

30 August 2017

case 13/17

DECISION

[Appellant]

appellant

v

the Single Resolution Board

Yves Herinckx, Vice-Chair
Eleni Dendrinou-Louri
Kaarlo Jännäri
Marco Lamandini
Luis Silva Morais

DECISION

In Case 13/17,

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (the “SRMR”),

[Appellant], [address], Spain, appellant,

v

the Single Resolution Board, represented by Dr Elke König, Chair,

THE APPEAL PANEL,

composed of Yves Herinckx, Vice-Chair, Eleni Dendrinou-Louri, Kaarlo Jännäri, Marco Lamandini and Luis Silva Morais,

makes the following decision.

(1) The procedure

1. An application was received by the Secretariat of the Appeal Panel on 19 July 2017, addressed to the Single Resolution Board and stating that it constituted an optional revision appeal pursuant to the provisions of articles 123 *et seq.* of the Spanish Law 39/2015 of 1 October on the Common Administrative Procedure of the Public Administrations. On 19 July 2017 the Secretariat wrote to Mrs [Appellant] and asked to clarify whether the application should be considered as an appeal to the Appeal Panel. Mrs [Appellant] Angulo responded in the affirmative on 19 July 2017.
2. Mrs [Appellant] alleges to be a shareholder of Banco Popular Español, S.A. (“Banco Popular”) and seeks the annulment and the suspension of the Board’s decision dated 7 June 2017 whereby the Board placed Banco Popular under resolution and adopted a resolution scheme. The scheme includes a full write-down of the shares in Banco Popular, a conversion into shares of all additional tier 1 instruments issued by Banco Popular followed by a full write-down of the shares resulting from this conversion, and a conversion into shares of all tier 2 instruments issued by Banco Popular followed by a sale to Banco Santander S.A. for a total consideration of €1 of the shares resulting from this conversion.

3. The operative part of the notice of appeal reads as follows:

REQUEST: to admit this present document and to treat it as a timely and properly presented revision appeal against the implementation of the abovementioned decision of the Single Resolution Board, as the implementation of such decision has caused very serious damage to the property of the former and legitimate shareholders and debtholders of Banco Popular; and to adopt without delay an annulment decision.

SUBSIDIARY REQUEST: to declare, in any case, the immediate suspension of the implementation measures carried out by the SRB by extension of the FROB since its validity and entry into force causes irreparable or hardly reparable harm to the property of the shareholders of Banco Popular as we have lost such status of shareholder.

4. On 20 July 2017, the Vice-Chair of the Appeal Panel informed Mrs [Appellant] that, on a preliminary analysis, the contested decision appeared to fall outside the Appeal Panel's jurisdiction. The Vice-Chair set the following timetable for the submission by the parties of their observations on the admissibility of the appeal: observations of Mrs [Appellant] by 25 July 2017, response of the Board by 28 July 2017 and rebuttal of Mrs [Appellant] by 1 August 2017. The Vice-Chair also requested each party to advise if it wished to make oral representations. Mrs [Appellant] filed observations on 25 July 2017. The Board responded on 28 July 2017, in English; a Spanish version of the response followed on 3 August 2017. Mrs [Appellant] filed a rebuttal on 4 August 2017.

(2) Arguments of the parties

5. Mrs [Appellant] contends that her appeal is admissible by reference to Articles 10(10), 11(3), 40(2) and 90(3) of the SRMR. Article 10(10) was breached because the resolution decision does not satisfy the proportionality requirement set out in that provision. Article 11(3) was breached because the Board failed to examine whether it would have been less onerous to apply simplified obligations rather than to place Banco Popular under resolution, and failed properly to assess the negative effect of its decision on other institutions. Article 40(2) was breached because Mrs [Appellant] was not given access to the file and her rights of defence were, as a consequence, not complied with. Mrs [Appellant] does not provide reasons supporting the alleged violation of Article 90(3).
6. Furthermore, Mrs [Appellant] alleges that a decision by the Appeal Panel declaring her appeal inadmissible would amount to denying remedies to natural persons who are not legal experts or would force them to bear the costs of hiring lawyers; she states that the Appeal Panel is the only body with jurisdiction to examine the facts of the

case. Mrs [Appellant] also claims that a decision of inadmissibility would be discriminatory because the Appeal Panel has allegedly declared admissible a similar appeal submitted by the Asociación Independiente de Afectados por el Popular (AIAP). In her rebuttal of 4 August 2017, Mrs [Appellant] submits further arguments that actually go to the merits rather than the admissibility of her appeal, and therefore need not be addressed at this stage.

