



LITIGATION &
ARBITRATION
DISPUTE
RESOLUTION

BANCO POPULAR LITIGATION:

Possible Legal Actions

June 2017

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POSSIBLE CLAIM PROCEDURES ARISING FROM THE PURCHASE OF BANCO POPULAR, S.A. BY BANCO SANTANDER, S.A.

The purpose of this information note is to analyse possible and potential claims that the clients of Banco Popular, S.A. ("[Banco Popular](#)"), both bondholders and shareholders, can file for the loss of value of their securities.

As is already known, after the stock market collapse of Banco Popular on 7 June 2017, the Fund for Orderly Bank Restructuring ("[FROB](#)") reported the sale of Banco Popular to Banco Santander, S.A. ("[Banco Santander](#)") for one 1 Euro. This decision was adopted by the Single Resolution Board ("[SRB](#)") after the financial institution was declared non-viable by a third party, an independent expert.

With this information and in accordance with the existing doctrinal and jurisprudential precedents in our country, we can affirm that there would be legal mechanisms that would allow the affected investors to recover their money, under certain conditions.

Therefore, this note is a first approach to the facts and the existing alternatives. Firstly, we will carry out a brief analysis of the background that has caused the "fall" of the financial institution to determine the possible actions in a second block, namely:

- Civil actions: for the breach of commercial and stock market regulations and/or errors and breaches at the time of the commercialisation of the financial products;
- Criminal actions;
- Actions of contentious administrative nature;
- Actions on behalf of foreign investors.

I. BACKGROUND SUMMARY

1. BANCO POPULAR, S.A. began its decline on 26 May 2016, when it announced a capital increase of 2.5 billion euros with which it expected to improve its solvency and profitability and strengthen its balance sheet. This transaction was accompanied by a strategic plan with which it wanted to free itself, in a very short space, from 15 billion euros of unproductive assets, mostly real estate.
2. Despite the apparent efforts of the senior management of Banco Popular, the bank's securities closed 2016 with a depreciation of almost 66%. This important reduction of its value continued at the beginning of 2017, owing to doubts generated by its future and, to a great extent, to the news leaked to several media in this sense. This climate led to an absolute lack of confidence on behalf of the market, which caused the departure of the president, Mr Ángel Ron, after 12 years in office. He was replaced by Mr Emilio Saracho in February 2017.

3. On 5 May 2017, Popular announced that in Q1 of 2017 it had lost 137 million, as it had been forced to provide nearly five hundred (500) million euros to provisions for real estate assets.
4. Then, on 16 May 2017, and after receiving indications of interest from several entities, BANCO POPULAR, S.A. began a merger process, which was also received with mistrust by the market; this resulted in a depreciation of more than 38% of the value of its shares.
5. Finally, as we have already said, on 7 June 2017, with their shares at a historical low (0.30 euros), and after a massive departure of shareholders, like its partner CREDIT MUTUEL, BANCO SANTANDER, S.A. has acquired 100% of Popular for one Euro, after the European Central Bank had verified the non-viability of the entity independently.
6. As a result of this entire process, the shareholders of the bank, as well as holders of different types of debt issued by BANCO POPULAR, have lost their investment.

II. POSSIBLE LEGAL ACTIONS

7. As we mentioned above, in this section we will analyse the possible actions that could be brought by those affected by the purchase of Banco Santander, in several jurisdictions:

A. Civil Actions

8. The civil scope is the ideal way to instrumentalize claims for payment of an ordinary nature. To determine the viability of the claims we have to distinguish between the type of financial product purchased by the investor, their profile, and the moment the purchase order was executed.

From this perspective, we consider the following scenarios, especially for those shareholders who purchased in 2016.
9. As we pointed out in the background events of this note, when the capital increase was carried out during June 2016, those responsible for Banco Popular would have masked the entity's true economic and financial position. In this sense, it is arguable that reliable and real information was not offered. Therefore, the capital increase was not enough to meet the bank's true financing needs.
10. In this sense, it should be noted that [Article 35.1 Spanish Securities Market Law \("SML"\)](#), a public offer for the sale or subscription of securities is:

"[...] Any communication to persons, in any form or by any means, that presents sufficient information on the terms of the offer and the securities offered, so as to allow an investor to decide to purchase or subscription of these securities [...]"

