The Banco Popular Resolution Case: A Tainted Success for the SRM?

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The Banco Popular (BP) resolution marks a milestone in the development of the incipient Banking Union. The bail-in of its creditors and its subsequent sale to Santander represented the first time the Single Resolution Board (SRB) has used its powers under the Single Resolution Mechanism Regulation to write down and restructure a bank’s liabilities. Indeed, other banks deemed failing or likely to fail since the setup of the SRB in 2015 have all been wound up under their respective national insolvency laws.¹

While the European Monetary Union benefitted from the experience and theorization of the ‘Bundesmodel’², the Banking Union established a new, untried common system of supervision and orderly resolution of failing financial institutions. Hence the BP case was eagerly awaited by market participants, to observe how a bank’s capital structure would be used when a bank faces financial difficulty, and if both financial stability, taxpayers and creditors’ interests are adequately protected and balanced under the new regime.³

The Spanish bank began showing signs of distress as early as 2016, aggravated by its sentence to compensate its clients for the floor clauses in home loans violating consumer protection laws.⁴ In April 2017 the chairman indicated that the bank needed a capital increase, and raised the possibility of selling the bank to a competitor.⁵ Reflecting concerns over its exposure to bad real estate assets -37 billion euros of nonperforming loans-, BP’s ratings plunged.⁶ Following further alarming announcements, the bank experienced increasing deposit outflows.⁷ The bank’s share price collapsed from 69 to 32 cents, as the depleting capital approached the trigger level at which Alternative Tier 1 instruments (‘AT1’) would convert into bail in able bonds.⁸

On the 6th June 2017, the ECB determined that BP filled the first of the three conditions for resolution, being ‘failing or likely to fail’, as ‘the significant deterioration of the liquidity

¹ A Dombret, Member of the Executive Board of the Deutsche Bundesbank ‘Failing or likely to fail? Putting the European banking union to the test’. Speech at the Deutsche Bundesbank’s University of Applied Sciences, Hachenburg, 21 August 2017.
³ D Tyler, ‘A Year on from the Banco popular resolution: the key questions’, Global Capital, 7 June 2018.
⁵ Letter of Danièle Nouy, Chair of the Single Supervisory Board, to MEPs Ernest Urtasun and Sven Giegold, QZ-055-58 and QZ-065, 3 August 2017.
⁷ D Tyler, ‘A Year on from the Banco popular resolution: the key questions’, Global Capital, 7 June 2018.
situation of the bank […] led to a determination that the entity would have, in the near future, been unable to pay its debts or other liabilities as they fell due.⁹

On the 7th June, the SRB decided that the two other ‘no private alternative’ and ‘public interest’ conditions were filled, and put BP into resolution.¹⁰ This triggered the writing down of shareholders and junior creditors, including Tier 2 and AT1 Bonds, among which ‘contingent convertible bonds’.¹¹ The SRB then approved the sale of Banco Popular to Santander for one euro.¹² With immediate effect, BP continued to operate under normal business conditions as a solvent and liquid member of the group Santander.¹³

In this article, we shall first examine to what extent BP’s resolution case can be considered a circumstantial success given the resolution regime’s excessive reliance on the market (I). In addition, we will assess how the booming litigation that ensued BP’s resolution and sale to Santander for one euro questions the EBU’s confidentiality regime, with a view to the protection of the interests of the investors affected by their decisions (II).

I/ The SRM’s Bail-in’s first trial: a mechanism still heavily reliant on the market’s functioning

The European actors involved considered the Banco Popular resolution a success - a win for the bank’s depositors and Spain’s taxpayers as public funds were not used and the critical operating functions of the bank were maintained, benefitting overall financial stability.¹⁴ From that point of view, the main goals of the resolution regime were achieved: ‘An effective resolution regime should minimise the costs of the resolution of a failing institution borne by the taxpayers. It should ensure that systemic institutions can be resolved without jeopardising financial stability.’¹⁵ The process was certainly a relief for the ECB as well, as it did not have to step into the quicksand of resolution financing, normally dealt with and financed at the national level.¹⁶