7. The Board states that, insofar as the appeal is directed against the implementing decision made by the FROB, the Appeal Panel has no jurisdiction.
8. The Board notes that the notice of appeal does not state why it is admissible, in breach of Article 5(4)(a) of the Appeal Panel's Rules of Procedure. The Board further contends that the contested decision was made pursuant to Article 18 of the SRMR and, therefore, is not of a type that can be appealed against in accordance with Article 85(3). The Board states that decisions referred to in Article 90(3), against which an appeal is possible, are the decisions that reject a confirmatory application. The appellant did not submit any such confirmatory application. Articles 10(10), 11(3) and 40(2) are irrelevant to this case because the contested decision was not made pursuant to these provisions. The appeal is, as a consequence, inadmissible.

(3) Findings of the Appeal Panel

9. The Spanish version of the Board's response and Mrs [Appellant]'s rebuttal were submitted after the deadlines set by the Vice-Chair. Given that the delay was minimal and that neither party objected, the Appeal Panel admits both documents.
10. The notice of appeal received on 19 July 2017 is expressly directed against the decision of the Board referred to above in paragraph 2. On 18 July 2017 Mrs [Appellant] mistakenly sent to the Secretariat of the Appeal Panel a similar notice of appeal directed against the FROB. The appeal being dealt with in this decision is the one dated 19 July 2017. In her rebuttal of 4 August 2017, Mrs [Appellant] confirmed that the contested decision is the Board's decision.
11. The jurisdiction of the Appeal Panel is determined by Article 85(3) of the SRMR: appeals to the Appeal Panel are permitted against decisions of the Board 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 SRMR. Other types of decisions of the Board are not appealable to the Appeal Panel; they may be appealable to the Court of Justice of the European Union in accordance with Article 86(1) of the SRMR and Article 263 TFEU, subject to the admissibility conditions set out in these provisions.
12. Articles 10(10), 11(3), 40(2) and 90(3) of the SRMR have no bearing on this case. Article 10 deals with measures adopted with a view to reducing or removing impediments to the resolvability of an institution. Article 11 concerns simplified obligations

in relation to the drafting of resolution plans. Article 40 relates to proceedings for the imposition of fines or periodic penalty payments. Article 90(3) is engaged when the Board has refused, totally or partially, to grant access to documents requested by way of a confirmatory application under Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

13. The contested decision relates to the resolution of a credit institution. It is based on Articles 14 to 29 (Part II, Title I, Chapter 3, 'Resolution') of the SRMR. This is a decision of a type which is not listed in Article 85(3) of the SRMR.
14. Contrary to the assertions of Mrs [Appellant], the circumstance that the contested decision may not be appealed against before the Appeal Panel does not lead to a denial of legal remedies. The Treaty on the Functioning of the European Union, by its Articles 263 and 277 on the one hand and its Article 267 on the other, and the SRMR, by its Articles 85 and 86, have established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of the acts of the Board. As indicated in paragraph 11, decisions of the Board that are not appealable to the Appeal Panel may be appealable directly to the Court of Justice of the European Union, subject to the applicable conditions as to admissibility. Where a decision of the Board is addressed to a national resolution authority, natural or legal persons who cannot, by reason of the admissibility conditions stated in the fourth paragraph of Article 263 TFEU or in Article 85(3) of the SRMR, challenge directly that decision do have protection against the application to them of that decision by the national resolution authority. Such persons may plead the invalidity of the Board decision at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, pursuant to Article 267 TFEU (see, with regard to the similar system of legal remedies applicable to regulatory acts, CJEU, 28 April 2015, C-456/13, *T & L Sugars*, paragraphs 30, 31 and 45 to 48; CJEU, 3 October 2013, C-583/11, *Inuit Tapiriit Kanatami*, paragraphs 92 to 96). Therefore, the argument that Mrs [Appellant] would be denied legal remedies if her appeal to the Appeal Panel were not declared admissible cannot be accepted.
15. The argument relating to the cost of legal assistance cannot affect the admissibility of this appeal, which is dependent on the nature of the contested decision.
16. As to the argument of discrimination, Mrs [Appellant] provides no evidence in support of her assertion that the Appeal Panel would have declared admissible a similar appeal by the Asociación Independiente de Afectados por el Popular.
17. The appeal is therefore not admissible.

On those grounds, the Appeal Panel hereby:

- 1. Declares that the appeal is not admissible.**

Yves Herinckx
Vice-Chair

Eleni Dendrinou-Louri

Kaarlo Jännäri

Marco Lamandini

Luis Silva Morais

This decision is signed in Spanish and in English. The Spanish version is authentic; the English version is a translation.