

Case C-504/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

2 July 2019

Referring court:

Tribunal Supremo (Supreme Court, Spain)

Date of the decision to refer:

25 June 2019

Appellants:

Banco de Portugal

Fundo de Resolução

Novo Banco, S.A.

Respondent:

VR

Subject matter of the main proceedings

Appeals brought against the judgment of the Audiencia Provincial (Provincial Court) which upheld the judgment given at first instance pursuant to which Novo Banco was ordered to repay the applicant the sum paid under the contract between the applicant and Banco Espírito Santo, S.A. Sucursal en España, for the purchase of preference shares in the Icelandic institution Kaupthing Bank.

Purpose and legal basis of the request for a preliminary ruling

The issue is whether, in the context of the reorganisation measures for credit institutions provided for in Directive 2001/24, the fundamental right to an effective remedy and the principle of legal certainty recognised in EU law preclude a change to the legal framework established in a decision issued by the Portuguese authorities in August 2014, which was subsequently altered by a

decision issued in December 2015, from being applied retrospectively to pending legal proceedings that were commenced before the latter decision was adopted.

Question referred

Is an interpretation of Article 3(2) of Directive 2001/24/EC under which, in legal proceedings pending in other Member States, the courts must, without any further formalities, recognise the effects of a Decision by the competent administrative authority of the home Member State that is intended retrospectively to change the legal framework that existed at the time the proceedings were commenced and that renders ineffective any judgments that do not accord with the provisions of the new decision, compatible with the fundamental right to an effective remedy in Article 47 of the Charter of Fundamental Rights of the EU, the principle of the rule of law in Article 2 of the Treaty on European Union, and the general principle of legal certainty?

Provisions of EU law cited

Charter of Fundamental Rights of the European Union

Article 47, first paragraph.

Treaty on European Union

Article 2.

Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions

Article 3(2).

Provisions of national law cited

National law of the host Member State (Spain)

Ley sobre saneamiento y liquidación de las entidades de crédito (Law on the reorganisation and winding up of credit institutions) 6/2005 of 22 April 2005, which implements Directive 2001/24.

Paragraph (1) of Article 19, which is entitled ‘Effects and publication in Spain of the adoption of reorganisation measures and winding-up proceedings’:

‘Where a reorganisation measure has been adopted or winding-up proceedings have been opened in respect of a credit institution authorised in a Member State of the European Union that has at least a branch or provides services in Spain, the said measure or proceedings shall be fully effective in Spain without further

formality, as soon as they become so in the Member State in which the measure has been adopted or the proceedings opened.’

National law of the home Member State (Portugal)

Decree-Law No 298/92 of 31 December 1992 approving the Regime Geral das Instituições de Crédito e Sociedades Financeiras (General Framework for Credit Institutions and Finance Companies), Article 145, which implements Directive 2001/24.

Decision of the Bank of Portugal of 3 August 2014.

Decisions of the Bank of Portugal of 29 December 2015.

Brief summary of the facts and the main proceedings

- 1 Banco Espírito Santo, S.A. (‘BES’) is a Portuguese institution which carried on its corporate objects in Spain through a branch.
- 2 On 10 January 2008, at the Bilbao office of Banco Espírito Santo, S.A. Sucursal en España (BES’s branch in Spain), Ms VR entered into a contract to purchase preference shares in the Icelandic institution Kaupthing Bank, for which she paid the sum of EUR 166 021.
- 3 In view of the severe crisis suffered by BES, in a decision dated 3 August 2014, amended by a further decision dated 11 August 2014 (‘the Bank of Portugal Decision of 3 August 2014’), the Board of Directors of the Bank of Portugal (‘the Bank of Portugal’) adopted certain ‘resolution measures’ — as they were termed — pursuant to Article 145C and following of the General Framework for Credit Institutions and Finance Companies approved by Decree-Law No 298/92 of 31 December 1992, as amended by various later Decree-Laws.
- 4 That decision ordered the creation of a ‘bridge bank’, Novo Banco, S.A. (‘Novo Banco’), to which part of BES’s business was transferred. Annex 2 to the decision listed the assets, liabilities and other items belonging to BES that were transferred to the new transferee institution. When BES’s Spanish branch became a branch of Novo Banco, Novo Banco continued the branch’s business relationship with Ms VR, on account of the transfer of the assets. Specifically, it continued that relationship in respect of the deposit and management of the securities that are the subject of these proceedings, and it continued to receive the periodic fees payable under that contract.
- 5 In February 2015, Ms VR filed a claim against Novo Banco, S.A. Sucursal en España (Novo Banco’s branch in Spain), in which she requested that the order to purchase the preference shares in Kaupthing Bank be declared void on grounds of error in consent and that Novo Banco be ordered to repay her the EUR 166 021 she had paid; or, in the alternative, that the termination of the contract be ordered

on the grounds that the bank had breached its duties of diligence and good faith and its obligation to provide information, and that the bank be ordered to pay her the sum of EUR 166 021 in damages. Novo Banco disputed the claim, arguing that it could not be sued because the claim concerned a liability that had not been transferred to it, pursuant to the Bank of Portugal Decision of 3 August 2014. Annex 2 to that decision established that all third party liabilities that formed part of BES's liabilities, including items not classified as part of its assets or liabilities, were transferred in their entirety to Novo Banco, with the exception of '*any liabilities or contingencies, in particular those arising from fraud or breach of regulatory, criminal or administrative provisions or decisions*', which were deemed to be 'excluded liabilities' under the transfer.

