priorities of 2018 resolution planning cycle") See König (2019). However there is no clear indication of this on the SRB website and from the SRB MREL policy it seems that the planning stage will have a second wave of plans covering the most complex institutions. See <https://srb.europa.eu/en/content/mrel>

<sup>93</sup> ECA, (2017), par 24-93. The ECA has also more recently warned of the contingent liabilities that may arise due to the ongoing litigation related to the resolution cases, ECA, (2018).

<sup>94</sup> <https://srb.europa.eu/en/node/695>

<sup>95</sup> ECA, (2017), par 35.

highlighted how the criteria behind the public interest assessment appear not to be uniformly and consistently applied. The existence of a public interest is considered within the context of the credibility and feasibility of liquidation under national insolvency proceedings. Recital 58 of the SRMR is clear in identifying the risk of jeopardise financial stability, interrupt the provision of essential services, and affect the protection of depositors as the underlying justifications for a positive public interest assessment. Elsewhere,<sup>96</sup> the continuity in the provision of critical functions is seen as one of the resolution objectives that justify the applicability of resolution action.

However, by looking at the non-confidential version of the resolution plan of Banco Popular, the justification given for the lack of credibility of national insolvency law relates to the potential adverse effect that the liquidation may 'create for the real economy and the Spanish financial system due to its size, number of deposits and interconnections'.<sup>97</sup> In the press release following the decision, the SRB mentions that the use of the sale of business tools 'meets the resolution objectives and ensures the financial stability in Spain and Portugal, where Banco Popular owns a subsidiary'. Yet no mention of Portugal was made in the resolution plan.

The same doubts remain when reading the extended version of the resolution decision. Whereas there a lengthier description of the Spanish insolvency law is included, there is no detailed explanation as to why a possible liquidation under that law was not credible. This is merely justified by the likely 'adverse impact on the real economy and the financial system of Spain' and a 'material adverse effect on other institutions due to the high risk of contagion, through direct exposures and to the similarities of their business model'.<sup>98</sup>

In their 2019 working plan, the SRB committed to develop and publish the criteria behind the public interest assessment, those related to MREL, the resolution planning manual operational continuity, and resolvability assessment.

From the perspective of transparency and accountability this inconsistency poses a serious challenge to the SRB. Unfortunately the general public does not have access to a non-confidential version of the plans.

Our assessment can only be based on the material published following the only resolution decision taken by the SRB. Yet it is striking how the justifications, explanations and possible causal effects among key assessments in the plan are broad and not substantiated. It is likely that the SRB relied on a more detailed and thorough internal analysis, yet the way in which they portray their decisions appears at times too simplistic.

Nonetheless, this simplicity and lack of transparency on the underlying grounds for decision-making expose the SRB to the risk of not being perceived as accountable, because the relevant stakeholders cannot evaluate its actions. This in turn paves the way for a discussion on the need to make part of the resolution plans public as mandated for instance under US law. Even though the SRB has recently said that 'In the interest of transparency, the SRB expects to publish a version of the Resolution Planning Manual in early 2019. The manual aggregates the relevant SRB policies and it will clearly spell out our expectations towards banks',<sup>99</sup> this is only a limited step forward.

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<sup>96</sup> Art 14 and 18 (5) SRMR.

<sup>97</sup> Banco Popular, (2016), par 3.1.

<sup>98</sup> SRB, (2018b), par (19) and (20).

<sup>99</sup> <https://srb.europa.eu/en/node/695>

The SRB could decide to publish a non-confidential, abridged version of the plans. This will not violate professional secrecy requirements, because there will be no disclosure of confidential information and may not require an amendment to the BRRD/SRMR as it could be part of the SRB policies.

By analysing the resolution plans of the US global systemically important banks (G-SIBs), one of us<sup>100</sup> has argued elsewhere that the existence of a public version of the plans does not seem to harm public confidence or market competition. Having a public non-confidential version would have a string of beneficial effects instead, in terms of the accountability of both private (banks) and public (SRB) bodies. For instance, it would allow taxpayers to know in detail how banks operate and how they are structured. Even if the content of the public section must represent only a tiny fraction of the overall plan, it is still a relevant source of information for stakeholders. This in turn may have a beneficial effect on the reduction of agency costs as it lowers information asymmetries.

