

**Case C-500/22**

**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:**

22 July 2022

**Referring court:**

Tribunal Supremo (Spain)

**Date of the decision to refer:**

19 July 2022

**Appellants in the appeal in cassation:**

Novo Banco, S. A. – Sucursal en España

Banco de Portugal

Fundo de Resolução

**Respondent in the appeal in cassation:**

Proyectos, Obras y Servicios de Badajoz, S. L.

**Subject matter of the main proceedings**

Senior bond issued by the Spanish branch of a Portuguese credit institution – Acquisition by a Spanish company on the secondary market – Contractual subrogation and reversal of subrogation by operation of law – Order requiring the Spanish branch of the subrogated institution to pay the purchaser the periodic yield and reimburse the nominal value of the bond – Appeal and appeal in cassation

**Subject matter and legal basis of the request**

Successive decisions on reorganisation measures adopted by the home Member State of a credit institution – Directive 2001/24/EC – Creation of a ‘bridge bank’ – Measures not published as required by Directive 2001/24 – Recognition of the effectiveness of the decisions by the host Member State – Interpretation of

Directive 2001/24 – Compatibility with the fundamental right to effective judicial protection, the general principle of legal certainty, the general principle of the prohibition of discrimination on grounds of nationality and the fundamental right to property

### **Questions referred for a preliminary ruling**

1. Is an interpretation of Article 3(2) of Directive 2001/24 which entails the recognition in a host Member State of the effects of a decision by the competent administrative authority of the home Member State which has not been published in the manner required by Article 6(1) to (4) of Directive 2001/24 compatible with the fundamental right to effective judicial protection under Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), the general principle of legal certainty and the principle of equality and the prohibition of any discrimination on grounds of nationality under Article 21(2) of the Charter?

2. Is an interpretation of Article 3(2) of Directive 2001/24 which entails the recognition in a host Member State of the effects of a decision by the competent administrative authority of the home Member State which transferred back to the failing bank to which the resolution measures were applied the obligations and responsibilities arising from a senior bond which was acquired by a third party while those obligations and responsibilities were in the ownership of the 'bridge bank' compatible with the fundamental right to property under Article 17 of the Charter and the general principle of legal certainty?

### **Provisions of European Union law and case-law relied on**

#### *Case-law*

Judgment of 21 May 2019, *Commission v Hungary (Usufruct Over Agricultural Land)*, C-235/17, EU:C:2019:432

Opinion of 19 November 2020, *Banco de Portugal and Others*, C-504/19, EU:C:2020:943

Judgment of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335

Judgment of 5 May 2022, *BPC Lux 2 and Others*, C-83/20, EU:C:2022:346

#### *Provisions*

Treaty on the Functioning of the European Union: Article 122

Charter of Fundamental Rights of the European Union: Articles 17, 21, 38, 47, 51 and 52

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: recitals 11 and 12; Articles 1, 2, 3, 4, 6, 13 and 14

Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism

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

### **Case-law of the European Court of Human Rights (ECtHR) relied on**

Judgment of 19 March 1997, *Hornsby v. Greece*, CE:ECHR:1997:0319JUD001835791

Judgment of 26 February 2002, *Del Sol v. France*, CE:ECHR:2002:0226JUD004680099

### **Provisions of national law relied on**

#### *National law of the host Member State (Spain)*

Ley 6/2005 de 22 de abril, sobre saneamiento y liquidación de las entidades de crédito (Law 6/2005 of 22 April 2005 on the reorganisation and winding up of credit institutions): Article 19. This legislation transposes Directive 2001/24 into Spanish law.

#### *National law of the home Member State (Portugal)*

Regime Geral das Instituições de Crédito e Sociedades Financeiras (General Regulatory Framework for Credit Institutions and Finance Companies). This legislation transposes Directive 2001/24 into Portuguese law.

Various decisions adopted by the Banco de Portugal (central bank of Portugal) on ‘resolution measures’ in respect of the Portuguese institution Banco Espírito Santo, S. A.: in particular, those of 3 August 2014, 11 August 2014, 13 May 2015 and 29 December 2015

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The Portuguese institution Banco Espírito Santo, S. A. (‘BES’) had a very significant commercial presence in Spain through its branch there (‘BES Spain’).