However, dissonant voices have raised disputing the ability of the bail-in tool to systematically attain those objectives. Critics have stressed the dependency of the process on the presence of prospective buyers. They believe that Banco Popular’s resolution ran

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¹³ European Parliament, Briefing, Regular Public Hearing with Danièle Nouy, Chair of the Single Supervisory Mechanism, ECON, 19 June 2017, 4. See page 3 for a complete timeline.
¹⁶ Y Mersch, ‘The limits of central bank financing in resolution’, Speech by Yves Mersch, Member of the Executive Board of the ECB, IMFS Distinguished Lecture Series Goethe Universität Frankfurt, 30 January 2018
smoothly because Santander was already willing to purchase the failing institution.\textsuperscript{17} The Italian Monte Paschi case, at the opposite end of the spectrum, evidences the limits of reliance on the market promoted by the new regime. Ultimately, not only is government support (a ‘stabilisation tool’\textsuperscript{18}) still possible under strict conditions\textsuperscript{19}, it simply cannot always be avoided, even under the new regime. This means that the use of taxpayer’s money, even if rationalised and postponed, remains a potentiality.\textsuperscript{20} Despite Monte Paschi’s public salvage, investors were still needed to wipe the 26 billion euros worth of bad debt off its balance sheets. While the European Commission insisted on transferring its losses to the private sector, in the absence of available buyers, an agreement had to eventually reached to allow a bail-out.\textsuperscript{21} A conundrum is yet to solve: a debt restructuring would affect Italian retail investors rather than other eurozone members, but the doom loop intertwining the fate of countries and their banking system, and interconnectedness of European banks means the all eurozone is at contagion risks.\textsuperscript{22}

Another problem linked to this reliance on the market is that it is subject to loss of confidence and contagion risks.\textsuperscript{23} Bail-in shall induce financial stability while “ensuring that shareholders and creditors of the failing institution suffer appropriate losses and bear an appropriate part of the costs arising from the failure of the institution.”\textsuperscript{24} Yet, the prospect of a bail-in acts as a spade of Damocles on bondholders, and while a bank run was avoided, the Banco Popular resolution was not exempt from difficulty. It actually showed that the use of the bail-in can exacerbate pro-cyclical effects, which, investors claim, contributed to the sale of BP to Santander for the symbolic amount of one euro. One issue for regulators is finding the right timing to trigger the bail-in while containing market behavioural risk. There is still no theoretical model of the criteria for intervention of resolution authorities (quantification of loss absorption buffer; estimation of potential extreme losses, choice of intervention thresholds).\textsuperscript{25} It is difficult to contain creditors’ flight or the search for increasingly expansive credit enhancement to avoid being hit by a bail-in. In the meantime, rapidly rising funding costs can only worsen existing liquidity issues and precipitate the inescapability of a resolution.\textsuperscript{26}

\textsuperscript{17} J Brundsen, ‘ECB’s Noye defends handling of Banco Popular Resolution’, Financial Times, 19 June 2017.
\textsuperscript{18} Article 37 BRRD.
\textsuperscript{21} T Worstall, ‘EU approves Monte dei Paschi Bailout – As it had to, really’, Forbes, 4 July 2017.
\textsuperscript{22} I Mateos y Lago, ‘Italy’s face-off with Brussels has echoes of the Greek debt crisis’, Financial Times, 24 October 2018.
\textsuperscript{23} M Schillig, Resolution and Insolvency of Banks and Financial Institutions (Oxford University Press 2016) 311.
\textsuperscript{24} Recital 67 BRRD.
Liquidity is in fact a persisting issue under the new regime. National central banks (NCBs) remain responsible for providing Emergency Liquidity Assistance (ELA), at their own cost, to domestic, otherwise solvent, financial institutions that are contending with temporary liquidity problems. NCBs, however, have limited margin of discretion. The ECB’s Governing Council adopted strict ex-ante and ex-post procedures that NCBs must follow in granting ELA.\(^{27}\)

