Anonymised version

Case C-83/20

Request for a preliminary ruling

Date lodged:

17 February 2020

Referring court:

Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal)

Date of the decision to refer:

23 January 2020

Appellants:

BPC Lux 2 Sàrl

BPC UKI LP

Bennett Offshore Restructuring Fund Inc.

Bennett Restructuring Fund LP

Queen Street Limited

BTG Pactual Global Emerging Markets and Macro Master Fund, L.P

BTG Pactual Absolute Return II Master Fund, L.P

CSS, LLC

Beltway Strategic Opportunities Fund L.P.

EJF Debt Opportunities Master Fund, L.P

TP Lux HoldCo, S.a.r.l.

VR Global Partners, L.P.

CenturyLink

City of New York Group Trust

Dignity Health

GoldenTree Asset Management LUX S.a.r.l

GoldenTree High Yield Value Fund Offshore 110 Two Limited

San Bernardino County Employees Retirement Association

EJF DO Fund (Cayman), LP

Massa Insolvente da Espírito Santo Financial Group, S.A.

Respondents:

Banco de Portugal

Banco Espírito Santo, S.A.

Novo Banco, S.A.

DO

SUPREMO TRIBUNAL ADMINISTRATIVO

(SUPREME ADMINISTRATIVE COURT, PORTUGAL)

[…]

The Administrative Chamber of the Supreme Administrative Court has issued […] the following decision.

BACKGROUND TO THE DISPUTE

1. BPC Lux 2 S.a.r.l.; BPC UKI, L.P.; Bennett Offshore Restructuring Fund, Inc.; Bennett Restructuring Fund, L.P; Queen Street Limited; BTG Pactual Global Emerging Markets and Macro Master Fund, L.P.; BTG Pactual Absolute Return II Master Fund, L.P; CSS, LLC; Beltway Strategic Opportunities Fund L.P.; EJF Debt Opportunities Master Fund, L.P; TP Lux HoldCo, S.a.r.l.; VR Global Partners, L.P.; CenturyLink; City of New York Group Trust; Dignity Health; GoldenTree Asset Management LUX S.a.r.l; GoldenTree High Yield Value Fund Offshore 110 Two Limited; San Bernardino County Employees Retirement Association; and EJF DO Fund (Cayman), LP have lodged an appeal […] against

the judgment given by the Tribunal Administrativo de Círculo de Lisboa (District Administrative Court, Lisbon, Portugal) on 12 March 2019.

Massa Insolvente da Espírito Santo Financial Group, S.A. is an applicant in the joined proceedings; it lodged an ordinary appeal pursuant to Articles 140 and 149 of the [Código de Processo nos Tribunais Administrativos (Code of Administrative Procedure; 'the CPTA')] with the Tribunal Central Administrativo Sul (Central Administrative Court South, Portugal) and subsequently lodged an appeal in cassation pursuant to Article 151(1) of the CPTA with the Supreme Administrative Court.

Both appeals were allowed to proceed by a decision dated 17 July 2019.

A- The appellants submitted their arguments […].

The BANCO DE PORTUGAL submitted observations on those arguments […].

B- MASSA INSOLVENTE DA ESPÍRITO SANTO FINANCIAL GROUP, an applicant in the joined proceedings […], submitted its arguments, which included the following: …

'*… 43. Moreover, in the judgment under appeal, the lower court also [ruled] […] that the plea of illegality on grounds of infringement of EU law could not be upheld because, in summary:*

(i) the failure to transpose or incorrect transposition of Directive 2014/59/EU had been relied on prematurely because, when Decree-Law No 114-A/2014 was adopted, the deadline for transposing the directive had not yet expired; and (ii) the right to property enshrined in Article 17 of the Charter or in Article 1 of Additional Protocol No 1 had not been infringed, because the restriction of the shareholders' property rights was justified.

44. In the light of the principles recognised in EU law — and also, of course, by the Portuguese Constitution — any restriction of the right to property must satisfy the following requirements: (i) it must be justified on grounds of public interest; (ii) it must be adopted in the cases and under the conditions provided for by law; (iii) fair compensation must be paid in good time for the loss; and (iv) the principle of proportionality must be respected.

45. […] [If] the "no creditor worse off" principle [were considered] to apply […] also to the shareholders, the fact is that (i) the legislation that provided the basis for the resolution action made no express provision for it; and (ii) the institution that took the resolution action considered that this principle did not apply to the shareholders, as was made clear in the response from the Banco de Portugal.

46. In any event, it should be noted that the creditor protection regime established by Article 145B(3) of the [Regime Geral das Instituições de Crédito e

Sociedades Financeiras (General Provisions governing Credit Institutions and Finance Companies; 'the RGICSF')], introduced by Decree-Law No 114-A/2014, also infringes Directive 2014/59/EU in so far as (i) it does not provide for two independent valuations to be undertaken; (ii) it does not require the valuations to be carried out as soon as possible; and (iii) it establishes that the difference identified by the valuation should not be paid to the creditors until the liquidation of the institution under resolution has been completed.

47. Even if it were accepted that the national provisions can be interpreted in a way that is compliant with EU law, it is not possible to see how such an interpretation could now be used to place the shareholders in the position in which they would have been if the financial institution under resolution had been liquidated in its entirety, given that the procedure under which the Banco de Portugal took the resolution action has inevitably affected that possibility.

48. The appellant does not agree with the statement that, irrespective of any application of the "no creditor worse off" principle, the shareholders are adequately protected through: (i) the benefit stemming from the fact that the original credit institution or its insolvency estate receives any proceeds from the sale of the bridge institution, as established in Article 145-I(4) of the RGICSF; and (ii) the proceeds obtained from the liquidation of the institution under resolution, which must be carried out in accordance with the [Código da Insolvência e da Recuperação de Empresas (Insolvency and Corporate Recovery Code)].

49. The application of those two mechanisms, whether jointly or separately, does not offer shareholders a satisfactory or fair outcome; it does not even provide them with an outcome similar to that which would be obtained by applying to them the "no creditor worse off" principle, which, applied at the present time in this specific case, using the compliant interpretation mechanism, runs up against the difficulties that we have already noted; this is therefore a clear case of infringement of the right to property and the principle of proportionality enshrined in the Charter.

50. Turning now to look specifically at Directive 2014/59/EU, Article 32 thereof establishes that, in order for a resolution action to be taken, all of the following conditions must be met: (i) the determination that the institution is failing or is likely to fail has been made by the competent authority; (ii) having regard to timing and other relevant circumstances, there is no reasonable prospect of any alternative private sector measures or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments; and (iii) resolution action is necessary in the public interest, which is to be construed as meaning that it is necessary for the achievement of the objectives in question [Article 32(1)(c) and Article 32(5) of Directive 2014/59/EU].

51. Directive 2014/59/EU establishes an entire set of resolution tools, namely: the sale of all or part of the business (Articles 38 and 39); the formation of a bridge institution (Articles 40 and 41); asset separation (Article 42); and bail-in (Article 43 et seq.).

