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# Bank Resolution and Judicial Review: Lessons of the Banco Popular Litigation

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## Abstract

Resolution of a troubled institution and the allocation of losses among creditors can be an efficient way to avoid contagion and minimize taxpayer support, but raises major issues of fairness and equity towards shareholders and creditors, which are a source of tensions. The Banco Popular litigation saga offers clear empirical evidence of these tensions. This essay discusses the main lessons that can be drawn from that litigation.

**Keywords** Judicial review · Standard of review · Bank crises · Bank resolution · Banco popular

## 1 Crisis Management and the Courts: A Brief Introduction

Crisis management often involves actions by authorities that consist in taking control of financial institutions, allocating losses among their creditors, and withdrawing their license. Resolution of a troubled institution and the allocation of losses among creditors can be an efficient way to avoid contagion and minimize taxpayer support.<sup>1</sup> However, it raises major issues of fairness and equity towards shareholders and creditors, which have public policy and even constitutional significance. Jurisdictions differ in the scope and extent of powers granted to specialist administrative authorities and in the tolerable interference with creditors' rights.<sup>2</sup> General standards

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<sup>1</sup> FSB (2011).

<sup>2</sup> Ramos and Solana (2019).

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for creditor treatment<sup>3</sup> are inspired by considerations that differ from those applicable in resolution frameworks for ‘systemically important banks’. This concept, in turn, is itself evolving in the context of crisis management, because a bank may be considered systemic when failing during a system-wide crisis, although it would not be considered as such in an idiosyncratic one. This does not render the standards inconsistent, but does introduce a source of tensions.<sup>4</sup>

A first tension arises regarding the tools for addressing bank failure. The ample experience of the US is based on the powers and practice of the Federal Deposit Insurance Corporation (FDIC), which were enhanced by the Dodd-Frank Act’s introduction of the Orderly Liquidation Authority (OLA) to deal with companies whose failure could cause financial instability. In 2014, the EU drastically changed its system, with the Bank Recovery and Resolution Directive (BRRD)<sup>5</sup> and the Single Resolution Mechanism (SRM),<sup>6</sup> thus providing for centralized decision-making on resolution schemes for significant institutions. This raises general issues related to the constitutional legitimacy of authorities that wield such extensive powers and tools.

In the second place, specific problems arise in the deployment of these tools. Inspired by the logic of avoiding contagion and systemic risk, resolution authorities can take control of financial institutions *before* they are fully insolvent (i.e., when a bank is ‘failing or likely to fail’ (FOLTF)), and impose a write-down or conversion of capital and debt instruments (‘bail-in’), while excluding claims that would rank *pari passu* with ordinary claims, because this is important for preserving the bank’s critical functions and/or keeping it operational. This raises legal challenges related to the ‘triggers’, e.g., whether a bank was actually FOLTF, and to the treatment of creditors and shareholders, in comparison with what they would receive in insolvency or liquidation proceedings, which leads to problems of discrimination.<sup>7</sup>

A third factor relevant for our analysis is resolution planning, which aims to avoid potentially messy crises by requiring banks to make ‘living wills’ that ensure their orderly resolution without public financial assistance. At least the largest globally systemic financial institutions (G-SIFIs) tend to plan for a resolution strategy that involves the bail-in of capital and debt. This requires them to issue easily bail-inable instruments, known as total loss-absorbing capacity (TLAC) or minimum requirements for capital and eligible liabilities (MREL) in the EU. Determining the level of instruments to be issued is controversial and is inextricably connected with resolution planning.

<sup>3</sup> Insolvency and Creditor Rights Standard (ICR) established by the World Bank’s Principles and the UNCITRAL Guide, [http://siteresources.worldbank.org/INTGILD/Resources/ICRStandard\\_Jan2011\\_withC1617.pdf](http://siteresources.worldbank.org/INTGILD/Resources/ICRStandard_Jan2011_withC1617.pdf) (accessed 21 September 2022).

<sup>4</sup> *Supra* n. 2.

<sup>5</sup> Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms [12 June 2014] OJ L 173 (hereafter: BRRD).

<sup>6</sup> Regulation (EU) No 806/2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund [15 July 2014] OJ L 225 (hereafter: SRM Regulation, or SRMR).

<sup>7</sup> *Supra* n. 2.

The SRB cases before the European courts and the SRB Appeal Panel provide clear empirical evidence of these tensions, with the Banco Popular litigation being the most prominent example. The resolution of Banco Popular on 6 June 2017 sparked a vivid judicial confrontation regarding (i) the annulment of the resolution decision (involving six pilot cases, one of which has been closed to date, and 99 non-pilot cases, five of which have been closed to date), (ii) access to documents and access to the file (with a large number of cases decided by the Appeal Panel, including five Appeal Panel decisions currently under scrutiny by the General Court in pending cases), (iii) alleged liability of the SRB or European Commission and claims for damages (four pending cases), and (iv) valuation 2 (one case closed at the General Court and two closed at the Court of Justice) and valuation 3 (six pending cases before the General Court and one closed at the Court of Justice). However, this is not an exception, but rather the rule: the resolution decisions for Sberbank Croatia and Slovenia have also been appealed in two pending cases each before the General Court, and the same fate was shared by the non-resolution decision for Sberbank Austria, as well as ABLV (which has one case pending and one closed at the Court of Justice and a claim for damages pending at the General Court) and PNB Banka. Beyond crisis management measures, resolution plans and MREL decisions have been appealed as well: there is a judgment<sup>8</sup> and two pending cases before the General Court, along with several (nine) decisions (in cases 8/18, 2/21, 3/21; 1/22, 2/22, 3/22, 1/23, joined cases 2/23 and 3/23, case 5/23), and two pending cases (3/2024 and 4/2024) of the SRB Appeal Panel.

## 2 The Legitimacy of Crisis Management Frameworks

Is it legitimate, and to what extent, to empower an administrative authority with far-reaching powers to take over a not-fully-insolvent institution and impose losses upon its shareholders and creditors? What standards of judicial review and safeguard of fundamental rights can be expected in such a controversial context? These questions are less easy than they may appear at first glance, and courts have had to deal with all of them (including others regarding the *ex ante* contributions to the Single Resolution Fund and thus the potential external financing of resolution, which has triggered more than 150 cases from 2016 to date).

In the US, the legitimacy of its federal bank crisis management system was tested a few years after it was established. In *Fahey v Malone*,<sup>9</sup> the Federal Home Loan Bank Board (FHLBB) appointed a conservator for a savings and loan (S&L) association. The plaintiffs alleged an unconstitutional seizure of property without due process of law, ‘motivated by malice and ill will’. A specially formed three-judge district court declared the relevant section of the Home Owners’ Loan Act of 1933 unconstitutional, removed the conservator, restored the institution to its former management, and enjoined the authorities “‘from ever asserting any claims, right, title or

<sup>8</sup> Case T-540/22 *France v SRB* (2024) ECLI:EU:T:2024:459.