The latest rules were actually adopted on 17 May 2017, shortly before the triggering of BP’s resolution, allowing NCBs to provide ELA to banks that do not meet the minimum capital requirements, only if expected to meet them in the next half year.\(^{28}\) This probably explains the contested treatment of the BP case as a solvency crisis rather than a liquidity crisis. BP investors claim BP failed because of a stressed liquidity situation, despite remaining a fundamentally solvent bank after being initially denied access to Emergency Liquidity Assistance. There may have been fears on the regulatory side that stepping into a liquidity crisis could escalate into solvency crisis funding, hence they refrained from providing liquidity support altogether in order to avoid a more politically exposed situation, in the absence of evidence the bank would be able to recover soundness within six months.\(^{29}\)

Still, investors reject the suitability of the resolution process and of the bail-in for what was described as a short-term liquidity crisis of a bank which otherwise solvent, since capital ratios were not in the red at the time. Bail-in only provides a lifeline of emergency assistance without high quality collateral. The situation can only deteriorate in the absence of an adequate liquidity support mechanism to sustain the institution in the immediate post-resolution stage, at the expense of creditors’ confidence.\(^{30}\) During the resolution process, liquidity must be provided by resolution financing arrangements and NCBs,\(^{31}\) an option, however, of limited availability as mentioned above. The institution will not be able to easily access capital markets, rendering it prey to vulture funds, and cross-border provision of liquidity is complex and expensive.\(^{32}\)

The 60 billion euros Single Resolution Fund expected by the end 2023 has been presented as an alternative means of resolution funding for liquidity issues. Nonetheless, SRB’s Chair E. König, declared that the SRF would never be the ‘sole answer’ to make sure a firm in resolution can continue to run with enough liquidity to meet its obligations. In the future, it is therefore possible that the resolution of an illiquid, otherwise solvent bank, occurs again, as it did with the Banco Popular. König added that ‘Santander provided more liquidity than her institution could have done, highlighting the need to find a solution when a buyer can’t

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\(^{30}\) S Fernandez de Lis, J Garcia, ‘Funding before and in resolution. A proposal for a funding in resolution mechanism’, BBVA Research, 31 May 2018.


immediately be found and there is limited or no access to normal sources of liquidity’. A project of ‘Eurosystem Resolution Liquidity’ has been discussed to provide a new liquidity source, but seem still far from materialization for now.

The blurred lines between liquidity and solvency crises had other implications for investors. It interfered with the use of contingent convertible bonds (‘CoCos’) during the BP resolution process. CoCos are a debt instrument providing a contractual recapitalization mechanism for troubled Systemically Important Financial Institutions. CoCos convert into shares should a bank’s Common Equity Tier 1 (‘CET 1’) ratio fall below a certain level. The whole framework under which CoCos were designed was to support banks facing temporary solvency issues, to keep them as a going concern, but not as a gone concern. Yet, technically, BP did not breach minimum capital levels before regulators deemed it nonviable, meaning the in-built triggers (below 5.125% or 7% firm’s CET1 ratio) were not activated. Bonds did not convert to equity, and CoCos investors were left with worthless securities as the resolution process was rapidly put into place. The irrelevance of loss absorption triggers caught the bondholders off guard, leading to litigation to shed light on the resolution decision-making process. Meanwhile, banks are now looking to devise more genuinely going concern capital instrument, ‘anytime CoCos’, that could be structured like senior or tier two debt and absorb losses at the discretion of the issuer.

