Case C-687/23

Request for a preliminary ruling

Date lodged:

15 November 2023

Referring court:

Tribunal Supremo (Spain)

Date of the decision to refer:

2 November 2023

Appellant:

D.E.

Respondent:

Banco Santander, S. A.

TRIBUNAL SUPREMO, SALA PRIMERA DE LO CIVIL (Supreme Court, Spain, First Civil Chamber).

[…] [procedural formulae]

SUPREME COURT

Civil Chamber

Order No /

[…] [members of the panel]

In Madrid, on 2 November 2023

[…] [reporting judge]

FACTS

ONE.- *Relevant background.*

1. - Banco Popular Español, S. A. ('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/2009' (Subordinated Bonds Exchangeable for Subordinated Obligations of Banco Popular Español, S. A. I/2009; 'Subordinated Bonds I/2009').

On 3 October 2009, D.E., as the sole director of the company Lera Blava, S. L. U., subscribed to 15 of those convertible bonds, for a total amount of EUR 15 000.

In May 2012, D.E., also acting on behalf of Lera Blava, S. L. U., exchanged those Subordinated Bonds I/2009, which matured in October 2013, for other mandatory convertible subordinated bonds (II/2012), maturing in November 2015.

On 14 January 2013, as payment for outstanding wages, the company granted D.E. ownership of those convertible bonds and that subrogation of D.E. to the ownership of the bonds was agreed to by the bank on 22 February 2013.

The mandatory convertible subordinated bonds (II/2012) were exchanged, mandatorily, for Banco Popular shares on 25 November 2015.

2. - 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.

The resolution instrument adopted consisted in the sale of the business by means of the transfer of the shares therein to a purchaser, Banco Santander, which purchased them for the sum of EUR 1.

Decision SRB/EES/2017/08 of the SRB was implemented by means of the Decision of 7 June 2017 of the Spanish Executive Resolution Authority (Fondo de Reestructuración Ordenada Bancaria; 'FROB') (Official State Gazette No 155 of 30 June 2017, p. 55470) – as the Executive Resolution Authority, pursuant to Article 2(1)(d) of Law 11/2015, of 18 June.

The FROB agreed to reduce Banco Popular's existing share capital at that time to zero euros (EUR 0) by writing down all of the shares in circulation, with the aim of establishing an unavailable voluntary reserve. At that moment, D.E. ceased to be the owner of the shares which he had obtained as a result of the exchange of the subscribed bonds, without receiving any consideration whatsoever.

3. - As a consequence of the resolution measures adopted by the FROB to implement the decision of the SRB, Banco Santander acquired all of the newly issued Banco Popular shares, which were issued by means of the conversion of the tier 2 capital instruments into newly issued shares as agreed in that decision. Subsequently, in 2018, by means of a merger by absorption of Banco Popular,

Banco Santander became the universal successor to Banco Popular, whose legal personality was extinguished.

TWO.- *Proceedings giving rise to the request for a preliminary ruling. Decision at first and second instance.*

1. - In October 2016, D.E. made a claim against Banco Popular seeking a declaration of nullity in respect of the purchase of the convertible subordinated bonds, due to a defect of consent, and an order for the return of the amount initially invested (EUR 15 000), plus the statutory interest accrued since the moment of subscribing to the product.

Secondarily, he sought an award of damages, because of the defendant's failure to comply with the legal obligations relating to information in respect of the subscription of the bonds in 2009 and their subsequent exchange in 2012. The claimant [now the appellant] based his claim on the defective marketing of the product in view of the requirements of the MiFID rules.

2. - The court of first instance tasked with hearing the proceedings found in favour of the appellant and declared the subscription of the mandatory convertible subordinated bonds null and void.

3. - The defendant bank appealed against the decision and the Audiencia Provincial (Provincial Court, Spain) allowed the appeal, finding there to be a defence of lack of *locus standi* on the part of D.E.

THREE.- *Appeal pending before the Supreme Court, in the context of which the decision was made to refer this question for a preliminary ruling.*

1. - The appellant has lodged an appeal against the decision of the Provincial Court. The appeal focuses on the denial of *locus standi*, as it maintains that the transfer of the ownership of the company's bonds to its sole director and shareholder was valid.

If those grounds of appeal are allowed, it would then be necessary to adjudicate on the nullity of the purchase of the Subordinated Bonds I/2009 and their subsequent exchange for other mandatory convertible subordinated bonds (II/2012).

2. - In its deliberations on the appeal, the court agreed to hear the parties regarding the relevance of requesting a preliminary ruling from the Court of Justice. Both parties have expressed their opposition to the question being referred for a preliminary ruling.

FOUR.- […] [details of the parties and their representatives]

LAW

ONE.- *European Union law.*

The question being referred amounts to a supplement to the question we formulated in our order of 15 December 2022. The rules of EU law affected, which we will here confine ourselves to summarising, are the same:

a) Article 34(1)(a) and (b) of 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 ('Directive 2014/59/EU').

b) Article 53(1) and (3) of Directive 2014/59/EU.

c) And Article 60(2)(a), (b) and (c), of Directive 2014/59/EU.

