



PRESS RELEASE No 117/25

Luxembourg, 11 September 2025

Judgment of the Court in Case C-687/23 | Banco Santander (Resolution of Banco Popular III)

Banco Popular: the rights arising from actions for a declaration of nullity and for damages brought before the resolution of that bank are enforceable against Banco Santander

On 7 June 2017, a resolution scheme in respect of the Spanish banking institution Banco Popular was adopted by the Single Resolution Board (SRB) and endorsed by the European Commission. The share capital of that bank was reduced to zero, its outstanding shares were written down and its Tier 2 instruments were converted into shares, which were subsequently transferred to Banco Santander. In 2018, Banco Santander became the universal successor to Banco Popular.

A large number of purchasers of various Banco Popular capital instruments brought actions for a declaration of nullity in respect of agreements for the purchase of those instruments and restitution of the price paid and/or actions for damages on account of the information provided by the bank. ¹ In the context of those disputes, the Spanish courts referred questions to the Court of Justice for a preliminary ruling.

In its judgments of 5 May 2022 and 5 September 2024, the Court held that the Bank Resolution Directive ² prevents the shareholders of a credit institution under resolution from bringing actions for a declaration of nullity and actions for damages after that resolution. ³

The Spanish Supreme Court has reservations regarding a situation in which convertible bonds were converted into Banco Popular shares before the adoption of the resolution actions in respect of that bank and where, unlike the cases which gave rise to the judgments referred to above, the action for a declaration of nullity of the contract for the subscription of convertible bonds and the action for damages at issue in the main proceedings were brought before the resolution of Banco Popular.

The Court recalls that, according to the Bank Resolution Directive, **in the event of a total write-down** of the share capital of a credit institution under resolution, **its shareholders may enforce** against that institution or its successor **only those obligations or claims arising from written down capital instruments which had already 'accrued' at the time of resolution.**

Where the resolution procedure involves the application of a 'bail-in tool' within the meaning of that directive, the write-down and conversion of capital instruments for the purposes of that bail-in contribute directly to the achievement of the objectives of the resolution procedure. Accordingly, actions for a declaration of nullity and for damages which are brought after that procedure entail the risk that the amount of capital instruments subject to such a bail-in would be retroactively reduced, in so far as they seek compensation or repayment in the amount of the funds paid for the purchase of those capital instruments prior to resolution.

The Court considers that **circumstances in which actions for a declaration of nullity and for damages are brought before resolution are substantially different from situations in which such actions are brought**

after resolution.

Unlike such subsequent actions, actions brought before resolution are **not** capable of **calling into question the prior valuation of the assets and liabilities of the institution or the resolution decision based on that valuation** and are **not**, therefore, likely to **hinder** the implementation of the resolution procedure **or deprive it of practical effect**. Accordingly, actions brought before resolution cannot be regarded as having such retroactive effect, in that the financial risks arising from pending disputes must be taken into account in the accounts of listed banks.

As regards the fact that the valuation may, depending on the circumstances, not account for all the actions brought, the Court states that such a level of uncertainty is apparent in any 'stock-taking' exercise, and so can be regarded as forming part of the general risk to be accepted in cases of resolution under the Bank Resolution Directive, in particular by the entity acquiring the credit institution under resolution. In that regard, the Court states that that directive provides for a 'fair, prudent and realistic valuation' of the assets and liabilities of such a credit institution, without requiring that those assets and liabilities be valued in full and in minute detail. In particular, where it is not possible to draw up a list of outstanding on balance sheet and off balance-sheet liabilities due to the urgency in the circumstances of the case, the resolution authority may, according to the provisions of that directive, confine itself to a provisional valuation of the assets and liabilities.

In addition, the Court considers that the rights arising from actions for a declaration of nullity and for damages brought before resolution may be regarded as having 'accrued' **without there being any need** for them to have been the subject of **a final judgment before resolution**. **Otherwise**, the enforceability of those rights would depend on **circumstances which are essentially beyond the influence of the person** who brought such actions, even though that person has demonstrated the **necessary diligence** to obtain payment of the claims before resolution.

Moreover, denying that those rights have 'accrued' would mean that the resolution decision **would render the pending court proceedings devoid of purpose** and those proceedings would have to be closed. That would constitute a **serious interference** with the **right to an effective remedy** enshrined in the Charter of Fundamental Rights of the European Union.

The Court notes that the interpretation which allows shareholders and creditors to pursue actions for a declaration of nullity and/or for damages which are already pending at the time of resolution is **not** such as to **jeopardise the financial stability of the Union**. **Nor does it disproportionately interfere with the rights of potential purchasers** of a credit institution under resolution or those of the successor entity following the resolution, in so far as those persons are also likely to become aware of the liabilities of that institution consisting of the rights arising from those shares, before making their offer with a view to acquiring that institution.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text and, as the case may be, the abstract](#) of the judgment is published on the CURIA website on the day of delivery.

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Pictures of the delivery of the judgment are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106.



¹ More specifically, information contained in the prospectus to be published, inter alia, when securities are offered to the public or admitted to trading.

² [Directive 2014/59/EU](#) of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

³ Judgments of 5 May 2022, *Banco Santander (Resolution of Banco Popular)*, [C-410/20](#), and of 5 September 2024, *Banco Santander (Resolution of Banco Popular II)*, [C-775/22](#), [C-779/22](#) and [C-794/22](#). In the first of those judgments, the Court held that the Bank Resolution Directive precludes, following a total write-down of shares ordered in the context of the resolution of a banking institution, the bringing of such actions – which concerned contracts for the subscription of Banco Popular shares – against that institution or its successor in law. In the second judgment, concerning contracts for the subscription of subordinated bonds that had been converted into Banco Popular shares before that bank's resolution, the Court reaffirmed its view that such actions could not be brought given their retroactive effect.