- 2 In August 2014, as a result of the difficulties being experienced by BES, the Banco de Portugal began to adopt a number of decisions on the reorganisation of that institution by means of ‘resolution measures’.
- 3 The first of those decisions was to set up a ‘bridge bank’ by the name of Novo Banco, S. A. (‘NB’), to which part of BES’ business was transferred.
- 4 Among the items transferred by that decision were certain senior debt instruments issued by BES under the name of ‘Obligaciones Sénior NB 6,875% venc. julio de 2016’ (NB Senior Debentures – 6.875% – maturing July 2016).
- 5 The same decision made it clear, however, that the Banco de Portugal could ‘at any time back transfer’ as between BES and NB ‘assets, liabilities, equity and assets under management’, subject to the condition of doing so in accordance with the Portuguese legislation.
- 6 During that same year (2014), the Banco de España (central bank), acting in accordance with Law 6/2005, published in the *Boletín Oficial del Estado* (Official State Gazette) (BOE) a very short notice mentioning the communication concerning the reorganisation measures which had been received from the Banco de Portugal, and stating that there had been a ‘partial’ transfer of business to NB, which would carry on BES’ ‘ordinary business without interruption’, and that, consequently, BES Spain would become a branch of NB.
- 7 In late 2014, the company Proyectos, Obras y Servicios de Badajoz, S. L. (‘POSB’) acquired on the secondary market a bond entitled ‘NB Senior Debentures – 6.875% – maturing July 2016’.
- 8 That bond had originally been issued by BES Spain but, at the time of the acquisition mentioned above, it was the responsibility of Novo Banco, S. A., Sucursal en España (‘NB Spain’), pursuant to the decisions adopted by the Banco de Portugal.
- 9 Upon the first annuity of the bond, NB Spain paid POSB the corresponding yield.
- 10 In late 2015, the Banco de Portugal clarified the status of the reorganisation by adopting further decisions. Those decisions included in particular the effective ‘transfer back’ from NB to BES of senior debt instruments.
- 11 Neither the 2014 decisions nor the 2015 decisions were published in Spain as required by Article 6 of Directive 2001/24, which is to say published in extracts in the *Official Journal of the European Union* (OJEU) and in two national newspapers in each host Member State specifying, in the official language or languages of that State, the purpose and legal basis of the decisions taken, the time limits for lodging appeals, the date of expiry of those time limits and the contact details of the authorities competent to hear an appeal.

- 12 In 2016, proceedings to wind up BES were instituted in Portugal. There is nothing to indicate that either the publications required by Article 13 of Directive 2001/24 or the provision of personalised information to creditors as required by Article 14 of that directive took place in Spain.
- 13 When the abovementioned bond matured, NB Spain neither paid POSB the corresponding yield nor reimbursed to it the nominal value of the bond.
- 14 NB Spain responded to POSB's out-of-court claim by stating that the decisions adopted by the Banco de Portugal in 2015 had 'transferred back' to BES the liability linked to that bond.
- 15 In 2017, POSB brought against NB Spain an action seeking payment of the yield corresponding to the last annuity of the bond and reimbursement of its nominal value.
- 16 NB Spain raised a plea of lack of standing to be sued: it argued that the liability linked to the bond had been 'transferred back' to BES.
- 17 The Juzgado de Primera Instancia (Court of First Instance) and, on appeal, the Audiencia Provincial (Provincial Court) dismissed that plea and upheld POSB's action.
- 18 In 2019, the Banco de España, acting in accordance with Law 6/2005, published in the BOE another notice mentioning a new communication from the Banco de Portugal in relation to the reorganisation measures set out in the 2014 and 2015 decisions.
- 19 That notice too did not fulfil the requirements laid down in Directive 2001/24: it did contain an extensive transcript of the measures in question, but it did not provide information on the time limits for appeals (dates), the contact details of the authorities competent to hear an appeal or the winding-up proceedings in respect of BES.
- 20 NB Spain brought an appeal in cassation against the judgment of the Provincial Court before the Tribunal Supremo (Supreme Court) (the referring court). The latter allowed the Banco de Portugal and the public entity Fundo de Resolução (Resolution Fund) to participate, in support of the form of order sought by NB Spain, as interested parties. The Resolution Fund is itself answerable to the Banco de Portugal and holds 25% of NB's capital.