Directive 2014/59/EU was transposed in Spain by Ley 11/2015, de 18 de junio, de recuperación y resolución de entidades de crédito y empresas de servicios de inversión (Law 11/2015, of 18 June, on the recovery and resolution of credit institutions and investment firms; 'Law 11/2015'), which contains various provisions that reproduce, in identical or similar terms, the provisions of that directive as set out in the preceding paragraphs.

The question is also set within the context of the case-law established by the judgment of the Court of Justice of 5 May 2022, in Case C-410/20 (EU:C:2022:351)

TWO.- *Justification for the request for a preliminary ruling. Questions arising as a result of the judgment of the Court of Justice of the EU of 5 May 2022 (C-410/20).*

1. - Spanish courts have given disparate interpretations to the various provisions of Directive 2014/59/EU in relation to the measures for the resolution of Banco Popular, which has led to differing resolutions to the disputes. That has caused a substantial number of appeals regarding this question to be brought before the Supreme Court.

2. - The judgment of the Court of Justice of 5 May 2022, in Case C-410/20 (EU:C:2022:351), ruled on how Article 34(1)(a), 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, 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.

3. - In the main proceedings in which this request for a preliminary ruling is made, the subordinated bonds mandatorily convertible into Banco Popular shares, Subordinated Bonds I/2009, subsequently exchanged for other mandatory convertible subordinated bonds (II/2012), 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 November 2015, in accordance with the terms of the issue to which they belonged (series II/2012). 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.

Those bonds having been exchanged for Banco Popular shares on 25 November 2015, before the decision regarding the resolution of the bank (7 June 2017), it seems clear that the effects of the resolution scheme also affect the shares acquired by the appellant in that exchange, which he still held on the date of the resolution, when they were consequently written down, since the first measure of the Decision of the Governing Committee of the FROB of 7 June 2017 consisted in: 'Reducing the existing share capital of Banco Popular Español, S. A. from two billion, ninety-eight million, four hundred and twenty-nine thousand and forty-six euros (EUR 2 098 429 046) to EUR 0, by means of the write down of all of the shares currently in circulation […]', regardless of the basis on which the shares were acquired.

A question arises for us in this dispute which is, in part, similar to that which was the subject of the question referred in the order of 15 December 2022. The question arising relates to the scope of the effect of discharging all obligations or liabilities on the part of Banco Santander, as the universal successor to Banco Popular, in particular as regards the claim or right which would arise from a court judgment finding the subscription of the mandatory convertible Subordinated Bonds I/2009 and those subsequently acquired in exchange, II/2012, null and void and ordering the return of the amounts initially handed over to purchase those bonds (EUR 15 000), taking into account that those subordinated bonds convertible into shares do not form part of the additional capital instruments referred to in the measures for the resolution of Banco Popular, but ended up being converted into shares in the same bank, as provided for in [the terms of] their issue, before the abovementioned resolution measures were adopted.

In this case, the difference which justifies expanding the question previously referred for a preliminary ruling is that the action for a declaration of nullity was brought before the procedure for the resolution of the bank had been concluded. Therefore, at the root of the question, in this case, is whether that claim or right would be a liability affected by the provision of Article 53(3) of Directive 2014/59/EU, given that the claim was brought before 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 the Court of Justice of 5 May 2022 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' [emphasis in bold added]. That same judgment of the Court of Justice likewise 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' [emphasis in bold added].

4. - In the case of the main proceedings to which this reference for a preliminary ruling relates, the convertible bonds matured and were converted into shares before the start of the procedure for the resolution of Banco Popular and the action for a declaration of nullity was also brought prior to the start of that resolution procedure.

5. - As we have observed, the judgment of the Court of Justice of 5 May 2022, even if 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', provides some considerations of interest in a case such as ours.

First, it recalls that, according to Article 34(1)(a) and (b) of Directive 2014/59/EU, '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'. And, in particular, in accordance with Article 53(3) of Directive 2014/59/EU, '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' (paragraph 33).

And, later on, 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'.

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.

Moreover, in the present case, the possible order to return the amount initially handed over to purchase the bonds, as a consequence of a declaration of nullity in respect of their subscription and subsequent exchange, 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 to the bonds, which were subsequently converted into shares.

In that regard, the fact that the possible claim for restitution 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 same financial products.

6. - If we were to understand that those liabilities may have arisen from the possible liability relating to the marketing of the subordinated bonds necessarily convertible into shares, in no event would 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/EU refers, nor would 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] D.E. would lack *locus standi* to bring the action he has brought against Banco Santander. A determination in that regard is the subject of the appeal pending before this court.

OPERATIVE PART

THE CHAMBER DECIDES: […] to refer the following question to the Court of Justice of the European Union 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 **before 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, where the claim from which that judgment ordering payment of compensation arises was brought **before the procedure for the resolution of the bank had been concluded**?

[…] [closing procedural formulae and judges' signatures]