11. On the other hand, [article 35.2](#) of the same legal text establishes, as a requirement to carry out a public offering, the issuance of an information leaflet that allows investors to have enough information to decide on the subscription of the shares¹.
12. In general terms, the stock exchange regulations establish that the information contained in the leaflet must be in accordance with the facts and it should not omit any facts that, due to their nature, could modify its scope.
13. From the information published and given the facts, it seems that the leaflet did not meet the legal requirements. In these cases, [articles 38.2 of the SML and 36 of Royal Decree 1310/2005, of 4 November, which partially develops Law 24/1988, of 28 July, on the Securities Market](#), establish a specific responsibility for those who sign the leaflet or the administrators when the information provided in the leaflet is false or omits relevant information that misleads investors, causing them damages. Specifically, article 36 of said Regulation provides that:

"... Those responsible for the information leaflet [...] shall be obliged to compensate those people who have acquired, in good faith, the securities referred to in the leaflet during their period of validity for the damages they have caused as a consequence of any false information included in the leaflet, or by the omission in the leaflet of any relevant information required in accordance with this Royal Decree, provided that the false information or omission of relevant information has not been corrected by a supplement to the leaflet or has been released to the market before such people had acquired the securities..."

14. Therefore, if it is proved that the information leaflet regarding Banco Popular's capital increase of 25 May 2016 contained false or misleading information, it is possible to initiate this claim procedure. To do so, an economic expert report that determines the falseness or inaccuracy of said leaflet will be absolutely necessary.
15. Finally, it will be necessary to distinguish, within the group of affected buyers, the date of subscription and, in particular, to differentiate between the following dates:
 - (i) The purchase of shares between 23 June 2016, the date on which the sale of Banco Popular shares begins, and 3 April 2017; and
 - (ii) The purchase of shares dated after 3 April 2017.
16. Why is this differentiation necessary? On that date, Banco Popular informed the National Securities Market Commission (CNMV) that it was carrying out accounting revisions that would affect the capital increase of May 2016, as well as the annual accounts that served as the basis for the draw-up of the corresponding leaflet regarding said increase. As notified to the investors, these revisions entailed adjustments of 694 million Euros that affected Banco Popular's net equity.

¹ The regulation of the contents of the leaflet is contained in articles 37 SML and 16 of Royal Decree 1310/2005, dated 4 November, which partially develops Law 24/1988, of 28 July, on the Securities Market, regarding the admission to trading of securities on official secondary markets, public offers for sale or subscription and the leaflet required for such purposes (hereinafter "RD 1310/2015"), in relation to Directive 2003/71 of the European Parliament and of the Council of 4 November 2003.

17. In short, we can assert that, since reporting the existence of alterations in the leaflet that served as the basis for the acquisition of shares, or at least since reporting the existence of irregularities, investors had enough information that allowed them to assess and decide on the purchase and sale of the shares.

B. Actions under Spanish commercial Law

18. Secondly, there is the possibility of filing of liability actions against members of the Board of Directors, both past and present, who have committed acts contrary to law, the articles of association or who are in breach of the duties inherent to the performance of their position, due to wilful intent or negligence.
19. Indeed, [article 236 of the Spanish Company Law](#) establishes that directors are liable for damages and points out that they

"shall be liable to the company, members and company creditors, for damage caused by acts or omissions contrary to the law or the articles of association, or for those performed in breach of the duties inherent to the performance of their position, provided there is wilful intent."

Therefore, the requirements for the action to succeed are:

- an active or passive behaviour displayed by the directors;
 - that such behaviour is attributable to the administrative body;
 - that the conduct is unlawful for violating the law or the articles of association, or that it does not meet the standards of diligence required from an orderly businessman and from a legal representative;
 - that the company is subject to damage; and
 - that there is a causal connection between the director's way of action and the damage.
20. As in the previous case, the breach of the duties imposed by the stock exchange regulations at the time of issuing the leaflet, entails liability on behalf of the directors against the shareholders and investors of the bank.
21. The same conclusions that we analysed in the previous point may be applicable to this assumption, but with certain differences. As stated in the resolution of the FOBR, within this group there is a diverse range of affected people.
22. In these cases, the following factors must also be taken into account:
- (i) Type of product purchased (subordinated bonds, convertible bonds)
 - (ii) Date of purchase and maturity of the product
 - (iii) Specific contractual content signed with the financial institution
 - (iv) Client profile (minority, financial knowledge, etc.)