### **The essential arguments of the parties in the main proceedings**

- 21 As in other cases concerning BES Spain which are pending before Spanish courts, NB Spain claims that it lacks standing to be sued (notwithstanding that it is carrying on the former institution's banking business in the same offices and with the same employees). In this case, it argues that the liability forming the subject of

the action had been transferred to it under the first decisions adopted by the Banco de Portugal, but that that responsibility was ‘transferred back’ to BES in 2015. It also argues that Directive 2001/24 obliges the Spanish courts to recognise the effectiveness of all those measures.

- 22 No objection to the making of a request for a preliminary ruling was made by POSB, NB Spain, the Banco de Portugal or the Resolution Fund. All of the parties have made submissions to assist with the correct formulation of the request.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 23 In general terms, the referring court states that the request for a preliminary ruling is concerned with the conformity of the interpretation of Directive 2001/24 with certain fundamental rights and general principles of EU law. It notes that that subject matter comes within the scope of EU law and cites in support of that assertion the judgment in Case C-83/20.
- 24 It also notes the grounds for making the request: the questions are relevant to the outcome of the dispute, there is no judgment in which the Court of Justice has interpreted EU law in this regard, the interpretation of that law does not provide an obvious answer and the judgment it will give will not be open to appeal.
- 25 Next, it states that it has chosen to make a request for a preliminary ruling in the present case because it exemplifies a number of cases of its type and that the proceedings in the appeals in those other cases have been stayed pending the judgment of the Court of Justice in this case.
- 26 More specifically, the referring court puts forward two arguments, one per question referred.
- 27 In the first place, it addresses the significance of the fact that the ‘resolution measures’ (on which the partial transfer and ‘back transfer’ between BES and NB were based) were not published in Spain, and states the following.
- 28 The measures adopted by the Banco de Portugal in relation to the institution BES and the creation of NB are reorganisation measures for the purposes of Directive 2001/24 (as confirmed by the judgment in Case C-504/19). On being deprived of its assets, BES became a failing bank.
- 29 Where the reorganisation is likely to affect third parties outside the home Member State of the institution concerned (because that institution has branches in one or more host Member States) and the reorganisation is open to appeal in the home Member State, Directive 2001/24 obliges the home Member State to publish the measures concerned in the OJEU and in two national newspapers in each host Member State in the language or languages of the relevant State. That publication must provide the necessary information on the measures in question and the appeals available.



- 30 In the present case, no such publication in respect of BES took place in Spain.
- 31 The publication carried out by the Banco de España in 2014 did not fulfil the requirements of Directive 2001/24. It was too succinct and even misleading as regards the seamless continuity between BES and NB; in any event, it did not disclose the ‘back transfer’ power which the Banco de Portugal already held. For its part, the publication carried out by the Banco de España in 2019 contained sufficient information on the reorganisation measures, including the ‘back transfer’ power, but not on the appeals available (which information would have been out of time by then anyway); what is more, it came after the acquisition of the bond by POSB and even after the start of the dispute in the main proceedings.
- 32 According to the Opinion in Case C-504/19, at the hearing held in that case, it was stated that the Spanish press had reported extensively on the reorganisation of BES and that that enabled certain Spanish investors to appeal against those measures in Portugal.
- 33 The documentation provided by the Banco de Portugal itself in this case, however, confirms that the information published by the Spanish press on the reorganisation (including on the liabilities excluded from the transfer between BES and NB) was generic. What is more, that information included statements by persons involved to the effect that customers would not be affected and giving the impression that there would be full continuity between BES and NB.
- 34 In particular, the Spanish press did not mention the power to ‘back transfer’ from NB to BES which the Banco de Portugal had already held since August 2014.
- 35 The inadequacy of that information is corroborated by the very fact that, in Portugal, only six appeals were brought by Spaniards, notwithstanding the large number of persons in Spain affected by the reorganisation of BES.
- 36 It is true that, according to Directive 2001/24, a reorganisation will be effective in relation to creditors whether or not it has been disclosed to the public. However, that provision probably seeks to ensure the effectiveness of the measures concerned in urgent situations in which time is of the essence. It is doubtful whether that provision would allow the effects of the measures on the rights of customers and the specific means of redress available to go unpublished for as long as they did in this case.
- 37 Furthermore, nor was the opening of the proceedings to wind up BES published in accordance with the requirements of Directive 2001/24 in Spain. This prevented Spanish creditors from filing their claims in those proceedings.
- 38 The Banco de Portugal argues that it published the measures in question (or at least part of its decisions) in accordance with the requirements of Directive 2014/59, which was already in force at that time, and that it published them on the internet in both Portuguese and English.