<sup>9</sup> *Fahey v Malone* (1947) 332 U.S. 245.

interest” in or to the Association’s property’.<sup>10</sup> On appeal, the Supreme Court examined whether this was an ‘unconstitutional delegation of legislative powers’ without adequate standards of action or guides to policy. The Court held that this case dealt with problems of ‘insecurity and mismanagement which are as old as banking enterprise’, and included remedies that were not ‘unknown to existing law to be invented by the Board in exercise of a lawless range of power’.<sup>11</sup> The FHLBB’s appointment of a conservator was based on rules which were ‘sufficiently explicit, against the background of custom, to be adequate for proper administration and for judicial review if there should be a proper occasion for it’.<sup>12</sup> The S&L’s organizational charter expressly indicated its subjection to the relevant statute:<sup>13</sup> if shareholders benefitted from a statute including certain limitations for public protection, they were estopped from alleging the unconstitutionality of those limitations.<sup>14</sup> Thus, after an initial hesitance, the courts’ view softened, allowing the rise of the administrative state.

In the EU, the bank resolution framework (BRRD plus SRM) dates back to 2014, so early challenges are recent. One was the case decided by the German Federal Constitutional Court (FCC) in 2019 regarding the constitutionality of *both* the SSM *and* the SRM framework (SSM/SRM judgment).<sup>15</sup> The plaintiffs alleged that the SRM was *ultra vires* and contrary to the EU Treaties’ principle of conferral of powers, and undermined democratic legitimacy. The FCC expressed concern about using the competence for the approximation of laws on the internal market (the internal market competence) to create agencies, also in light of the Court of Justice’s recent openness to delegating powers to them.<sup>16</sup> This, it held, did not find clear support in the text of the Treaty (Article 114 TFEU), in a systematic analysis (based on conferral and a multi-level system of administrative cooperation<sup>17</sup>), or in a teleological analysis, which (in its view) called for a strict interpretation of enforcement powers.<sup>18</sup>

However, the FCC accepted the SRM and the agency (Single Resolution Board (SRB)), *within* narrow limits.<sup>19</sup> In the FCC’s view, the SRB satisfied this test, provided the transferred tasks and powers were interpreted strictly.<sup>20</sup>

<sup>10</sup> *Ibid.*, 248.

<sup>11</sup> *Ibid.*, 250.

<sup>12</sup> *Ibid.*, 254.

<sup>13</sup> *Ibid.*, 255.

<sup>14</sup> *Ibid.*: ‘It is an elementary rule of constitutional law that one may not “retain the benefits of the Act while attacking the constitutionality of one of its important conditions”.’

<sup>15</sup> Bundesverfassungsgericht, 2 BvR 1685/14, 2 BvR 2631/14, 30 July 2019 (hereafter: SSM/SRM judgment). Compare D’Ambrosio and Messineo (2021) (and an English translation of relevant excerpts of the judgment at 255).

<sup>16</sup> SSM/SRM judgment, 236-239.

<sup>17</sup> *Ibid.*, 242-245.

<sup>18</sup> *Ibid.*, 245.

<sup>19</sup> *Ibid.*, 246: the transfer of powers that are not clearly defined or cannot be sufficiently reviewed, of essential decisions on the strategic direction of a policy area, and of other fundamental decisions, as well as the delegation of legislative powers, is ruled out.

<sup>20</sup> *Ibid.*, 247.

Furthermore, in the FCC's view, the independence of both the SRB and national resolution authorities (NRAs) resulted in a diminished level of democratic legitimacy.<sup>21</sup> However, this was balanced by political accountability mechanisms. Also important is the system of administrative review by the Appeal Panel, and especially judicial review by the CJEU.<sup>22</sup>

Finally, the 'bank levy' (contributions to the Single Resolution Fund (SRF)) was not *ultra vires* either because in the FCC's view it is based on domestic law.<sup>23</sup>

Yet, the legitimacy of the SRM was also challenged before European courts in the flood of cases following the resolution of Banco Popular, among which the General Court chose six pilot cases (the 'pilot cases') *Tatiana Pérez*,<sup>24</sup> *Del Valle*,<sup>25</sup> *Eleveté*,<sup>26</sup> *Algebris*,<sup>27</sup> *Aeris*<sup>28</sup> and *Liaño Reig*<sup>29</sup> to deal with the majority of legal issues. In addition to the substantive and procedural challenges examined below, the appellants challenged the SRB's role as an unlawful delegation of powers. Based on the *Meroni* doctrine, reinterpreted by the *ESMA short selling* case, the Court distinguished between the (unlawful) delegation of a discretionary power and the (lawful) delegation of a clearly defined executive power, amenable to judicial review.<sup>30</sup> In the Court's view, the SRM scheme fell under the second category: the initial proposal (for direct exercise of SRB powers) was modified due to concerns from the Council to introduce an endorsement (and thus control) by the Commission regarding whether the resolution was 'required by the public interest' (the more 'discretionary' element of the resolution scheme), making the delegation lawful.<sup>31</sup> As for the use of specific resolution tools, such as the sale of business and write-off and conversion of capital instruments, the Court held that the Commission's assessment also encompassed the choice of resolution tools and whether those tools were adequate for resolution objectives,<sup>32</sup> even to the point of stating that the resolution tools did not entail a delegation of autonomous competences<sup>33</sup> (which is debatable). The short time frame for the Commission to endorse (24 hours) was not seen as an impediment by the Court, since, in its view, the Commission is duly informed of any actions in preparation for resolution.<sup>34</sup> The matter was further scrutinized by the

<sup>21</sup> *Ibid.*, 279, 282, 283.

<sup>22</sup> *Ibid.*, 275-276.

<sup>23</sup> *Ibid.*, 303, 306.

<sup>24</sup> Case T-481/17 *Tatiana Pérez de Guzmán v SRB* (2022) ECLI:EU:T:2022:311.

<sup>25</sup> Case T-510/17 *Del Valle Ruiz v Commission & SRB* (2022) ECLI:EU:T:2022:312.

<sup>26</sup> Case T-523/17 *Eleveté v Commission & SRB* (2022) ECLI:EU:T:2022:313. On appeal, in Case C-541/22, see now the Opinion of AG Capeta of 14 March 2024 ECLI:EU:C:2024:233.

<sup>27</sup> Case T-570/17 *Algebris v Commission & SRB* (2022) ECLI:EU:T:2022:314.

<sup>28</sup> Case T-628/17 *Aeris Invest Sàrl v Commission & SRB* (2022) ECLI:EU:T:2022:315.

<sup>29</sup> Case T-557/17, now decided on appeal in Case C-947/19 (2021) ECLI:EU:C:2021:172.

<sup>30</sup> *Supra* n. 28, paras. 123-127; *supra* n. 25, paras. 209-211.

<sup>31</sup> *Supra* n. 28, paras. 128-134; *supra* n. 25, paras. 212-219.

<sup>32</sup> *Supra* n. 28, paras. 136-142, 143-145.

<sup>33</sup> *Supra* n. 28, paras. 146-148.

<sup>34</sup> *Supra* n. 25, paras. 230-231.