The handling of information during the decision-making process as a whole has in fact sparked controversies. Effective communication between the actors involve preserving confidentiality is key to a successful resolution to prevent market panic reactions. Yet, affected investors, who lost up to 3 billion euros, claim that shortly before the resolution, Reuters revealed that SRB Chair Elke König had told EU officials that BP could be wound down if it failed to find a buyer. Investors maintain this precipitated the bank’s demise and postponed its sale to Santander to the course of resolution, for a symbolic amount. Wiped out investors also accuse the SRB of ignoring a number of crucial elements, including plans for a pre-resolution market capitalisation of 1.3 billion euros, and information about the potential sale of the bank to Santander, described in the Deloitte valuation report as the best indication of the lender’s value. They claim the SRB imposed its own selling

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34 Reuters, ‘ECB could provide cash to failing banks if conditions were met’, 23 April 2018.
40 Recital 33 BRRD.
41 Article 84 BRRD.
44 JH Binder, ‘Wunderkind is walking? The Resolution of Banco Popular as a First Test for the Single Resolution Mechanism’, OBLB, 14 June 2017.
process, without regard for the market price suggested by Deloitte, thereby favouring Santander’s interest at their expense.\(^45\)

Likewise, investors deem that the decisions of the SRB were based on a flawed valuation report which valued the bank at 1.3 billion euros at best, and as little as negative 8.2 billion at worst, with the most accurate value likely to be around negative 2 billion euros. Investors were sceptical as 2 billion euros is identical to the total value of the bank’s subordinated debt (AT1 and T2 instruments\(^46\)) which meant that the bank’s senior debt could be left untouched as required.\(^47\) To Deloitte’s credit, however, the report was made in 12 days, when it usually takes 6 weeks, and in order to contain market confidence, what matters the most when gauging a number is that losses are not underestimated, reiterating bail-ins because of inaccurate initial assessment understimating losses.\(^48\)

More broadly speaking, the Banco Popular case resounds with recurrent questioning of the ECB and SRB’s confidentiality policy and its compatibility with the protection of creditors’ interest.

**II/ A growing pressure on the ECB and SRB’s transparency policy**

The perceived lack of transparency of the decision-making process of the resolution was voiced by certain MEPs to the Chair of the Single Supervisory Board of the ECB. Why did the EBA stress tests fail to ring the alarm earlier, despite BP’s large toxic mortgage loan portfolio?\(^49\) For how long Banco Popular’s liquidity threshold was breached? Were there privileged insiders able to withdraw billions of euros worth of deposits just before the ECB’s resolution declaration?\(^50\)

Considerable efforts were made to establish solid political accountability mechanisms for the SSM and the SRB new bodies.\(^51\) Yet, their current confidentiality regime, while apparently not clashing with the principle of transparency consecrated by Article 15 Treaty on the Functioning of the European Union,\(^52\) seem ill fitted to their new responsibilities and the direct financial, individual effects they convey. As mentioned above, it is the ECB and the SRB’s duty to minimise negative repercussion on the right of property of creditors, which must not be simply sacrificed to the general interest.\(^53\)

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\(^46\) Alternative Tier 1 instruments are mostly Cocos; Tier 2 instruments encompass hybrids; reserves and subordinated terms debts.
\(^50\) Letter of Danièle Nouy, Chair of the Single Supervisory Board, to M. Zanni, MEP, QZ050, 20 July 2017.
\(^53\) Opinion of Advocate General Wahl in Case C-526/14, Kotnik and others, ECLI:EU:C:2016:102, point 73.
For now, in terms of disclosure, the principle would be confidentiality, with some discretion for these authorities to disclose certain categories of documents not covered by absolute secrecy. The resulting perceived lack of transparency of regulators during BP resolution gave rise to litigation, before the SRB Appeal Panel (‘AP’), the ECJ, Spanish courts and American courts. While investors’ requests for full transparency are unlikely to succeed, overly restrictive and unjustified confidentiality practices of resolution authorities have already been challenged, with partial success, leading to a gradual release of information. Subsequently, if the documentation disclosed allows to establish creditors were left worse off as a result of BP’s resolution compared with regular insolvency proceedings, creditors are eligible for compensation, although it remains unclear how creditors could establish such a requirement with a view to technically complex and potentially biased assessments.