So far, European authorities seem to value confidentiality over transparency given that the possibility to publish a non confidential version of the plans is not contemplated under the current regulatory and statutory EU regime<sup>101</sup> nor is there any hint that the SRB intends to do so. Yet, having a public section of a resolution plan does not seem to make banks more vulnerable. Rather, it may make them more accountable to the public as a whole.<sup>102</sup>

The other main difference with the US is that there the onus of drafting the plan falls on the bank itself. The plan is then vetted by the resolution authorities which indicate -in a so called 'feedback letter'- the existence of deficiencies and shortcomings that must be addressed.<sup>103</sup> The existence of (publicly available) feedback letters addressed to the banks shows the dialogue between the regulators and the firms, increases transparency, and to an extent shifts the responsibility of the viability of the plan on the banks themselves. In the US the publication of detailed criteria in the assessment of banks improves transparency (public scrutiny) and accountability, facilitating G-SIBs resolvability.<sup>104</sup>

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<sup>100</sup> Russo, C. (2019); Russo, C. (2011).

<sup>101</sup> Para. 44 of the SRM Regulation subjects resolution plans to the 'requirements of professional secrecy' laid down in the Regulation due to 'the sensitivity of information contained in them'. Para. 116 too insists on the need to keep confidential any information related to resolution plans.

<sup>102</sup> Russo, C. (2019).

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

## 5. CONCLUSIONS

This paper has analysed the decisions taken by the SRB so far against the main goals it was supposed to accomplish, pointing out shortcomings of the the current system, ranging from the over-complexity of institutional design of the system, to the understanding of the foundational concepts that have led to inconsistencies and fragmentation along national lines of the resolution regimes.

We have advocated the adoption of quantitative criteria to be used to inform the choice between resolution and liquidation and to reach a consistent and agreed understanding in relation to the concept of 'public interest'.

We suggest that the rules concerning public intervention of the state aid framework and the BRRD/SRMR regime be aligned in order to remove any incentive to escape resolution. This stricter approach could be balanced with the introduction of a financial stability exemption to the application of bail-in, as suggested by the IMF. These amendments, in our opinion, could help reduce the risk of litigation which otherwise might affect every future crisis management decision.

We also recommend a clear hierarchical system of claims to avoid investors resorting to a multiplicity of litigation strategies, which not only creates inefficiencies but also compromises legal certainty and predictability.

Finally, the SRB should consider publishing an abridged non-confidential version of the resolution plans. The US experience has shown how this does not have an adverse impact on competition nor on market confidence. In fact it increases the level of accountability of the entities involved.

In short, our recommendations can be summed up in clarity on public interest, transparency on resolution versus liquidation and enhanced accountability.

## APPENDIX – LIST OF CLAIMS AGAINST BANCO POPULAR

### A. Claims brought before the Court of Justice of the European Union<sup>105</sup>

- 1) Case T-473/17, Jarabo et Jarsan Centro de Gestion v SRB (closed)
- 2) Case T-482/17, Comercial Vascongada Recalde v Commission and SRB (pending)
- 3) Case T-483/17, Garcia Suárez and Others v Commission and SRB (pending)
- 4) Case T-484/17, Fidesbanand Others v SRB (pending)
- 5) Case T-497/17, Sánchez del Valle and Calatrava Real State 2015 v Commission and SRB (pending)
- 6) Case T-498/17, Pablo Álvarez de Linera Granda v Commission and SRB (pending)
- 7) Case T-499/17, Esfera Capital Agencia de Valores v Commission and SRB (pending)
- 8) Case T-501/17, Mutuality Complementaria de Previsión Renault España v Commission and SRB (pending)
- 9) Case T-502/17, SFP Asset Management and Others v SRB (pending)
- 10) Case T-505/17, Inverni and Others v Commission and SRB (pending)
- 11) Case T-507/17, Fundación Pedro Barrié de la Maza, Conde de Fenosa v Commission and SRB (pending)
- 12) Case T-508/17, Financiere Tesalia and Others v Commission and SRB (pending)
- 13) Case T-509/17, Cartera de Inversiones Melca and Others v Commission and SRB (pending)
- 14) Case T-510/17, Del Valle Ruiz and Others v Commission and SRB (pending)
- 15) Case T-512/17, OCU and Others v SRB (pending)
- 16) Case T-515/17, Sánchez Valverde e Hijos v SRB (pending)
- 17) Case T-516/17, Imasa, Ingeniería y Proyectos v Commission and SRB (pending)
- 18) Case T-517/17, Grúas Roxu v Commission and SRB (pending)
- 19) Case T-518/17, Olarreaga Marques and Saralegui Reyزابal v SRB (pending)
- 20) Case T-520/17, Gestvalor 2040 e.a. v SRB (pending)
- 21) Case T-521/17, Hernández Díaz v SRB (pending)
- 22) Case T-522/17, Nap Innova Hoteles v SRB (closed)
- 23) Case T-523/17, Eleveté Invest Group and Others v Commission and SRB (pending)
- 24) Case T-524/17, Folch Torrela and Others v SRB (pending)
- 25) Case T-525/17, Taberna Ángel Sierra and Others v SRB (pending)
- 26) Case T-526/17, Ruiz Jayo and Others v SRB (pending)
- 27) Case T-527/17, Waisman and Others v SRB (pending)
- 28) Case T-529/17, Blasi Gómez and Others v SRB (pending)
- 29) Case T-530/17, López Campo and Others v SRB (pending)
- 30) Case T-531/17, Promociones Santa Rosa v SRB (pending)