52. However, the grounds given for the Resolution Action do not contain a single line, word or mere mention of any assessment — not even implicit — of the most obvious of the four options listed above, being the only one that would safeguard the integrity of BES' assets, namely a bail-in using the relevant capital instruments.

53. In addition to the requirement to have regard to the principle of proportionality when the resolution decision itself was taken, Directive 2014/59/EU also establishes that, once the decision has been taken, interference with property rights should not be disproportionate.

54. In that regard, the Commission took the view that interference with property rights would not be disproportionate if the shareholders and creditors concerned were entitled to compensation, which should be equal to the amount that they would have been entitled to receive if the institution had been wound up under normal insolvency proceedings.

55. That approach was incorporated into Directive 2014/59/EU, which establishes a dual compensation mechanism: (i) a payment to be made to the institution under resolution; and (ii) what is known as the "no creditor or shareholder worse off" principle; where this mechanism is in place, the essential content of the right to property is deemed not to be infringed.

56. Consequently, irrespective of the direct effect of Directive 2014/59/EU, the national authority [responsible for taking the] resolution action, which in this case is the Banco de Portugal, must in any event respect the compensation mechanisms for the institution under resolution, as clear expressions of the right to property protected by the Charter.

57. In this submission we have shown that the valuation (whether provisional or definitive) established in Article 36 of Directive 2014/59/EU and the payment to the institution under resolution to be determined during the valuation stage, also provided for in that article, should have been made as soon as possible after the resolution decision was taken.

58. In addition, Directive 2014/59/EU also establishes a safeguard mechanism for shareholders and creditors, stipulating that the shareholders and those creditors whose claims have not been transferred are entitled to receive at least as much as what they would have received if the institution under resolution had been completely wound up under normal insolvency proceedings (see Article 73 of the directive).

59. For those purposes, Article 74 of Directive 2014/59/EU stipulates that a valuation must be carried out by an independent person as soon as possible after the resolution action or actions have been effected. The main purpose of that valuation will be to determine the difference between (i) the treatment that shareholders and creditors would have received if the institution under resolution had entered normal insolvency proceedings and (ii) the actual treatment that they have received under the resolution action (Article 74(2) of the directive), so that, if there is a positive difference in favour of the shareholders and/or creditors, they will be entitled to be paid that difference out of the resolution financing arrangements.

60. […] Although Decree-Law No 114-A/2014 was adopted after the publication of Directive 2014/59/EU and states […] that it is intended partially to transpose that directive, it is clear that it totally fails to achieve that objective.

61. The RGICSF does not establish any mechanism for making a payment to the institution under resolution as provided for in Article 36 of Directive 2014/59/EU — [just as] there was no such mechanism before Decree-Law No 114-A/2014 was passed: it merely establishes that, once the sums provided by the Resolution Fund, the Deposits Guarantee Fund or the Agricultural Credit Cooperatives Guarantee Fund have been repaid, the balance of the sale proceeds are to be repaid to the original credit institution or its insolvency estate.

62. That solution is very different from the one envisaged by the directive, because it does not ensure prompt payment of appropriate compensation for the "expropriation" of the assets of the institution under resolution.

63. Secondly, although Article 145B(3) of the RGICSF establishes a safeguard mechanism for creditors, it does not do so for shareholders, unlike Directive 2014/59/EU, even though the Portuguese regulatory authorities themselves — including the Banco de Portugal — recognised the need to make provision for ***appropriate compensation for shareholders, and we know that the views of those regulatory authorities*** *were taken into account during the adoption of Decree-Law No 114-A/2014, which inexplicably did not establish any suitable mechanism for compensating shareholders.*

64. Even if it were possible to interpret the national provisions in a way that is compliant with EU law, as held by the lower court, with the consequent application of the "no creditor worse off" principle to shareholders, that solution would not be sufficient, for the reasons set out in paragraphs 159 to 164.

65. Lastly, as regards the two mechanisms in the national legislation, which do not constitute application of the "no creditor worse off" principle to shareholders but which, in the opinion of the lower court, allegedly offer adequate protection for the shareholders' right to property, those mechanisms cannot be considered adequate or sufficient for the reasons set out in paragraphs 165 to 171.

66. Therefore, the rules in the directive regarding the safeguard mechanism for shareholders have not been transposed, and that situation cannot be rectified through recourse to a compliant interpretation or resolved by applying the alleged shareholder protection mechanisms to be found in the relevant national legislation.

67. Thirdly, nor does Decree-Law No 114-A/2014 make provision for the two independent valuations we referred to earlier, which are established in Articles 36 and 74 of Directive 2014/59/EU and would be key to ensuring a proper and timely application of the mechanisms for safeguarding shareholders and creditors.

68. Decree-Law No 114-A/2014 provides only for a single valuation (see Articles 145F(5) and 145H(4) of the RGICSF), and contains no requirement for it to be carried out promptly, which can only be detrimental to the valuation's accuracy and promptness.

69. Moreover, with regard to the directive's direct effect and the transposition deadline, it is unacceptable for a Member State to opt expressly to transpose a directive — even before the deadline — and to do so in a way that is defective. In so doing, it would be in breach of its obligations under Article 4(3) and Article 288 TFEU.

70. When it comes to assessing the compatibility of national provisions with EU directives, the Court of Justice has held that national provisions whose declared purpose [is] […] to transpose a directive can be considered to come within the scope of that directive from the date on which they come into force — and, therefore, not just from the deadline for transposing the directive —, which means that where a Member State transposes a directive before the deadline it will be under a particular obligation to do so correctly and in full.

71. In the present case, the clear […] objective of the […] national provisions in question was to bring Portuguese law into line with Directive 2014/59/EU. They therefore brought the rules on the resolution of financial institutions within the scope of EU law.

72. The aim of Directive 2014/59/EU, in particular Articles 36, 73 and 74 thereof, was to apply the principle of proportionality and the right to property established in the Charter. Therefore, on that ground too — breach of the principle of proportionality and the right to property which the provisions of the directive sought to implement — the incorrect transposition of those articles by the Portuguese legislature constitutes a breach of its treaty obligations.

73. Lastly, it should also be noted that, even before the deadline for transposing a directive has expired and after it has come into force, under the current Article 4(3) and Article 288 TFEU, Member States must "during the period allowed for transposition refrain from taking any measures liable seriously to compromise the result prescribed by the directive concerned" — the so-called blocking effect.

74. […] Although the court whose decision is being appealed recognised the existence of that obligation on Member States, it nevertheless ruled that the blocking effect did not apply in this case.

75. The court is mistaken because, […] by transposing Directive 2014/59/EU incorrectly — in particular, by failing to provide for a proper valuation of the assets and liabilities or for payment of adequate compensation to the institution under resolution and its shareholders — the national legislature created a situation that allowed the resolution action to be taken in the terms in which it was taken by the Banco de Portugal, and the effects of that action extend beyond the point when the action was taken and […] considerably beyond the deadline for transposing Directive 2014/59/EU.

