



The unconditional recognition of a reorganisation measure regarding a credit institution, having retroactive effect, is contrary to EU law if it means that the client can no longer pursue legal proceedings on the merits against the ‘bridge bank’ to which the liabilities in question were previously transferred

In 2008, VR, a natural person, entered into a contract with Banco Espírito Santo, Sucursal en España (‘BES Spain’), the Spanish branch of the Portuguese bank Banco Espírito Santo (BES), by which it acquired preference shares in an Icelandic credit institution. In view of BES’s severe financial difficulties, Banco de Portugal, by a decision adopted in August 2014, decided to create a ‘bridge bank’, called Novo Banco SA, to which BES’s assets, liabilities and other off-balance items were transferred. However, certain liabilities were excluded from the transfer to Novo Banco. Following the transfer, Novo Banco SA, Sucursal en España (‘Novo Banco Spain’) continued the commercial relationship that VR had established with BES Spain.

On 4 February 2015, VR brought an action before the Juzgado de Primera Instancia de Vitoria (Court of First Instance, Vitoria, Spain) against Novo Banco Spain seeking, primarily, a declaration that the contract was null and void or, alternatively, its termination. Novo Banco Spain objected that it could not be sued because, under the August 2014 decision, the alleged liability was a liability that had not been transferred to it.

As the Court of First Instance, Vitoria upheld VR’s application, Novo Banco Spain brought an appeal before the Audiencia Provincial de Álava (Provincial Court, Álava, Spain). In the course of the proceedings, it lodged two decisions adopted by Banco de Portugal on 29 December 2015. Those decisions modified the August 2014 decision, stating inter alia that ‘as of today, the following liabilities of BES have not been transferred to Novo Banco: ... any liability that is the subject of one of the procedures set out in Annex I’, which included the action brought by VR. In addition, they provided that, to the extent that assets, liabilities or off-balance sheet items should have remained part of BES’ assets and liabilities but had, in fact, been transferred to Novo Banco, they were transferred back from Novo Banco to BES, with effect from 3 August 2014.

As the Provincial Court of Álava dismissed Novo Banco Spain’s appeal, Novo Banco Spain brought an action before the referring court, the Tribunal Supremo (Supreme Court, Spain). Novo Banco Spain takes the view that, under Directive 2001/24 on the reorganisation and winding up of credit institutions¹, the decisions of 29 December 2015 are effective in all Member States without any further formalities. The Supreme Court, considering that those decisions modified the August 2014 decision with retroactive effect, referred the matter to the Court of Justice in order to ascertain whether such substantive changes should be recognised in the ongoing judicial proceedings.

The Court observes that, under Article 3(2) of Directive 2001/24, **reorganisation measures are, in principle, applied in accordance with the law of the home Member State and are to take effect in accordance with the legislation of that State throughout the European Union**

¹ 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 (OJ 2001 L 125, p. 15).

without further formalities. However, as an exception to that principle, Article 32 of Directive 2001/24 provides that the effects of reorganisation measures or winding-up proceedings on a pending lawsuit concerning an asset or a right of which the credit institution has been divested are governed solely by the law of the Member State in which the lawsuit is pending.

First, the Court notes that the application of Article 32 requires **three cumulative conditions to be met, and that those conditions are fulfilled in the dispute before the Tribunal Supremo.** First, **the measures must be reorganisation measures** within the meaning of Directive 2001/24, which is the case here, since the decisions of 29 December 2015 are intended to preserve or restore the financial situation of a credit institution.

Secondly, **there must be a pending lawsuit**, a concept which covers only **proceedings on the merits.** In the present case, the main proceedings must be regarded as proceedings on the merits and the decisions of 29 December 2015 were adopted at a time when the proceedings initiated by VR on 4 February 2015 were already pending.

Thirdly, **the pending lawsuit must concern ‘assets or rights of which the credit institution has been divested’.** In view of the disparities between the language versions of Article 32 of Directive 2001/24, the Court examines the purpose of that provision and holds that it is intended to make the effects of reorganisation measures or winding-up proceedings on pending proceedings subject to the law of the Member State in which those proceedings are taking place. In the light of such a purpose, it would not be logical to exclude the effects produced by reorganisation measures in a pending lawsuit from the application of that law where that action concerns liabilities, which, by means of such reorganisation measures have been transferred to another entity. Thus, **Article 32 must be applied to one or more of the credit institution’s assets and liabilities that are subject to reorganisation measures, as in the case of the potential liability at issue in the dispute before the Tribunal Supremo.**

Secondly, as regards the extent of the effects of reorganisation measures governed by the law of the Member State in which the lawsuit is pending, the Court notes that **the law of that Member State governs all the effects that such measures may have on such a lawsuit, whether it is procedural or substantive.**

Therefore, it follows from Directive 2001/24 that **the effects, both procedural and substantive, of a reorganisation measure on a pending lawsuit on the merits are limited to those determined by the law of the Member State in which that lawsuit is pending.**

Furthermore, the Court observes, first, that **the recognition, in the proceedings before the Tribunal Supremo, of the effects of the decisions of 29 December 2015,** insofar as they are capable of calling into question the judicial decisions already taken in favour of VR, **would be incompatible with the general principle of legal certainty.** Secondly, to recognise reorganisation measures taken by the competent authority of the home Member State after an action has been brought in another Member State which have the effect of **modifying the relevant legal framework for the resolution of the dispute which gave rise to that action with retroactive effect,** and which could lead the court before which the action has been brought to dismiss it, would constitute a **limitation on the right to an effective remedy,** within the meaning of the first subparagraph of Article 47 of the Charter of Fundamental Rights of the European Union.

The Court concludes that Directive 2001/24, read in the light of the principle of legal certainty and the first subparagraph of Article 47 of the Charter of Fundamental Rights, **preclude recognition, without any further conditions, in ongoing legal proceedings on the merits, of the effects of a reorganisation measure, such as the decisions of 29 December 2015, where such recognition has the result that the credit institution to which the liabilities had been transferred by the first reorganisation measure can no longer be sued for the purposes of those proceedings, thereby calling in to question the judgments already delivered in favour of the applicant who is the subject of those proceedings.**

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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