Summary of the Judgments in Cases T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB*, ECLI:EU:T:2022:311, T-510/17, *Del Valle Ruiz and Others v Commission and SRB*, ECLI:EU:T:2022:312, T-523/17, *Eleveté Invest Group and Others v Commission and SRB*, ECLI:EU:T:2022:313, T-570/17, *Algebris (UK) and Anchorage Capital Group v Commission*, ECLI:EU:T:2022:314, and T-628/17, *Aeris Invest v Commission and SRB*, ECLI:EU:T:2022:315

In the five cases at hand, in which judgments were delivered on 1 June 2022, the General Court (in its extended composition) rendered the **first major judgments concerning the resolution of *Banco Popular Español, S.A.*** (hereafter: BPE). As highlighted in the rather comprehensive press release published by the *CJEU's Communication Directorate* (Press and Information Unit), the present 'test cases' gave the Court the first opportunity to decide on the legality of a resolution scheme adopted by the SRB and the new EU bank resolution framework introduced as part of the Banking Union in the aftermath of the 2008 financial crisis. Due to similar arguments put forward in other BPE cases,[1] the five judgments will also have an impact on the outstanding proceedings.

Currently, **only two judgments are available in English**, i.e. in Case T-510/17, *Del Valle Ruiz and Others v Commission and SRB* [also accessible in French] and in Case T-570/17, *Algebris (UK) and Anchorage Capital Group v Commission* [other translations: French and Hungarian]). The judgment in Case T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB*, is available in French, Polish and Spanish; the judgment in Case T-523/17, *Eleveté Invest Group and Others v Commission and SRB*, in French, Spanish, Italian, Polish, Portuguese and Romanian; and finally, the judgment in Case T-628/17, *Aeris Invest v Commission and SRB*, in French, Spanish, Lithuanian, Polish, Portuguese and Romanian.

1 **Facts**

The five cases concerned the SRB Decision of 7 June 2017 (SRB/EES/2017/08) establishing a resolution scheme for BPE, which was endorsed by the Commission (Decision 2017/1246, OJ 2017, L 178, p. 15), following a **significant deterioration in the liquidity position** of BPE (see in detail on the background the identical para. 25-83 of all cases and on the liquidity situation esp. para. 35 et seq.). The basis for the resolution decision was an internal valuation of June 2017 drafted by the *SRB* (so-called 'valuation 1'), an additional valuation carried out by SRB's independent expert *Deloitte* on 6 June 2017 (called 'valuation 2', on this para. 65) as well as a 'positive' failing or likely to fail (FOLTF) assessment by the *ECB* (para. 61); the non-confidential version of the ECB's FOLTF assessment can be found here. The same conclusion was also reached by BPE's Board of Directors on 6 June 2017 (para. 62). Against this background, on 7 June 2017, the SRB decided to **bail-in BPE's shareholders and creditors** as well as **transfer BPE's new shares to *Banco Santander S.A.*** for EUR 1. It was precisely this write-down and conversion of BPE's capital instruments that led to the proceedings before the General Court.

In the five actions, the **claimants** were (i) shareholders of BPE (T-481/17 and T-628/17), (ii) shareholders or holders of Additional Tier 1 (AT1) or Tier 2 capital instruments issued by BPE (T-523/17), (iii) fund managers holding AT1 and Tier 2 capital instruments (T-570/17), and (iv) shareholders or holders of bonds issued by BPE (T-510/17) — see para. 24 for all cases. As regards the **scope of application**, some of the applications sought (only) the annulment of the SRB Decision (T-481/17) or of the Commission Decision (T-570/17), while others requested the annulment of both decisions together (T-523/17, T-510/17, T-628/17). Furthermore, across the different legal actions, the applicants relied on some overlapping pleas in law, but also some 'case-specific' pleas. Overall, the cases can be narrowed down to **ten issues** (cf. also the press release by the CJEU), which will be highlighted below.

[1] For instance, Case T-481/17 relies on the pleas in law in Case T-478/17, *Mutualidad de la Abogacía and Hermandad Nacional de Arquitectos Superiores y Químicos v SRB*.

Findings of the General Court

A **first head of claim** concerned the **admissibility of bringing an action only against the SRB decision** (see in particular para. 107-150, T-481/17). Looking at the wording of Article 86 of the SRM Regulation but also with reference to the principles of legal certainty and effective judicial protection the General Court reasoned that *a resolution scheme adopted by the SRB is producing legal effects and thus subject to appeal on its own* (cf. para. 143 and 149, T-481/17).[2]

