

EMEA DC Meeting Statement 9 June 2017

The EMEA DC met today to discuss whether:

- (a) for the purposes of trades entered into using the 2014 ISDA Credit Derivatives Definitions (the **2014 Definitions**), a Governmental Intervention Credit Event has occurred with respect to Banco Popular Español, S.A. (**Banco Popular** or the **Reference Entity**); and
- (b) for the purposes of trades entered into using the 2003 ISDA Credit Derivatives Definitions (the **2003 Definitions**), a Restructuring Credit Event has occurred with respect to Banco Popular,

as a result of the resolution scheme approved under the EU's bank recovery and resolution rules and announced by the Single Resolution Board (**SRB**) on 7 June 2017 for the sale of Banco Popular to Banco Santander S.A. (the **Resolution Scheme**).¹ The Resolution Scheme was implemented by the Fondo de Reestructuración Ordenada Bancaria (the **FROB**).² Under the Resolution Scheme, the FROB wrote down all of the existing shares (Common Equity Tier 1), converted the Additional Tier 1 instruments of Banco Popular into new shares which were written down and converted the Tier 2 subordinated debt instruments issued by Banco Popular into new shares, which were transferred to Banco Santander S.A. for a purchase price of €1.³

The EMEA DC resolved that a Governmental Intervention Credit Event occurred under the 2014 Definitions in relation to European Financial Corporate and Standard European Financial Corporate Transaction Types and a Restructuring Credit Event occurred under the 2003 Definitions in relation to European Corporate and Standard European Corporate Transaction Types, in each case with respect to Banco Popular on 7 June 2017.

2014 Definitions

The EMEA DC initially considered whether the implementation of the Resolution Scheme constituted a Governmental Intervention Credit Event as described in Section 4.8(a)(iii) of the 2014 Definitions. Section 4.8(a)(iii) of the 2014 Definitions provides that a Governmental Intervention Credit Event occurs with respect to one or more Obligations upon “*a mandatory cancellation, conversion or exchange*” resulting from “*action taken or an announcement made by a Governmental Authority pursuant to, or by means of, a restructuring and resolution law or regulation (or any similar law or regulation), in each case, applicable to the Reference Entity in a form which is binding, irrespective of whether such event is provided for under the terms of such Obligation*”.

The EMEA DC was of the view that the implementation of the Resolution Scheme satisfied the requirements of Section 4.8(a)(iii), as there has been a mandatory conversion of all Tier 2 subordinated debt into equity pursuant to action taken by the SRB and the FROB under the EU's bank recovery and resolution rules. The SRB is a Governmental Authority, being a public body established by the EU and charged with the regulation of the European financial markets in which Banco Popular operates, and its announcement of the Resolution Scheme on 7 June 2017 was binding on all holders of the affected debt instruments of Banco Popular. The FROB is the Spanish national resolution authority and its implementation of the Resolution Scheme on 7 June 2017 was binding on all holders of the affected debt instruments of Banco Popular. While some of the subordinated debt constitutes contingent convertible bonds, a Governmental Intervention Credit Event can arise irrespective of whether the conversion is provided for under the terms of the relevant Obligation and therefore the DC did not analyse such provisions.

¹ The press release issued by the European Commission is available on the EU website: http://europa.eu/rapid/press-release_IP-17-1556_en.pdf

The press release issued by the SRB is available on the SRB website: <https://srb.europa.eu/en/node/315>.

² The decision statement issued by the FROB can be accessed here: <http://www.frob.es/es/Lists/Contenidos/Attachments/519/FROBImplementingActJune72017.pdf>

³ The note summarising the effect of the resolution scheme can be accessed on the SRB website: <https://srb.europa.eu/en/node/315>

In considering whether a Credit Event had occurred in respect of any Senior Transactions referencing Banco Popular, the EMEA DC noted that under Section 3.6(b) of the 2014 Definitions any Subordinated Obligations are Excluded Obligations for the purpose of determining whether a Governmental Intervention Credit Event has occurred in respect of any Senior Transactions with Financial Reference Entity Terms specified as being applicable in the related Confirmations, which is the case here. **Accordingly the Governmental Intervention Credit Event determination will only apply to any Transactions which have a Subordinated Obligation as their Reference Obligation.**

The EMEA DC resolved that a Governmental Intervention Credit Event under Section 4.8(a)(iii) of the 2014 Definitions had occurred in respect of Banco Popular on 7 June 2017. The EMEA DC noted that by virtue of Section 8.9(a) of the 2014 Definitions, this Credit Event will constitute an Asset Package Credit Event and, pursuant to Section 8.8 of the 2014 Definitions, that Asset Package Delivery will apply.