<sup>105</sup> See Della Negra, F. – Smits, R. (2019), on actions related to the resolution of Banco Popular SA. As stated in section 3.2, “The pending cases on the resolution of *Banco Popular Español S.A.* can be distinguished in different classes. All cases concern the SRB Decision of 7 June 2017 (SRB/EES/2017/08) (‘SRB Decision’) adopting a resolution scheme for *Banco Popular*. Where relevant, proceedings concern the Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for *Banco Popular Español S.A.* (‘Commission Decision’). Where the ECB is concerned, the proceedings concern its Failing or Likely to Fail assessment adopted on 6 June, a *public version* of which is available at the Banking Supervision website. There are cases against the SRB alone while other have been instituted also against other defendants, i.e., European Commission and/or the European Central Bank. In most cases the applicant requests annulment of the SRB Decision (and/or the Commission Decision) but, in several, there is an additional request for compensation of damages (i.e., request for annulment, or for annulment and compensation). Where the request for annulment of the SRB Decision (and/or the Commission Decision) is accompanied by a request for a new calculation (i.e., request for doing the resolution procedure again and better, this time, in terms of outcome for the applicant), the case is classified as one requesting compensation. Finally, there are proceedings in which a request is submitted for the annulment or inapplicability of provisions of the SRM Regulation”.

- 31) Case T-535/17, Asociación de Consumidores de Navarra 'Irache' v SRB (pending)
- 32) Case T-538/17, Jess Liberty v SRB (pending)
- 33) Case T-544/17, Imabe Ibérica v SRB (pending)
- 34) Case T-545/17, Afectados Banco Popular v SRB (pending)
- 35) Case T-552/17, Maña and Others v SRB (pending)
- 36) Case T-554/17, Gonzáles Calvet v SRB (pending)
- 37) Case T-555/17, TW and Others v SRB (pending)
- 38) Case T-557/17, Liaño Reig v SRB (pending)
- 39) Case T-563/17, Gayalex Proyectos v SRB (pending)
- 40) Case T-566/17, Molina García v SRB (pending)
- 41) Case T-570/17, Algebris UK and Others v Commission (pending)
- 42) Case T-575/17, Algebris UK and Others v SRB (pending)
- 43) Case T-585/17, Alonso Goñi and Others v SRB (pending)
- 44) Case T-592/17, Serra Noguera and Others v SRB (pending)
- 45) Case T-597/17, Poza Poza v SRB (pending)
- 46) Case T-613/17, La Guirigaña and Others v ECB and SRB (pending)
- 47) Case T-618/17, Activa Minoristas del Popular v ECB and SRB (closed)
- 48) Case T-619/17, de la Fuente Martín and Others v SRB (pending)
- 49) Case T-623/17, Previsión Sanitaria Nacional, PSN, Mutua de Seguros y Reaseguros a Prima Fija v SRB (pending)
- 50) Case T-628/17, Aeris Invest v Commission and SRB (pending)
- 51) Case T-630/17, Top Cable v Commission and SRB (pending)
- 52) Case T-631/17, Hola v Commission and SRB (pending)
- 53) Case T-637/17, Policlínico Centro Médico de Seuros and Medicina Asturiana v Commission and SRB (pending)
- 54) Case T-638/17, Helibética v Commission and SRB (pending)
- 55) Case T-640/17, Escriba Serra and Others v Commission and SRB (pending)
- 56) Case T-642/17, Gonzáles Buñuel and Others v SRB (pending)
- 57) Case T-643/17, Euroways v Commission and SRB (pending)
- 58) Case T-648/17, Dadimer and Others v SRB (pending)
- 59) Case T-653/17, Relea Álvarez and Others v SRB (pending)
- 60) Case T-659/17, Vallina Fonseca v SRB (pending)
- 61) Case T-660/17, Miralla Inversiones v Commission and SRB (pending)
- 62) Case T-662/17, Link Flexible and Others v SRB (pending)
- 63) Case T-663/17, Saheceand Others v SRB (pending)
- 64) Case T-669/17, Hernando Avendaño and Others v SRB (pending)
- 65) Case T-670/17, LG Vaquero Aviación and Others v SRB (pending)
- 66) Case T-675/17, Aplicacions de Servei Monsan and Others v SRB (pending)
- 67) Case T-678/17, Minera Catalano Aragonesa and Luengo Martínez v Commission and SRB (pending)
- 68) Case T-679/17, Grupo Villar Mir v SRB (pending)
- 69) Case T-680/17, Helibética v SRB (pending)
- 70) Case T-685/17, Miralla Inversiones v SRB (pending)
- 71) Case T-686/17, Policlínico Centro Médico de Seguros and Medicina Asturiana v SRB (pending)
- 72) Case T-687/17, Vendrell Marti v SRB (pending)
- 73) Case T-688/17, Hola v SRB (pending)
- 74) Case T-689/17, Top Cable v SRB (pending)
- 75) Case T-690/17, Uluru and Others v Commission and SRB (pending)

