

**Case C-794/22**

**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:**

23 December 2022

**Referring court:**

Tribunal Supremo (Spain)

**Date of the decision to refer:**

15 December 2022

**Appellant:**

FSC

**Respondent:**

Banco Santander, S.A.

---

**Subject matter of the main proceedings**

Claim for 1) a declaration of nullity in respect of the purchase of Subordinated Bonds Exchangeable for Subordinated Obligations of Banco Popular Español and, secondarily, 2) an award of damages, based on the bank's failure to fulfil its information obligations in relation to the subscription order for those bonds.

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

Interpretation of Article 34(1)(a) and (b) of Directive 2014/59/EU in relation to Article 53(1) and (3) and Article 60(2), first subparagraph, points (b) and (c), of the same directive. Legal basis: Article 267 TFEU.

**Question referred for a preliminary ruling**

Must Article 34(1)(a) and (b), read together with Article 53(1) and (3) as well as Article 60(2), first subparagraph, points (b) and (c), of Directive 2014/59/EU be interpreted as meaning that the possible claim or right that arises from a judgment

ordering payment of compensation given against the successor entity to Banco Popular Español, S.A. following an action for damages arising from the marketing of a financial product (subordinated bonds necessarily convertible into shares in the same bank) not included among the additional capital instruments to which the resolution measures for Banco Popular refer, which were ultimately converted into ordinary shares in the bank before the bank resolution measures were adopted (7 June 2017), could be considered a liability affected by the write-down or cancellation provision of Article 53(3) of Directive 2014/59/EU, as an ‘unaccrued’ obligation or claim, such that it would be discharged and would not be enforceable against Banco Santander, as the successor entity to Banco Popular, where the claim from which that judgment ordering payment of compensation arises was brought after the procedure for the resolution of the bank had been concluded?

Or, conversely, must those provisions be interpreted as meaning that the abovementioned claim or right constitutes an ‘accrued’ obligation or claim – Article 53(3) of the Directive – or ‘liability already accrued’ at the time of the resolution of the bank – Article 60(2)(b) – and, as such, excluded from the effects of the discharge or settlement of those obligations or claims, and, consequently, [that the abovementioned claim or right] is enforceable against Banco Santander, as the successor to Banco Popular, even where the claim from which that judgment ordering payment of compensation arises was brought after the procedure for the resolution of the bank had been concluded?

### **Provisions of European Union law relied on**

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;

- Article 34(1)(a) and (b).
- Article 53(1) and (3).
- Article 60(2)(a), (b) and (c).

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

Directive 2014/59/EU was transposed in Spain by Law 11/2015, of 18 June, on the recovery and resolution of credit institutions and investment firms, which contains various provisions that reproduce the provisions of that directive in identical or similar terms.

The Spanish Civil Code regulates the payment of compensation as a result of civil liability for damage caused in relation to the performance of obligations.

Article 1101: ‘Persons who, in the performance of their obligations, act fraudulently or negligently or cause a delay, or do not comply with the terms of those obligations in any way, shall be required to remedy the damage caused.’

