Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 14 October 2021 [1]

Case C-83/20

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 LP,
BTG Pactual Absolute Return II Master Fund LP,
CSS LLC,
Beltway Strategic Opportunities Fund LP,
EJF Debt Opportunities Master Fund LP,
TP Lux HoldCo Sàrl,
VR Global Partners LP,
CenturyLink Inc. Defined Benefit Master Trust,
City of New York Group Trust,
Dignity Health,
GoldenTree Asset Management Lux Sàrl,
GoldenTree High Yield Value Fund Offshore 110 Two Ltd,
San Bernardino County Employees Retirement Association,
EJF DO Fund (Cayman) LP,
Massa Insolvente da Espírito Santo Financial Group SA
v
Banco de Portugal,
Banco Espírito Santo SA,
Novo Banco SA

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal))

(Reference for a preliminary ruling – Directive 2014/59/EU – Recovery and resolution of credit institutions and investment firms – Articles 36, 73 and 74 – Partial transposition of a directive before the transposition deadline – Resolution of a credit institution – Treatment of

[1] Original language: Italian.

shareholders and creditors – 'No creditor worse off' principle – Article 17 of the Charter of Fundamental Rights of the European Union)

1. This request for a preliminary ruling from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) concerns the interpretation of Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms [2] and Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'), which provides for the protection of the right to property.

2. The request is part of an action brought before the Portuguese administrative courts by various shareholders and holders of subordinated bonds of Banco Espírito Santo ('BES'), seeking the annulment of the BES resolution decision taken by the Banco de Portugal in 2014.

3. The particular feature of this case lies in the fact that the resolution decision was taken pursuant to national legislation on the resolution of credit institutions, introduced into Portuguese law long before the adoption of Directive 2014/59, but amended by an act that only partially transposed that directive before the transposition deadline.

4. Given the circumstances, the referring court questions the compatibility of the national provision on the basis of which the BES resolution decision was taken with Directive 2014/59 and Article 17 of the Charter, owing to the failure to transpose a whole series of requirements laid down in the directive. The referring court also questions whether that legislation is liable, in the context of taking the resolution action, seriously to compromise the result prescribed by Directive 2014/59, in applying the standard derived from the case-law set out in the judgment of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628; '*Inter-Environnement Wallonie*'), regarding the obligations of Member States during the period prescribed for the transposition of a directive.

I. Legal framework

A. European Union law

5. Article 34 of Directive 2014/59, entitled 'General principles governing resolution', provides:

'1. Member States shall ensure that, when applying the resolution tools and exercising the resolution powers, resolution authorities take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:

(a) the shareholders of the institution under resolution bear first losses;

(b) creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings, save as expressly provided otherwise in this Directive; …'

[2] 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 (OJ 2014 L 173, p. 190).

6. Article 36 of Directive 2014/59, entitled 'Valuation for the purposes of resolution', provides:

'1. Before taking resolution action or exercising the power to write down or convert relevant capital instruments resolution authorities shall ensure that a fair, prudent and realistic valuation of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is carried out by a person independent from any public authority, including the resolution authority, and the institution or entity referred to in point (b), (c) or (d) of Article 1(1). …

4. The purposes of the valuation shall be:

(a) to inform the determination of whether the conditions for resolution or the conditions for the write down or conversion of capital instruments are met;

(b) if the conditions for resolution are met, to inform the decision on the appropriate resolution action to be taken in respect of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);

…

(e) when the bridge institution tool or asset separation tool is applied, to inform the decision on the assets, rights, liabilities or shares or other instruments of ownership to be transferred and the decision on the value of any consideration to be paid to the institution under resolution or, as the case may be, to the owners of the shares or other instruments of ownership;

…

(g) in all cases, to ensure that any losses on the assets of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) are fully recognised at the moment the resolution tools are applied or the power to write down or convert relevant capital instruments is exercised.

…

8. The valuation shall indicate the subdivision of the creditors in classes in accordance with their priority levels under the applicable insolvency law and an estimate of the treatment that each class of shareholders and creditors would have been expected to receive, if the institution or entity referred to in point (b), (c) or (d) of Article 1(1) were wound up under normal insolvency proceedings.

That estimate shall not affect the application of the "no creditor worse off" principle to be carried out under Article 74.'

7. Article 73 of Directive 2014/59, entitled 'Treatment of shareholders and creditors in the case of partial transfers and application of the bail-in tool', provides:

'Member States shall ensure that, where one or more resolution tools have been applied and, in particular for the purposes of Article 75:

(a) except where point (b) applies, where resolution authorities transfer only parts of the rights, assets and liabilities of the institution under resolution, the shareholders and those creditors whose claims have not been transferred, receive in satisfaction of their claims at least as much as what they would have received if the institution under resolution had been wound up under normal insolvency proceedings at the time when the decision referred to in Article 82 was taken;

…'

8. Article 74 of Directive 2014/59, entitled 'Valuation of difference in treatment', provides:

'1. For the purposes of assessing whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings, including but not limited to for the purpose of Article 73, Member States shall ensure that a valuation is carried out by an independent person as soon as possible after the resolution action or actions have been effected. That valuation shall be distinct from the valuation carried out under Article 36.

2. The valuation in paragraph 1 shall determine:

(a) the treatment that shareholders and creditors, or the relevant deposit guarantee schemes, would have received if the institution under resolution with respect to which the resolution action or actions have been effected had entered normal insolvency proceedings at the time when the decision referred to in Article 82 was taken;

(b) the actual treatment that shareholders and creditors have received, in the resolution of the institution under resolution; and

(c) if there is any difference between the treatment referred to in point (a) and the treatment referred to in point (b).

3. The valuation shall:

(a) assume that the institution under resolution with respect to which the resolution action or actions have been effected, would have entered normal insolvency proceedings at the time when the decision referred to in Article 82 was taken;

(b) assume that the resolution action or actions had not been effected;

(c) disregard any provision of extraordinary public financial support to the institution under resolution.

…'

B. Portuguese law

9. In Portugal, national rules on the recovery and resolution of credit institutions were introduced within the framework of the Regime Geral das Instituições de Crédito e Sociedades Financeiras (General Provisions governing Credit Institutions and Finance Companies, 'the RGICSF') by Decreto-Lei n.º 31-A/2012 (Decree-Law No 31-A/2012) of 10 February 2012.

10. Those rules were amended by Decreto-Lei n.º 114-A/2014 (Decree-Law No 114-A/2014) of 1 August 2014, which partially implemented Directive 2014/59 by transposing specific aspects of that directive.

11. More specifically, Decree-Law No 114-A/2014 amended Articles 145-B, 145-F and 145-H of the RGICSF, which, following that amendment, read as follows:

'Article 145-B …

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 or she would have incurred if the institution had gone into liquidation.

…

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 145-F(6) and Article 145-H(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 145-F …

6. For the purposes of Article 145-B(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.

…

Article 145-H

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 145-B(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.

Article 145-I

…

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 145-H(6);

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

12. The transposition of Directive 2014/59 was completed by the ratification of Law No 23-A/2015 of 26 March 2015.

II. The facts giving rise to the dispute, the procedure in the main proceedings and the questions referred

13. BES was one of the main credit institutions in the Portuguese banking system. After facing a serious financial crisis, BES was the subject of a resolution decision taken by the Banco de Portugal on 3 August 2014. That decision was taken in view of the serious and grave risk of BES defaulting on its obligations. Therefore, had the resolution action not been approved urgently, the bank would have faced the inevitable suspension of payments and withdrawal of its banking licence. The bank would then have been placed in liquidation, which would have posed a huge systemic risk and a serious threat to financial stability.