- 76) Case T-693/17, García Gómez and Others v SRB (pending)
- 77) Case T-700/17, Traviacar and Others v SRB (pending)
- 78) Case T-701/17, OCU v SRB (pending)
- 79) Case T-705/17, Temes Rial and Others v SRB (pending)
- 80) Case T-707/17, Euroways v SRB (pending)
- 81) Case T-731/17, Escribà Serra and Others v SRB (pending)
- 82) Case T-735/17, Asociación de Usuarios de Bancos, Cajas y Seguros de España v SRB (pending)
- 83) Case T-16/18, Activos e Inversiones Monterosso v SRB (pending)
- 84) Case T-62/18, Aeris Invest v SRB (pending)
- 85) Case T-315/18, Calvo Gutierrez and Others v SRB (pending)
- 86) Case T-405/18, Holmer Dahl v SRB (pending)

#### **B. Claims brought before the SRB Appeals Panel<sup>106</sup>**

- 1) CASE 14/18, Decision 28 February 2019
- 2) CASE 7/18, Decision 19 June 2018
- 3) CASE 2/17, Decision 23 March 2018
- 4) CASE 54/17, Decision 19 June 2018
- 5) CASE 53/17, Decision 19 June 2018
- 6) CASE 52/17, Decision 19 June 2018
- 7) CASE 51/17, Decision 19 June 2018
- 8) CASE 50/17, Decision 19 June 2018
- 9) CASE 49/17, Decision 19 June 2018
- 10) CASE 48/17, Decision 19 June 2018
- 11) CASE 47/17, Decision 19 June 2018
- 12) CASE 46/17, Decision 19 June 2018
- 13) CASE 45/17, Decision 19 June 2018
- 14) CASE 43/17, Decision 28 November 2017
- 15) CASE 42/17
- 16) CASE 41/17, Decision 28 November 2018
- 17) CASE 40/17, Decision 28 November 2018
- 18) CASE 39/17, Decision 28 November 2018
- 19) CASE 38/17, Procedural Order 7 September 2017
- 20) CASE 37/17, Procedural Order 7 September 2017
- 21) CASE 36/17, Decision 9 November 2017
- 22) CASE 35/17, Decision 9 November 2017
- 23) CASE 34/17, Decision 21 August 2017
- 24) CASE 33/17, Decision 1 September 2017
- 25) CASE 32/17, Decision 1 August 2017
- 26) CASE 31/17, Decision 1 August 2017
- 27) CASE 30/17, Decision 1 August 2017
- 28) CASE 29/17, Decision 1 August 2017
- 29) CASE 28/17, Decision 1 August 2017
- 30) CASE 27/17, Decision 1 August 2017

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<sup>106</sup> See <https://srb.europa.eu/en/content/cases>.



- 31) CASE 26/17, Decision 16 August 2017
- 32) CASE 25/17, Decision 16 August 2017
- 33) CASE 24/17, Decision 1 August 2017
- 34) CASE 23/17, Decision 1 August 2017
- 35) CASE 22/17, Decision 1 August 2017
- 36) CASE 21/17, Decision 1 August 2017
- 37) CASE 20/17, Decision 25 September 2017
- 38) CASE 19/17, Decision 25 September 2017
- 39) CASE 18/17, Decision 25 September 2017
- 40) CASE 17/17, Decision 25 September 2017
- 41) CASE 16/17, Decision 25 September 2017
- 42) CASE 15/17, Decision 25 September 2017
- 43) CASE 14/17, Decision 25 September 2017
- 44) CASE 13/17, Decision 30 August 2017
- 45) CASE 12/17, Decision 30 August 2017
- 46) CASE 11/17, Decision 1 August 2017
- 47) CASE 10/17, Decision 1 August 2017
- 48) CASE 9/17, Decision 1 August 2017
- 49) CASE 8/17, Decision 2 August 2017
- 50) CASE 7/17, Decision 2 August 2017
- 51) CASE 6/17, Decision 2 August 2017
- 52) CASE 5/17, Decision 19 July 2017
- 53) CASE 4/17, Decision 19 July 2017
- 54) CASE 3/17, Decision 19 July 2017
- 55) CASE 2/17, Decision 19 July 2017
- 56) CASE 1/17, Decision 19 July 2017