Court of Justice, and both AG Capeta in her Opinion<sup>35</sup> and the Court<sup>36</sup> held that the resolution plan is only adopted with the endorsement of the Commission. Thus, the judgment of the General Court in *Tatiana Pérez* was set aside insofar as it declared the action against the resolution scheme adopted by the SRB admissible.

### 3 Substantive Review: ‘Property’ and Other Rights

Crisis management measures normally entail a serious interference with property, as authorities take control over the entity’s operations, transfer its assets and/or liabilities to an acquirer, a ‘bridge bank’, or a ‘bad bank’, or write down or convert its equity or debt. In all these cases a pertinent question is whether any of these measures amount to ‘expropriation’ or unlawful interference with property for holders of shares and subordinated debt.

US cases have addressed these questions under the Fifth Amendment (the ‘Takings Clause’), reserved for cases of expropriation.<sup>37</sup> The key question is whether crisis measures have gone ‘too far’ and become an expropriation (if not, *procedural* safeguards apply). In Europe, under the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (Charter), substantive protections encompass both ‘expropriation’ and ‘interference with’ property,<sup>38</sup> in addition to the more procedural protections.<sup>39</sup>

For Europe, an earlier and landmark case was *Pavvlika/Chrysostomides*, which analyzed Cyprus’ crisis-management measures.<sup>40</sup> The complaint was comprehensive, as it also reviewed the sale of Greek bank branches. The Court explained that the measures were proportionate because the bail-in was based on a clear

<sup>35</sup> Case C-551/22 *Commission v Tatiana Perez and SRB* (2024) ECLI:EU:C:2023:846.

<sup>36</sup> Judgment of 18 June 2024, Case C-551/22, *Commission v SRB* (2024) ECLI:EU:C:2024:520.

<sup>37</sup> The Fifth Amendment states that ‘private property [shall not] be taken for public use without just compensation’.

<sup>38</sup> Art. 1, Protocol 1 ECHR; Arts. 16 and 17 of the Charter.

<sup>39</sup> Art. 6 of the ECHR, Art. 47 (judicial protection) and Art. 41 (good administration) of the Charter.

<sup>40</sup> T-786/14 *Bourdouvali and Others v Council and Others* (2018) ECLI:EU:T:2018:487. On the same date, the Court decided Case T-680/13 *Chrysostomides, K. & Co. and Others v Council and Others* (2018) ECLI:EU:T:2018:486. Since its text is a verbatim copy of *Bourdouvali and Others*, references will be made to the former.

and accessible legal framework with creditor safeguards,<sup>41</sup> was suitable to the end sought,<sup>42</sup> and was proportionate,<sup>43</sup> similar to the sale of branches.<sup>44</sup> Official communications could not generate legitimate expectations for a ‘prudent and circumspect’ reader,<sup>45</sup> and there was no discrimination.<sup>46</sup> The Court explained common sense market facts in plain terms, holding that bank deposits are not risk-free, that investors’ harm must be assessed based not on securities’ nominal value, but on their ‘true’ market value, and against the alternative of a liquidation process.<sup>47</sup> It also held that the ECB enjoys broad discretion in emergency liquidity assistance (ELA) operations, and the absence of constraints meant that there could not be any ‘legitimate expectations’.<sup>48</sup>

The above principles were confirmed in the *Banco Popular* saga, where one of the claims repeated by the appellants was that the resolution scheme for Banco Popular constituted an intolerable interference with their property. The General Court relied, *inter alia*, on *Chrysostomides* to emphasize that property is ‘not an absolute right’, and can be subject to restrictions, which must be: (a) provided for in legal provisions (legality); (b) necessary to pursue EU objectives of general interest (necessity) and; (c) proportionate to those objectives (proportionality), that bank crisis management measures typically fulfil these requirements, and it is widely acknowledged that shareholders bear the first losses and that their investment carries risks.<sup>49</sup> In the specific context, the measures were (a) provided for in the SRMR,<sup>50</sup> (b) necessary to ensure financial stability and prevent contagion,<sup>51</sup> and (c) proportionate to the ends sought, because the SRB justified why it used the sale of business

<sup>41</sup> *Ibid.*, paras. 268-284. Creditors could not be placed in a worse position than if the entity had been liquidated, while the urgency of the situation (and the fact that the measures were not ‘penalties’) justified the lack of opportunity to object.

<sup>42</sup> *Ibid.*, paras. 285-298. There was no manifest error of assessment in the diagnosis of Cyprus’ economic situation, nor in the opinion that converting deposits into equity to achieve a 9% core capital ratio, and separating a ‘bad’ bank could stabilize (and trim) the system.

<sup>43</sup> *Ibid.*, paras. 299-324, 329. The parliament in Cyprus had rejected less intrusive measures, a full state bailout would have made public debt unsustainable, bank recapitalization by the ESM was not an option, and the applicants could not prove that other alternatives could have been less harmful, equally effective, or more swiftly executed.

<sup>44</sup> *Ibid.*, paras. 331-360. The measures reduced contagion risk, not taking the measures would have increased financial assistance beyond the committed amounts, and the sale was open and transparent.

<sup>45</sup> *Ibid.*, paras. 403-438.

<sup>46</sup> *Ibid.*, paras. 439-508, vis-à-vis other creditors, depositors of Greek branches, deposits below EUR 100,000, or other countries’ creditors, or against members of cooperative banks.

<sup>47</sup> *Ibid.*, paras. 313, 317, 320.

<sup>48</sup> *Ibid.*, paras. 361-402.

<sup>49</sup> *Supra* n. 24, paras. 482-499; *supra* n. 25, paras. 488-499; *supra* n. 27, paras. 391-402; *supra* n. 26, paras. 59-174.

<sup>50</sup> The fact that a definitive valuation (valuation 2) was ultimately not conducted was not a breach of legality. *Supra* n. 25, paras. 504-506. Nor was there any breach of legality in the Commission’s endorsement of the decision. *Supra* n. 27, paras. 406-408.

<sup>51</sup> The Court rejected the appellants’ claim that, unlike Kotnik, Ledra, etc., this was not a ‘systemic’ crisis, but one limited to a specific entity, because, the Court held, distress can easily propagate from one bank to another. *Supra* n. 24, para. 501.

and discarded other alternatives.<sup>52</sup> There was no discrimination, because shareholders are not comparable to depositors,<sup>53</sup> and the NCWO principle prevented treatment worse than under liquidation.<sup>54</sup> Claims of a ‘lack of compensation’ were misdirected against resolution measures, as they would result from the official valuation specifically oriented at establishing any compensation rights,<sup>55</sup> or were unjustified, because property rights do not guarantee immediate payment, or payment in the absence of harm.<sup>56</sup> Furthermore, any compensation should consider as counterfactual the shares’ value in a *liquidation*, calculated according to a specific valuation procedure for this purpose, i.e., the counterfactual could not be their market value at the moment of intervention,<sup>57</sup> nor their value in case of a hypothetical private solution,<sup>58</sup> nor their value under a hypothetical ‘definitive valuation’,<sup>59</sup> which serves a different purpose (the definitive valuation was not carried out in this case for reasons that were considered legally valid). Finally, property rights do not grant their holders a right to be heard beyond what is granted by procedural safeguards,<sup>60</sup> and, in any event, its restriction was proportionate in light of the objectives sought (financial stability and preventing contagion), which required the decision to be adopted in an extremely short time period.<sup>61</sup>