76. It must therefore be concluded that the incorrect transposition of Directive 2014/59/EU, implemented via Decree-Law No 114-A/2014 of 1 August 2014 — which was adopted on that date solely in order to provide a basis for the resolution action in respect of BES, which was taken two days later — seriously compromised the result prescribed by that directive, as was clearly foreseeable at the time, in that it introduced legislation on resolution actions that was clearly contrary to Directive 2014/59/EU.

77. In view of the fact that that legislation on resolution actions — that is, Articles 145A to 145O of the RGICSF — taken as a whole breaches various rules and principles of EU law, the legislation must […] […] be […] set aside in its entirety by the court on that ground under the principle of the primacy of EU law. …

[…] We request that this appeal be declared well founded […].'

THE BANCO DE PORTUGAL puts forward the following arguments […]:

'*… (LL) With regard to the alleged infringement by the resolution action of the right to private property enjoyed by the shareholders of the bank under resolution and of the principle of proportionality, enshrined in Article 17 of the Charter of Fundamental Rights of the European Union and in Article 1 of Additional Protocol No 1, it has already been noted that […] the grounds […] put forward by the appellant are not significantly different from the grounds for the alleged invalidity of the Resolution Action for infringement of the right to private property and of the principle of proportionality under Portuguese law […], […], [because] naturally, those rights and principles are essentially no different, […] in terms of their scope and the content of the respective protection they provide, from those established in EU law;*

(MM) Moreover, […] the appellant's interpretation of the judgment under appeal (and of the case-law of the Court of Justice of the European Union which it cites) is clearly wrong, in that it recognises the direct applicability of the "no creditor worse off" principle to the shareholders of the credit institutions under resolution since the entry into force of Decree-Law No 114-A/2014 (that is, before the expiry

of the deadline for transposing Directive 2014/59/EU); this is […] manifestly not the case, given that on this point the lower court merely held that […] the fact that the national provisions governing the resolution of BES did not provide for the application of the aforesaid principle to the shareholders did not mean, in particular, that "in terms of the extracontractual civil liability of the State … the position of the shareholders does not also come within the scope of protection provided by the legislation, if shareholders suffer a deterioration in their legal position as compared with the position in which they would have been in the event of a liquidation, which, in any case, is not an argument that has been put forward";

(NN) Moreover […] the appellant could not have relied on that ground […] since, as […] the bank resolution action took place in a situation in which the credit institution was completely failing to comply with the applicable ratios and was unable to meet its obligations in the immediate or short term (see Article 145C(1) and (3) of the RGICSF), it can intuitively be concluded that, under the alternative scenario to the adoption of the BES Resolution Action — that is, the immediate insolvency and disorderly liquidation of BES — the position of the shareholders would have been the same or even worse than the situation in which they actually found themselves after that resolution action was taken;

(OO) It is precisely in that scenario — that is, accepting the possibility that, in this particular case, the shareholders have found themselves in a worse position than they would have been in under the alternative scenario in which the credit institution was liquidated without a resolution action […] — that the provisions […] of Article 145I(4) of the RGICSF, concerning the receipt of any proceeds from the sale of the bridge bank, and the clear benefits that stem from conducting an orderly liquidation of the bank under resolution may be relevant, in so far as they help to neutralise the impact of any possible (but unlikely) difference in the position of the shareholders in the event of resolution and in the event of liquidation immediately before the resolution;

(PP) […] It must be concluded that the fact that the national law under which the Resolution Action was taken does not provide for compensation for the shareholders of the bank under resolution does not infringe Article 17 of the Charter and Article 1 of Additional Protocol No 1 cited above, because any potential restriction of the property rights of those shareholders is fully justified by the very nature and characteristics of their investments, in that they are the bank's owners and are, therefore, required to be the first to bear the consequences of a deterioration in the bank's financial position (precisely as occurs under the general insolvency regime);

(QQ) Nor […] is there any sense in the appellant's argument that, regardless of the provisions of national law that applied at the time of the BES Resolution Action, in the context of that action the Banco de Portugal should have applied solutions such as those set out in Article 36(4)(e) and Articles 73 and 74 of Directive 2014/59/EU (on the recognition of possible compensation for the bank

under resolution and for its shareholders) on the ground that the right to private property necessitated those solutions; this is because of the simple fact that the Resolution Authority is required to take resolution action on the basis of the provisions of national law in force at that time;

(RR) […] [With] regard to the alleged failure to transpose or incorrect transposition of Directive 2014/59/EU by Decree-Law No 114-A/2014 — and the consequences that would arise from its being set aside by virtue of the primacy of EU law — it has also been shown that the appeal brought by Massa Insolvente da Espírito Santo Financial Group is manifestly inadmissible;

(SS) In particular, that is because, under the case-law of the Court of Justice of the European Union […], on 1 August 2014 the Portuguese legislature was under no obligation already to have transposed any of the directive's provisions into national law, and consequently those provisions did not have direct effect, and because the national courts were not bound by the principle of interpreting national law in accordance with EU law as regards that directive;

(TT) Moreover, it is perfectly permissible to transpose a directive in part, in stages, before the transposition deadline; when that occurs, the directive in question does not acquire direct effect — still less, of course, as regards all the provisions included in it;

(UU) In that respect, therefore, […] the […] legislature that introduced Decree-Law No 114-A/2014 did not [breach] its obligation to refrain from taking any measures which, on expiry of the deadline for transposing Directive 2014/59/EU, were liable seriously to compromise the result prescribed by that directive, because, first, as we have shown, [breach] of that obligation must be assessed on the basis of the provisions that were actually adopted under national law, not on the basis of failure to transpose measures that are not yet binding, which is the situation in the present case;

(VV) And, secondly, it is also because the primary objectives expressly established in Directive 2014/59/EU […] do not include, even indirectly or implicitly, any objective regarding a European requirement to compensate the credit institutions under resolution and their respective shareholders (by contrast with the position that clearly applies to their creditors); it can therefore be concluded that the fact that Decree-Law No 114-A/2014 does not provide for potential payment of compensation to the banks under resolution and their shareholders does not compromise the future achievement of the objectives prescribed by that directive;

(WW) Moreover, even if compensating the banks under resolution and the shareholders were, as a matter of law, one of the fundamental objectives of Directive 2014/59/EU, even then the result would not have been compromised — and certainly not seriously — by the adoption of Decree-Law No 114-A/2014, particularly since […] its provisions do not prevent or hinder the banks that may be subject to resolution after the deadline for transposing the directive, and their

respective shareholders, from actually receiving certain compensation provided that the necessary conditions are satisfied;…'

— For its part, NOVO BANCO, SA submitted a reply to the appeal brought by Massa Insolvente da Espírito Santo Financial Group, in which it set out the following … arguments:

['](17) The appellant has failed to demonstrate […] an infringement of the right to property and the principle of proportionality enshrined in Article 17 of the Charter of Fundamental Rights of the European Union and Article 1 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(18) Regardless of the fact that Decree-Law No 114-A/2014 […] effected a partial transposition of that directive, under Article 130 of the directive Member States had until 31 December 2014 to transpose it;

(19) Neither the appellant's original application nor its appeal state the reasons why Articles 145A to 145O of the RGICSF should be set aside;

(20) Both the European Commission and the European Central Bank assisted the Banco de Portugal in the adoption of the Decision of 3 August 2014 and made no objection to it; …

(34) The request for a preliminary ruling sought by the then applicant, now the appellant in these proceedings, is completely inadmissible, in particular because it is manifestly irrelevant. …[']

[…]*

II — Facts

The Supreme Administrative Court refers to the facts as found in the judgment under appeal, which are reproduced in the present decision.