14. The abovementioned BES resolution decision was taken on the basis of the RGICSF, according to the version resulting from Decree No 31-A/2012, as amended by Decree-Law No 114-A/2014.

15. The BES resolution decision led to the creation of a bridge bank, 'Novo Banco S.A.', to which most of BES's assets, liabilities and off-balance sheet items were transferred.

16. The company Massa Insolvente da Espírito Santo Financial Group, S.A. ('Massa Insolvente') directly and indirectly held equity interests in BES.

17. BPC 2 Lux and Others hold subordinated bonds issued by BES.

18. Massa Insolvente and BPC 2 Lux and Others challenged the BES resolution decision, seeking its annulment before the Portuguese courts. They claimed, inter alia, that the resolution decision had been taken in breach of EU law.

19. Having been seised of this case, the referring court has some doubts as to the measures taken by the Portuguese legislature in partially transposing Directive 2014/59. The referring court considers it necessary to clarify the interpretation of the applicable provisions of EU law to assess the grounds for unlawfulness relied upon.

20. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must EU law, in particular Article 17 of the [Charter] and Directive 2014/59/EU …, 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 in *Inter-Environnement Wallonie*], is national legislation such as that described in the main 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?'

III. Legal analysis

21. In the present case, the referring court has referred two questions to the Court for a preliminary ruling to determine the consistency with EU law of the Portuguese regime for the resolution of credit institutions, introduced into the RGICSF in 2012 and subsequently amended in 2014, and which was applied to the BES resolution procedure.

22. The first question is divided into two parts. In the first part, the referring court refers to Article 17 of the Charter, which provides for the protection of the right to property; in the second part of that question, that court refers to Directive 2014/59, and in particular Articles 36, 73 and 74 thereof. That directive, and specifically those articles, are also the subject of the second question referred for a preliminary ruling.

23. Therefore, the second part of the first question referred for a preliminary ruling and the second question referred for a preliminary ruling both seek to determine the consistency with Directive 2014/59 of the national legislation at issue, albeit on the basis of two different standards. The second part of the first question referred seeks to ascertain whether the directive precludes such national legislation, whereas the second question seeks to ascertain whether that legislation is liable 'seriously to compromise the result prescribed' by the directive, in accordance with the standard developed by the Court of Justice in the case-law set out in the judgment in *Inter-Environnement Wallonie* on the obligations of Member States during the period prescribed for transposing a directive.

24. In that context, I consider it appropriate, first of all, to make some preliminary points on the applicability, in the present case, of the provisions of EU law cited by the referring court.

A. Preliminary points on the applicability of EU law

25. The national legislation applicable in the main proceedings – that is to say, the legislation in force when the BES resolution decision was taken on 3 August 2014, and which is the subject of the questions referred for a preliminary ruling – consists of the Portuguese regime for the recovery and resolution of credit institutions, introduced into the RGICSF by Decree-Law No 31-A/2012 of 10 February 2012, as subsequently amended by Decree-Law No 114-A/2014 of 1 August 2014.

26. It is clear from the file that Decree-Law No 31-A/2012 was adopted prior to the European Commission's submission of the proposal for a directive which subsequently led to the adoption of Directive 2014/59.[3] Therefore, the act as such certainly could not constitute transposition of that directive. Moreover, in response to a specific question from the Court, the Portuguese Government clarified that Decree-Law No 31-A/2012 did not transpose any other act of EU law.[4]

27. By contrast, it is explicitly stated in the order for reference that Decree-Law No 114-A/2014, which amended the Portuguese regime for the recovery and resolution of credit institutions in 2012, transposed specific aspects of Directive 2014/59, although it did not transpose the entirety of its provisions. In addition, the preamble to that decree-law explicitly states that it seeks to transpose into Portuguese law the 'no creditor worse off' principle[5] laid down in Directive 2014/59.

[3] The proposal for a directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 [COM(2012) 280 final] was published on 6 June 2012.

[4] In particular, the Portuguese Government clarified that that decree did not constitute transposition of 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), which had been transposed into Portuguese law by another act, namely Decree-Law No 199/2006 of 25 October 2006.

[5] In other words, the principle that no creditor may be worse off as a result of the intervention of the authorities than they would have been had the credit institution concerned been wound up under normal insolvency proceedings.

28. In this respect, according to Article 130 of Directive 2014/59, the deadline by which Member States had to adopt and publish the laws, regulations and administrative provisions necessary to comply with that directive was 31 December 2014. Furthermore, Member States were to apply those measures from 1 January 2015. [6]

29. Accordingly, it must be held that – as observed by the referring court itself – Decree-Law No 114-A/2014 partially transposed Directive 2014/59 some five months prior to the transposition deadline. The transposition of the directive into Portuguese law was subsequently completed in 2015 by Law No 23-A/2015.

30. Against that legislative backdrop, it must be ascertained whether Directive 2014/59 and the Charter are applicable in the present case.

1. Applicability of the provisions of Directive 2014/59

31. It is clear from the Court's settled case-law that, since the purpose of the period prescribed for transposition of a directive is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period. [7]

32. In addition, although during the transposition period the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period, [8] they have the right to adopt transitional measures or to implement the directive in stages. [9]

33. It is also settled case-law that a directive can have direct effect only after the expiry of the time limit laid down for its transposition into national law. [10] It follows that a directive cannot be relied upon before the national courts in respect of proceedings initiated before the period prescribed for its implementation had expired. [11]

34. Nevertheless, in accordance with the settled case-law of the Court set out in *Inter-Environnement Wallonie*, mentioned by the referring court in its second question referred for a preliminary ruling, it follows from Article 4(3) TEU and the third paragraph of Article 288 TFEU that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive. [12]

6 Except for the provisions contained in Section 5 of Chapter IV of Title IV relating to the bail-in tool, which had to be applied from 1 January 2016 at the latest.

7 Judgments of 18 December 1997, *Inter-Environnement Wallonie*, paragraph 43; 5 February 2004, *Rieser Internationale Transporte* (C-157/02, EU:C:2004:76, paragraph 68), and of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627, paragraph 25).

8 Judgment of 18 December 1997, *Inter-Environnement Wallonie*, paragraph 44.

9 Judgment of 18 December 1997, *Inter-Environnement Wallonie*, paragraph 49.

10 See judgment of 17 January 2008, *Velasco Navarro* (C-246/06, EU:C:2008:19, paragraph 25 and the case-law cited).

11 See, to that effect, Opinion of Advocate General Sharpston in *BP and Others* (C-234/18, EU:C:2019:920, point 45).

12 Judgments of 18 December 1997, *Inter-Environnement Wallonie*, paragraph 45, and, inter alia, of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 – C-167/09, EU:C:2011:348, paragraph 78), and, most recently, of 11 February 2021, *M.V. and Others (Successive fixed-term employment contracts in the public sector)* (C-760/18, EU:C:2021:113, paragraph 73 and the case-law cited).