Case law shows, in our view, the ‘evanescence’ of property rights over banks’ financial instruments (shares or bonds) in crisis contexts. This is also evident in the most recent findings of the Court of Justice in *Banco Santander v J.A.C. and M.C.P.R.*, where Banco Popular shareholders claimed that they were mis-sold the bank’s shares by way of a false prospectus<sup>62</sup> and that the bank had concealed its true financial situation in a public offer made only one year before the resolution of the bank. To safeguard the proper functioning of resolution, the Court of Justice concluded nonetheless that, where a conflict exists, the public interest in resolution must prevail over investor protection and that therefore shareholders whose shares were cancelled in the resolution could not claim damages for the previous mis-selling of those shares, nor could they seek the retroactive annulment of their original investment decision or the restitution of their funds. However, the Court conceded that these litigious claims based on securities law should be considered in evaluating any compensation due to shareholders and creditors in resolution, by adding their value

<sup>52</sup> *Ibid.*, paras. 502-505; *supra* n. 25, para. 501; *supra* n. 26, paras. 182-189.

<sup>53</sup> *Supra* n. 26, paras. 194-195.

<sup>54</sup> *Supra* n. 24, paras. 502-505; *supra* n. 25, para. 511; *supra* n. 27, paras. 413-417; *ibid.*, paras. 199-208.

<sup>55</sup> *Supra* n. 24, paras. 512-521; *supra* n. 27, para. 417. The NCWO and the valuation are regulated, respectively, in Articles 15 and 20 SRMR.

<sup>56</sup> E.g., *supra* n. 27, paras. 416-421.

<sup>57</sup> *Supra* n. 24, paras. 522-525; *ibid.*, paras. 423-427.

<sup>58</sup> *Supra* n. 27, para. 422.

<sup>59</sup> *Supra* n. 25, paras. 511-526.

<sup>60</sup> *Supra* n. 24, paras. 527-530; *supra* n. 25, para. 533.

<sup>61</sup> *Supra* n. 25.

<sup>62</sup> Case C-410/20 *Banco Santander SA v J.A.C. and M.P.C.R.* (2022) ECLI:EU:C:2022:351.

when comparing the treatment of shareholders in resolution with what they would have received in liquidation.<sup>63</sup>

#### 4 Substantive Review Beyond 'Property': Conditions for Intervention

Since courts are relatively permissive regarding interferences with property, provided the conditions for intervention are fulfilled, the existence of such conditions is a contested matter. In the *Banco Popular* cases, the General Court had to examine the application of a resolution scheme to the bank. The ECB found that Banco Popular was failing-or-likely-to-fail (FOLTF) due to a serious liquidity crisis resulting from excessive deposit outflows, the speed of these outflows, and the bank's inability to generate further liquidity, but that, nonetheless, it could not be clearly established whether the bank was also FOLTF based on its capital position, i.e., its solvency. The SRB followed the ECB's conclusions, declaring the bank FOLTF and applying a resolution scheme.

The Court applied its typical standard of review, based on a manifest error of assessment, although completed with a process-based review,<sup>64</sup> with an emphasis on the factual elements relied upon by the SRB.<sup>65</sup> However, in parallel, in practice, the Court also conducted a substantive review, appraising the SRB's interpretation of the relevant provisions, especially those establishing the conditions for resolution.

The General Court upheld the SRB's interpretation and application of the legal framework. It held that an FOLTF finding regarding a solvent yet illiquid institution was permitted by (i) the text of the relevant law, which allowed an FOLTF declaration for an entity that is unable or will likely be unable in the near future to pay debts as they fall due, while 'balance sheet insolvency' constituted a separate and independent ground for making such an FOLTF declaration; (ii) the context, including the recitals, which supported this interpretation; and (iii) the EBA Guidelines, which referred to a breach of liquidity requirements as a basis for an FOLTF finding and listed adverse liquidity developments among the relevant factors.<sup>66</sup>

In light of this framework, the SRB decision properly weighed the relevant factors, and the Court did not find any manifest error of assessment. First, Banco Popular had breached liquidity requirements and was unable to restore compliance at the date when the resolution scheme was implemented, i.e., its liquidity problems were not temporary.<sup>67</sup> Second, the SRB correctly concluded that there were no alternatives, such as supervisory or private sector measures. The appellants could not clearly indicate which alternatives were available, other than Emergency Liquidity Assistance (ELA). However, granting ELA was not within the SRB's power, and

<sup>63</sup> *Ibid.*, paras. 48-50.

<sup>64</sup> Lenaerts (2012).

<sup>65</sup> *Supra* n. 24, paras. 167-171; *supra* n. 25, paras. 107-110; *supra* n. 26, paras. 111-115; *supra* n. 27, paras. 105-109; *supra* n. 28, paras. 115-119.

<sup>66</sup> See, e.g., *supra* n. 24, paras. 373-375, 384-388; *supra* n. 25, paras. 332-334, 341-345; *supra* n. 26, paras. 129-131, 141-145.

<sup>67</sup> *Supra* n. 24, paras. 379-383; *supra* n. 25, paras. 337-340; *supra* n. 26, paras. 148-158.

although the ECB approved it, it was deemed insufficient to meet the liquidity short-fall, and was eventually withdrawn by the Bank of Spain.<sup>68</sup> Early intervention measures were not within the competence of the SRB.<sup>69</sup>

Likewise, the bank's liquidity position had not left enough time for a private transaction. Even the entity's board acknowledged that the bank was failing, and was unable to mobilize enough resources through contingency measures to avoid failure.<sup>70</sup> A capital increase was initially considered, but this was before the liquidity position worsened, and there was no clear evidence that a sale of assets was considered or could have been effective; there was no time for a merger or acquisition, given the dire situation, and a private sale process had not yielded any solution.<sup>71</sup> Finally, the Court found no error of assessment in the determination of a public interest in the resolution: an ordinary insolvency proceeding might have resulted in greater losses for creditors, and the losses sustained by shareholders and subordinated creditors were outweighed by the preservation of critical functions and financial stability.<sup>72</sup>

Likewise, in *ABLV v SRB*,<sup>73</sup> the U.S. Department of the Treasury, through the Financial Crimes Enforcement Network (FinCEN), announced a draft measure to designate ABLV Bank as an institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act. After this announcement, the bank was no longer able to make payments in US dollars, and this triggered a liquidity crisis, which led the ECB to inform the bank that, in order to avoid default, it had to have 1 billion euro in cash in its account with the Latvian Central Bank by a set deadline. The ECB's determination of this amount was challenged by the bank as disproportionate, but the claim was rejected by the Court, which noted not only that a liquidity constraint could trigger the FOLTF of a bank, but also that the ECB's assessment of the bank's short-term liquidity needs could not be reversed by the court because the appellant had not provided evidence to demonstrate the *implausibility* of the ECB's conclusions.<sup>74</sup> The pending cases in *Sberbank* are more likely to give the European courts further leeway to further explore these aspects.