*

POINTS OF LAW

Massa Insolvente da Espírito Santo Financial Group has appealed against the decision of the [Tribunal Administrativo e Fiscal de Lisboa (Administrative and Tax Court, Lisbon; 'the TAF')] over the need for a request for a preliminary ruling.

In that regard it argues, contrary to what was found by that court, that in the present proceedings there is disagreement over the following points: (i) the interpretation of Articles 36, 73 and 74 of Directive 2014/59/EU in the context of a separation of assets; (ii) the possible infringement of EU law by the Portuguese

State for having incorrectly transposed Directive 2014/59/EU into national law by means of Decree-Law No 114-A/2014; and (iii) the possible obligation on national courts to interpret national legislation in accordance with Directive 2014/59/EU.

[…] […]

The Banco de Portugal contends that the appeal should be dismissed […].

[…].

*

[…].

[…] Under Article 267 of the Treaty on the Functioning of the European Union (TFEU) the national courts and tribunals of the countries of the European Union (EU) must request the Court of Justice of the European Union (CJEU) to give a preliminary ruling on any matter concerning the interpretation or validity of an [act] of EU law where a reply is considered necessary in order for the national court or tribunal in question to give judgment and where there is no judicial remedy under national law against the decisions of the court or tribunal concerned.

Where a question concerning EU law is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the Court of Justice (third paragraph of Article 267 TFEU).

[…] It is for the national court to assess the need to make a request for a preliminary ruling and to come to a decision independently of the arguments put forward by the parties.

[…]

In view of the fact that the Supreme Administrative Court is under an obligation to refer the matter, there is no need to examine this ground of appeal.

[…].

2. […] The matter must be referred for a preliminary ruling as soon as it becomes clear that a ruling by the Court of Justice of the European Union is needed in order for the national court to give judgment and the court in question is in a position to define with sufficient precision the law and the facts relevant to the case and the legal questions it raises.

According to Article 267 TFEU:

‘The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.’

It is necessary to examine […] whether […] the validity or interpretation of an act of an agency of the Union has been called into question.

Massa Insolvente da Espírito Santo Financial Group argues […] that the resolution action in question infringes EU law, in particular the right to property and the principle of proportionality (Articles 17 and 52 of the Charter of Fundamental Rights of the European Union and Articles 32, 36, 73 and 74 of Directive 2014/59/EU), in that it cumulatively satisfies various requirements for such an infringement, in particular those concerning necessity and proportionality in connection with the objectives being pursued, even though the contested decision is silent on that matter, owing to the incorrect transposition of that directive into national law effected by Decree-Law No 114-A/2014 […], which amended Articles 145A to 145O of Decree-Law No 298/92 of 31 December 1992 [approving the RGICSF] […], and that this […] infringes not only that legislation but also the principle of the primacy of EU law.

Decree-Law No 114-A/2014 […], at issue in the present case, […] amended ‘*the General Provisions governing Credit Institutions and Finance Companies, approved by Decree-Law No 298/92 of 31 December 1992 amending the provisions in Title VIII on resolution actions and partially transposing Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms’*.

Before Decree-Law 114-A/2014 came into force, the version of Decree-Law No 282/92 […] that applied was the version introduced by Decree-Law No 63-A/2013 of 10 May 2013, which included the following provisions:

'Article 145A

Purpose of the resolution actions

The Banco de Portugal may take the actions provided for in this chapter in respect of credit institutions having their registered office in Portugal in order to achieve any of the following objectives:

(a) to ensure the continuity of the provision of essential financial services;

(b) to protect against systemic risk;

(c) to safeguard the interests of taxpayers and of the Treasury;

(d) to safeguard depositor confidence.

Article 145B

Guiding principle for taking resolution actions

1 — When taking resolution actions, it shall be ensured that the shareholders and creditors of the credit institution bear primary responsibility for the losses incurred by the institution in question, in accordance with their order of priority and on equal terms within each class of creditors.

2 — The previous paragraph shall not apply to covered deposits in accordance with Articles 164 and 166.

Article 145C

Taking resolution actions

1 — Where a credit institution fails to satisfy or is seriously likely to fail to satisfy the requirements for continuing authorisation to carry on its activity, the Banco de Portugal may take the following resolution actions where they are essential in order to achieve any of the objectives set out in Article 145A:

(a) the sale of all or part of the business to another institution authorised to carry on the activity in question;

(b) the transfer of all or part of the business to one or more bridge banks.

2 — The Banco de Portugal shall take resolution actions where it considers it unlikely that the credit institution will be able, within a reasonable timeframe, to implement the measures required in order to return to an appropriate state of soundness and to comply with prudential ratios.

3 — For the purposes of paragraph 1, a credit institution will be deemed to be seriously likely to fail to satisfy the requirements for continuing authorisation to

carry on its activity where, among other justified grounds, the relevance of which is to be assessed by the Banco de Portugal in the light of the objectives set out in Article 145A, any of the following circumstances apply:

(a) the credit institution has suffered losses that may undermine its equity, or there are reasonable grounds for believing that such a situation will arise in the short term;

(b) the credit institution's assets are less than its liabilities, or there are reasonable grounds for believing that such a situation will arise in the short term;

(c) the credit institution cannot meet its obligations, or there are reasonable grounds for believing that such a situation will arise in the short term.

4 — The taking of resolution actions is not conditional on the prior taking of corrective actions.

5 — A resolution action shall be deemed to be without prejudice to the possibility of taking one or more corrective actions at any time. […]

Article 145D

Removal of management and supervisory bodies

1 — Where the Banco de Portugal decides to take a resolution action, the members of the management and supervisory bodies of the credit institution in question shall cease to hold office and, where the Banco de Portugal so determines, any auditor or audit firm authorised to audit the accounts which is not a member of the supervisory body shall also cease to hold office.

2 — Where the circumstance in the previous paragraph applies, the Banco de Portugal shall appoint the new members of the credit institution's management body in accordance with the provisions of the following article, and any restrictions in the institution's constitution shall not apply; it shall also appoint a supervisory committee or controller, which shall be governed, mutatis mutandis, *by the provisions of Article 143.*

3 — If the Banco de Portugal removes the auditor or audit firm pursuant to paragraph 1, it shall appoint another auditor or audit firm to perform the duties in question.

4 — Where the members of the management and supervisory bodies, and the auditor or audit firm authorised to audit the accounts which is not a member of the supervisory body, have been removed from office in accordance with paragraph 1, they must provide all information requested by the Banco de Portugal and cooperate as required by it for the purposes of taking resolution actions.