In light of the fact that the EMEA DC had already concluded that the Resolution Scheme constituted a Credit Event, the EMEA DC did not consider whether a Restructuring Credit Event under the 2014 Definitions had occurred.

2003 Definitions

The EMEA DC's discussion then focused on whether the Resolution Scheme constituted a Restructuring Credit Event under Section 4.7(a)(ii) of the 2003 Definitions (as under the 2003 Definitions, there is no equivalent to a Governmental Intervention Credit Event as described under the 2014 Definitions). A Restructuring Credit Event will arise upon the announcement of certain events by a Governmental Authority in a form that binds all holders of the relevant Obligation and where such event is not expressly provided for under the terms of such Obligation. The event described in Section 4.7(a)(ii) is "*a reduction in the amount of principal or premium payable at maturity or at scheduled redemption dates*". The occurrence of the event must directly or indirectly result from a deterioration in the creditworthiness or financial condition of the Reference Entity and the Multiple Holder Obligation must be satisfied.

The question under discussion centred on whether the mandatory conversion of the subordinated debt into equity would be tantamount to a reduction in the principal amount of the subordinated debt, to the extent that the underlying bond documentation does not permit such convertibility. The EMEA DC considered the question with respect to the subordinated notes issued by Banco Popular on 22 December 2009 and maturing on 22 December 2019 (the "**2009/1 Notes**"), the terms of which do not contain any contingent convertible provisions.⁴

The EMEA DC was of the view that:

- (a) the mandatory conversion of the subordinated debt into equity in respect of the 2009/1 Notes amounted to a reduction in the principal amount of the bonds. The EMEA DC noted that some or all of the other subordinated debt had contingent convertible provisions but given the conclusion reached in respect of the 2009/1 Notes, the EMEA DC did not consider any of the other subordinated bonds;
- (b) the SRB and the FROB are Governmental Authorities and their announcement of the Resolution Scheme on 7 June 2017 was binding on all holders of the affected debt instruments of Banco Popular;
- (c) the Resolution Scheme resulted from the deterioration in the financial condition of the Reference Entity. In its announcement on 7 June 2017, the SRB noted that the ECB had concluded on 6 June 2017 that Banco Popular "*is failing or likely to fail on the basis of Article 18(4)(c) SRMR. In particular, taking into account the rapidly deteriorating liquidity situation of [Banco Popular], the ECB*

⁴ The subordinated bond documentation (including the terms of the 2009/1 Notes) can be accessed on Banco Popular's website: <http://www.grupobancopopular.com/EN/InvestorRelations/FixedIncomeandRatings/Paginas/SociedadesEmisoras.aspx>

considered that there were sufficient grounds supporting the determination that [Banco Popular] would, in the near future, be unable to pay its debts as they fall due”⁵; and

- (d) based on the considerable size (by reference to the outstanding principal amount) of the 2009/1 Notes immediately prior to the Resolution Scheme, the fact that such bonds were listed on more than one exchange and the fact that the EMEA DC has seen no evidence to suggest that such bonds were held by fewer than four holders, the Multiple Holder Obligation requirement was satisfied.

On this basis, the EMEA DC resolved that a Restructuring Credit Event under Section 4.7(a)(ii) of the 2003 Definitions had occurred in respect of Banco Popular and that the date of such event was the 7 June 2017, being the date on which the SRB took resolution action.⁶ The EMEA DC noted that Mod Mod R would apply to the relevant Transactions entered into using the 2003 Definitions.

Next steps

The EMEA DC resolved to hold an auction in respect of the Transactions entered into using the 2014 Definitions. The EMEA DC resolved potentially to hold an auction in respect of the relevant Transactions entered into using the 2003 Definitions (being those Transactions which are subject to the Small Bang Protocol or which otherwise incorporate the 2009 ISDA Credit Derivatives Determinations Committees, Auction Settlement and Restructuring Supplement). The EMEA DC further resolved to hold a subsequent call on Monday 12 June 2017 to discuss matters relating to the auctions.

⁵ <https://srb.europa.eu/en/node/315>

⁶ https://srb.europa.eu/sites/srbsite/files/note_summarising_effects_07062017.pdf