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

- 1 Banco Popular carried out an issue of ‘Bonos Popular I/2010 Capital Convertible 8%’, also known as ‘Bonos Subordinados Canjeables por Obligaciones Subordinadas de Banco Popular Español, S. A. I/2010’ (Subordinated Bonds Exchangeable for Subordinated Obligations of Banco Popular Español, S. A. I/2010; ‘Subordinated Bonds I/2010’). On 19 November 2010, FSC subscribed to 75 of those convertible bonds, for a total amount of EUR 75 000.
- 2 Those Subordinated Bonds I/2010 were mandatorily exchanged for 38 659 shares in Banco Popular on 25 June 2012 (with a value at that time of EUR 72 371.19). Up to the time of the exchange, the bonds resulted in the appellant being paid the following amounts of interest: EUR 6 032.98 in 2011 and EUR 2 991.78 in 2012.
- 3 On 7 June 2017, the European Commission adopted Decision (EU) 2017/1246, endorsing the resolution scheme for Banco Popular Español, S.A. (OJ 2017 L 178, p. 15); the Single Resolution Board (SRB) adopted Decision SRB/EES/2017/08, which activated the resolution scheme for Banco Popular; and the Spanish Executive Resolution Authority (Fondo de Reestructuración Ordenada Bancaria; FROB) adopted the measures necessary to implement the resolution decision (Official State Gazette of 30 June 2017). In short, the resolution mechanism for Banco Popular consisted in the sale of the business by the transfer of the shares therein to a purchaser, Banco Santander, which purchased them for the sum of EUR 1. Specifically, the resolution involved the following measures:
  - First, reducing Banco Popular’s existing share capital to EUR 0 by writing down the nominal amount of its share capital in the amount of EUR 2 098 429 046, with the consequent write down and cancellation of 100% of its existing shares. At the same time, carrying out a capital increase, in the amount of EUR 1 346 542 000, to convert all the additional tier 1 capital instruments into newly issued shares with a nominal value of EUR 1 (‘New Shares I’), in order, then, to reduce the share capital to zero once again by writing down all of those New Shares I.
  - Second, agreeing a capital increase, in the amount of EUR 684 024 000, in order to convert all the tier 2 capital instruments in circulation as at the date of the resolution decision into newly issued shares of Banco Popular (‘New Shares II’), and transferring all of the New Shares II to Banco Santander, which purchased them for the price of EUR 1.

As a consequence of that resolution of Banco Popular, FSC ceased to be the holder of the shares which he had obtained when the bonds to which he had subscribed were exchanged, without receiving any consideration whatsoever.

- 4 On 11 December 2017, FSC made a claim against Banco Popular seeking the following:
  - a) a declaration of nullity in respect of the purchase of the convertible subordinated bonds, because there was a defect of consent;
  - b) secondarily, an award of damages, because of the bank's failure to comply with the legal obligations relating to information in respect of the subscription order for those bonds.

The appellant bases his claim on the defective information which, he claims, was provided to him by the respondent bank.

- 5 The court of first instance dismissed the claim. It found that the action brought for a declaration of nullity was time-barred, as more than four years had elapsed since the day of the mandatory exchange for shares (25 June 2012), and it dismissed the action for damages, holding that the breach of contract which has to serve as a basis for such an action relates to obligations arising from the contract and, in this case – it asserts – the complaint relates to non-performance of pre-contractual obligations.
- 6 The appellant appealed against that judgment and the Provincial Court dismissed that appeal. After reasoning that the action for a declaration of nullity was time-barred, establishing the date of the mandatory exchange of the bonds for shares as the first day for the purposes of calculating the limitation period, it held that the action for damages could not succeed either, although for a different reason from that referred to by the judgment at first instance.
- 7 FSC brought a further appeal against the judgment on appeal, confining his challenge to the dismissal of the secondary claim for compensation for the damage caused by the defective information relating to the financial products offered. He has not challenged the dismissal of his principal claim, relating to the nullity of the subscription contract for the convertible bonds.

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

- 8 The arguments of the parties are reproduced in the presentation of the reasoning in the request for a preliminary ruling.
- 9 Moreover, Banco Santander objects to the question being referred for a preliminary ruling, because it considers that the purchase of the preference shares has not caused any damage to the purchaser.