## 5 Procedural Safeguards: 'Arbitrary and Capricious', 'Good Administration' and Judicial Protection

Given the limited practical utility of substantive safeguards, shareholders and creditors have often relied on procedural safeguards, which present specific challenges for banks. These have crystallized under the 'arbitrary and capricious' standard in the US, while they are still evolving in the EU and have been subject to limited case law

<sup>68</sup> See, e.g., *supra* n. 24, paras. 394-407; *supra* n. 25, paras. 368-377; *supra* n. 26, paras. 154-158.

<sup>69</sup> *Supra* n. 24, paras. 453-454.

<sup>70</sup> *Ibid.*, paras. 367-368; *supra* n. 25, paras. 328-329, 362.

<sup>71</sup> *Supra* n. 24, paras. 408-419; *supra* n. 25, paras. 363-366, 381-401; *supra* n. 26, paras. 193-231.

<sup>72</sup> *Supra* n. 24, paras. 434-440; *supra* n. 26, paras. 239-255.

<sup>73</sup> Case T-280/22 *ABLV Bank v SRB* (2022) ECLI:EU:T:2022:429 (hereafter: *ABLV v SRB*).

<sup>74</sup> *Ibid.*, paras. 94 and 116-124.

in international investment arbitration. We must differentiate between the situation before the *Banco Popular* cases and after.

Before *Banco Popular*, some ECtHR cases,<sup>75</sup> such as *Credit and Industrial Bank v Czech Republic*<sup>76</sup> and *Capital Bank v Bulgaria*,<sup>77</sup> focused on procedural safeguards. Facing a financial crisis, Czech and Bulgarian authorities adopted extraordinary intervention measures over individual banks, (Credit and Industrial Bank and Capital Bank) to mitigate the spill-over effects of insolvency. Capital Bank was declared insolvent, deprived of its license, and wound up, and applicable rules rendered the intervention unchallengeable before the courts.<sup>78</sup> The board of Credit and Industrial Bank was replaced with an insolvency administrator appointed by the administrative authorities, which meant that the former directors/representatives lacked standing to lodge an appeal on behalf of the bank.<sup>79</sup> In both cases, the ECtHR focused on procedural rights<sup>80</sup> and concluded that there had been a breach. In *Credit and Industrial Bank*, the deprivation of representative powers rendered review practically impossible, as the decision was adopted without the bank's presence and was not subject to appeal.<sup>81</sup> In *Capital Bank*, the decision was notified after its adoption, but the courts had not acted as 'courts with full jurisdiction.'<sup>82</sup> Moreover, the hearing before the Central Bank, an administrative body, could not replace the lack of judicial review.<sup>83</sup> Interestingly, in *Capital Bank*, the ECtHR found the measures disproportionate in spite of the peculiarities of the 'banking business' and the public interest in financial stability: the need for urgency could justify stricter time limits, but not the absence of review, and the need to avoid panic did not justify the lack of a hearing on the withdrawal of the license, which was adopted months after the bank was intervened.<sup>84</sup>

In the *Banco Popular* cases, the General Court has had to deal with practically all kinds of procedural claims, which, given the number of cases still in the pipeline, and their appeals before the Court of Justice, as well as the pending cases in *Sberbank*, will continue to shape EU procedural safeguards in bank crisis management for years to come.

<sup>75</sup> See, for example, Lamandini et al. (2017).

<sup>76</sup> *CME Czech Republic B.V. v The Czech Republic* (2003) Award by Wolfgang Kühn, Stephen Schwebel and Ian Brownlie under UNCITRAL Rules.

<sup>77</sup> *Capital Bank AD v Bulgaria*, App no 49429/99 (2005).

<sup>78</sup> *Supra* n. 76, 69; *ibid.*, 27-33.

<sup>79</sup> *Supra* n. 76, 58.

<sup>80</sup> The applicants challenged the measures on the grounds of a breach of Art. 6 ECHR (access to court) and Art. 1 of Protocol 1 (right to property), but in *Credit v Czech Republic* the arguments were the same, and the ECtHR declined to examine the 'property' claim after finding a breach of Art. 6. In *Cap. Bank v Bulgaria*, the ECtHR adopted a procedural approach for both Art. 6 and Art. 1 of Protocol 1.

<sup>81</sup> *Supra* n. 76, 69-72. According to the ECtHR's findings, in the process of review envisaged in the procedural laws, the courts could not examine the substantive reasons for the imposition and extension of compulsory administration. The procedure was exclusively written, with no hearing, and no possibility of opposition by the bank's management.

<sup>82</sup> *Supra* n. 77, 109, 135.

<sup>83</sup> *Ibid.*, 105-109, 134-135.

<sup>84</sup> *Ibid.*, 113, 137.

When discussing its standard of review, the Court refused to depart from its case law on ‘complex assessments’, which focuses on the existence of a ‘manifest error’ or misuse of powers,<sup>85</sup> but added that this standard required the court to also examine the accuracy, reliability, and consistency of the SRB’s evidence, i.e., a ‘process-based review’, while leaving the appellant the burden to produce evidence that made the SRB’s factual assessment appear *implausible*.<sup>86</sup>

An important part of the decision to place the entity in resolution was the valuation process. This comprised a valuation prepared by the SRB on 5 June 2017 under Article 20(5)(a) SRMR, to determine whether the conditions for resolution were met (valuation 1), and another valuation prepared by an appointed independent expert on 6 June 2017 (valuation 2). The General Court rejected the appellants’ argument that valuation 1 was not carried out by an independent person as required by the SRMR as a general rule, holding that the urgency of the situation enabled the SRB to conduct the valuation itself, and that this valuation was rendered obsolete by the ECB’s FOLTF assessment on 6 June 2017, which relied on more updated information on deposit withdrawals.<sup>87</sup> The Court also dismissed all claims<sup>88</sup> about the expert’s alleged lack of independence,<sup>89</sup> the methodology used, which, the Court confirmed, was based on correct criteria<sup>90</sup> and conducted under significant uncertainty and time constraints,<sup>91</sup> yet compliant with applicable technical criteria (which the Court discussed in extensive detail<sup>92</sup>), and the claim that it was not ‘reasonable, prudent and realistic’ due to the divergence between scenarios (it was not that substantial) or compared with valuation 1 (whose purpose was different, i.e., to determine the conditions for resolution<sup>93</sup>).

The appellants’ argument that the SRB had not conducted an *ex post* definitive valuation, as required by Article 20(11) SRMR, had already been rejected in the *Aeris* and *Algebris* cases by the General Court and the Court of Justice. They accepted the SRB’s opinion that not only would the valuation have served no practical purpose, but it was also not required by the SRMR, since Article 20(12) does not mention the ‘sale of business’ tool; the logic was that, if that tool is used, the appropriate valuation is the one resulting from the market price in a lawful tender procedure.<sup>94</sup> The General Court also rejected the appellants’ objections to the tender

<sup>85</sup> *Supra* n. 24, paras. 167-169; *supra* n. 25, paras. 107-108; *supra* n. 26, paras. 111-112; *supra* n. 27, paras. 105-106; *supra* n. 28, paras. 115-116.