- 6 In a judgment of 15 October 2015, the Juzgado de Primera Instancia de Vitoria (Court of First Instance, Vitoria) upheld the claim, on the grounds that, under the Bank of Portugal Decision of 3 August 2014, the liability at issue in the proceedings had been transferred to Novo Banco. It held that there had been an error in consent, in that the claimant, who was aged 68 when she entered into the contract and had no financial training, was not given sufficient information by BES on the nature and risks of the preference shares she purchased. It therefore declared the contract void on grounds of error in consent and ordered Novo Banco to repay the claimant the EUR 166 021 she had paid for the preference shares.
- 7 Novo Banco appealed, continuing to argue that it could not be sued because the liability for which it was being pursued remained part of BES's assets and liabilities. In a written submission filed on 26 January 2016 it produced two decisions issued by the Bank of Portugal on 29 December 2015 ('the Bank of Portugal Decisions of 29 December 2015'), which stated that the following liabilities were not transferred to Novo Banco:

'Any obligations, warranties, liabilities or contingencies assumed in the marketing, brokerage, sales process and distribution of financial instruments issued by any institutions ...'.
- 8 Those decisions also stipulated that, in particular, the following BES liabilities had not been transferred to Novo Banco: 'any damages in connection with breach of contracts ... entered into before 3 August 2014'; 'any damages and sums owed as the result of the voiding of transactions undertaken by BES as a provider of financial services and investments'; and 'any liability that is the subject of any of the proceedings described in Annex I'; the latter referred to a series of legal proceedings brought in various States, including the proceedings brought by Ms VR.
- 9 Finally, the Bank of Portugal Decisions of 29 December 2015 stipulated that 'in so far as any asset, liability or other item ... should have remained as part of BES's assets and liabilities but was in fact transferred to Novo Banco, those assets, liabilities or other items are transferred back from Novo Banco to BES with effect from 3 August 2014'.

- 10 The Bank of Portugal justified these changes in its decisions on the grounds that, as a public authority with powers of resolution, it needed to ensure certainty as to the definition of the ‘transfer boundaries’, thereby ensuring the effectiveness of the resolution measure adopted in respect of BES, in the face of a series of diverging court decisions over the assets, liabilities and other items transferred from BES to Novo Banco.
- 11 However, the Provincial Court dismissed the appeal and upheld the judgment given at first instance.
- 12 Novo Banco lodged an extraordinary appeal against the Provincial Court’s judgment, on grounds of procedural error, and an appeal in cassation. The appeals have been ruled admissible by the referring court.

Main arguments of the parties to the main proceedings

- 13 In essence, the appellants in cassation argue that Novo Banco may not be sued, on the grounds that neither the debt nor the liability in question was transferred from BES and that, in any event, from a legal standpoint any liability arising from the voiding of the contract for the preferential shares in Kaupthing Bank remains with BES. In this respect, they cite the two Bank of Portugal Decisions of 29 December 2015 referred to above.
- 14 The appellants rely on the legal provision which stipulates that decisions by the competent administrative authority in the home Member State must be effective in other Member States ‘without further formality’, as the basis for arguing that the claims brought against Novo Banco should not be decided under the legal framework in place when the claim was lodged, but should instead be decided in accordance with the amendments introduced by the Bank of Portugal Decisions of 29 December 2015, which were adopted after proceedings had commenced and judgment had been given at first instance. Lastly, they argue that, in any event, if Novo Banco were to be ruled liable in a final judgment, it would have no effect, because the liability had been transferred from Novo Banco back to BES by the competent administrative authority of the home State, in spite of the existence of pending legal proceedings.
- 15 As evidence of its interest in the proceedings, Fundo de Resolução (the Resolution Fund) — a Portuguese public law entity that provides financial support to underpin the application of resolution measures adopted by the Bank of Portugal — referred to the sale of 75% of Novo Banco’s share capital to an investment fund in a transaction commenced in January 2016. The sale agreement included the provisions contained in a third decision issued by the Bank of Portugal on 29 December 2015 (‘the Neutralisation Decision’), under which the Resolution Fund undertook, in certain circumstances, to compensate Novo Banco for any adverse court judgments that did not reflect the boundaries of the assets and liabilities that had been established in the two decisions of 29 December 2015.