35. In my view, it follows from the case-law cited in the previous points that the applicants in the main proceedings cannot rely upon Directive 2014/59 before the referring court to plead the incompatibility of the Portuguese regime for the recovery and resolution of credit institutions, in force when the BES resolution decision was taken (in other words, before the deadline for transposition of the directive), and this despite the fact that Decree-Law No 114-A/2014 partially transposed the directive into Portuguese law before that deadline expired.

36. Indeed, as can be seen from point 34 above, during the period for transposition, the Member State in question was only required to refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by the directive. Therefore, it is solely on the basis of that obligation, in light of the criteria that will be specified in more detail in point 55 et seq., that we must assess the compatibility with Directive 2014/59 of the national legislation in force at that time and under which the Member State in question partially transposed that directive – which, as I explained in point 32, it was undoubtedly free to do.

37. That conclusion is not, in my view, called into question by the case-law relied upon by Massa Insolvente, according to which not only the national provisions specifically intended to transpose a directive, but also, from the date of that directive's *entry into force*, the pre-existing national provisions capable of ensuring that the national law is consistent with it must be considered to fall within its scope. [13]

38. Indeed, the fact that certain pre-existing national provisions are capable of ensuring that the national law is consistent with a directive and can therefore be considered as falling within the scope of that directive, and thus EU law, does not necessarily mean that Member States are required to ensure that their national law is fully consistent with that directive by the transposition deadline, and that their obligations thus extend beyond the obligation to refrain recognised by the case-law cited in point 34 above. In my view, that does not necessarily mean that individuals, contrary to the case-law cited in point 33 above, can rely upon that directive before the national courts in proceedings initiated before the transposition deadline.

2. Applicability of the Charter

39. Regarding the applicability of Article 17 of the Charter mentioned by the referring court in the first part of the question referred for a preliminary ruling, it should be recalled that Article 51(1) of the Charter states that the provisions of the Charter are addressed to the Member States only when they are implementing EU law. [14]

40. According to settled case-law of the Court, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. It is in this respect that the Court has observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of EU law. [15]

[13] Judgments of 7 September 2006, *Cordero Alonso* (C-81/05, EU:C:2006:529, paragraph 29); of 23 April 2009, *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2009:244, paragraph 35); and of 21 July 2011, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* (C-2/10, EU:C:2011:502, paragraph 70).

[14] See judgments of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraph 32 and the case-law cited), and of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv* (C-393/19, EU:C:2021:8, paragraph 30 and the case-law cited).

[15] Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19 and the case-law cited), and of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraph 21), and order of 7 September 2017, *Demarchi Gino and Garavaldi* (C-177/17 and C-178/17, EU:C:2017:656, paragraph 18).

41. It is clear from the case-law of the Court that, in order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law, the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law, and also whether there are specific rules of EU law on the matter or capable of affecting it. [16]

42. It is therefore necessary to ascertain whether the legislation at issue in the main proceedings can be regarded as falling within the scope of EU law.

43. First, I would point out that there is no question that Decree-Law No 114-A/2014 constitutes a measure implementing EU law. Indeed, as noted in point 27, it explicitly transposed Directive 2014/59 into Portuguese law (albeit partially) before the transposition deadline.

44. With regard to the clarification given in point 26 above, the Portuguese Government has, moreover, argued that the former legislation in Decree-Law No 31-A/2012, as amended by the 2014 Decree-Law, does not constitute a measure implementing EU law as such.

45. On the one hand, the Portuguese Government itself confirmed that the 2012 legislation pursued the same fundamental objective as Directive 2014/59, albeit with a somewhat different approach. Indeed, that legislation – for the adoption of which the Portuguese legislature drew its inspiration from the preparatory work for the directive – was enacted, pending the ratification of Directive 2014/59, in anticipation of the introduction into Portuguese law of regulatory measures relating to the recovery and resolution of credit institutions, so as to avoid a repeat of the serious harm caused to the public and private sector by the financial crisis.

46. On the other hand, the Portuguese Government explained that Decree-Law No 31-A/2012 was intended to give effect to and fulfil the commitments made by Portugal in the Memorandum of Understanding on Specific Economic Policy Conditionality concluded on 17 May 2011 between the Portuguese Government, the European Commission, the European Central Bank and the International Monetary Fund.

47. That Memorandum of Understanding has its legal basis in Article 3(5) of Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, [17] which in turn has its legal basis in Article 122(2) TFEU. [18] That memorandum is also provided for in Council Implementing Decision 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal. [19]

48. It is worth mentioning that the Court has previously held that measures taken by a Member State to implement commitments entered into in a memorandum of understanding under EU law fall within the scope of EU law within the meaning of Article 51(1) of the Charter. [20]

16 Judgments of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraph 25 and the case-law cited), and of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraph 37), and order of 7 September 2017, *Demarchi Gino and Garavaldi* (C-177/17 and C-178/17, EU:C:2017:656, paragraph 20).

17 OJ 2010 L 118, p. 1.

18 See, in that regard, judgment of 8 November 2016, *Dowling and Others* (C-41/15, EU:C:2016:836, paragraph 8).

19 OJ 2011 L 159, p. 88.

20 See, by analogy, judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraphs 32 to 35 and 45 to 48). As regards the applicability of the Charter in the light of Article 51 in a situation concerning measures adopted by the Portuguese Republic in view of the commitments undertaken pursuant to the legislation referred to in point 47, see points 43 to 53 of the Opinion of Advocate General Saugmandsgaard Øe in *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2017:395), confirmed implicitly by the Court in its judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117).

49. Therefore, in my view, it follows from all the above considerations that the national legislation at issue in the present case falls within the scope of EU law and that, as a result, the provisions of the Charter are applicable in the main proceedings.

3. Conclusion on the applicability of EU law

50. In the light of the above considerations, it must be concluded, in my view, that the applicants in the main proceedings cannot rely upon Directive 2014/59 before the referring court to plead the incompatibility of the Portuguese regime for the recovery and resolution of credit institutions in force when the BES resolution decision was taken. Accordingly, it is not necessary, in my view, to answer the second part of the first question referred for a preliminary ruling.

51. The consistency with Directive 2014/59 of national legislation such as that at issue in the main proceedings must be determined on the basis of the standard developed by the Court in the case-law set out in *Inter-Environnement Wallonie*, according to which it must be ascertained whether that legislation is liable 'seriously to compromise the result prescribed' by that directive. That question is the subject of the second question referred for a preliminary ruling, which, in my view, should be dealt with first. I will then examine whether national legislation of this type is consistent with Article 17 of the Charter, as requested in the first part of the first question referred for a preliminary ruling.

B. The second question referred for a preliminary ruling, relating to Directive 2014/59

52. By its second question, the referring court asks whether, in the light of the case-law of the Court of Justice set out in the judgment in *Inter-Environnement Wallonie*, national legislation on the resolution of credit institutions, such as that contained in the RGICSF in the version applied to the resolution of BES, which partially transposes Directive 2014/59/EU, is liable seriously to compromise the result prescribed by the directive, and particularly Articles 36, 73 and 74 thereof, in the context of taking the resolution action.

53. That question must be examined in the light of the requirements of Directive 2014/59, which the national legislation failed to transpose into the regime for the resolution of credit institutions; requirements that relate to the elements set out in points (a) to (d) of the first question referred for a preliminary ruling. Those requirements are: 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 (point (a)); the potential compensation based on that valuation, to be paid to the institution under resolution or, where appropriate, to the holders of shares or other titles of ownership (point (b)); the explicit provision of the 'no creditor worse off' principle for the shareholders of the institution under resolution (point (c)); and 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 (point (d)).