- 39 The Opinion in Case C-504/19, however, raises doubts about the applicability of Directive 2014/59 to this case. In any event, moreover, Directive 2014/59 does not alter the obligation to publish which Directive 2001/24 imposes in situations such as that in this case.
- 40 What is more, Directive 2001/24 itself justifies that obligation to publish on the ground that it is necessary to avoid (even indirect) discrimination on the basis of nationality as between creditors in the home Member State and creditors in the host Member State.
- 41 The fact is that Spanish investors may have been discriminated against by comparison with Portuguese investors: since the decisions of the Banco de Portugal (in particular, the ‘back transfer’ power it held) were not duly published in Spain, they were unaware that acquiring the bonds in question was not a safe investment because responsibility for them could revert to a failing bank (BES).
- 42 Furthermore, that requirement to publish is also founded on the principle of legal certainty: the persons concerned must have a precise knowledge of their rights and obligations in order to be able to take appropriate action in response to the measures concerned. The Court of Justice has held that, where such measures are liable to have financial consequences, the principle of legal certainty must be observed all the more strictly (judgment in Case C-504/19).
- 43 In the present case, it is especially significant that the fact of the ‘back transfer’ power was not duly published. When POSB acquired the bond on the secondary market, the obligations connected with it fell to NB Spain, and POSB was therefore able to rely on the information available on the solvency of the ‘bridge bank’ created by the Portuguese State. Indeed, NB Spain paid the yield on the first annuity. However, when the bond matured, NB Spain refused to pay the yield on the last annuity and reimburse the nominal value of the bond because that obligation had been ‘transferred back’ from a solvent bank to a failing one.
- 44 Publication also supports effective judicial protection, inasmuch as it allows an appeal to be brought against the authority which adopts the ‘resolution measures’. This is demonstrated in the case-law of the ECtHR, which states that the possibility of appeal must not be merely ‘theoretical or illusory’.
- 45 For all the foregoing reasons, it is doubtful whether Article 3(2) of Directive 2001/24 can be interpreted as meaning that decisions adopted by the authority of the home Member State must be recognised in the host Member State even where the requirement to publish has not been fulfilled.
- 46 In the second place, the referring court looks at the possibility that there has been a disproportionate interference with the right to property and that the principle of legal certainty has been infringed, and states the following.
- 47 Ownership of a senior bond comes within the scope of the fundamental right to property provided for in Article 17 of the Charter. According to the case-law of



the Court of Justice, that provision concerns rights with an asset value creating an established legal position under the legal system concerned, enabling the holder to exercise those rights autonomously and for his or her own benefit.

- 48 The 'back transfer' to BES of obligations connected with the bond acquired by POSB effectively deprives POSB of its property.
- 49 It is true that the right to property is not absolute: Article 17 of the Charter itself states that an owner may be deprived of his or her right to property in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for its loss. For example, shareholders may be deprived of that right in the event of the resolution of a failing bank.
- 50 However, POSB was neither a shareholder in, nor a creditor to, BES: when it acquired a bond on the secondary market, it became a creditor to NB, a solvent bank to which the rights and obligations linked to that bond had previously been transferred.
- 51 The 'back transfer' to BES deprived POSB of its property without fair compensation in good time.
- 52 In addition, the fact that the decisions of the authority which made that 'back transfer' had not been published as required by Directive 2001/24 may constitute an infringement of the principle of legal certainty.