The appellants have also requested that the matter be referred to the Court of Justice of the European Union for a preliminary ruling.

Brief summary of the basis for the request for a preliminary ruling

- 16 When Ms VR lodged the claim against Novo Banco, the creation of Novo Banco as a ‘bridge bank’ and the transfer of BES’s assets and liabilities to it were governed by the Bank of Portugal Decision of 3 August 2014, which was issued under the national legislation implementing Directive 2001/24.
- 17 In judgment No 678/2018 of 29 November 2018, handed down in a similar case, this court already held that liabilities in respect of breach of contract, particularly in connection with requirements to provide information and advice on investments, had been transferred from BES to Novo Banco, because these liabilities were not included in the exceptions established by the Bank of Portugal Decision of 3 August 2014. This court held that damages for breach of contract did not constitute liability arising from fraud or breach of regulatory, criminal or administrative provisions or decisions.
- 18 With regard to the Bank of Portugal Decisions of 29 December 2015, this court takes the view that an administrative decision taken after proceedings have been commenced cannot be allowed to change the terms of those proceedings as determined at the commencement of proceedings. Moreover, Article 10(2)(e) of Directive 2001/24 stipulates that the law of the home Member State shall determine in particular ‘the effects of winding-up proceedings brought by individual creditors, *with the exception of lawsuits pending*, as provided for in Article 32’. However, in the present case, the appellants are relying on the Bank of Portugal Decisions of 29 December 2015 and, although the stated purpose of those decisions is to ‘clarify’ the Bank of Portugal Decision of 3 August 2014, what they actually do is to change the wording of that earlier decision with retrospective effect from the entry into force date of the earlier decision, as can be seen from the extract from the decisions reproduced in paragraph 7 above.
- 19 Regardless whether, as argued by the Bank of Portugal and the Resolution Fund, the resolution measures adopted under the Bank of Portugal Decision of 3 August 2014 constitute reorganisation measures as provided for in Title II of Directive 2001/24 rather than winding-up proceedings under Title III of the directive — see the judgment of the Court of Justice of the European Union of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 111 to 114 — in which case Title III of the directive would not apply, this court doubts whether it is compatible with the fundamental rules and general principles of EU law for the Bank of Portugal Decisions of 29 December 2015 to produce effects in other Member States without any further formalities, as argued by the appellants.
- 20 Those doubts do not concern the possibility that a decision by the competent public authority may have retrospective effect — see the judgment of the Court of Justice of 24 October 2013, *LBI*, C-85/12, EU:C:2013:697 — nor the possibility

that liabilities that were initially transferred to Novo Banco may subsequently be transferred back to BES.

- 21 The court's doubts concern the appellants' claim that the changes to the legal framework governing the reorganisation measures must be recognised in pending legal proceedings that commenced before the Bank of Portugal issued its Decisions of 29 December 2015. Those proceedings are examining precisely the question of the assets and liabilities that were actually transferred to Novo Banco and the ensuing possibility that it may be sued under the legal framework that applied when the claim was lodged.
- 22 The arguments propounded by the appellants would lead to a situation in which an adverse judgment in the present proceedings would have no practical effect, because the liabilities that were originally transferred from BES to Novo Banco had been transferred back by the Decisions of 29 December 2015.
- 23 The fundamental right to an effective remedy is also recognised in Article 47 of the Charter of Fundamental Rights of the European Union, and this court believes it is doubtful whether giving effect to the Bank of Portugal Decisions of 29 December 2015 in the way argued by the appellants is compatible with that right.
- 24 In paragraph 15 of the judgment of 15 October 1987, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and Others*, C-222/86, EU:C:1987:442, the Court of Justice held that where it is a question of securing an effective remedy, interested parties must be able to decide, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. In the present case, the applicant commenced proceedings against Novo Banco in respect of liabilities that had been transferred to Novo Banco under the Bank of Portugal Decision of 3 August 2014, and she incurred certain costs.
- 25 In its judgment of 19 March 1997, *Hornsby v Greece*, the European Court of Human Rights held that the right in Article 6(1) of the European Convention on Human Rights would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain ineffective and unenforceable. That is what would happen if the Bank of Portugal Decisions of 29 December 2015 were interpreted in the manner suggested by the appellants and if the Portuguese administrative authority were allowed to decide whether a court judgment has correctly interpreted the 'transfer boundaries' established by the Bank of Portugal Decision of 3 August 2014.
- 26 Finally, there are doubts as to whether the principle of legal certainty is compatible with a situation in which, after Ms VR sued Novo Banco, as the 'bridge bank' to which part of BES's assets and liabilities were transferred under the legal framework defined by the relevant resolution measures, on the grounds that liability had been transferred to the defendant institution, the competent

administrative authority can make changes to that legal framework which have an impact on these legal proceedings even though judgment has already been given at first instance, and can deprive a final judgment of effect.

WORKING DOCUMENT