As a **second point**, the Court assessed the **scope of the its review** (see esp. para. 164-172, T-481/17, but cf. also, e.g, para. 104-111, T-510/17; para. 102-109, T-570/17). Here, the Court stipulated that *resolution decisions are made on the basis of highly complex economic and technical assessments*, and therefore the Court's review must adhere to the principles set out in case law concerning (a) highly complex scientific and technical matters and (b) complex economic assessments (see i.a. para. 169, T-481/17; para. 109, T-510/17): first, as regards 'highly complex scientific and technical facts', the Court's review is limited to examining whether (x) there is no manifest error, (y) no misuse of power or (z) no manifest exceedance of the limits of discretionary power (see para. 167, T-481/17; para. 107, T-510/17); secondly, with respect to 'complex economic assessments', the Court is necessarily confined to verifying (i) compliance with the rules of procedure as well as whether there was (ii) a statement of reasoning, (iii) an accurate statement of the facts and (iv) no manifest error of assessment or misuse of powers (see para. 168, T-481/17; para. 108, T-510/17). Despite this deferential attitude towards the SRB's decision-making, the Court stressed that it will not refrain from reviewing the SRB's interpretation of economic information forming the basis of its decision. Specifically, **the Court will verify** (1) *the factual accuracy of the evidence relied on as well as its reliability and consistency*, but also (2) *whether that evidence comprises all the relevant data to be taken into account in evaluating a complex situation* and (3) *whether the evidence is capable of supporting the conclusions reached* (para. 170, T-481/17; para. 110, T-510/17).[3]

A **third set of issues**, which arose to some extent in all five cases, revolved around a possible **violation of the applicants' fundamental rights** enshrined in the Charter, esp. an infringement of the right to be heard (see e.g. para. 117-186 and para. 413-440, T-510/17; para. 321-388, T-570/17), of the right to property (see e.g. para. 485-541, T-510/17; para. 389-432, T-570/17) and of the right of access to documents (see esp. para. 321-337, T-481/17; para. 495-528, T-523/17). With respect to the **right to be heard**, the General Court found that the absence of an (explicit) provision requiring shareholders and creditors to be heard constitutes a limitation which is however *justified and necessary to meet an objective of general interest*;[4] it also *respects the proportionality principle* (para. 387, T-570/17). With respect to **the right to property** the General Court reasoned that *the resolution decision was a justified and proportionate restriction on their right to property* (see on this and the following para. 429, T-570/17). More specifically, BPE was FOLTF and there were no alternative measures and without resolution BPE would have entered into regular insolvency proceedings and shareholders had to bear the risk of their investments; additionally, the SRM Regulation provides possible compensation. Lastly, some claims were made regarding **the right of access to documents**, i.a. in relation to the valuation.

[2] See on this also Jolien Timmermans, 'Good job! The General Court pats the SRB on the shoulder for its first ever banking resolution', *REALaw.blog* of 7th June 2022, available at <https://realaw.blog/?p=1570> accessed 4 August 2022.

[3] Critically ibid.

[4] The effective implementation of a resolution action constitutes such an objective of general interest (cf. para. 146, T-510/17). For a more detailed analysis of this see Christy Ann Petit, 'Op-Ed: "Financial stability objective and delegation of powers in resolution – a consolidation of EU case-law. The 'Banco Popular' cases before the General Court"', *EU Law live* from 16th June 2022 <https://eulawlive.com/op-ed-financial-stability-objective-and-delegation-of-powers-in-resolution-a-consolidation-of-eu-case-law-the-banco-popular-cases-before-the-general-court/> accessed 4 August 2022.

The Court, however, hold that the applicants are not the addressees of the resolution scheme[5] or the valuation 2 and that they did not dispute that valuation of the independent expert contains confidential data, which is why they *cannot claim a right to the access to the complete version* (cf. para. 336, T-481/17).

A **fourth concern** was a possible **breach of principles relating to the delegation of power**. To be precise, it was argued that Articles 18 and 22 of the SRM Regulation are unlawful in that they infringe the principles of the *Meroni* case-law of the Court of Justice (see para. 204-242, T-510/17; para. 121-148, T-628/17). However, the General Court took the stance that under Article 18 of the SRM Regulation, it is necessary for the Commission or the Council to endorse the resolution scheme with regard to its discretionary aspects in order to produce legal effects, which is why *the legal and political responsibility for determining the EU's resolution policy is conferred on an EU institution, and thereby in line with Meroni* (para. 218, T-510/17; also para. 121, T-570/17; para. 130, T-481/17; para. 133, T-628/17). The Court also stated that the *SRB does not have not the power to decide autonomously* whether an entity should be subject to a resolution action pursuant to Article 18 of the SRM Regulation or to decide on the resolution tool to be applied pursuant to Article 22 of the SRM Regulation (para. 228, T-510/17).[6]

Another aspect (**no. 5**) under scrutiny was the **valuation carried out for the purposes of resolution** – esp. by the independent expert *Deloitte*, but also by the SRB itself – as per Article 20 of the SRM Regulation. In particular, it was doubted that the valuation for BPE was 'fair, prudent and realistic' (see in detail e.g. para. 263-425, T-523/17; also para. 243-320, T-510/17). Again, the Court reasoned that, given the time constraints and the information available, *a provisional valuation under Article 20 is necessarily subject to some uncertainties and approximations* and that *some reservations expressed by Deloitte cannot imply that a valuation was not 'fair, prudent and realistic'* (cf. para. 302, T-510/17; also para. 242, T-570/17). Moreover, valuation 1 carried out by the SRB aiming at determining, whether BPE was FOLTF, became obsolete following the FOLTF assessment by the ECB on 6 June 2017 (para. 263, T-510/17).