54. To answer that question, it is necessary, first of all, to clarify the scope of the obligation to refrain, which is recognised by the case-law set out in *Inter-Environnement Wallonie* mentioned by the referring court.

1. The scope of the Member States' obligation to refrain in the light of the judgment in Inter-Environnement Wallonie

55. As previously mentioned in point 34, it follows from Article 4(3) TEU and from the third paragraph of Article 288 TFEU that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive.

56. The Court has consistently held that such an obligation to refrain must be understood as referring to the adoption of any measure, general or specific, liable to produce such a compromising effect.[21] In this connection, it is immaterial whether or not such provisions of domestic law, adopted after the directive entered into force, are concerned with the transposition of the directive.[22]

57. The Court has also had occasion to hold that all the authorities of the Member States concerned, including the national courts, have such an obligation to refrain from taking measures. It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.[23]

58. In principle, it is for the national court to assess whether the national provisions whose legality it is called upon to consider might seriously compromise the attainment of the result prescribed by that directive.[24]

59. However, where the file contains all the information necessary to enable that assessment to be carried out, the Court may itself determine whether the national legislation or measure which is the subject of the reference for a preliminary ruling made to it in a particular case by a national court is liable seriously to compromise the result prescribed by the directive at issue in that case.

60. For example, in the judgment of 8 May 2003 in *ATRAL* (C-14/02, EU:C:2003:265), the Court found that a national measure, adopted during the period for transposition of the relevant directive in that case, which made devices bearing the 'CE' marking subject to a prior approval procedure, was liable to compromise the result prescribed by that directive.[25]

21 See judgments of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 – C-167/09, EU:C:2011:348, paragraph 78), and of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraph 57).

22 See judgments of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709, paragraph 68); of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 121); and of 27 October 2016, *Milev* (C-439/16 PPU, EU:C:2016:818, paragraph 31).

23 Judgments of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 123), and of 23 April 2009, *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2009:244, paragraph 39 and the case-law cited).

24 Judgment of 18 December 1997, *Inter-Environnement Wallonie*, paragraph 46, and judgment of 26 May 2011 in *Stichting Natuur en Milieu and Others* (C-165/09 – C-167/09, EU:C:2011:348, paragraph 80), as well as, to the same effect with regard to a transitional period, judgment of 10 November 2005, *Stichting Zuid-Hollandse Milieufederatie* (C-316/04, EU:C:2005:678, paragraphs 42 and 43).

25 See paragraphs 56 to 59 of that judgment. For an example of another case in which national legislation was considered liable seriously to compromise the result prescribed by the directive at issue in that case, see the Opinion of Advocate General Kokott in *VYSOČINA WIND* (C-181/20, EU:C:2021:619, in particular point 99), in which she considered that the Czech legislation at issue in that case was liable seriously to jeopardise the objective of that directive.

61. Conversely, in the judgment of 26 May 2011 in *Stichting Natuur en Milieu and Others* (C-165/09 – C-167/09, EU:C:2011:348), the Court held that a simple specific measure consisting in the decision to grant an environmental permit for the construction and operation of an industrial installation, did not appear liable, in itself, seriously to compromise the result prescribed by the directive at issue in that case. [26]

62. Similarly, in the judgment of 26 February 2015 in *Federconsorzi and Liquidazione giudiziale dei beni ceduti ai creditori della Federconsorzi* (C-104/14, EU:C:2015:125), the Court held that a legislative act adopted during the period prescribed for transposition of the directive at issue in that case, which modified to the disadvantage of a creditor of the State the interest on a debt arising from the performance of a contract concluded before a certain date, could not, in the light of the content of that directive, be regarded as being capable of seriously compromising the attainment of the objective pursued by that directive. [27]

63. Furthermore, in its judgment of 27 October 2016 in *Milev* (C-439/16 PPU, EU:C:2016:818), the Court held that, in the case in question, an opinion delivered by the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) during the transposition period of the directive at issue in that case could not constitute an interpretation of national law which was likely seriously to compromise attainment of the objective pursued by that directive. [28]

64. In its case-law, the Court has also provided guidance on the elements and parameters to be considered when assessing whether a national provision or measure may be considered liable seriously to compromise the result prescribed by a directive.

65. Thus, the Court has clarified that such a review must necessarily be conducted on the basis of an overall assessment, taking account of all the policies and measures adopted in the national territory concerned, such that a simple specific measure does not appear liable, in itself, seriously to compromise the result prescribed by a given directive. [29]

66. Furthermore, in making that assessment, it must be considered, in particular, whether the provisions in issue purport to constitute full transposition of the directive in question, as well as the effects in practice of applying those incompatible provisions and of their duration in time. [30]

67. Conversely, it is also possible to take into account the right of a Member State to adopt transitional measures or to implement the directive in stages. In such cases, the incompatibility of the transitional national measures with the directive, or the non-transposition of certain of its provisions, would not necessarily compromise the result prescribed. [31]

[26] See paragraph 83 of that judgment.

[27] See paragraph 32 of that judgment. For another case in which the Court held that legislation adopted during the period for transposition of the directive at issue in that case could not seriously compromise the result prescribed by that directive, see judgment of 13 March 2014, *Jetair and BTWE Travel4you* (C-599/12, EU:C:2014:144, paragraph 37).

[28] See paragraphs 28 to 36 and the operative part of that judgment.

[29] See judgment of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 – C-167/09, EU:C:2011:348, paragraphs 81 to 83).

[30] See, to that effect, judgment of 18 December 1997, *Inter-Environnement Wallonie*, paragraph 47.

[31] See, to that effect, judgment of 18 December 1997, *Inter-Environnement Wallonie*, paragraph 49.

2. On seriously compromising the attainment of the result prescribed by Directive 2014/59

68. To answer the second question referred for a preliminary ruling, it must be determined, on the basis of the lessons learned from the case-law cited in the previous points, whether the national legislation – owing to its failure to transpose specific requirements laid down in Directive 2014/59, mentioned by the referring court in points (a) to (d) of its first question referred for a preliminary ruling – might seriously compromise the attainment of the result prescribed by that directive.

69. In the first place, it is necessary to identify the 'result prescribed' by Directive 2014/59, the attainment of which might be compromised by the national legislation at issue.

70. It should be noted that, as observed by several parties who submitted observations to the Court, it is apparent from reading the recitals and text of Directive 2014/59 that this pursues several objectives, some general, others more specific in nature.

71. Thus, with regard to the general objectives, it is clear from recital 1 of the directive that it seeks to introduce the necessary tools 'to prevent insolvency' of credit institutions and investment firms 'or, when insolvency occurs, to minimise negative repercussions by preserving the systemically important functions of the institution concerned'.

72. The application of those tools, and the related powers by resolution authorities, should take into account the 'resolution objectives' which are specifically listed in Article 31(2) of Directive 2014/59 and which are, in principle, of equal significance.[32] Those objectives are to ensure the continuity of critical functions,[33] to avoid a significant adverse effect on the financial system,[34] to protect public funds,[35] to protect depositors and investors,[36] and to protect client funds and client assets.[37]

73. Directive 2014/59 lays down a series of provisions that, within the framework of those general objectives, pursue specific objectives. Some of the provisions of the directive are intended specifically to ensure that the resolution tools and powers are exercised in a manner compatible with the fundamental rights guaranteed by the Charter, and in particular the right to property guaranteed by Article 17 thereof.