23. Within this group of affected people, we must analyse each specific case and the viability of the action, depending on the parameters that we have just analysed.
24. It should be noted that, prior to the sale of the bank, many of these products had been declared void by the Supreme Court in several judgements. Automatic full nullity implies that it has *ex nunc* effects, that is to say, "*as if it had never existed*" and the contract is ignored by law.
25. In this case, the nullity could come from a dual path (a) on one side, the inaccuracies of the leaflet of the purchased product and (b) on the other side, the lack of consent at the time of signing the contract, as our High Court has already stated.
26. In any case, we must consider that, in order to determine the feasibility of the action, we need to analyse, on a case-by-case basis, the particularities of each contract and therefore, the subsequent steps.

C. Criminal actions

27. According to the latest information provided, a total of 3 claims have been filed before the Spanish Special and High Court, *Audiencia Nacional*, against the senior management of Banco Popular, its accounts auditor, Price Waterhouse Coopers, among others, for the following criminal offences:
 - False accounting criminal offence.
 - Criminal offences against the market.
 - Disloyal management criminal offence.
 - Insider trading criminal offence.
28. Although 3 distinct claims have been filed by different consumer and user organisations so far, it is likely that the *Audiencia Nacional*, *ex officio*, will gather them in a single case, since we are talking about the judgement of the same facts.
29. Consequently, any affected person may file a claim individually, stating the specific facts that have led them to lose their investment with subsequent addition to the main cause, or directly appear in court in the open case, as a person affected by the crimes that are the subject matter of the investigation.
30. Our recommendation is to opt for the second of the procedures presented, this is, to appear in court in the proceedings that have already begun. This way, the affected people will save on costs derived from raising a new claim. They will be able to follow the procedure at first hand.
31. If Banco Popular, Banco Santander or its directors are finally declared liable, they must respond for criminal and civil actions, for the loss suffered by investors, civil liability being a matter secondary to criminal liability.

D. Contentious administrative actions

32. The next block of possible actions that can be undertaken are those aimed at challenging the administrative resolutions that have served towards the termination and sale of Popular.
33. It is early days to carry out a feasibility assessment of these claims, considering the limited information available on the resolution process by the SRB and subsequent sale of the entity. However, the major losses suffered by shareholders and investors require us not to rule out any possibilities.
34. In this sense, it is important to note that the decisions to terminate and sale a financial institution, such as the case at issue, must be justified, in essence, by (i) proving the non-viability of the financial institution; (ii) the absence of a less burdensome measure than the one adopted; and (iii) proving that shareholders would not lose less money in bankruptcy proceedings.
35. There are many people, including the Association of Inspectors of the Bank of Spain, who criticise the supervision of the Spanish authorities. The latter have confirmed:

"[...] the uselessness of stress tests and the weaknesses of the SREP process [...]".

36. If it could be proven that there were no such elements, the administrative decisions would be against the Law and the damage caused to shareholders and investors would be unlawful, with the subsequent responsibility of the European Union and the Spanish State to compensate them.
37. In order to attain this compensation, a first challenging procedure would have to start against the two (2) administrative decisions through which the disappearance of Popular has been carried out:

(i). [Decision SRB/EES/2017/08 of the Single Resolution Board](#) which, at the request of the European Central Bank, declares the non-viability of Popular and the need for its resolution. This decision also approves the resolution mechanism that contains the applicable resolution measures.

The decision of the SRB may be challenged within two (2) months, before the Court of Justice of the European Union.

(ii). [Resolution of the Governing Committee of the FOBR dated 7 June 2017](#) , by which it is agreed to adopt the necessary measures to implement the decision of the Single Resolution Board, at its Extended Executive Session dated 7 June 2017, in which the resolution scheme for Banco Popular Español, S.A. has been adopted, pursuant to [article 29 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 Resolution of the FOBR can be appealed by means of an administrative appeal for reversal within a period of one (1) month, before the FOBR itself or directly presenting a contentious-administrative appeal within two (2) months before the Illustrious Contentious-administrative Section of the *Audiencia Nacional*.