As a **sixth issue**, some of the applicants also disagreed with the **existence of resolution conditions** as per Article 18(1) of the SRM Regulation. Together, the legal actions questioned all three conditions, i.e. (i) that BPE was FOLTF (on this e.g. para. 353-408, T-510/17), (ii) that there was no reasonable prospect of an alternative private sector measure (on this e.g. para. 324-352 T-510/17) and (iii) that the public interest condition was fulfilled (see para. 427-442, T-481/17). However, contrary to the claimants, the General Court considered that the SRB and Commission *did not make a manifest error of assessment in finding that the conditions under Article 18(1)(a) and (b)* of the SRM Regulation were satisfied (see e.g. para. 351 and 407, T-510/17). Furthermore, in Case T-481/17, the Court stipulated that the SRB also *did not commit a manifest error of assessment in considering that the condition laid down in Article 18(1)(c)* of the SRM Regulation was met (see para. 441).

Another argument (**no. 7**) concerned the alleged **failure of the Commission to examine the resolution scheme before endorsing it** (see para. 110-144, T-570/17). However, in the Court's view, this claim is also based on an *incorrect assumption about the Commission's role in the preparatory phases* (that this was limited to the period between the SRB's transmission of the resolution scheme and its approval by the Commission) and must be rejected (cf. para. 139 et seq., T-570/17). Amongst others, the Commission representatives *participated in several meetings* of the SRB and thus had become aware of and participated in the drafting of the preliminary resolution schemes before 7 June 2017 (see

[5] In line with Article 90(4) of the SRM Regulation, only the entity that is the subject of the resolution scheme (i.e. BPE), but not its shareholders or creditors, can rely on the right of access to the document (cf. para. 503 et seq., T-523/17).

[6] See for an analysis Petit, *EU Law live* from 16th June 2022 (n. 4).

para. 136, T-570/17). On a related note, the participation in the SRB's sessions also was a factor taken into account in the context of the alleged infringement of the principles relating to the delegation of power (cf. para. 231, T-510/17; see the fourth concern above).

Eighth, applicants alleged an **infringement of the obligation to state reasons** by failing to provide the actual and specific reasons why the Commission adopted the contested decisions (see para. 542-559, T-510/17; para. 145-157, T-570/17). The Court rejected this claim as unfounded i.a. because in Decision 2017/1246 the *Commission explicitly stated that it agrees with the SRB's grounds for adopting the resolution action* in relation to BPE, in particular with regard to the public interest criterion (cf. para. 553, T-510/17 and para. 150, T-570/17). Furthermore, the Court referred to its comments made earlier in the fundamental rights context (in relation to the right to effective judicial protection) that applicants are not entitled to receive the full versions of the resolution scheme, valuation 2 or the other documents on which the SRB relies in its decision-making (cf. para. 549, T-510/17).

As a **ninth plea**, an **infringement of the** SRM Regulation **in relation to the sales process** was alleged, as the highest possible sales price supposedly had not been achieved (see para. 520-569, T-628/17). However, the Court found that the applicants *have not established that the sale procedure was irregular*, and that the applicants *cannot claim that the procedure did not lead to the maximisation* of *the sale price* (para. 568, T-628/17). Rather, the Court referred to Article 39(2) of the BRRD noting that, except for the case that potential purchasers are unduly favoured or discriminated against, *the law does not prevent a national resolution authority from soliciting particular potential purchasers* (para. 546, T-628/17).

As a **tenth issue**, the Court had to rule on the **claim for compensation** in respect of the non-contractual liability of the SRB and the Commission (see in detail para. 587-675), raised only in the 'test case' T-523/17, but also the subject of many other BPE-related proceedings. The request for compensation was based i.a. on an alleged breach of confidentiality obligations as well as on a 'passive attitude'. The General Court concluded that the claimants *have not demonstrated the existence of unlawful conduct* and, therefore, that they have not established the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals (para. 651, T-523/17). In addition, the Court reasoned that the applicants *have not established a causal link* between the alleged unlawful conduct by the SRB and the Commission and BPE's liquidity crisis (see para. 665, T-523/17).

Overall, the Court therefore **dismissed the claims in their entirety**. However, it should be noted that an appeal has already been submitted in Case T-481/17 (see C-448/22 P, ***SFL v SRB***), which is why the BPE Saga will most likely continue before the CJEU.

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