<sup>86</sup> *Supra* n. 24, paras. 170-171; *supra* n. 25, paras. 109-110; *supra* n. 26, paras. 114-115; *supra* n. 27, paras. 108-109; *supra* n. 28, paras. 118-119. For a similar conclusion, also compare *supra* n. 73, paras. 94 and 116-124.

<sup>87</sup> *Supra* n. 24, paras. 562-573; *supra* n. 25, paras. 263-267; *supra* n. 26, paras. 293-303.

<sup>88</sup> E.g., *supra* n. 24, paras. 576-620; *supra* n. 28, paras. 602-668.

<sup>89</sup> *Supra* n. 26, paras. 305-327.

<sup>90</sup> *Ibid.*, 331-345.

<sup>91</sup> *Ibid.*, 348-353.

<sup>92</sup> *Ibid.*, 354-393.

<sup>93</sup> *Ibid.*, 394-411.

<sup>94</sup> Cases C-874/19 *P Aeris* (2021) EU:C:2021:1040 and C-934/19 *P Algebris* (2021) EU:C:2021\_1042. Yet, even the invalidity of the *ex post* valuation could not affect the validity of the resolution decision, since it was an act posterior to it.

process, holding that the process was transparent, the SRB addressed the five entities that had shown an interest in the sale<sup>95</sup> and sought to strike a balance between the sale's procedural requirements and resolution objectives. Any deviations from the former (e.g., admitting Santander's offer even after the deadline had passed) were justified by the latter (namely, the urgency of the situation, the need to avoid an uncontrolled insolvency, and the danger to financial stability), resulting in an adjudication in favor of Banco Santander for 1 euro, as it was the only entity that made an offer.<sup>96</sup>

The Court also rejected the allegations concerning the duty to state reasons. The SRB was not obliged to give reasons for the sale process, since this was conducted by the Spanish FROB, nor for the price, which resulted from a competitive process.<sup>97</sup> The SRB thoroughly justified the conditions of resolution and the choice of tool,<sup>98</sup> and provided a copy of the resolution scheme, with the confidential parts redacted.<sup>99</sup> Since the SRB justified the alternative chosen, it was not obliged to consider any hypothetical alternatives, e.g., a segregation accompanied by liquidity provision, as suggested by one appellant. This appellant did not substantiate why such a solution would have been viable or how it would have reconciled minimal destruction of value (which was its aim) with fulfilling resolution objectives, such as the continuity of critical functions (something that the sale of business achieved<sup>100</sup>). The Court also dismissed the allegations that the Commission simply endorsed the SRB's decision, without providing its own reasoning: the law only requires the Commission to either endorse the SRB decision or object to its discretionary aspects. In any event, the duty to provide reasons must be assessed in light of the circumstances of the case, including the urgency of the situation.<sup>101</sup>

The General Court also considered (and rejected) the allegations concerning the breach of procedural *safeguards*. The appellants alleged that they were deprived of their right to be heard based on both the SRMR provisions and the SRB's actions. Regarding the SRMR provisions on resolution tools, the Court held that the measures adopted under these are *addressed* to the bank, even though shareholders may be negatively affected (e.g., by a write-down of instruments<sup>102</sup>). Thus, their right of audience is not absolute, but may be limited if justified by objectives of general interest, such as those protected by resolution.<sup>103</sup> In particular, resolution requires the adoption of urgent measures, whose effectiveness may depend on a certain

<sup>95</sup> See, e.g., *supra* n. 24, paras. 630-653.

<sup>96</sup> *Ibid.*, 654-700.

<sup>97</sup> *Supra* n. 26, paras. 538-540.

<sup>98</sup> *Ibid.*, 541-558.

<sup>99</sup> *Ibid.*, 560-569.

<sup>100</sup> *Supra* n. 28, paras. 669-697.

<sup>101</sup> *Supra* n. 25, paras. 550-562; *supra* n. 27, paras. 149-155.

<sup>102</sup> *Supra* n. 24, paras. 201-203.

<sup>103</sup> *Ibid.*, paras. 209-221; *supra* n. 25, paras. 136-150; *supra* n. 26, paras. 446-466; *supra* n. 27, paras. 341-358; *supra* n. 28, paras. 231-250.

‘surprise effect’, which would be hindered (and the objectives thwarted) if a right of audience were granted to shareholders.<sup>104</sup>

The principle of effective judicial protection was also respected from the moment shareholders could file an annulment action (among others), since this principle does not grant a right to challenge measures *before* they are adopted, nor does it require the possibility for the court to undo the act.<sup>105</sup> Finally, the Court rejected the appellants’ allegations concerning their lack of access to the documents used by the SRB for its decision. The right of access to the file (Article 41 of the Charter) is exercised during the administrative proceedings and is restricted to the entity subject to resolution, i.e., the bank, and not its shareholders.<sup>106</sup> Furthermore, it cannot comprise confidential information, e.g., provided by third parties (who must be able to trust that the information will remain confidential<sup>107</sup>). In any event, the appellants were given access to non-confidential versions of several of the relevant acts.<sup>108</sup> The Court reached an analogous conclusion when access was claimed as part of the appellants’ right to judicial protection.<sup>109</sup>

Finally, the Court rejected the appellants’ allegations regarding a breach of confidentiality, based on the SRB Chair’s interview with Bloomberg, followed by an article from Reuters that cited an anonymous source at the Commission or SRB. According to the appellants, their combined effect was to cause the liquidity crisis and precipitate the resolution. However, in the Court’s view, during her interview the SRB Chair made relatively general remarks and did not disclose any confidential information, while the appellants were unable to substantiate that the cited ‘official’ was, in fact, someone at the Commission or SRB (and the information about the troubles of Banco Popular was already public).

## 6 Investment Treaty Litigation

Protection under investment treaties has also been sought in the Banco Popular litigation saga.

In *Del Valle Ruiz v Spain*<sup>110</sup> the claimants alleged that Spain had breached its investment treaty obligations, especially the Fair-and-Equitable Treatment (FET) standards, during the crisis management of Banco Popular. The case presented a major jurisdictional problem because the Mexico/Spain investment treaty does not cover actions taken by EU authorities, and the FOLTF assessment and resolution decisions were adopted by European authorities, while the Spanish FROB merely implemented the resolution action. The claimants alleged that Spain had failed to

<sup>104</sup> *Supra* n. 24, paras. 222-242; *supra* n. 25, paras. 151-185; *supra* n. 26, paras. 467-493; *supra* n. 27, paras. 359-387; *supra* n. 28, paras. 251-272.

<sup>105</sup> *Supra* n. 25, paras. 187-199.

<sup>106</sup> *Supra* n. 24, paras. 321-331; *ibid.*, paras. 456-464; *supra* n. 26, paras. 495-504.