Article 145E

Management

1 — The directors appointed by the Banco de Portugal in accordance with paragraph 2 of the previous article shall be remunerated by the institution and, in addition to the powers and duties conferred on members of the management body by law and by the institution's constitution, they shall have the following powers and duties:

(a) the powers and duties established in Article 145(2);

(b) the power to implement the decisions taken by the Banco de Portugal pursuant to Articles 145F to 145I, without any requirement to obtain the prior consent of the credit institution's shareholders.

2 — The appointed directors shall perform their duties for a period of time to be determined by the Banco de Portugal, which shall be for a maximum of 1 year, but which may be extended for further periods of the same duration.

3 — The provisions of paragraphs 3, 4 and 6 to 10 of Article 145 shall apply, with such amendments as may be required.

Article 145F

1 — The Banco de Portugal may order the sale of all or part of the assets, liabilities, off-balance sheet items and assets managed by a credit institution to one or more institutions authorised to carry on the activity in question.

2 — For the purposes of the previous paragraph, the Banco de Portugal shall invite potential recipients to submit offers and shall ensure that the procedure is transparent and that all interested parties receive equal treatment, having regard to the need for promptness entailed by the circumstances.

3 — In selecting the recipient, the Banco de Portugal shall have regard to the objectives set out in Article 145A.

4 — Potential recipients must be given immediate access to relevant information on the credit institution's financial situation and assets and liabilities for the purposes of valuing the assets, liabilities, off-balance sheet items and managed assets that are to be sold; to that effect the duty of secrecy established in Article 78 may not be relied on against such access, which shall be without prejudice to the duty on the potential recipients to maintain due confidentiality of the information in question.

5 — For the purposes of the sale provided for in paragraph 1, the assets, liabilities, off-balance sheet items and managed assets selected by the Banco de Portugal must undergo a valuation as at the time of sale, to be carried out by an

independent body appointed by the Banco de Portugal in the timescale determined by the Banco de Portugal, the cost of which is to be borne by the credit institution. The valuation is to be performed using a market-based valuation or, in the alternative, a fair-value method, which must take into account the intangible value, whether positive or negative, of the sale for the recipient.

6 — The Banco de Portugal shall determine the amount of financial support which, where necessary, is to be provided by the Resolution Fund in order to achieve the sale referred to in paragraph 1.

7 — The Banco de Portugal may invite the Deposits Guarantee Fund or, in the case of actions taking place under the Integrated Mutual Agricultural Credit Scheme, the Agricultural Credit Cooperatives Guarantee Fund, to take part in the sale process for covered deposits, in accordance with Article 167A or Article 15A of Decree-Law No 45/98 of 9 November 1998 as amended by Decree-Laws No 126/2008 of 21 July 2008, No 211-A/2008 of 3 November 2008, and No 162/2009 of 20 July 2009.

8 — Where the value of the liabilities sold exceeds the value of the assets, the financial support provided in order to make up the difference in accordance with paragraphs 6 and 7 shall constitute loans from the Resolution Fund, the Deposits Guarantee Fund or the Agricultural Credit Cooperatives Guarantee Fund to the vendor credit institution.

9 — Where the sale proceeds are positive, they shall be paid to the vendor credit institution.

10 — Following the sale, continuity of operations must be ensured in respect of the sold assets, liabilities, off-balance sheet items and managed assets; in particular:

(a) for all legal and contractual purposes the recipient institution must be deemed the successor to the vendor credit institution in respect of all the transferred rights and obligations;

(b) the vendor credit institution and any company belonging to the same group that provides services to it in connection with the sold business must provide all information requested by the recipient institution and guarantee the recipient institution access to the information systems relating to the sold business and, in return for consideration to be agreed by the parties, must continue to provide it with such services as the recipient institution considers necessary for the normal conduct of the sold business.

11 — The decision ordering the sale referred to in paragraph 1 shall have effect regardless of any legal or contractual provision to the contrary, and shall constitute sufficient title for the purposes of undertaking any legal procedure in connection with the sale.

12 — The decision regarding the sale referred to in paragraph 1 shall not be conditional on the prior consent of the credit institution's shareholders or of the parties to contracts in respect of the assets, liabilities, off-balance sheet items and managed assets to be sold, and may not be used as a ground for exercising any acceleration rights contained in the contracts in question.

13 — Any partial sale of the credit institution's business must not prejudice the transfer in full of the vendor credit institution's contractual positions, including the transfer of the liabilities associated with the sold assets, in particular as regards financial guarantee contracts, securitisation operations or other contracts containing set-off or netting clauses.

14 — If the consideration fixed at the time of sale of the assets, liabilities, off-balance sheet items and managed assets is demonstrated not to reflect their fair value, the recipient institution may, with the prior authorisation of the Banco de Portugal, return those assets, liabilities, off-balance sheet items and managed assets, provided that the provisions of the previous paragraph are observed, in which case the corresponding adjustment shall be made to the aforesaid consideration.

15 — As an alternative to the return referred to in the previous paragraph, the Banco de Portugal may propose to pay the recipient institution the difference between the agreed consideration and the fair value of the assets, liabilities, off-balance sheet items and managed assets.

16 — The payment referred to in the previous paragraph may be made by transferring new assets belonging to the vendor credit institution to the recipient institution or may be financed from the Resolution Fund, the Deposits Guarantee Fund or the Agricultural Credit Cooperatives Guarantee Fund in accordance with paragraphs 6 and 7.

17 — If the sale referred to in paragraph 1 gives rise to a concentration under competition law, that concentration may take place before the Competition Authority issues a no objection decision; this is without prejudice to any subsequent action by the Competition Authority.

Article 145G

Transfer of all or part of the business to bridge banks

1 — The Banco de Portugal may order the transfer of all or part of the assets, liabilities, off-balance sheet items and assets managed by a credit institution to one or more bridge banks formed for that purpose, with the aim of enabling their subsequent sale to another institution authorised to carry on the activity in question.

2 — The Banco de Portugal may also order the transfer of all or part of the assets, liabilities, off-balance sheet items and assets managed by two or more

credit institutions forming part of the same group to one or bridge banks for the purposes set out in the previous paragraph.

3 — A bridge bank is a credit institution with the legal status of a bank, whose entire share capital is held by the Resolution Fund.

4 — The Resolution Fund shall subscribe for and pay up the share capital of the bridge bank from its own resources.

5 — The bridge bank shall be formed by means of an agreement of the Banco de Portugal, which shall approve its constitution; the provision in Chapter ii of Title ii shall not apply.

6 — Once the agreement referred to in the previous paragraph has been adopted, the bridge bank shall be required to carry on the activities established in Article 4(1).

7 — The bridge bank's share capital may not be less than the minimum stipulated in a ministerial order made by the member of the Government responsible for finance, following consultation with the Banco de Portugal, and the bridge bank must comply with the regulations applicable to banks.

8 — The bridge bank may commence its activity before completion of registration and other legal formalities; this is without prejudice to the requirement for it to complete those procedures as soon as possible.