Several investors filed appeals before the Appeal Panel of the SRB regarding access to SRB documents used for the decision-making process. On 28 November 2017, on the one hand, the SRB Appeal Panel confirmed that full disclosure of the Provisional Valuation Report would raise financial stability concerns, with ‘an impact on other market participants and/or resolution actions in the future’ and ‘could objectively raise actual concerns either of financial stability or of protection of commercial interests’. On the other hand, it held that the SRB should identify and publish the elements of the Valuation Report which it considers to be of a non-confidential nature.

With respect to the 2016 Resolution Plan for Banco Popular, the SRB AP considered that since its disclosure would take place several months after adoption of the Resolution Decision, some parts of the Resolution Plan could be made public. However, access to internal documents can be refused to the extent that the appellants did not establish an overriding public interest in the disclosure of the documents. Finally, denying full access to documents relating to the competitive process for the sale of Banco Popular ‘was duly substantiated and was duly justified by the applicable exceptions invoked by the Board’.

On 2 February 2018, the SRB released six documents, including a summary of its resolution decision and provided a copy of the initial valuation reports conducted by Deloitte, used to justify putting Banco Popular through a resolution process.

On 13 June 2018, EU authorities received the second No Creditors Worse Off (NCWO) report: the accountancy firm’s first estimate of what creditors would have received, had the bank been put into liquidation rather than resolution. It was further elaborated by Deloitte to assess whether bondholders would have fared better if BP had not been resolved, with this

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54 See the Decision of the Executive Session of the Board of 7 February 2017 on public access to the Single Resolution Board documents (SRB/ES/2017/01) and Article 132 TFEU, together with the ECB Statute, Rules of Procedure and Decision of Separation, and the Interinstitutional Agreement concluded between the ECB and the European Parliament as well as a Memorandum of Understanding concluded with the Council (the latter two allowing for exchange of certain information normally confidential, but that shall remain as such to the public).
56 SRB Appeal Panel, cases 38/17 to 43/17.
report still to be released. Investors ironised about required independence of the accounting firm, hired again to ‘mark its own homework’.61

On 18 June 2018, the SRB’s AP called the SRB to amend its stance on public access to documents.62 The AP held that reasons for redacting parts of these documents were ‘manifestly insufficient, particularly as they related to minimising the possibility of challenges being brought against the resolution decision’. It ordered the SRB to publish a fuller version of documents used during the resolution process, targeting “(1) redactions of the removal, in the first valuation report for BP, of the adjustments that were made to produce a fair representation of the bank’s financial position, the level that deposit outflows were said to have exceeded on a number of days in the run up to the bank’s failure and the description of what BP did in response to these outflows. (2) in the addendum to the second valuation report, the decision to conceal Deloitte’s estimates for the potential recoveries and losses for creditors in an alternative insolvency procedure, the changes rendered the document “almost unintelligible”; (3) the removal of similar tables also in the second valuation report; (4) the suppression of data relating to Deloitte’s no creditor worst case analysis and its simulation of a liquidation scenario for BP, in the appendices to the 2nd valuation report” It also ordered the SRB to publish further information about BP’s 2016 resolution plan from the 2016 and the 2017 critical functions report.63

Lastly, on 6th August 2018, the SRB revealed Deloitte’s third valuation report, concluding that all shareholders and creditors in all the bank’s divisions would have suffered similar losses if the bank had been liquidated, hence they are not entitled to compensation. A final decision will be reached by the AP after hearing the opinions of affected investors, who had until 14 September 2018 to register (phase I) and will be able to submit written comments until 26 November 2018 (phase II) as to an alleged breach of the NCWO principle.64

Investors have also brought the case before the ECJ, as the two jurisdictions are not exclusive.65 95 admissible lawsuits were filed in July and August 2017 against the SRB and the European Commission, with six test cases being currently treated, and several others before Spanish jurisdictions.67 Under the SRMR, the FROB (Fondo de Reestructuración Ordenada Bancaria, the Spanish competent authority) is responsible for the implementation of the resolution process, although its liability cannot be engaged if it did not have any margin of discretion in the decisions incriminated.68

Once obtained the information required, investors pretend to have the sale of BP annulled for breach of EU rules, and ask for compensation of 69 euro cents per share for BP shareholders, by virtue of the NCWO principle. Indeed, the resolution procedure must abide by nine principles, and the NCWO principle is regarded as the cornerstone of protection conferred