<sup>107</sup> *Supra* n. 24, paras. 332-337; *supra* n. 25, paras. 466-480; *supra* n. 26, paras. 505-523.

<sup>108</sup> *Supra* n. 25, paras. 481-483; *supra* n. 26, paras. 524-526.

<sup>109</sup> *Supra* n. 25, paras. 441-455.

<sup>110</sup> Case No 2019-17 *Del Valle and Others v Kingdom of Spain* (2023).

correct the acts of other parties to prevent the bank's failure. The Arbitral Tribunal declared itself competent to decide solely on Spain's actions, taking into account all elements as factual context. The Tribunal held that Spain was not under a duty to end deposit withdrawals or correct public officials' statements, or enact a short sales ban; most notably, it found that in the ELA process, the Bank of Spain had not exceeded its discretion in assessing the adequacy of collateral or applying haircuts, and the ultimate decision not to grant ELA was precipitated by the bank board's assessment that the bank was FOLTF and that the FROB neither pressured the SRB to utilize the sale of business tool nor organized a flawed action process. In conclusion, the Tribunal categorically dismissed all the claimants' allegations, to the point of making an award of costs to the respondent. The Tribunal did so by engaging with the facts in an analysis as detailed and comprehensive as that in the pilot cases decided by the General Court. Neither the investment arbitration nor the European courts, therefore, condoned the governmental actions taken in the name of financial stability but evaluated the measures in terms of substance and procedure. It is worth noting that the Tribunal discussed at length the standard of proof, which relates to the degree of certainty required for a tribunal to find that a fact alleged by the claimant is proven. It considered that the Tribunal enjoyed wide discretion in weighing the evidence and applied the standard of reasonable certainty. It also noted that the claimants had requested the Tribunal to apply a standard of proof lower than the preponderance of evidence and to shift the burden of proof to the respondent, which, in this case, had exclusive control over the evidence and had taken steps to deny access to relevant evidence to the claimants. The Tribunal considered, in principle, that, depending on the circumstances, it may, in its discretion, determine that the burden of proof should be shifted or the standard lowered 'and ultimately whether an alleged fact can be deemed established under the circumstances'.<sup>111</sup> All crucial facts, including those concerning the alleged ELA suspension on 6 June 2017,<sup>112</sup> were ultimately established with reasonable certainty, grounded on the documentary evidence submitted by both parties.

## 7 All's Well That Ends Well, Then?

Can we then conclude, as in Shakespeare's comedy, 'all's well that ends well'? Quite so, yet with *caveats*. The resolution context is one where public decision-making is structurally imbued with future scenarios analysis, probabilistic assessments of possible, yet remote, catastrophic events (bank failures potentially capable of endangering financial stability), as well as preparatory and preventative public actions (*ex ante* resolution planning, determination of the TLAC/MREL ammunition, and

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<sup>111</sup> Ibid., paras. 495-497.

<sup>112</sup> Ibid., paras. 592-659 (and, at 635, the finding that 'upon a review of the entirety of the record, the Tribunal comes to the conclusion that there was nothing unreasonable or arbitrary in the conclusion of the Bank of Spain that Banco Popular had not managed to provide sufficient collateral and to pledge it in accordance with the applicable requirements to justify disbursements in excess of the sum of 3.8 billion that Bank of Spain had released to Banco Popular'.

FOLTF and public interest assessments), largely based, in turn, on forward-looking, speculative assumptions. Public actions appear, in practice, often inspired by a logic of precaution very similar to that of the precautionary principle, although in *Tatiana Perez* the General Court raised doubts on the applicability of this principle in the banking sector, noting that Article 191(2) TFEU and existing case law so far confine this principle to environmental policy and public health.<sup>113</sup> Yet, in our view, the resolution context, like environmental policy, is one fraught by uncertainties and populated by known unknowns, where there is, in practice, an unspoken belief that the risk of false negatives clearly outweighs that of false positives following the typical precautionary adage ‘better safe than sorry’. In this context, this translates, *de facto*, into a rule of thumb whereby, in doubt, administrative action (in the form of (i) skeptical views on divestiture strategies and intra-group asset transfers before and during resolution and in resolution planning and iMREL waivers, (ii) higher MREL requirements, also in the form of add-ons over TLAC, and (iii) positive FOLTF and public interest assessments) is usually preferred to inaction. This means that banks’ crisis management is, so far, perhaps the most advanced frontier, along with climate change,<sup>114</sup> of (real world) decision-making in uncertainty. This is also a context where in practice a ‘minimax’ approach (the decision rule used in decision theory to minimize the possible loss for a worst-case scenario where the consequences of decisions depend on unknown facts) is suitable and is being applied (without stating it explicitly), at least in some instances. As a matter of fact, public authorities engaged in the resolution context are often called to frame their decision-making by considering multiple, alternative and hypothetical scenarios. Sometimes this requires a more familiar assessment that there is objective evidence to support the conclusion that a certain event will occur in the future, based on a probabilistic assessment (as was the case, under the EBA Guidelines on FOLTF, regarding the likely failure due to the bank’s liquidity position);<sup>115</sup> yet, in other cases, this necessitates making assumptions beyond a single probability distribution requiring decisions that consider multiple priors and many potential outcomes, and in some other relevant instances weighing possibilities in a scenario analysis that factors in black swans and fat-tail events. Since the outcome of this complex decision-making has highly relevant economic implications, is costly for banks and society at large, and results in winners and losers in the process, this turns, quite naturally, into a legal battleground, where decision theory can test, in the field and *in vivo*, at least some of its theoretical propositions long discussed in the context of public choice under uncertainty. This also has far-reaching implications for the evidentiary standard to be met by the parties in resolution litigation.

Just to give a few examples, a credible resolution plan cannot be devised without forecasting the business profile of the resolved entity at the time of resolution, which requires making consequential and robust assumptions not only about the expected balance sheet depletion effect based on credit risk at resolution, but also regarding

<sup>113</sup> *Supra* n. 24, paras. 446-448.

<sup>114</sup> Ramos Muñoz D et al. (2023a); Ramos Muñoz D et al. (2023b).

<sup>115</sup> EBA (2015); on its implication for Banco Popular’s FOLTF, see *supra* n. 26, paras. 140-144, in particular at 143.

possible divestitures before or at resolution (which, in turn, translates into an inter-institutional coordination problem, which was part of the discussion of case 1/22 before the SRB Appeal Panel: to what extent can recovery actions agreed in advance with the supervisory authority at the level of the recovery plans be credibly factored in into the resolution context?). Likewise, an MREL determination needs to be tailored to the entity's profile at resolution as envisaged in the resolution plan (which, as noted, is in itself a probabilistic outcome), and, in addition, to further hypotheticals concerning, e.g., the need for additional capital buffers beyond the minimum to ensure market confidence. As noted above, and as clearly shown not only by the *Banco Popular* case but also by *ABLV* and *Sberbank*, the FOLTF assessment is not necessarily a balance-sheet insolvency test. Thus, when the failure is likely enough to trigger resolution action, it becomes a loaded question in the context of a liquidity crisis (the competent authorities must forecast, in light of existing trends, the expected further deterioration of the bank's liquidity position, including deposit outflows, and assess, in parallel, the present and future conditions for access to emergency liquidity assistance from the relevant central bank). The public interest assessment implies the simultaneous consideration of two hypotheticals: one idiosyncratic and the other within the context of a system-wide crisis. Ultimately, also the choice of the resolution tool involves a dynamic multi-scenario decision-making process in uncertainty. This means that, in the real world, finding the right balance between the costs associated with potential excesses in the use of precaution ('false positives') and the costs of inaction ('false negatives') or insufficient preparation is not an easy task.