74. Indeed, as stated in recital 13 of Directive 2014/59, the use of resolution tools and powers provided for in that directive may disrupt the rights of shareholders and creditors.[38] In this respect, recital 50 of the directive states that such interference with property rights should not be disproportionate.

[32] See Article 31(3) of Directive 2014/59.

[33] See also recitals 5, 13, 45, 70, 72 and 90 of Directive 2014/59.

[34] In this respect, see also recitals 3, 4, 11, 13, 14, 18, 24, 29, 40, 41, 45, 49, 63, 64, 67, 72, 83, 91, 92, 97, 99, 102, 108 and 132 of Directive 2014/59.

[35] See also recitals 16, 45 and 109 of Directive 2014/59.

[36] See also recitals 45, 55, 71, 102, 110, 112 and 117 of Directive 2014/59.

[37] See also recitals 45 and 65 of Directive 2014/59.

[38] According to that recital, the power of the authorities to transfer the shares or all or part of the assets of an institution to a private purchaser without the consent of shareholders affects the property rights of shareholders. In addition, the power to decide which liabilities to transfer out of a failing institution based upon the objectives of ensuring the continuity of services and avoiding adverse effects on financial stability may affect the equal treatment of creditors.

75. The provisions that pursue that specific objective include those mentioned by the referring court in its questions referred for a preliminary ruling – that is to say, those contained in Article 36 of Directive 2014/59, which provides for a fair, prudent and realistic valuation for the purposes of resolution before taking resolution action, and those contained in Articles 73(a) and 74 of that directive, which, on the one hand, ensure the treatment of shareholders and creditors in particular according to the 'no creditor worse off' principle, in the event of a partial transfer of the rights, assets and liabilities of the institution under resolution, and on the other hand, provide for an *ex post* valuation for the purposes of assessing whether shareholders and creditors would have received different treatment if the institution under resolution had entered into normal insolvency proceedings.

76. Those articles have the specific objective of ensuring that the resolution tools and powers provided for in Directive 2014/59 are applied in compliance with the fundamental rights guaranteed by the Charter, and in particular the right to property of the shareholders and creditors of the institution under resolution – an obligation that, as the Commission rightly points out, is already imposed on Member States under Article 51(1) of the Charter.

77. I therefore take the view that it is in the light of those general and specific objectives pursued by Directive 2014/59 that it must be assessed whether the national legislation at issue could seriously compromise the attainment of the 'result prescribed' by that directive, bearing in mind that the specific question of the protection of the right to property enshrined in Article 17 of the Charter is examined below in the analysis of the first part of the first question referred for a preliminary ruling.

78. In the second place, it must be determined whether the absence of the specific requirements referred to by that court in points (a) to (d) of the first question referred for a preliminary ruling means that the national legislation at issue could seriously compromise the attainment of the 'result prescribed' by that directive.

79. In that regard, as a general observation, I would like to point out that it is clear from the order for reference that the amendments made during the period for transposition of Directive 2014/59 by Decree-Law No 114-A/2014 of 1 August 2014 to the legislation introduced in Portugal on the recovery and resolution of credit institutions in 2012 – legislation that, as we have seen, existed before the adoption of Directive 2014/59 – have implemented some, although not all, of the provisions contained in that directive, thus bringing the national legislation closer to the regime provided for therein.

80. Even in the light of the case-law of the Court cited in points 60 to 67 above, that finding alone, in my view, makes it difficult, in the present case, to conclude that the national legislation at issue might 'seriously compromise the attainment of the result prescribed' by Directive 2014/59. Indeed, as observed by the Portuguese Government, the transposition of some of the provisions of a directive – in so far as it is not disputed that it was transposed correctly – rather than being liable seriously to compromise the attainment of the result prescribed by that directive, supports the attainment of its objectives.

81. Furthermore, according to the case-law cited in points 55 to 57 above, the obligation imposed on Member States before the deadline for transposition of a directive is a negative obligation which consists of refraining from taking measures that would compromise the result prescribed by the directive. In my view, such an obligation could hardly be breached by enacting legislation that correctly transposes the directive, albeit only partially.

82. Although those considerations may in themselves lead to a negative answer to the second question referred for a preliminary ruling, it is still worth examining in detail the requirements mentioned by the referring court, the absence of which could, in its view, seriously compromise the attainment of the result prescribed by Directive 2014/59.

3. Requirements whose absence would seriously compromise the attainment of the result prescribed by Directive 2014/59

83. In point (a) of its first question, the referring court states that the national legislation at issue, applicable at the time of the resolution of BES, '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'.

84. However, I note that – as the Commission rightly observed – Article 145-H(4) of the RGICSFF, in its 2012 version, already provided that the assets, liabilities, off-balance sheet items and assets managed by the credit institution concerned were to be subject to a valuation at the time of the transfer, carried out, at the credit institution's expense, by an independent entity appointed by the Banco de Portugal within a timescale set by the latter. The amendment of that provision in 2014 meant that the valuation also had to 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 original credit institution had been wound up immediately before the resolution action was taken.

85. Although – contrary to Article 36(1) of Directive 2014/59 – that provision does not state that the valuation must be 'fair, prudent and realistic', its wording and context appear (subject to confirmation by the referring court) to refer to the use of accounting parameters incorporating those criteria which the independent body must in any event use when carrying out that valuation.

86. In that context, I find that the circumstance mentioned by the referring court in point (a) of its first question does not suggest that the national legislation at issue could seriously compromise the attainment of the 'result prescribed' by Directive 2014/59.

87. The referring court further observes, in point (b) of its first question, that the national legislation at issue, applicable at the time of the BES resolution, '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'.

88. It is worth noting here that, even in the original 2012 version, Article 145-I(3) and (4) of the RGICSF provided that any surplus proceeds from the sale of the bridge bank's assets, less the repayment of sums provided by the Resolution Fund and other guarantee funds, were to be returned to the original credit institution or its insolvency estate, if it had gone into liquidation.

89. This rule, aimed at ensuring the 'economic neutrality' of the resolution action, avoided depriving the original credit institution (or its insolvency estate) of the proceeds of the sale of the bridge bank's assets, less the repayment of sums provided by the various funds by way of a loan. This rule was intended therefore to protect the shareholders and creditors of the original institution.

90. In addition, as noted by the Commission, it is clear that the proceeds of that sale are positively influenced by the various measures taken as part of the resolution action to create the bridge bank, such as the separation from the bridge bank of 'toxic assets', which remained in the institution under resolution, the other recovery measures, the support measures by the various funds, and the fact that the sale of the bridge bank is able to take place in an orderly manner. All these factors are intended to increase the value of any surplus proceeds from the sale of the bridge bank, in the interest of the shareholders and creditors of the original institution.

91. In my view, without prejudice to the points made in point 131 et seq. as regards compliance with Article 17 of the Charter, although the national legislation at issue does not correspond exactly to that laid down in Directive 2014/59 – which, as the referring court points out, provides for the payment of 'any consideration'[39] – it cannot be concluded that that legislation might seriously compromise the attainment of the 'result prescribed' by Directive 2014/59.