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

- 10 This dispute occurs against a backdrop of extensive litigation in Spain regarding the various capital instruments of Banco Popular (ordinary shares, preference shares, subordinated bonds, subordinated obligations, etc.). In general, the purchasers of such financial products have brought actions to have the contracts for the purchase of such products declared void, seeking in those actions the return of what was paid for such purchases, or actions for damages (either in relation to the information contained in the prospectus, as provided for in Article 6 of Directive 2003/71/EC, or in view of the general rules relating to contracts and the provisions of securities market legislation relating to information obligations in the marketing of complex financial products), in which payment of compensation is sought for the losses suffered on account of such purchases. The basis for such actions is the defective information provided by Banco Popular when marketing such financial products. Following the resolution of Banco Popular, the actions have been brought against Banco Santander.
- 11 After the further appeal brought by FSC was lodged, the Court of Justice gave its judgment of 5 May 2022, *Banco Santander* (C-410/20). That judgment states that ‘the combined provisions of Article 34(1)(a), Article 53(1) and (3), and Article 60(2), first subparagraph, (b) and (c) of Directive 2014/59/EU [...], must be interpreted as precluding, following a total write-down of shares in the capital stock of a credit institution or investment firm subject to a resolution procedure, persons having acquired shares, in the context of a public offer to subscribe issued by that institution or firm, before the opening of such a resolution procedure, from bringing, against that institution or firm or its successor entity, an action for damages on the basis of the information provided in the prospectus, as provided for in Article 6 of Directive 2003/71/EC [...] or an action for a declaration of nullity of the purchase contract for such shares, which, given its retroactive effect, results in the restitution of the value of said shares, plus interest from the date of conclusion of the contract’ (C-410/20, EU:C:2022:351, final paragraph).
- 12 The above-referenced judgment ruled on how the provisions of Article 34(1)(a), in relation to those of Article 53(1) and (3) and those of Article 60(2), first subparagraph, points (b) and (c), of Directive 2014/59/EU, are to be interpreted, in relation to (i) actions for damages on the basis of the information provided in the prospectus and actions for a declaration of nullity in respect of the subscription contract for Banco Popular shares, (ii) acquired in the context of a public offer to subscribe, (iii) which were written down in the resolution procedure for that bank, (iv) [where such actions are] brought by persons who were holders of such Banco Popular shares before the start of the resolution procedure.
- 13 In the present dispute, the convertible subordinated bonds of Banco Popular purchased by the appellant do not correspond to any of the additional capital instruments written down or cancelled by the effects of the resolution scheme for Banco Popular. However, those bonds were exchanged for, or converted into, shares in Banco Popular on 25 June 2012, in accordance with the terms of the

issue to which they belonged. The appellant was the holder of those shares from the date of the exchange until 7 June 2017, when, under the resolution scheme for Banco Popular, they were written down, together with the rest of the shares that formed the share capital, without the basis on which the shares were acquired appearing to be relevant for such purposes.

- 14 The question which arises centres on the scope of the effect of discharging all obligations or liabilities for Banco Santander, as the universal successor to Banco Popular, in particular as regards the claim or right which would arise from a court judgment ordering payment of compensation for damage that would have resulted, where applicable, from a possible failure to comply with the legal obligations relating to information in the marketing of those convertible subordinated bonds, before the abovementioned resolution measures were adopted.
- 15 In particular, at the root of the question is whether that claim or right would be a liability affected by the provision of Article 53(3) of the Directive, given that the claim was brought after the procedure for the resolution of the bank had been concluded and in view of the exception established by that provision with regard to ‘unaccrued liabilities’. The question arises because, as the judgment of 5 May 2022, *Banco Santander* (C-410/20), underlines, Article 53(3) of Directive 2014/59/EU states that ‘where a resolution authority reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability, any obligations or claims arising in relation to it that are not accrued at the time when the institution or firm is resolved shall be treated as discharged for all purposes, and shall not be provable in relation to the credit institution or investment firm under resolution or any successor entity in any subsequent winding up’ (C-410/20, EU:C:2022:351, paragraph 33). That same judgment emphasises that Article 60(2) of the same directive, in relation to the provisions governing the write down or conversion of capital instruments, provides that ‘where the principal amount of a relevant capital instrument is written down: [...] (b) no liability to the holder of the relevant capital instrument shall remain under or in connection with that amount of the instrument, which has been written down, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write-down power’ (ibid, paragraph 10).
- 16 In the present case, the convertible bonds accrued on the day of their conversion into shares and, therefore, prior to the start of the procedure for the resolution of the bank. With regard to liability for the possible damage resulting from non-performance or defective performance of obligations, the judgment in which it is declared is not constitutive in nature, but rather it acknowledges its existence and quantifies it, since the obligation to compensate arises outside the scope of the courts with the causation of the damage.
- 17 In that regard, the appellant argues that: i) the above-referenced judgment is not applicable, because the convertible bonds were not any of the additional capital instruments written down or cancelled under the resolution scheme; thus,



Article 53(3) of Directive 2014/59 does not apply, as the actions brought do not deal with nullity or damages arising from the direct marketing of Banco Popular shares, but rather from the marketing of bonds that were not affected by the resolution; ii) the substantial damage suffered (loss of the value of the investment) occurred before the resolution of Banco Popular (at the time of the resolution, Banco Popular's shares had already lost most of their value); and iii) a preliminary ruling is necessary to clarify whether that provision of the Directive is applicable solely to products affected by the resolution of the entity, since, were that not the case, Banco Santander would automatically be exempt from any liability arising from the negligent marketing of any debt issue, simply because it had resulted in shares.