9 — The Banco de Portugal shall issue a circular setting out the regulations for the formation and operation of bridge banks.

10 — The Código das Sociedades Comerciais (Commercial Companies Code) shall apply to the bridge banks, with such amendments as are required, having regard to the objectives and nature of these institutions.

11 — The Banco de Portugal shall be responsible for appointing the members of the management and supervisory bodies of the bridge bank, on the recommendation of the executive committee of the Resolution Fund; the members of the management and supervisory bodies must comply with all instructions and recommendations from the Banco de Portugal, in particular decisions concerning the management of the bridge bank.

12 — The bridge bank shall have a limited duration of 2 years, which may be extended by further periods of 1 year on duly justified public interest grounds, particularly where risks to financial stability remain or negotiations over the sale of the assets, liabilities, off-balance sheet items and managed assets are ongoing; however, under no circumstances may the maximum duration exceed 5 years.

13 — In carrying on its activity, the bridge bank must follow management criteria that enable it to maintain low levels of risk.

14 — The Competition Authority must be notified of the transfer of all or part of the assets, liabilities, off-balance sheet items or assets managed by a credit institution to one or more bridge banks formed for that purpose, and of any extension of the duration as provided for in paragraph 12. However, in view of its temporary nature, the transfer shall not constitute a business concentration for the purposes of competition law.

Article 145H

Bridge bank's assets and funding

1 — The Banco de Portugal shall select the assets, liabilities, off-balance sheet items and managed assets to be transferred to the bridge bank on its formation.

2 — Any obligations which the original credit institution has entered into with the following persons may not be transferred to the bridge bank:

(a) its shareholders, members of its management and supervisory bodies, auditors or audit firms, or persons having that status in respect of other undertakings that are in a control or group relationship with the original credit institution;

(b) any persons or entities that have been shareholders or have held the positions or performed the services referred to in point (a) during the 4 years prior to the formation of the bridge bank, and whose actions or omissions have caused the financial difficulties experienced by the credit institution or have contributed to aggravating its situation;

(c) the spouses, relatives in the first degree of consanguinity or affinity, or third parties acting on behalf of the persons or entities referred to in points (a) and (b) above;

(d) anyone who is responsible for acts relating to the credit institution or who has benefited from such acts, whether directly or through a third party, and who, in the opinion of the Banco de Portugal, has caused the financial difficulties or, through his actions or omissions within his sphere of responsibility, has contributed to aggravating the situation.

3 — Nor may any instruments that are included in the determination of the credit institution's own funds, the conditions of which have been approved by the Banco de Portugal, be transferred to the bridge bank.

4 — The assets, liabilities, off-balance sheet items and managed assets referred to in paragraph 1 must undergo a valuation as at the time of the transfer, to be carried out by an independent body appointed by the Banco de Portugal in the timescale determined by the Banco de Portugal, the cost of which is to be borne by the credit institution.

5 — Once the transfer referred to in paragraph 1 has been completed, the Banco de Portugal may, at any time, take any of the following actions:

(a) transfer other assets, liabilities, off-balance sheet items and managed assets belonging to the original credit institution to the bridge bank;

(b) transfer assets, liabilities, off-balance sheet items and managed assets from the bridge bank to the original credit institution.

6 — The Banco de Portugal shall determine the amount of financial support which, where necessary, is to be provided by the Resolution Fund for the purposes of creating the bridge bank and enabling it to carry on its activity, in particular in the form of loans made to the bridge bank for any purpose or the provision of any financing considered necessary to enable the bridge bank to increase its capital.

7 — The Banco de Portugal may invite the Deposits Guarantee Fund or, in the case of actions taking place under the Integrated Mutual Agricultural Credit Scheme, the Agricultural Credit Cooperatives Guarantee Fund, to take part in the process of transferring covered deposits to a bridge bank, in accordance with Article 167A or Article 15A of Decree-Law No 345/98 of 9 November 1998 respectively.

8 — The total value of the liabilities and off-balance sheet items to be transferred to the bridge bank may not exceed the total value of the assets transferred by the original credit institution plus, where applicable, the financing provided from the Resolution Fund, the Deposits Guarantee Fund or the Agricultural Credit Cooperatives Guarantee Fund.

9 — On completion of the transfer referred to in paragraph 1, continuity of operations must be ensured in respect of the transferred assets, liabilities, off-balance sheet items and managed assets and, for all legal and contractual purposes, the bridge bank must be deemed the successor to the original credit institution in respect of all the transferred rights and obligations.

10 — The original credit institution and any company belonging to the same group that provides services to it in connection with the transferred business must provide all information requested by the bridge bank and guarantee the bridge bank access to the information systems relating to the transferred business and, in return for consideration to be agreed by the parties, must continue to provide it with such services as the bridge bank considers necessary for the normal conduct of the transferred business.

11 — The decision regarding the transfer referred to in paragraph 1 shall have effect regardless of any legal or contractual provision to the contrary, and shall constitute sufficient title for the purposes of undertaking any legal procedure in connection with the transfer.

12 — The decision regarding the transfer referred to in paragraph 1 shall not be conditional on the prior consent of the credit institution's shareholders or of the parties to contracts in respect of the assets, liabilities, off-balance sheet items and managed assets to be transferred, and may not be used as a ground for exercising any acceleration rights contained in the contracts in question.

13 — Any partial transfer of the assets, liabilities, off-balance sheet items and managed assets must not prejudice the transfer in full of the original credit institution's contractual positions, including the transfer of the liabilities associated with the transferred assets, in particular as regards financial guarantee contracts, securitisation operations or other contracts containing set-off or netting clauses.

Article 145I

Sale of the bridge bank's assets

1 — Without prejudice to any acts of disposal which the bridge bank may be authorised to make under its powers of management, where the Banco de Portugal considers that the conditions are right for the sale of all or part of the assets, liabilities, off-balance sheet items and managed assets that were transferred to the bridge bank, it shall invite other institutions authorised to carry on the activity in question to submit purchase offers; transparency must be ensured through the procedure.

2 — In selecting the recipient, the Banco de Portugal shall have regard to the objectives set out in Article 145A.

3 — The proceeds of the sale must be used, first, to make the following repayments, to be made on a proportional basis:

(a) to repay the Resolution Fund all sums provided by it pursuant to Article 145H(5);

(b) to repay the Deposits Guarantee Fund or the Agricultural Credit Cooperatives Guarantee Fund all sums provided by them pursuant to Article 145H(6).

4 — Once the sums referred to in the previous paragraph have been repaid, any remaining proceeds from the sale shall be returned to the original credit institution or its insolvency estate, if it has gone into liquidation.

5 — Once all the assets, liabilities, off-balance sheet items and managed assets that were transferred to the bridge bank have been sold and the proceeds of the sale have been distributed in accordance with paragraphs 3 and 4, the bridge bank shall be dissolved by the Banco de Portugal.

6 — Where it proves impossible to sell all the assets, liabilities, off-balance sheet items and managed assets that were transferred to the bridge bank, the Banco de Portugal may order the bridge bank to be wound up under the out-of-court liquidation procedure for credit institutions.