92. In point (c) of its first question, the referring court also observes that the national legislation applicable at the time of the resolution of BES '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'.

93. In other words, the referring court highlights the fact that the 'no creditor worse off' principle was not provided for in the national legislation at issue for the benefit of shareholders.

94. However, to my mind, that absence is not in itself liable seriously to compromise the result prescribed by Directive 2014/59, within the meaning of the case-law set out in *Inter-Environnement Wallonie*, especially in a situation in which, as the Commission points out, the Portuguese legal system took into account the position and interests of the shareholders of the credit institution in the course of the resolution procedures implemented under the national legislation at issue.

95. In the first place, Article 145-B(1)(a), as amended by Decree-Law No 114-A/2014, provided that, in applying the resolution measures, 'the shareholders of the institution under resolution bear first losses'. That provision therefore expressed the principle enshrined in Article 34(1)(a) of Directive 2014/59, which is a general principle of company and bankruptcy law.

96. In the second place, the national legislation on the recovery and resolution of credit institutions – as I explained in points 88 to 90 above – contained provisions such as Article 145-I(4) of the RGICSF which protect shareholders' interests.

97. In the third place, as explained by the Banco de Portugal, the national legislation, in any event, allows shareholders to bring an action for damages against the State if they can prove that the resolution action places them in a less favourable situation than if the institution had gone into liquidation.

[39] See in particular Articles 36(4)(e) and 40(4) of Directive 2014/59. It should also be noted that the parties discuss the nature of this consideration. While Massa Insolvente and BPC Lux 2 and Others contend that such consideration is compensatory in nature, according to Banco de Portugal and the Portuguese Government, it is only intended to ensure the neutrality of the resolution measure for the bridge bank and the resolution financing mechanism, should it be found that the value of the assets transferred is higher than the valuation carried out initially and on the basis of which the capital needs of the bridge bank were determined.

98. In that context, not even the circumstance mentioned by the referring court in point (c) of its first question suggests, in my view, that the national legislation at issue could 'seriously compromise the attainment of the result prescribed' by Directive 2014/59.

99. Lastly, the referring court states, in point (d) of its first question, that the national legislation at issue, applicable at the time of the resolution of BES, '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'.

100. However, it should be observed that, as mentioned in point 84 above, Article 145-H(4) of the RGICSF, as amended in 2014, provided that the independent valuation to be carried out by an independent institution appointed by the Banco de Portugal must also include an estimate, as at the date of transfer, 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. That estimate had to be made in accordance with the 'no creditor worse off' principle, as laid down in Article 145-B(1)(c) of the RGICSF (exclusively) for the benefit of creditors. As the Commission points out, that valuation largely corresponded to the valuation provided for in Article 74 of Directive 2014/59.

101. Unlike Article 74 of Directive 2014/59, the national provision does not state that the two valuations (the one referred to in point (a) and the one referred to in point (d) of the first question referred for a preliminary ruling), corresponding to those provided for in Articles 36 and 74, respectively, of Directive 2014/59, should be separate. However, the national legislation did not prohibit them from being carried out separately, which appears to have happened in the present case where two separate valuations were carried out by two different audit firms.

102. In that context, not even the circumstance mentioned by the referring court in point (d) of its first question suggests, in my view, that the national legislation at issue could seriously compromise the attainment of the 'result prescribed' by Directive 2014/59.

103. It follows from all the above considerations that legislation such as that at issue in the main proceedings, applied to the resolution of BES, is not liable seriously to compromise the attainment of the result prescribed by Directive 2014/59.

C. The first part of the first question referred for a preliminary ruling, on Article 17 of the Charter

104. By the first part of its first question referred for a preliminary ruling, the referring court asks the Court whether Article 17 of the Charter must be interpreted as precluding national legislation on the resolution of credit institutions, such as that contained in the RGICSF in the version applied to the resolution of BES, which (i) does 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 (point (a)), (ii) does not provide for potential compensation based on that valuation, to be paid to the institution under resolution or, where appropriate, to the holders of shares or other titles of ownership (point (b)), (iii) does not provide explicitly for the 'no creditor worse off' principle for the shareholders of the institution under resolution (point (c)), and (iv) does 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 (point (d)).

105. To answer the referring court's question, it is necessary to examine whether Article 17 of the Charter, and in particular paragraph 1 thereof, precludes national legislation such as that at issue in the main proceedings, contained in the version of the RGICSF applied to the resolution of BES. In order to determine the scope of the fundamental right to peaceful enjoyment of property, it is necessary, having regard to Article 52(3) of the Charter, to take account of Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), signed in Rome on 4 November 1950, which enshrines that right. [40]

106. By virtue of Article 17(1) of the Charter everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions and no one may be deprived of his or her possessions, except 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 their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

107. In that regard, it must be remembered that, according to settled case-law, the right to property guaranteed by that provision is not absolute and that its exercise may be subject to restrictions, provided that the restrictions genuinely meet objectives of general interest pursued by the European Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed. [41]

108. Furthermore, it should also be borne in mind that, in accordance with Article 52(1) of the Charter, limitations may be imposed on the exercise of the rights and freedoms recognised by the Charter, such as the right to property, as long as those limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. [42]

109. In the first place, it should be noted that it is not contested that measures such as those adopted in the main proceedings – which provide, in the context of a procedure for the recovery and resolution of a credit institution, for the transfer of the assets and liabilities of the credit institution to a bridge bank – amount to restrictions liable to prejudice the right to property, within the meaning of Article 17(1) of the Charter, of shareholders of the credit institution and creditors of the credit institution, such as bondholders, whose claims are not transferred to the bridge bank.

110. In this respect, I note that the Court has previously clarified that the protection afforded by 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

[40] Judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 49 and the case-law cited). See also judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 72).

[41] See judgments of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 69 and 70); of 16 July 2020, *Adusbef and Others* (C-686/18, EU:C:2020:567, paragraph 85); and of 14 January 2021, *Okrazhna prokuratura – Haskovo and Apelativna prokuratura – Plovdiv* (C-393/19, EU:C:2021:8, paragraph 53).

[42] Judgments of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 53), and of 16 July 2020, *Adusbef and Others* (C-686/18, EU:C:2020:567, paragraph 86).

her own benefit.[43] It follows that the protection provided for in Article 17(1) of the Charter also applies to rights with an asset value arising from the holding of shares or bonds negotiable on the capital market.

111. Moreover, it follows from the case-law of the European Court of Human Rights ('the ECtHR'), in relation to Article 1 of Protocol No 1 to the ECHR, that both shares[44] and bonds negotiable on the capital market must be regarded as 'goods' eligible for protection under that article.[45]

112. In the second place, I believe that such restrictions respect, in principle, the essential content of the right to property of the shareholders and bondholders of the credit institution affected by the resolution measures.

113. Indeed, on the one hand, resolution measures such as those described in point 109 do not, in my view, give rise to a deprivation of ownership of shares or bonds in the strict sense, since they do not involve a transfer of ownership resulting from a formal expropriation of those assets.[46] Therefore, they do not constitute interference impairing the very substance of the right to property.[47]

114. I would add, moreover, that it is possible that in some cases resolution measures involving credit institutions may lead to situations of genuine deprivation of property[48] or to situations comparable to such deprivation.[49] Nevertheless, the deprivation of property does not in itself constitute an infringement of fundamental rights if the conditions laid down in Article 17(1) of the Charter, read in conjunction with Article 52(1) of the Charter, are met.[50]

115. On the other hand, recovery and resolution actions, such as the one taken against BES, are applied to a credit institution only if that institution is failing or is likely to fail.[51] Consequently, in that situation, the loss of value of assets eligible for protection under Article 17(1) of the Charter – namely shares and bonds negotiable on the capital market – which in some cases may be written off, is due not to those measures, but to the fact that the credit institution is failing or likely to fail.