- 18 For its part, Banco Santander argues that there was no compensable damage and also that:

– If the investor seeks any restitutory or compensatory remedy the purpose of which is the total or partial recovery of the value of the shares that were written down under the resolution scheme (or of any other instrument cancelled under the resolution), the above-referenced judgment of the Court of Justice has made it clear that he lacks standing to do so and nor is there any legitimate basis for Banco Santander to bear the corresponding liabilities or consequences;

– If the claimant seeks restitutory or compensatory remedies based on the particular circumstances of his original investments in products that were not written down or cancelled by the effects of the resolution of Banco Popular, which, subsequently, were converted into products that were affected by the resolution, the factual and legal prerequisites for those remedies will have to apply.

- 19 The judgment of 5 May 2022, *Banco Santander* (C-410/20), although it refers to 'persons having acquired shares, in the context of a public offer to subscribe issued by that institution or firm, before the opening of such a resolution procedure' (C-410/20, EU:C:2022:351, paragraph 52), provides some considerations of interest in this case.
- 20 First, it recalls that, according to Article 34(1)(a) and (b) of Directive 2014/59, 'it is the shareholders, followed by the creditors, of a credit institution or investment firm under resolution that are required to bear the first losses incurred as a result of the application of that procedure' (ibid. paragraph 32) and that, according to Article 53(3) of that directive, 'where a resolution authority reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability, any obligations or claims arising in relation to it that are not accrued at the time when the institution or firm is resolved shall be treated as discharged for all purposes, and shall not be provable in relation to the credit institution or investment firm under resolution or any successor entity in any subsequent winding up' (ibid. paragraph 33).

- 21 Second, it adds that ‘Article 60 of Directive 2014/59 on the write down or conversion of capital instruments, states in paragraph 2, first subparagraph, (b), that no liability to the holder of the capital instruments written down under the resolution decision shall remain, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write-down power’ (ibid. paragraph 34).
- 22 In Spanish law, ‘*devengo*’ [from the Spanish verb ‘*devengar*’, one of two Spanish verbs used in the Spanish version of Directive 2014/59/EU to mean ‘accrue’ in the sense relevant to this case] is understood to mean the moment at which the right to claim performance of an obligation arises, while ‘*vencimiento*’ [from ‘*vencer*’, the other such verb] is understood to refer to the end of the period established for the performance of an obligation, from which point that obligation is enforceable.
- 23 Moreover, in the present case, the claim for compensation does not relate to any obligation or liability resulting from ‘the exercise of the write-down power’, but rather from the marketing of the financial products of which the investment initially consisted. That is, its cause of action does not lie in the loss of the value of the investment as a consequence of the write down of the shares, but rather it has its origin in the liabilities arising from the initial transaction of subscribing for the bonds, which were subsequently converted into shares.
- 24 In that regard, the fact that the possible claim for compensation has arisen outside the scope of the courts (and, therefore, must be regarded as accrued) and is due (since it would not be subject to a time period) is not incompatible with its classification as a ‘contingent claim’ until it is definitively established (or excluded) by the courts, and, as such, it seems reasonable that claims which are in that situation (the subject of current or potential litigation) may be taken into account in a prudent assessment of the liabilities of the entity from which compensation or restitution is claimed by reason of the marketing of those financial products.
- 25 If those liabilities are understood to arise from the possible liability relating to the marketing of the subordinated bonds necessarily convertible into shares, in no event do they form part of those ‘liabilities already accrued’, to which the exclusion from the discharging effects of the write down contained in Article 60(2)(b) of Directive 2014/59 refers, nor do they form part of the obligations or claims already accrued at the time of the resolution of Banco Popular, as referred to in Article 53(3) of the Directive, [and therefore] the appellant would lack *locus standi* to bring his action against Banco Santander.