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The Resolution of Banco Popular: Too Big to Fail but Unlikely to Raise Competition Concerns

Christian Grobecker (Sidley Austin LLP) · Wednesday, August 2nd, 2017

The financial crisis led to the bail out of several banks which were considered to be "too big to fail." Considering the costs of those bail outs for the European taxpayer and in view of the importance of financial stability for the proper functioning of the EU's internal market, the EU institutions created a new legal framework for handling such bank failures going forward. This framework provides authorities with tools to manage a bank's failure where they determine that the bank's going through normal insolvency proceedings would harm the public interest and cause financial instability. The notion of "resolution" refers to the use of these tools. A key feature of the framework is the so-called Single Resolution Mechanism (SRM), which is run by the Single Resolution Board (SRB), an EU agency entrusted by EU regulation with a range of resolution powers. In exercising those powers, the SRB has at its disposal a Single Resolution Fund that is financed by contributions from the banking sector.

The SRB passed its first real test last month. On June 6th, the European Central Bank declared that the Spanish bank Banco Popular was either failing or likely to fail. The SRB then rapidly decided that it was in the public interest to put the bank into resolution under the SRM. The SRB adopted its very first resolution scheme, in which it instructed the Spanish national resolution authority, the FROB, to apply the SRM's so-called "sale of business" tool. This tool enables the sale of all or part of the bank's business to one or more purchasers without the consent of the bank's shareholders. After receiving the European Commission's approval for the bank's resolution the FROB sold the shares for the symbolic amount of EUR 1 to the bank's competitor Santander on June 7th. The rapid sale of the shares allowed Banco Popular to continue its business activities without interruption.

According to the Commission's press release, Santander did not receive any assistance under the resolution scheme that would constitute state aid subject to EU-level antitrust scrutiny, but the share sale to Santander is still subject to normal merger control and regulatory reviews.

Normally, the EU merger control regime is "suspensory" in that the sale cannot be implemented until after the transaction is formally notified for merger control review and the Commission clears it as not harming competition. However, as the resolution-led sale process resulted in the overnight transfer of shares to Santander, thus immediately implementing the transaction, it required a derogation from the suspension requirement. Taking into account Banco Popular's likely failure in the absence of the resolution, the Commission granted the derogation in June subject to certain safeguards. Most importantly, Santander is not allowed to "carry out actions that could alter the operations of Banco Popular, in particular vis-à-vis its customers, pending the merger review." Santander appointed a trustee approved by the Commission to monitor compliance with the safeguards.

Santander formally notified the transaction to the Commission for substantive review under the EU Merger Regulation on July 14th, so the provisional deadline for the Commission to clear the transaction is August 22nd. According to publicly available information, Santander, which was already the largest bank in Spain, would increase its market share through its acquisition of Banco Popular to around 20 percent on the Spanish credit market and to around 25 percent on the Spanish market for SME lending. Under the EU Merger Regulation and the Commission's Horizontal Merger Guidelines, market shares at those levels are presumed not to raise competition concerns. Even in the unlikely event that the combination of Santander and Banco Popular were to raise concerns, moreover, the so-called "failing firm" defense might well apply. Under the Horizontal Merger Guidelines (which reflect the Commission's past practice), that defense will apply when the failing firm's leaving the market in the transaction's absence would weaken the competitive market structure to a degree comparable to any deterioration resulting from the transaction. Under the EU Merger Regulation, moreover, a Member State has a right to take "appropriate measures to protect legitimate interests other than those taken into consideration" in that regulation, which expressly provides that prudential rules are regarded as legitimate interests. The actions of the SRB and the FROB to prevent a guaranteed bankruptcy and ensure the stability of the financial system, at no cost for the taxpayer, must indeed count for something.

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