38. The annulment of these decisions would potentially allow subsequent claims of liability against the European Union by means of an action for non-contractual liability before the Court of Justice of the EU ([articles 268 and 340 of the Treaty on the Functioning of the European Union](#)) and the General Administration of the State by means of the patrimonial liability of the Administration ([article 67 of Law 39/2015, of 1 October, of the Common Administrative Procedure of the Public Administrations, and articles 32 and ff. of Law 40/2015, of 1 October, on the Legal Regime of the Public Sector](#)).

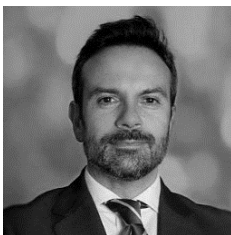
E. Actions on behalf of foreign investors

39. Finally, foreign investors who have been equally affected by the Banco Popular case should also be cared for. Their unique nature must be treated separately.
40. Indeed, it should be noted that Spain has signed several international instruments to promote foreign investment. Therefore, the vast majority of these international agreements allow the investor to choose between going to ordinary courts or to a court of arbitration for international investments.
41. In this sense, investors have an advantage, as these instruments include protections against specific risks such as expropriations, as would be reasoned in the case of Banco Popular, due to the fact that a public entity has intervened. This way, the acquirer of shares and other debt securities issued by the entity would enjoy this protection when they face their investments being confiscated by an administrative act of the Spanish State.
42. As a result, foreign investors in Banco Popular are expected to be able to initiate the corresponding international arbitration proceedings against the Spanish Kingdom for having been stripped of their investment by resolution of the FOBR Governing Board of 7 June 2017, which executed the decision of the Single Resolution Board to sell Banco Popular to Banco Santander.

C. CONCLUSIONS

43. Civil actions represent the ideal procedure to file a claim against Banco Popular. The falseness and inaccuracy of the annual accounts contained in the leaflet for the capital increase of 25 May 2016 would have clearly misled the investors who attended. Therefore, it is expected that the filed claims would sentence Banco Popular to pay damages and losses caused by non-compliance with [articles 38.2 SML and 36 of RD 1310/2005](#).
44. Likewise, the Courts and Tribunals could declare the annulment of the contracts for the purchase and sale of shares of Banco Popular for the existence of an error in the consent, without it being necessary for the affected people to be the beneficial owners of the shares of the financial entity, and also for those who have disposed of them.
45. Equally important is [the commercial procedure](#), through which investors can take actions of liability against the directors of Banco Popular, both current and former, for any acts against the law, the articles of association or for the breach of duties inherent to their position.

46. [The criminal procedure](#) is open for those affected, both by filing new claims or by appearing in court in the proceedings that have already begun. In any case, some of the behaviours that were carried out during the resolution process of Banco Popular and which could lead to criminal consequences for those responsible for market-related offences, false accounting, insider trading and disloyal management, are quite relevant.
47. Regarding the [contentious-administrative procedure](#), the resolution of the Single Resolution Board approving the sale of Banco Popular to Banco Santander is subject to appeal within 2 months, before the Court of Justice of the European Union. For its part, the resolution of the Governing Board of the FOBR of 7 June 2017, executing the decision of the Single Resolution Board, is subject to appeal within a period of 1 month by means of an appeal for reversal or directly by means of a contentious-administrative appeal within 2 months.
48. Finally, foreign investors affected may choose the ordinary jurisdictional path before the Spanish Courts and Tribunals or initiate arbitration proceedings against the Spanish Kingdom under the various international investment protection treaties and instruments.
49. In any case, the complexity of the different scenarios, taking into account the different procedures, advise that actions in defence of the affected investors are always carried out under specialised legal direction in complex litigation, both in Spain and in the European Community, and especially in international arbitration proceedings that could be initiated by foreign investors.
50. It is expected that Banco Santander will offer alternatives to certain investors, offering some kind of compensation, swap or agreement. However, we think that a study of the viability of a claim procedure is always necessary, as well as to start negotiations with the acquiring bank, with the same legal guarantees.



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