43 See judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 69).

44 See, in particular, as regards shares in a credit institution subject to a recovery and resolution decision, ECtHR judgment of 19 November 2020, *Project-trade d.o.o. v. Croatia*, CE:ECHR:2020:1119JUD000192014, § 75 and the case-law cited. See also ECtHR judgment of 11 December 2018, *Lekić v. Slovenia*, CE:ECHR:2018:1211JUD003648007, § 71 and the case-law cited.

45 ECtHR judgment of 21 July 2016, *Mamatas and Others v. Greece*, CE:ECHR:2016:0721JUD006306614, § 90.

46 In that respect, as Advocate General Saugmandsgaard Øe pointed out in his Opinion in *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2018:971, point 156), it follows from the case-law of the ECtHR that a deprivation of that kind exists in the event of a transfer of ownership resulting from a formal expropriation of possessions. See, to that effect, inter alia, ECtHR judgment of 23 September 1982, *Sporrong and Lönnroth v. Sweden*, CE:ECHR:1982:0923JUD000715175, § 62 and 63.

47 See, to that effect, judgment of 16 July 2020, *Adusbef and Others* (C-686/18, EU:C:2020:567, paragraph 89).

48 See, for example, the situation described in point 111 of the Opinion of Advocate General Kokott in *Aeris Invest* v *SRB* and *Algebris (UK) and Anchorage Capital Group* v *SRB* (C-874/19 P and C-934/19 P, EU:C:2021:563).

49 This may occur if, although technically the action does not result in a (forced) transfer of ownership of the shares or claims, their economic value is so reduced that the action essentially amounts to a deprivation of property. See ECtHR judgment of 7 November 2002, *Olczak v. Poland*, CE:ECHR:2002:1107DEC003041796, § 71.

50 On the combined interpretation of those two provisions, see judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 89). On the conditions that must be met by the contested legislation providing for a deprivation of property in order for it to comply with those two provisions of the Charter, read in the light of the requirements established by the case-law of the European Court of Human Rights, see the Opinion of Advocate General Saugmandsgaard Øe in *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2018:971, points 164 to 166).

51 See in this respect Article 32, and in particular paragraph 1(a), and recital 41 of Directive 2014/59. For the relevant Portuguese legislation, see Article 145-C of the RGICSF.

116. In reality, the resolution action only reduces the nominal value of the equity and debt instruments affected, because that value, due to the abovementioned failure or likelihood of failure, no longer corresponds to their real value. The depreciation of those instruments is thus merely formal. From an economic point of view, the position of the investors, on the whole, remains unchanged in principle: in the worst-case scenario, they are globally not any worse off than they would have been if the resolution action had not been taken. [52]

117. In the third place, there is no doubt that, in the present case, the restrictions on the right to property referred to in paragraph 109 above are provided for by law, in accordance with both Article 17(1) and Article 52(1) of the Charter.

118. In the fourth place, those restrictions do indeed meet objectives of general interest recognised by the European Union, within the meaning of Article 52(1) of the Charter, and may be considered to be in the public interest, within the meaning of Article 17(1) of the Charter, in the event of the deprivation of property.

119. Indeed, the Court has already had occasion to recognise that the objective of ensuring the stability of the banking and financial system corresponds to an objective of general interest pursued by the European Union, namely the objective of ensuring the stability of the banking system of the euro area as a whole. This is due to the central role played by financial services in the economy of the European Union and the risk that the failure of one or more banks is liable to spread rapidly to other banks, with negative spill-over effects in other sectors of the economy and significant financial losses for depositors at the banks concerned. [53] This approach is, moreover, consistent with that of the ECtHR in its settled case-law. [54]

120. In the fifth place, it is necessary to ascertain whether those restrictions are proportionate to the achievement of the objective pursued, which in turn means ensuring that those restrictions are necessary and appropriate to achieve the objective of general interest recognised by the European Union.

121. In this respect, it must be determined whether the national legislature has struck a 'fair balance … between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights', which entails ascertaining whether there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions'. [55]

122. BPC Lux 2 and Others and Massa Insolvente contend that the national legislation at issue infringes the principle of proportionality since, contrary to Directive 2014/59, it does not provide for the application of the 'no creditor worse off' principle for shareholders, but only for creditors. They submit that, to ensure the proportionality of interference with property rights, the EU

[52] See, to that effect, and by analogy with a situation in which the resolution decision was financed by means of State aid, the Opinion of Advocate General Wahl in *Kotnik and Others* (C-526/14, EU:C:2016:102, point 90).

[53] See, to that effect, judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 71, 72 and 75). See also judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 91).

[54] See also ECtHR, judgments of 7 November 2002, *Olczak v. Poland*, CE:ECHR:2002:1107DEC003041796, § 81; of 10 July 2012, *Grainger and Others v. United Kingdom*, CE:ECHR:2012:0710DEC003494010, §§ 39 and 42; and of 21 July 2016, *Mamatas and Others v. Greece*, CE:ECHR:2016:0721JUD 006306614, § 103.

[55] See, inter alia, ECtHR, judgments of 23 September 1982, *Sporrong and Lönnroth v. Sweden*, CE:ECHR:1982:0923JUD000715175, § 69; of 12 December 2002, *Wittek v. Germany*, CE:ECHR:2002:1212JUD003729097, § 53; and of 7 November 2002, *Olczak v. Poland*, CE:ECHR:2002:1107DEC003041796, § 74. See also the Opinion of Advocate General Saugmandsgaard Øe in *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2018:971, point 162).

legislature, in Directive 2014/59, sought to guarantee that shareholders and creditors who are prejudiced would not incur greater losses than they would have incurred if the credit institution had been wound up when the resolution decision was taken.

123. Those arguments are reflected in points (c) and (d) of the first question, by which the referring court questions the compatibility of the national legislation at issue with Article 17 of the Charter because, on the one hand, there is no provision for the 'no creditor worse off' principle for the shareholders of the institution subject to the resolution action, and on the other hand, there is no specific assessment as to whether the shareholders and creditors would have received more favourable treatment if the credit institution under resolution had entered into normal insolvency proceedings.

