

EMEA DC STATEMENT 14 AUGUST 2018

The EMEA DC met on Friday 10 August 2018 to discuss recent developments regarding the publication of the valuation required by Article 20(16) of the SRM Regulation¹ (the **Article 20(16) Valuation**) following the bail-in of Tier 2 subordinated debt instruments (**Tier 2 Notes**) issued or guaranteed by Banco Popular Español SA (**Banco Popular**) on 7 June 2017. The EMEA DC agreed to publish the following statement.

Capitalised terms used but not defined herein have the meaning specified in the 2014 ISDA Credit Derivatives Definitions (the **2014 Definitions**) or the ISDA Credit Derivatives Determinations Committee Rules (January 20, 2016 Version) (the **DC Rules**), as applicable.

Background

On 6 August 2018, the Single Resolution Board (the **SRB**) published (a) a non-confidential version of the report (the **Article 20(16) Valuation Report**) in respect of the Article 20(16) Valuation that has been carried out by Deloitte² and (b) a notice (the **SRB Notice**) regarding its preliminary decision that, based on the conclusions in the Article 20(16) Valuation Report, it does not intend to compensate former shareholders and creditors of Banco Popular who were affected by the resolution actions of 7 June 2017 (the **Affected Shareholders and Creditors**).³ An announcement by the SRB in respect of the publication of the Article 20(16) Valuation Report and the SRB Notice (the **SRB Announcement**)⁴ and an explanatory memorandum in respect of the Article 20(16) Valuation Report (the **Explanatory Memorandum**)⁵ accompanied the publication of these items.

As has been previously noted by the DC,⁶ the Article 20(16) Valuation is a measure which seeks to safeguard the 'no creditor worse off' principle provided for under the SRM Regulation⁷: Affected Shareholders and Creditors should not incur greater losses pursuant to any resolution action than they would have incurred if the relevant entity had been wound up under normal insolvency proceedings. If it is determined pursuant to the Article 20(16) Valuation that Affected Shareholders and Creditors would have received better treatment under normal insolvency proceedings, then they should be entitled to the payment of the difference by the European Single Resolution Fund under Article 76.1(e) of the SRM Regulation (the **Article 76 Compensation Right**).

The DC has previously expressed the view that any Article 76 Compensation Right constitutes an Asset that comprises the sole Asset to be included in the Asset Package for the purposes of the triggered subordinated 2014 Transactions.

Article 20(16) Valuation Report and SRB Notice

The Article 20(16) Valuation Report comes to the conclusion that, in respect of the Affected Shareholders and Creditors, no recoveries would have been expected in a normal insolvency proceeding even under the most optimistic scenario considered by Deloitte and, as a result, there is no difference in treatment had Banco Popular been subject to normal insolvency proceedings in comparison to the actual treatment pursuant to the resolution actions taken.

Based on Deloitte's conclusions in the Article 20(16) Valuation Report, the SRB has determined "*on a preliminary basis that it is not required to pay compensation to the Affected Shareholders and Creditors*

¹ Regulation (EU) No 804/2014, the text of which is available on the EU website: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0806&from=EN>

² A copy of the Article 20(16) Valuation Report is available here: https://srb.europa.eu/sites/srbsite/files/valuation_report_non_confidential_version_en.pdf

³ A copy of the SRB Notice is available here: https://srb.europa.eu/sites/srbsite/files/srb_ees_2018_132_notice_of_the_srb_final.pdf

⁴ A copy of the SRB Announcement is available here: <https://srb.europa.eu/en/node/603>

⁵ A copy of the Explanatory Memorandum is available here: https://srb.europa.eu/sites/srbsite/files/20180806_explanatory_note_en.pdf

⁶ See DC Statement of [25 August 2017](#)

⁷ Article 15 of the SRM Regulation.

*pursuant to Article 76(1)(e) of [the SRM Regulation].*⁸ In other words, the SRB is of the view that holders of the Tier 2 Notes are entitled to no compensation payment pursuant to their Article 76 Compensation Right.

Before the SRB makes a final decision on the Affected Shareholders and Creditors' Article 76 Compensation Right, the SRB has launched a 'right to be heard' procedure pursuant to Article 41(2)(a) of the Charter of Fundamental Rights of the EU. Pursuant to this procedure, Affected Shareholders and Creditors may submit their comments and views in respect of the SRB's preliminary decision on the Article 76 Compensation Right. The SRB will adopt its final decision on whether compensation needs to be paid to the Affected Shareholders and Creditors under Article 76(1)(e) following its review of any comments and views submitted. It is not clear to the DC how long this right to be heard procedure will take to complete.

DC determination

In line with previous DC Statements⁹, the DC has consistently been of the view that it should await publication of the Article 20(16) Valuation before making a determination in respect of the value of the Asset Package for purposes of settling triggered subordinated 2014 Transactions referencing Banco Popular. As the Article 20(16) Valuation Report has now been published, the DC considers that it now has sufficient information to make that determination based on the conclusions contained therein, specifically that Affected Shareholders and Creditors would not have received better treatment if Banco Popular had been wound up under normal insolvency proceedings.

Accordingly, the DC has resolved that for purposes of triggered subordinated 2014 Transactions referencing Banco Popular:

- (a) the Article 76 Compensation Right comprises the sole Asset to be included in the Asset Package;
- (b) the Article 76 Compensation Right constitutes a Non-Financial Instrument (as defined in Section 8.14 of the 2014 Definitions);¹⁰
- (c) the Asset Market Value (as defined in Section 8.15 of the 2014 Definitions) of the Article 76 Compensation Right is equal to zero;¹¹ and
- (d) the value of the Asset Package is therefore zero.

While the DC recognises that the SRB's decision is preliminary only and its final decision is subject to the outcome of the 'right to be heard' procedure:

- (i) the DC noted that the availability of the Article 76 Compensation Right depends on an Article 20(16) Valuation and that the Article 20(16) Valuation Report from Deloitte is in final form¹²;
- (ii) the Article 20(16) Valuation Report concluded that Affected Shareholders and Creditors would not have received any recoveries in normal insolvency proceeding *even under the most optimistic scenario considered*; and
- (iii) the DC noted that the theoretical risk of the SRB's preliminary decision changing is counterbalanced by the need to avoid a continued delay in the settlement of the subordinated 2014 Transactions and to provide the market with certainty, particularly given that the resolution actions in respect of Banco Popular were taken over a year ago. In this regard:

⁸ See paragraph 3.4 of the [SRB Notice](#).

⁹ See DC Statements of [25 August 2017](#) and [5 December 2017](#)

¹⁰ See DC Statement of [25 August 2017](#)

¹¹ See Section 8.12(b)(v) of the 2014 Definitions.

¹² A draft report was circulated to the SRB on 20 April 2018 and the final report was issued as at 12 June 2018 (with clerical errors corrected on 31 July 2018).

- (A) the DC noted in August 2017 that it did not expect to wait beyond the publication of the Article 20(16) Valuation before making a determination of the value of the Asset Package¹³; and
- (B) the SRB has not provided a deadline for the publication of its final decision and so there is no certainty on when this may be.

Deemed CDS Auction

Settlement of triggered subordinated 2014 Transactions will be effected by reference to a deemed Auction in accordance with the form of Auction Settlement Terms which the DC will publish shortly and pursuant to which the Auction Final Price will be deemed to be zero. The form of the Auction Settlement Terms will also contain other terms relevant to the settlement of these triggered subordinated 2014 Transactions (e.g. the Auction Settlement Date).

¹³ See DC Statement of [25 August 2017](#)