In other contexts, such as antitrust, there has long been an attitude that the costs of false positives (i.e., erroneous antitrust convictions and over-deterrence) far exceed the costs of false negatives (i.e., erroneous acquittals and under-deterrence). This translated into a call for a higher evidentiary burden for those alleging an antitrust violation, be it the authority or a private plaintiff.<sup>116</sup> The evidentiary standard in antitrust has thus often been, in American parlance, the 'preponderance of evidence' standard to be discharged by those alleging the antitrust violation; in British and European jargon, the 'balance of probability' (an exemplary discussion can be found in the European Court's practice in the Opinions of AG Kokott in *Bertelsmann*<sup>117</sup> and in *CK Telecoms*<sup>118</sup>). Yet, the social costs implicated in a false negative in an antitrust case are rarely comparable with the financial stability implication of a false negative in resolution, due to the catastrophic destructive potential of a missed resolution of one or more G-SIFIs.

Economic science cannot (at least not always) offer conclusive answers or tools to provide full evidence of the existence or extent of potential future risks to financial stability that may materialize in a worst-case scenario and are accounted for, and factored in, in the wide range of decisions concerning the preparation and

<sup>116</sup> Bork (1978), pp 134-160; for a recent reconsideration, Gavil and Salop (2020).

<sup>117</sup> Case C-413/06 *Bertelsmann and Sony Corporation of America v Impala* (2008) ECLI:EU:C:2008:392, paras. 207-208.

<sup>118</sup> Case C-376/20 *European Commission v CK Telecoms UK Investments Ltd.* (2022) ECLI:EU:C:2022:817, paras. 56-58. In the literature, consider Kalintiri (2019) and Mendes (2019).

implementation of resolution. We believe that this is therefore a context where the approach of the CJEU in *Blaise*<sup>119</sup> regarding the precautionary principle (in *Blaise*, to counter human health risks through protective measures) would be worth mirroring: if it proves impossible to determine with certainty the existence or extent of the alleged risk, but there is a likelihood of real harm should the risk materialize, the precautionary principle justifies the adoption of corrective actions also in the context of resolution.

The test of time says little, so far, about the costs associated with precautionary resolution preparation. In fact, it must be acknowledged that the TLAC/MREL ammunition, which represents the prerequisite for implementing bail-in in the Banking Union, has reached its targets only this year. Therefore, even though it is certainly true that, in the recent past, the SRB has departed from the resolution plans prepared in advance at the time of resolution, has never adopted the bail-in tool (instead opting, twice, for the sale of business tool) and has often reversed, at resolution, the public interest assessment made *ex ante* in the resolution plan, and critics have therefore questioned the effectiveness, overall reasonableness, and proportionality of the European resolution framework, this still says little about the present and the future. If the ammunition for bail-in is only now fully loaded, it is only fair to acknowledge that what matters in assessing the credibility of the bail-in tool in Europe will be its practice from now on. Moreover, one should also be careful in drawing inferences from the peculiar, Swiss-specific, response to the Credit Suisse collapse, because the differences with the European context outweigh the similarities. Therefore, our experience is still too limited to claim that the resolution framework relies excessively, albeit implicitly, on the precautionary principle, leading to too many false positives, which translate into too many undesirable costs for the banks, but also for the economy as a whole (any excess in the TLAC/MREL ammunition fatally translates into additional and unnecessary financing costs for the banks and a correlated restriction on lending).

This has implications for judicial review on two counts.

One cannot reasonably expect a judicial scrutiny of decisions based on assumptions of hypothetical future events to be much stricter than the one established by European courts in the *Banco Popular* saga. The *plausibility test* used by European courts to scrutinize future scenarios considered by the resolution authority in its decision-making under uncertainty is therefore, in our view, generally warranted.

There are, however, two *caveats*. The balance of probability test may still apply in the context of resolution. However, it is important to scrutinize legal concepts of the resolution framework which are expressly grounded on a probabilistic assessment based upon a single probability distribution (and binary assessment), as is the case with the ‘likely to fail’ in the FOLTF assessment. In that scenario, to infer and conclude that a bank is FOLFT, and thus that ‘there is objective evidence to support the conclusion that failing will occur in the future’ (as the EBA Guidelines require), the competent authority (and the valuer, in valuation 1) needs to be persuaded (offering robust reasons for this) that failing is more likely than not.

<sup>119</sup> C-616/17 *Procureur de la République v Blaise* (2019) ECLI:EU:C:2019:190, para. 43.

A second *caveat* is that *ex post* judicial review needs to require more than *plausibility* where there is an inconsistency between the assessments of supervisory and resolution authorities on matters having simultaneous implications for both fields, as is the case with asset transferability concerning capital, liquidity and iMREL waivers or divestiture measures in recovery and resolution planning. In such case, in the event of a discrepancy, we believe that European courts can (and should) carefully and closely cross-examine the (potentially divergent) outcomes reached by the two authorities. If these differences reflect various objectives between the relevant legal frameworks, they are reasonable and justified. If they show methodological flaws on one side that need to be remedied to ensure better consistency in the continuum from supervision to resolution in crisis management, the scrutiny should adequately reflect that. Furthermore, measurable scenarios should be scrutinized with great care. The clearest example is valuation 3 and the *ex post* assessment of compensation claims by affected shareholders and creditors. True, this valuation, too, needs to compare the actual scenario of resolution with the counterfactual of liquidation (here, there is an interesting interplay between Article 76 SRMR, Level 2 Regulation 2018/344, and national law),<sup>120</sup> and the lack of harmonization in banks' liquidation within the Banking Union is a source of additional, undesirable variance in the expected outcomes. This further confirms the urgent need for a UNIDROIT guide and its implementation by the 20 Member States of the Eurozone, especially regarding transfer tools in liquidation. Nonetheless, in that realm, courts, in our view, should not shy away from pointing out that, while crisis measures may have been justified in a situation of urgency, comparative harm deserves compensation. Their stricter scrutiny conveys an important message to the public regarding the overall legitimacy of the European crisis management framework: courts are the ultimate guardians of fundamental rights affected by resolution in the interest of financial stability.

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**Conflict of interest** Marco Lamandini and David Ramos Muñoz declare no conflict of interest.

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<sup>120</sup> Joined Cases T-302/20, T-303/20 and T-307/20 *Del Valle Ruiz v SRB* (2023) ECLI:EU:T:2023:735, paras. 71-85.

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