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Comments on the Opinion of Advocate General Ćapeta in Case C 551/22 P concerning Banco Popular

A. Introduction

1. I discuss below the opinion of Advocate General Ćapeta in Case C 551/22 P concerning Banco Popular[2]. My main comments are as follows: Advocate General Ćapeta correctly confirms a number of errors of the General Court that the Commission had identified in its appeal. The General Court indeed erred in assuming a power of the Single Resolution Board (the "**SRB**") to adopt a binding resolution scheme. It is correct also that the Commission is an author of the final decision pursuant to Art. 18 SRMR (Regulation (EU) No 806/2ß14 on the Single Resolution Mechanism). It is necessary, however, to clarify certain points.

2. The SRB's erroneous assumption that it has the power to adopt a binding resolution scheme requires the annulment of such decision as an *ultra vires* act. A dismissal of the action as inadmissible is not appropriate. The right of the applicants to obtain judicial review must not be affected by the SRB's error.

3. The correct interpretation of Art. 18 SRMR is that both the Council and the Commission are co-authors of the decision pursuant to Art. 18 SRMR. The Commission's endorsement does not by itself cause the scheme to come into effect. The endorsement is not an appropriate subject-matter for an action for annulment.

B. The SRB's decision needs to be annulled as an *ultra vires* act

4. The SRB's erroneous assumption of a power to adopt a binding resolution scheme has to lead to the annulment of such decision as an *ultra vires* act. *Ultra vires* acts are subject

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[2] Opinion of Advocate General Ćapeta delivered on 9 November 2023, Case C-551/22 P European Commission v Fundación Tatiana Pérez de Guzmán el Bueno, Stiftung für Forschung und Lehre (SFL), Single Resolution Board (SRB)

to annulment pursuant to Art. 263 TFEU and Art. 264 TFEU. The General Court's findings as to the decision that the SRB adopted are binding on the Court of Justice. They were not contested as distortions of the facts. The assumption of a non-existent act is reserved for extreme cases. The principle of legal certainty protects the applicants' reliance on the manner in which the SRB presented its decision. This presentation was moreover not contradicted by any of the institutions of the EU who now disagree with the SRB. The Applicants attempts to obtain judicial review cannot be thwarted because the decision was wrongly presented as having been authored by the SRB.

C. Is the assumption of a decision of the true authors justified?

5. Is it appropriate following the finding as to the SRB's errors to assume a decision by the institutions which are truly authorized to adopt a decision pursuant to Art. 18 SRMR? It is by no means self-evident that this assumption is possible. The decision was presented after all as a decision by the SRB.

6. Any such assumption would in any case then require an analogous understanding also of the actions for annulment. These actions would have to be interpreted as being directed against the true authors. A reviewable act cannot escape judicial review because an agency of the EU wrongly claimed to be its author and because those affected by it relied on this presentation. The case would thus have to be referred back to the General Court for an examination of the decision of the Council and the Commission.

D. The Council and the Commission are co-authors of the decision

7. The Council and the Commission are co-authors of the decision. The fifth subparagraph of Art. 18(7) SRMR provides that the Council's and the Commission's decision on the basis of the non-objection mechanism is the only manner in which the resolution scheme can come into force. The fact that the resolution scheme does not enter into force if the Council objects is confirmed also by Art. 18(8) SRMR.

8. The role of the Council as a co-author is based on a compromise. The Council initially even wished to be the only author. The second and the third subparagraph of Art. 18(7)

carefully delineate the respective substantive competences of the Commission and the Council. Each of them is responsible for specific discretionary aspects of the decision. The second subparagraph of Art. 18(7) SRMR expressly confirms that there is no overlap between these areas of responsibility.

9. The extent to which the Council takes an interest in a concrete case is irrelevant. This is precisely why the decision making on the basis of a non-objection mechanism is envisaged by the fifth subparagraph of Art. 18 SRMR. The second paragraph of recital 26 SRMR expressly confirms that the Council should not duplicate the preparatory work already undertaken by the Commission. The Council thus relies on preparatory work by the Commission with respect to the discretionary aspects which pursuant to the third subparagraph of Art. 18(7) SRMR are the sole prerogative of the Council. The Commission's preparatory work in this regard is attributable to the Council. This includes any guidance by the Commission as to the extent to which the scheme needs to be reviewed by the Council.

E. The Commission's endorsement is a mere intermediate step

10. The Commission's endorsement is a mere intermediate step. Its annulment cannot be an effective form legal redress because the resolution scheme would then enter into force pursuant to the fifth subparagraph of Art. 18(7) SRMR by virtue of the Council's and the Commission's non-objection. The Commission's endorsement is a mere expression of support.

F. Can the Commission eliminate the Council's right to object?

11. Can the Commission eliminate the Council's right to object? The Commission clearly does not have any such power. A resolution scheme does not come into force if the Council objects. This is confirmed by the fifth subparagraph of Art. 18(7) SRMR. It is confirmed again by Art. 18(8) SRMR. It is true that the Commission influences the extent to which the Council actually takes an interest in a matter. This is part of its

preparatory work for the Council. The power of objection of the Council, however, cannot be eliminated by the Commission.

G. Could the SRMR have entrusted the decision to the SRB?

12. Advocate General Ćapeta is of the opinion that the SRMR could have entrusted the decision to the SRB without breaching the Meroni-doctrine as further developed in the Romano and ESMA-cases. It was in her opinion a matter of legislative choice that the Parliament and the Council as the authors of the SRMR did not confer this power on the SRB. The Commission's position is that such conferral of power would breach the Meroni-doctrine. The General Court's view is that no breach of the Meroni-doctrine occurs as long as the Commission expressly endorses the resolution scheme.

13. The view of the General Court is not satisfactory. Art. 18 SRMR clearly provides for a joint decision by the Council and the Commission. The Commission's endorsement is not a necessary part of the procedure pursuant to Art. 18 SRMR. To assume that Art. 18 SRMR is reconcilable with the Meroni-doctrine only if it is not interpreted literally is not satisfactory.

14. The solution of Advocate General Ćapeta on the other hand goes too far in allowing the transfer of significant power to a mere agency. Decisions pursuant to Art. 18 SRMR can be extremely significant. A global financial crisis can involve the determination of the fate of all significant credit institutions in the Euro-zone. The first adoption of a resolution scheme merely happens to concern a very limited and specific crisis. The Commission's view on the Meroni-aspects is thus more convincing.