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60 Article 76 SSMR.
61 Art. 20 SSMR.
62 SRB Appeal Panel, cases 44 to 54/17, 56/17 and 1 and 7/18.
64 See SRB Website, accessible at https://srb.europa.eu/en/content/banco-popular (last consulted 15/10/18).
65 See Articles 85 and 86 SRMR and Article 263 TFEU.
68 D Busch; G Ferrarini, European Banking Union, Oxford University Press, 2015, 449.
upon creditors by the EU resolution framework, \(^{69}\) even more so considering the restricted \textit{ex ante} judicial review of bail-in decisions.\(^{70}\) The ECJ has already confirmed that the burden sharing requirement in bank resolution does not infringe the right to property of the investors, under safeguards such as the no creditor worse off principle.\(^{71}\) Establishing the (non) compliance with the NCWO principle is therefore key in assessing the existence of a breach of right of property, and eventually, entitlement to compensation, which requires for investors access to the relevant information involved in the decision making process.

Formally, the choice of tools and powers laid down in the SRMR/BRRD and granted to the SRB, the European Council, the European Commission and the NRAs must be made to best achieve the five equivalent objectives of the resolution process,\(^{72}\) but the importance given to the protection for creditors, that is one of them, remains unclear in practice.\(^{73}\) Investors affirm that, in practice, avoidance of the use of public funds prevailed, while the protection of their interests, including the minimisation of their own losses, was neglected, generating avoidable destruction of value, in violation with what is prescribed by the SRM Regulation\(^{74}\). What appears for now is that a change in the confidentiality practices of resolution authorities would be necessary to guarantee their right to remedy, already enjoined by the SRB’s AP (which does not have jurisdiction over the ECB, however).

Trends in caselaw remain to be monitored, as the ECJ has the final authority over the SRB’s AP’s decisions if challenged. However, it seems the AP was already following a trend of increased transparency obligations on resolution authorities, initiated by the ECJ itself in the 2014 \textit{Banco Espirito Santo/ Novo Banco} case.

In the \textit{Banco Espirito Santo/ Novo Banco} resolution case (occurring before the setup of the SRB, under the Portuguese implementation of the BRRD, hence the jurisdiction of the ECJ), the Court stressed the distinction between the ECB’s Governing Council meetings proceedings that are granted absolute secrecy for the sake of its independence, and decisions taken by the Governing Council, including their minutes, which may be made public at its discretion. This led the Court to annul the ECB’s refusal to communicate certain amounts linked to the resolution, as ‘Under the second sentence of Article 10.4 of the ESCB and ECB Statute, the Governing Council may decide to make the outcome of its deliberations public. Therefore, its decisions do not enjoy absolute protection in so far as concerns their disclosure. […] It follows that the ECB should have, first, explained why the amount not disclosed to the applicant, when giving only partial access to the document requested, fell within the area

\(^{69}\) Article 15 1 SRMR. The nine general principles are: the order in which losses should be borne (by shareholders first), the removal of management; the liability under national law for those responsible for the bank failure (both natural and legal persons); the No Creditor Worse Off rule (NCWO) and equitable treatment of shareholders (which is not ‘pari Article 34 BRRD.passu’).

\(^{70}\) Article 85 BRRD.

\(^{71}\) Judgment Of The Court (Grand Chamber) 19 July 2016, \textit{Kotnic}, Case C- 526/14, EU:C:2016:767, point 75.

\(^{72}\) JH Binder, C Gotsos, \textit{The European Banking Union, a Compendium}, Hart Publishing, 2016, 59. The objectives are ensure the continuity of critical functions; avoid significant adverse effects on financial stability, in particular by preventing contagion and by maintaining market discipline; protect public funds by minimising reliance on extraordinary public financial support; protect depositors covered by Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes (DGSD) and investors covered by the Directive 97/9 EC of 3 March 1997 “on investor compensation schemes” (both directives of EP and Council); protect client funds and clients assets.