### C. Administrative and Judicial Claims brought before Spanish Courts

There are over 250 claims (*Recursos contencioso-administrativos*) against FROB pending in the *Audiencia Nacional*.<sup>107</sup>

And there are numerous cases that have been brought in the Spanish Courts of Justice in Barcelona, Valencia, Madrid, etc (*Juzgados Nacionales de primera instancia e instrucción y Audiencias Provinciales*)<sup>108</sup>

The Spanish Ombudsman (*Defensor del Pueblo*) recommended that extra-judicial ways be found to compensate minority investors in Banco Popular S.A.<sup>109</sup>

### D. Claims brought before US Courts

<sup>107</sup> See <http://www.frob.es/es/Lists/Contenidos/Attachments/548/MactividadesFROB2017.pdf> [paragraph 123: *Asimismo, a fecha de redacción de la presente Memoria se tiene conocimiento de que se están ventilando en la Audiencia Nacional un total de 259 recursos contencioso-administrativos, respecto de los cuales la Audiencia está dictando los respectivos autos acordando suspender su tramitación hasta que recaiga resolución definitiva en los recursos de anulación formulados contra la decisión de la JUR, en su sesión ejecutiva ampliada de fecha 7 de junio de 2017, por la que se adoptó el dispositivo de resolución sobre la entidad Banco Popular Español, S.A., y que penden en el Tribunal General de la Unión Europea*]. For example, Anchorage, Algebris and Ronit Capital filed administrative claims against FROB, that implemented the SRB's resolution decision (Euromoney, 2018). For a commentary see inter alia: [https://www.elconfidencial.com/empresas/2018-06-07/banco-popular-santander-sentencias-jueces-europa-bancos\\_1575039/](https://www.elconfidencial.com/empresas/2018-06-07/banco-popular-santander-sentencias-jueces-europa-bancos_1575039/) and [https://www.lavozdeasturias.es/noticia/actualidad/2018/06/06/popular-viacrucis-judicial-ano-despues/0003\\_201806G6P33991.htm](https://www.lavozdeasturias.es/noticia/actualidad/2018/06/06/popular-viacrucis-judicial-ano-despues/0003_201806G6P33991.htm)

<sup>108</sup> See <http://www.plataformaafectadosbonospopular.com/sentencias-favorables/>

<sup>109</sup> See <https://www.defensordelpueblo.es/resoluciones/perdida-economica-de-los-accionistas-y-bonistas-tras-la-venta-del-banco-popular/>



Pimco and Anchorage Capital have made court filings in New York seeking information from Banco Santander, in its capacity as the purchaser of Banco Popular.<sup>110</sup>

#### **E. Claims brought before Arbitral Tribunals (ICSID)**

In 2018, a group of Banco Popular's Mexican investors filed investment arbitration claims against the Kingdom of Spain before the International Centre for the Settlement of Investment Disputes (ICSID) based on the alleged violation of the 2006 Bilateral Investment Treaty between Mexico and Spain.<sup>111</sup>

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<sup>110</sup> *Ibid.*

<sup>111</sup> See <https://investmentpolicyhub.unctad.org/ISDS/Details/927>, <https://www.italaw.com/sites/default/files/case-documents/italaw9932.pdf>, <https://www.italaw.com/sites/default/files/case-documents/italaw9933.pdf>

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This paper discusses from a legal perspective how, over the past years, the SRB has performed against the main goals it was supposed to accomplish, in light of the decisions taken so far (looking backwards) and points to some of the challenges ahead (looking forward). These include inconsistencies in the implementation of the BRRD/SRMR regime, in particular with regard to the 'dichotomy' between liquidation and resolution, the resulting fragmentation along national lines, the interpretation of the public interest test, and the complexity and inefficiency of the existing system of 'multi-layered' litigation. The ongoing work of the SSM and the SRM and the development of Banking Union need to continue to address the 'fault lines' in their design and provide for a better alignment of the triggers for resolution and liquidation and greater transparency on the outcome of resolution planning. This document was provided by the Economic Governance Support Unit at the request of the ECON Committee.

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