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Taking Financial Risks Out of Property Rights Protection under Article 17 of the EU Charter of Fundamental Rights by Sabrina Praduroux

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Judgments of the General Court in the Case T-510/17, *Antonio Del Valle Ruíz and Others v European Commission and Single Resolution Board.*

The case stemmed from an action based on Article 263 TFEU for annulment of both the Single Resolution Board's (SRB) decision concerning a resolution scheme in respect of Banco Popular Español S.A. and the Commission Decision endorsing the SRB's decision and was designated as 'test case' representing approximately 100 actions brought by natural and legal persons who owned capital instruments in Banco Popular before the resolution. In support of the annulment action, the applicants rely on nine pleas in law, the third of which alleges infringement of the right to property.

Introduction

Property rights are a key construct of any market economy. It was, therefore, ineluctable that in the process of building the common market, notwithstanding the 'presumption of non-interference' of the EU institutions in the area of property law originally established in Article 222 of the Treaty establishing the European Economic Community – now Article 345 of the Treaty on the Functioning of the European Union -, the EU action on property-related issues would have steadily increased.

EU's incursions into the property law field are grounded on the objectives of the Union, which are no longer exclusively focused on the establishment of a single market. Relevant EU institutions' acts range, thus, from ownership unbundling measures in the area of network industries to freezing of funds to combat terrorism; from measures to ensure the stability of the financial system to rules restricting property rights for environmental protection purposes, and so forth.

Being the right to property both a basic institution of the economic system and a constitutionally protected right in the EU Member States, it is no coincidence that it was invoked in the very first cases in which the Court of Justice, through its creative jurisprudence, laid down the foundations for the protection of fundamental rights within the EU legal order.

In the renowned Hauer case, the ECJ specifically acknowledged that "*the right to property is guaranteed in the Community legal order in accordance with the ideas common to the Constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the protection of Human Rights*", making at the same time clear that "*the scope of that right should be measured in relation to its social function*", which is to say that "*the substance and enjoyment of property rights are subject to restrictions which must be accepted by each owner on the basis of the superior general interest and the general good*".

These principles then found a place in the text of Article 17 of the EU Charter of Fundamental Rights which guarantees the right to property in non-absolute terms, as the same can be subject to limitations that are deemed necessary for the general interest.

As interpreted by the CJEU, the scope of Article 17 of the Charter is rooted in the protection of economic interests created under domestic or EU law, but it is shaped in the light of the EU general interest. Ownership of shares falls within the scope of application of Article 17 of the Charter, which includes "*rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his or her own benefit*" (Joined Cases C-798/18 and C-799/18, para. 33).

Arguments presented to the General Court and its findings

In the case commented on here, the General Court was called upon to assess whether the limitations on property rights of *Banco Popular*'s shareholders complied with Article 52(1) of the Charter, which requires that any limitation on the exercise of the protected rights and freedoms must be provided for by law, pursue an objective of general interest, and respect the essence of those rights and freedom as well as the proportionality principle.

The applicants raised three complaints, alleging specifically that: "*First, the contested decisions do not comply with the 'conditions provided for by law,' secondly, those decisions impair the essence of their right to property by failing to provide for compensation and, thirdly, that impairment is disproportionate*" (para. 504).

The Court rejected all the above complaints and stated that the decision to write down and convert Banco Popular's capital instruments adopted by the SRB "*in the resolution scheme does not constitute an excessive and intolerable interference impairing the very substance of the applicants' right to property, but must be regarded as a justified and proportionate restriction of their right to property, in accordance with the provisions of Article 17(1) and Article 52(1) of the Charter*" (para. 540).

For this blog post, I will focus on the Court's reasoning for rejecting the second complaint concerning the alleged infringement of the *essence of the applicants' right to property* (para. 508).

The requirement of respect for the *essence of fundamental rights* laid down in Article 52(1) of the Charter is based on the case-law of the CJEU going back to the above-mentioned *Hauer* case. Indeed, even though in that case the Court referred to "*the very substance of the right*" as the limits on limitations to property rights, in subsequent cases the Court stated that the term "*essential content*" equates to the substance of the right (Case T187/11, para. 81).

Any formula defining the essence or substance of the right to property can be found in the CJEU's case law. However, the EU courts when carrying out the "respect-for-the-essence test" to decide whether an interference impairing the very substance of the right of property have consistently considered two factors: first, whether the owner could still make some use of his or her property and, second, whether the property concerned had been deprived of all economic value.

In the case at hand, though, the fact that, because of the measures adopted by the SRB in the resolution scheme, the applicants' shares, and bonds were deprived of all economic value, did not lead the Court to conclude that the essence of their right to property was impaired. This conclusion is based on the consideration that "*the value of their investment is in fact the value in the event of the resolution scheme not having been adopted, namely a situation in which Banco Popular is wound up*" (para. 523).

In other words, in the Court's reasoning, the objects of the applicants' property rights were shares that had no market value because they were shares of a failing bank destined for bankruptcy. From this perspective, therefore, there was no loss of economic value for which the applicants could seek compensation under Article 17 of the Charter.

Comment

This approach is, *mutatis mutandis*, in line with the one taken in previous cases concerning measures that imposed destruction of property without providing for compensation and that the Court held compatible with the principles governing property rights protection, as far as the destroyed property did not have marketable value (e.g. Joined Cases C-20 and 64/00 and case C-56–13).

Also noteworthy is the Court's reference to the so-called 'No Creditor Worse Off or NCWO' principle (see Article 15(1)(g) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014), according to which: "*no creditor is to incur greater losses than would have been incurred if the entity subject to a resolution procedure had been wound up under normal insolvency proceedings*" (para.

510), which underlies the mechanism for the compensation of the shareholders and creditors established by the SRM Regulation.

This entails, from a broader perspective, that a complaint in terms of deprivation of a legitimate expectation of obtaining an asset under the normal liquidation procedure, based on the legitimate expectations case law developed by the European Court of Human Rights (ECtHR) interpreting Article 1 of Protocol No. 1 to the European Convention on Human Rights (Article P1-1), would hardly be practical.

Moreover, on the one hand, the ECtHR expressly ruled out that Article P1-1 could give rise to "*any positive obligation for the State to maintain the value not only of deposits, but also of claims or any other asset*" (Application no. 35221/97) and, on the other, it considers financial risk, that by itself may lead to a significant loss of the economic value of the property, as a relevant factor when assessing the proportionality of State's interference with the right to the peaceful enjoyment of one's possessions (Applications nos. 63066/14, 64297/14 and 66106/14).

To sum up, stating that: "*shareholders of an entity must bear the risks inherent in their investments*" as well as the economic consequences of its possible failure (para. 495), the EU General Court ruled out the possibility to extend the protection afforded to the right to property under Article 17 of the Charter to the intrinsic financial risk inherent to ownership of shares.

This solution is, in principle, consistent with the ECtHR's jurisprudence that should, according to Article 52(3) of the Charter, guide the CJEU when interpreting and applying Article 17 of the Charter.

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