Article 145J

Other measures

1 — Simultaneously with the taking of a resolution action, where necessary in order to achieve the objectives set out in Article 145A, the Banco de Portugal may order the application of the following measures to the credit institutions under resolution:

(a) a temporary waiver of the prudential rules;

(b) a temporary dispensation from timely compliance with obligations incurred previously;

(c) a temporary closure of branches or other premises where transactions are undertaken with the public.

2 — The provision in point (b) of the previous paragraph shall be deemed to be without prejudice to the maintenance of all creditors' rights against those who are jointly liable or guarantors.

3 — The measures established in this article shall last for a maximum period of 1 year, which may be extended up to a maximum period of 2 years.

Article 145L

Set-off and netting agreements

1 — The taking of any resolution action by the Banco de Portugal shall give rise to the suspension, for a period of 48 hours from service of the relevant notice or, if earlier, the announcement of the decision by the Banco de Portugal, of acceleration rights included in set-off and netting agreements contained in contracts to which the credit institution in question is a party, where the exercise of those rights is triggered by the resolution action in question.

2 — On the conclusion of the period referred to in the previous paragraph, with regard to contracts sold or transferred under Articles 145F or 145G, the parties to the contracts with the credit institution may not use the taking of the resolution action as a ground for exercising acceleration rights included in set-off and netting agreements.

3 — Without prejudice to the previous paragraph, parties to contracts covered by set-off and netting agreements that have been sold or transferred under Articles 145F or 145G shall continue to be entitled to enforce the acceleration

clause against the transferring credit institution on grounds other than that referred to in the previous paragraph.

4 — Paragraph 1 shall not apply to those cases where the acceleration right arises from clauses included in financial guarantee contracts and shall be deemed to be without prejudice to the provisions of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.

Article 145M

Winding-up arrangements

If, following the taking of any resolution action, the Banco de Portugal considers that the objectives set out in Article 145A have been achieved, and it establishes that the institution does not meet the requirements for maintaining its authorisation to carry on its activity, it may revoke the authorisation of the credit institution that has been the subject of the resolution action in question, in which case the winding-up arrangements established in the applicable legislation shall apply.

Article 145N

Appeals and public interest

1 — Without prejudice to Article 12, decisions of the Banco de Portugal adopting resolution actions are subject to the appeals provided for in the legislation governing administrative disputes, with the provisos set out in the following paragraphs, having regard to the public interest criterion governing such decisions.

2 — The only persons with standing to make an application for injunctive relief are those who, either individually or collectively, hold at least 10% of the share capital or the voting rights of the institution in question.

3 — Questions concerning the valuation of the assets and liabilities under resolution, or related questions, which do not require expert evidence are to be addressed during the substantive proceedings.

4 — In the course of the enforcement of court decisions annulling actions taken under this chapter, the Banco de Portugal may rely on legitimate grounds for non-execution in accordance with Article 175(2) and Article 163 of the Code of Administrative Procedure, in which case proceedings shall immediately be commenced to determine the appropriate compensation in accordance with the procedures set down in Articles 178 and 166 of that code.

5 — Where notice is served on the Banco de Portugal in accordance with Article 178(1) of the Code of Administrative Procedure, it shall provide the

interested party and the court with the reports of the independent asset valuations in its possession that were commissioned for the purposes of taking the actions provided for in this chapter.

Article 145O

Valuations and calculation of compensation

1 — For the purposes of paragraph 4 of the previous article and of any appeals over payment of compensation in connection with the adoption of the resolution actions referred to in Article 145C(1), any increase in value arising from public financial support, in particular support provided by the Resolution Fund, or from any intervention by the Deposits Guarantee Fund or the Agricultural Credit Cooperatives Guarantee Fund, shall not be taken into account.

2 — In the proceedings referred to in the previous paragraph, irrespective of its possible involvement as a party, the Banco de Portugal must, on the order of the court hearing the case, submit a valuation report covering all prudential aspects that may be relevant for the purposes of calculating the compensation, in particular those concerning the credit institution's future capacity to satisfy general authorisation requirements; this is without prejudice to the power of the Banco de Portugal to supply such a report of its own motion.

3 — The compensation referred to in this article shall be paid from the Resolution Fund, except in those cases where the Banco de Portugal is civilly liable for unlawful acts.'

The above provisions were amended as follows by Article 2 of Decree-Law No 114-A/2014 […]:

'*Article 145B …*

1 — When taking resolution actions, having regard to the objectives referred to in the previous article, it shall be ensured that:

(a) the shareholders of the credit institution bear primary responsibility for the losses incurred by the institution in question;

(b) secondarily, the creditors of the credit institution bear the remaining losses of the institution in question on equitable terms, in accordance with the order of priority of the various classes of creditors;

(c) no creditor may bear greater losses than he would have incurred if the institution had gone into liquidation.

2 — ….

3 — If, on the conclusion of the liquidation of the credit institution under resolution, any creditors of that institution whose claims were not transferred to

another credit institution or bridge bank are found to have borne greater losses than it is calculated, in accordance with the provisions for the valuation referred to in Article 145F(6) and Article 145H(4), that they would have incurred if the institution had gone into liquidation immediately before the resolution action was taken, the creditors in question shall be entitled to receive the difference from the Resolution Fund.

Article 145F …

1 — …. 2 — …. 3 — …. 4 — …. 5 — ….

6 — For the purposes of Article 145B(3), the valuation referred to in the previous paragraph shall also include an estimate of the amount which each class of creditors would have received in respect of their claims, in accordance with the statutory order of priority, if the credit institution had been wound up immediately before the resolution action was taken.

7 — The Banco de Portugal shall determine the nature and amount of any financial support to be provided, where necessary, by the Resolution Fund, including, in particular, the provision of guarantees and loans to the vendor credit institution or the recipient institution in order to preserve the value of assets and liabilities and to enable the sale referred to in paragraph 1 to take place.

8 — [Previous paragraph 7].

9 — Where the value of the liabilities sold exceeds the value of the assets, the amount of the financial support provided to make up the difference in accordance with paragraphs 7 and 8 shall constitute loans from the Resolution Fund, the Deposits Guarantee Fund or the Agricultural Credit Cooperatives Guarantee Fund to the vendor credit institution.

10 — [Previous paragraph 9] 11 — [Previous paragraph 10] 12 — [Previous paragraph 11]

13 — [Previous paragraph 12] 14 — [Previous paragraph 13]

15 — [Previous paragraph 14] 16 — [Previous paragraph 15]

17 — The payment referred to in the previous paragraph may be made by transferring new assets from the vendor credit institution to the recipient institution or may be made from the Resolution Fund, the Deposits Guarantee Fund or the Agricultural Credit Cooperatives Guarantee Fund in accordance with paragraphs 7 and 8.

18 — [Previous paragraph 17]

19 — In selecting the assets, liabilities, off-balance sheet items and managed assets to be sold pursuant to this article, the provisions of Article 145H(2) shall apply, with such amendments as may be necessary.