\(^{74}\) Art 14(2) SRMR.
covered by the exception provided for in the first indent of Article 4(1)(a) of Decision 2004/258 and, second, provided a statement of reasons making it possible to understand and verify how, specifically and actually, disclosure of that information would undermine the public interest as regards the confidentiality of proceedings of the ECB’s decision-making bodies.’

In the recent *UBS Europe SE* case, the Luxembourghish financial supervisor withdrew from a man its authorisation to direct an investment firm for loss of good repute. Acknowledging the case was not about a criminal sanction but an administrative decision, the Court still proceeded to examine ‘to what extent the obligation of professional secrecy provided for in Article 54(1) of Directive 2004/39 is in any event restricted by the right to an effective remedy and a fair trial and by the respect for the rights of the defence enshrined in Articles 47 and 48 of the Charter, read in the light of Articles 6 and 13 ECHR.’ It recalled that, ‘according to settled case-law, protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person constitutes a general principle of EU law. That protection may be invoked by a relevant person in respect of a measure adversely affecting’. Eventually, the ECJ remitted to the case to national judiciary review, to ensure that a balance was struck between ‘the interest of the person who is the subject of a measure adversely affecting him in having access to the information necessary for him to be in a position to exercise fully his rights of defence and, on the other hand, the interests in connection with maintaining the confidentiality of the information covered by the obligation of professional secrecy’. Such precedent could be a positive precedent for investors and provide new legal bases to their claims, although engaging the liability of public authorities remains a complex process and it is likely the ECJ will advance cautiously, to avoid difficulties with the newly created Banking Union.

**Conclusions**

Monte Paschi was a false start for the SRM in terms of credibility. The authorities had to laboriously navigate their way through ‘a system that is half-built, with all the problems of a half-built system’

, which ultimately could not prevent a bail-out. Stumbling over a politically exposed situation, the Banking Union was attacked on its ‘political flak in Germany and Northern Europe for […] being too soft on troubled Italian lenders, while in Italy it is criticized for supposedly being too harsh’.

Banco Popular put things back on an even keel for the SRM. Thanks to a process that required neither bail-out funds nor resorting to a common backstop, it could reassure those refractory to the European Deposit Insurance Scheme and a mutual fiscal net to the Single Resolution Fund, that the bail-in can effectively serve to keep the doom loop at bay.

Notwithstanding, concluding that the Banco Popular case is a credibility boost for the resolution authorities would be premature. The ECB and the SRB in particular cannot rest on

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77 C Bell, “How Banco Popular put a spotlight on the EU’s Single Supervisory Mechanism” Global Counsel, 21 June 2017.
78 P Taylor, “’Mamma Mia!’ dash for most important job in EU Banking”, *Politico*, 28 August 2018.
their laurels, after a series of condemnations on the grounds of their confidentiality practices. In the future, the resolution authorities will have to be proactive and to operate under an acceptable level of ex-post disclosure of its decision-making process in order to demonstrate it rigorously applied of the No Creditor Worse Off principle. If they fail to adapt their rigid confidentiality practices -without waiting for regulatory changes, they will carry on generating litigation which, whether investors’ claims are successful or not, is bound to tarnish their credibility.

It remains to be seen whether the ECJ will confirm, also echoed in the recent SRB Appeal Panels’ decisions. The Novo Banco case, along with Banco Popular, both still ongoing, need to be monitored as they should provide important precedents. It is doubtful the ECJ will hit the resolution authorities with a fatal blow on the first application of the bail-in tool. More likely, the two cases will act as a call for more discipline on the part of resolution authorities, sending the signal that they will not be able to simply shield themselves behind confidentiality in the face of investors’ claims.79 However, the US courts might not show the same leniency in demanding access to the documents that explain why and how the FROB, the SRB and EC resolved Popular and approved its sale to Santander.80

80 D Tyler, ‘A Year on from the Banco popular resolution: the key questions’, Global Capital, 7 June 2018.