124. In that regard, I note, first of all, that the Court has already had occasion to affirm that, given the particular economic context, Member States have broad discretion when adopting economic decisions and are in the best position to determine the measures likely to achieve the objective pursued, [56] namely, in the present case, the stability of the banking and financial system. [57]

125. Furthermore, the Court has also had occasion to clarify that although there is a clear public interest in ensuring throughout the European Union a strong and consistent protection of investors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system. [58]

126. Regarding the shareholders of a bank more specifically, the Court has held that, as already noted in point 95 above, in accordance with the general rules applicable to the status of shareholders of public limited liability companies, they must fully bear the risk of their investments, up to the amount of the latter's share capital. Furthermore, as I explained in points 115 and 116, the scale of losses suffered by shareholders (and creditors) of a distressed bank will, in any event, be the same, regardless of whether those losses are caused by a court insolvency order or a resolution action. [59]

127. In that context, as I explained in points 95 to 98 above, the national legislation at issue contained provisions which took into account the position of the shareholders of the credit institution concerned and their interests in the course of the resolution procedures implemented under that national legislation. In particular, as observed in points 88 to 90 above, the provision contained in Article 145-I of the RGICSF was intended to protect the interests of shareholders and, with the aim of ensuring the 'economic neutrality' of the resolution action, avoided depriving the original credit institution (or its insolvency estate) of the proceeds of the sale of the bridge bank's assets, less the repayment of sums provided by the various funds by way of a loan.

128. Moreover, as I explained in points 100 and 101 above, that legislation also provided for a specific valuation largely corresponding to the valuation described in Article 74 of Directive 2014/59.

[56] See judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 57). See also, ECtHR, 7 November 2002, *Olczak v. Poland*, CE:ECHR:2002:1107DEC003041796, § 77 and the case-law cited.

[57] See ECtHR, judgments of 7 November 2002, *Olczak v. Poland*, CE:ECHR:2002:1107DEC003041796, § 77 and the case-law cited, and of 10 July 2012, *Grainger and Others v. United Kingdom*, CE:ECHR:2012:0710DEC003494010, § 36 and the case-law cited.

[58] See judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 91).

[59] See, to that effect and by analogy with a situation in which the resolution act was financed by State aid, judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraphs 73 to 75).

129. It follows that that legislation, particularly when read in the light of the case-law cited in points 125 and 126 above, and the principle referred to in point 95, does not place a disproportionate and excessive burden on the shareholders of the credit institution which is failing (or likely to fail), and this regardless of the absence – contrary to Directive 2014/59 – of an explicit provision of the 'no creditor worse off' principle for the benefit of the shareholders.

130. Therefore, it must be concluded that, in view of the objective of general interest pursued by the national legislation at issue – namely, of ensuring the stability of the banking and financial system and avoiding the risk of more serious consequences in the event of the insolvency of failing credit institutions than those resulting from subjecting those institutions to resolution procedures – it does not constitute a disproportionate and intolerable interference in the shareholders' right to property. Consequently, the measures provided for by that legislation cannot be regarded as unjustified restrictions on that right. [60]

131. In the sixth place, the referring court observes in points (a) and (b) of its first question that, contrary to the provisions of Directive 2014/59, [61] the national legislation at issue, applied to the resolution of BES, did not provide for potential compensation based on the valuation of the institution under resolution to be paid to that institution or, where appropriate, to the holders of shares or other titles of ownership. As previously explained, under that legislation, any surplus proceeds from the sale of the bridge bank's assets, less the repayment of sums provided by the Resolution Fund and other guarantee funds, was to be returned to the original credit institution or its insolvency estate, if it had gone into liquidation. However, Massa Insolvente and BPC Lux 2 and Others claim that this provision does not meet the two conditions mentioned in point 120, in breach of Article 17(1) of the Charter.

132. In that regard, the second sentence of Article 17(1) of the Charter provides that, in the case of a deprivation of property, it must be fairly compensated in good time. This provision thus stipulates two conditions: first, the payment of 'fair compensation'; second, that this payment must be made in 'good time'.

133. Regarding the first condition, according to the case-law of the ECtHR, compensation at the market value of the assets in question is usually 'fair'; however, compensation below market value may also be considered fair under certain circumstances. [62]

134. However, in the case of restrictions on the right to own shares or capital instruments, such as bonds, that have been issued by a bank that is failing or likely to fail, compensation in the amount of the liquidation value may be regarded as fair. In effect, once the conditions for resolution – that is to say, when the bank fails (or is likely to fail) – are met, the comparison with the hypothetical situation of liquidation or normal insolvency proceedings is entirely appropriate, since without intervention by the authorities, insolvency would be the only alternative. [63]

[60] See, to that effect, judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 74).

[61] See Articles 36(4)(e) and 40(4) of Directive 2014/59.

[62] See, in that regard, inter alia, ECtHR judgment of 25 March 1999, *Papachelas v. Greece*, CE:ECHR:1999:0325JUD003142396, § 48.

[63] See, to that effect, the Opinion of Advocate General Kokott in *Aeris Invest* v *SRB* and *Algebris (UK) and Anchorage Capital Group* v *SRB* (C-874/19 P and C-934/19 P, EU:C:2021:563, points 113 and 115).

135. Moreover, the Court has already recognised that, in the case of the failure or likely failure of a bank, equating the situation of the shareholders and creditors of that bank with a hypothetical liquidation scenario does not constitute unjustified interference with their fundamental right to property. [64]

136. It follows that legislation such as that at issue before the referring court, which provides that any proceeds from the sale of the bridge bank's assets, less the repayment of sums provided by the various guarantee funds, is to be returned to the original credit institution or its insolvency estate, if it had gone into liquidation, does not infringe the requirement for payment of 'fair compensation' within the meaning of Article 17(1) of the Charter.

137. As to the second condition – that the payment must be made 'in good time' – this means that the compensation must be paid within a reasonable time, according to the ECtHR case-law. [65]

138. The expression 'reasonable time' must be considered by comparing the situation of shareholders and creditors of the bank that is failing – or likely to fail – with a hypothetical liquidation scenario. Shareholders and creditors of a bank in such a situation would only receive payment of the sums to which they were entitled as a result of the bank's liquidation in the course of insolvency proceedings.

139. However, as the Commission points out, it is not uncommon in insolvency proceedings for any payments resulting from the liquidation of the assets of the credit institution in question to be made years, if not decades, later. Accordingly, any payment of the proceeds from the sale of the bridge bank's assets, as provided for in the national legislation at issue, does not, in principle, necessarily take longer than liquidation payments, and in fact is normally quicker. It follows that, in any event, that legislation does not infringe the second condition mentioned in point 131.

140. To conclude, it follows from all the above considerations that, in my view, Article 17(1) of the Charter must be interpreted as not precluding legislation such as that at issue in the main proceedings, applied to the resolution of BES.

IV. Conclusion

141. On the basis of all the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Tribunal Supremo Administrativo (Supreme Administrative Court, Portugal) as follows:

(1) National legislation on the resolution of credit institutions, adopted before the entry into force 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

[64] See, to that effect, judgments of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraphs 78 and 79), and of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 73 and 74). See also the Opinion of Advocate General Kokott in *Aeris Invest* v *SRB* and *Algebris (UK) and Anchorage Capital Group* v *SRB* (C-874/19 P and C-934/19 P, EU:C:2021:563, point 118).

[65] See in particular, ECtHR judgment of 21 February 1997, *Guillemin v. France*, CE:ECHR:1997:0221JUD001963292, § 54.

European Parliament and of the Council, and amended before the deadline for transposition of that directive, which, while transposing some of the provisions of that directive, did not transpose the provisions of that directive relating to:

– first, 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;

– second, potential compensation based on that valuation to be paid to the institution under resolution or, where appropriate, to the holders of shares or other titles of ownership;

– third, the express provision 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;

– fourth, a separate valuation 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,

is not liable seriously to compromise the attainment of the result prescribed by Directive 2014/59.

(2) Article 17(1) of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding such national legislation.