Article 145H

... 1 — ...

2 — ...

(a) shareholders who, at the time of the transfer, hold at least 2% of the share capital, persons or entities which during the 2 years prior to the transfer have held at least 2% of the share capital, members of its management and supervisory bodies, auditors or audit firms or persons having that status in respect of other undertakings that are in a control or group relationship with the original credit institution;

(b) ...; (c) ...; (d) ...

3 — ...

4 — The assets, liabilities, off-balance sheet items and managed assets selected in accordance with paragraph 1 must undergo a valuation as at the time of the transfer, to be carried out by an independent body appointed by the Banco de Portugal in the timescale determined by the Banco de Portugal, the cost of which is to be borne by the credit institution. For the purposes of Article 145B(3), that valuation must also include an estimate of the amount which each class of creditors would have received in respect of their claims, in accordance with the statutory order of priority, if the credit institution had been wound up immediately before the resolution action was taken.

5 — ....

6 — The Banco de Portugal shall determine the nature and amount of any financial support to be provided, where necessary, by the Resolution Fund for the purposes of creating the bridge bank and enabling it to carry on its activity, in particular in the form of loans made to the bridge bank for any purpose, the provision of any financing considered necessary to enable the bridge bank to increase its capital, or the provision of guarantees.

7 — ... . 8 — .... 9 — .... 10 — .... 11 — .... 12 — .... 13 — ....

Article 145I

...1 — .... 2 — .... 3 — ...:

(a) to repay the Resolution Fund all sums provided by it pursuant to Article 145H(6);

(b) to repay the Deposits Guarantee Fund or the Agricultural Credit Cooperatives Guarantee Fund all sums provided by them pursuant to Article 145H(7).

4 — .... 5 — .... 6 — ....'

The regulations governing resolution actions in respect of supervised institutions were, in turn, further amended by Law No 23-A/2015 of 26 March 2015, which completed the transposition of the directive in question.

With regard to the partial transposition of directives before the transposition deadline, the Court of Justice of the European Union has already ruled that the partial transposition of a directive must not be liable to compromise the directive's objectives. This is made particularly clear in the judgment of 18 September 1997, Case C-129/96, which held as follows:

'*The second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.*'

[…] In various other judgments, the Court of Justice of the European Union has ruled specifically on whether certain provisions of directives must be interpreted as precluding particular national legislation even before the expiry of the transposition deadline.

See, for example, among others, […] [the judgments] of 2 June 2006[,] […] C-27/15 and […] of 26 February 2015[,] […] C-104/14.

It is true that the third paragraph of Article 288 of the Treaty establishes that a directive must […] first be transposed into national law and that it is binding on each Member State as to the result to be achieved, but leaves to the national authorities the choice of form and methods. But it is equally true that, in certain circumstances, the Court of Justice of the European Union recognises direct effect in order to protect the rights of individuals where the provisions of the directive are unconditional and sufficiently clear, and the Member State has not transposed them by the deadline.

It follows that, in the light of the obligation on Member States to take all necessary measures to achieve the result prescribed by a directive and […] [of the] case-law of the Court of Justice of the European Union to the effect that Member States and their courts must refrain, during the period laid down for implementing a directive, from adopting measures or making interpretations that are liable seriously to compromise the result prescribed by that directive, a request for a preliminary ruling needs to be made to the Court of Justice in order to remove doubt and to obtain the clarification and correct interpretation of the relevant EU

law required in order to examine […] the grounds of illegality that have been relied on […].

[…] Doubts have been raised in connection with the grounds of illegality that have been relied on; these concern the interpretation of EU law […] and, therefore, need to be resolved before judgment can be given.

[…] Having regard to the requirements stemming from the principle of the primacy of [EU] law and the principle of compliant interpretation, and given that the preliminary ruling procedure is an essential tool to ensure uniform interpretation and application of EU law in all Member States, the cohesion of the system of judicial protection within the EU and the principle of effective judicial protection of the rights of individuals, it is considered necessary and appropriate to make […] [a] request for a preliminary ruling, given that an analysis and a search of the *www.curia.europa.eu/juris/* website have not identified any case-law of the Court of Justice of the European Union on the specific and precise limits […] [to] the issue […] that has been raised […] or concerning a similar situation, particularly as regards the legislative framework […], and the present court does not know […] whether there is any settled case-law of the Court of Justice on that issue or on how to interpret the regulations at issue beyond reasonable doubt.

In those circumstances, the Supreme Administrative Court considers that the present case meets the formal requirements […] for […] [a] request for a preliminary ruling.

Therefore, […] in the context of the present proceedings and of the positions put forward by the parties, it is necessary to ascertain and determine whether the national legislation that partially transposes Directive 2014/59/EU by means of Articles 145A to 145O of the RGICSF complies with the EU law cited above and with the case-law of the Court of Justice of the European Union set out in the judgment of 18 December 1997, *Inter-Environnement Wallonie*, Case C-129/96, […] [paragraphs] 44 and 45, [which was subsequently confirmed and is settled case-law], and to clarify whether the adoption of those provisions, in the terms set out above, principally through Decree-Law No 114-A/2014, is liable seriously to compromise the result prescribed by that directive.

The following question[s] […] are therefore referred to the Court of Justice for a preliminary ruling […]:

1. Must EU law, in particular Article 17 of the [Charter of Fundamental Rights of the European Union] and Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, and in

particular Articles 36, 73 and 74 of that directive, be interpreted as precluding national legislation such as that set out above, which was applied through a resolution action consisting in the formation of a bridge bank and the separation of assets, and which, in partially transposing that directive before the deadline for transposition:

(a) did not provide for a fair, prudent and realistic valuation of the assets and liabilities of the credit institution under resolution to be carried out before the resolution action was adopted;

(b) did not provide for potential compensation based on the valuation referred to in point (a) to be paid to the institution under resolution or, where appropriate, to the holders of shares or other titles of ownership and which, instead, merely provided for any remaining proceeds from the sale of the bridge bank to be returned to the original credit institution or its insolvency estate;

(c) did not establish that the shareholders of the institution under resolution were entitled to receive an amount not less than the amount it is calculated they would have received if the institution under resolution had been completely wound up under normal insolvency proceedings, and established such a safeguard mechanism only for creditors whose claims had not been transferred; and

(d) did not provide for a separate valuation from that referred to in point (a) to be carried out in order to determine whether shareholders and creditors would have received more favourable treatment if the credit institution under resolution had entered into normal insolvency proceedings?

2. In the light of the case-law of the Court of Justice set out in the judgment of 18 December 1997, *Inter-Environnement Wallonie*, [Case C-129/96, which was subsequently confirmed by the Court], is national legislation such as that described in the present proceedings, which partially transposes Directive 2014/59/EU, liable seriously to compromise the result prescribed by the directive, particularly by Articles 36, 73 and 74 thereof, in the context of taking the resolution action?

*

In the light of all the foregoing […]:

[…] […] the present proceedings are stayed […].

[…] Lisbon, 23 January 2020

[…]