Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 13 February 2025 [1]

Case C-687/23

D.E.
v
Banco Santander, SA

(Request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling – Directive 2014/59/EU – Framework for the recovery and resolution of credit institutions – Resolution of Banco Popular – Compulsory transfer of shares without consideration – Action for nullity and damages brought before the resolution decision was taken – Concept of an 'accrued' liability – Right to an effective remedy)

I. Introduction

1. The present preliminary reference is yet another entry in the line of case-law that followed the 7 June 2017 resolution of the Spanish bank, Banco Popular Español, S.A. ('Banco Popular'). [2]

2. As a result of that resolution, a large number of natural and legal persons lost their investments. That resulted in a plethora of litigation before the national and EU Courts.

3. Among those disputes are a number of cases seeking a declaration of nullity and the recovery of sums paid or damages by reason of the failure of Banco Popular to adhere to certain transparency and consumer-law requirements when it sold certain financial instruments to natural and legal persons. In other words, the nature of those actions lies not in the loss of the value of said instruments as a result of the resolution, but rather in the claim of illegality of the initial subscription to those instruments.

[1] Original language: English.

[2] See Decision SRB/EES/2017/08 of 7 June 2017 of the Single Resolution Board concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., endorsed by the European Commission in its Decision (EU) 2017/1246 (OJ 2017 L 178, p. 15) (together, 'the Resolution Decision').

4. In its judgments in *Banco Santander (Resolution of Banco Popular)*[3] and *Banco Santander (Resolution of Banco Popular II)*,[4] the Court held that such judicial proceedings, to the extent that they were commenced *after* the date that the resolution decision was taken, are precluded by Directive 2014/59/EU (the Bank Resolution and Recovery Directive; 'the BRRD').[5]

5. The novelty of the present case lies in the fact that the litigation in the main proceedings started *before* the resolution took place. Does that make a difference? That, in essence, is what the Court is asked in the present case.

II. Facts, the questions referred and the procedure before the Court

6. In 2009, Banco Popular carried out an issue of 'Bonos Subordinados Canjeables por Obligaciones Subordinadas de Banco Popular Español, S. A. I/2009' ('the Subordinated Bonds I/2009').

7. On 3 October 2009, D.E., in his capacity as sole director of the company Lera Blava, S.L.U. ('the Company'), subscribed, on behalf of that company, to 15 of those convertible bonds, for a total amount of EUR 15 000.

8. On 25 May 2012, D.E., also acting on behalf of the Company, exchanged the Subordinated Bonds I/2009, which were to mature in October 2013, for other mandatory convertible subordinated bonds ('the Subordinated Bonds II/2012'). The latter were to mature in November 2015.

9. On 14 January 2013, the Company assigned ownership of those bonds to D.E. as payment for outstanding wages.

10. On 25 November 2015, and in accordance with the terms of their issue, the Subordinated Bonds II/2012 were mandatorily converted into Banco Popular shares. D.E. accordingly became a shareholder of Banco Popular.

11. On 6 October 2016, D.E. brought proceedings in his own name against Banco Popular, asking for a declaration of nullity of the Subordinated Bonds I/2009 and II/2012 by reason of an error vitiating consent as required by EU law, in particular MiFID I,[6] and seeking reimbursement of the sum initially invested. In the alternative, D.E. sought compensation for the damage caused by the failure to comply with the obligations resulting from MiFID I.

[3] Judgment of 5 May 2022, *Banco Santander (Resolution of Banco Popular)* (C-410/20, EU:C:2022:351) ('*Banco Santander (Resolution of Banco Popular)*').

[4] Judgment of 5 September 2024, *Banco Santander (Resolution of Banco Popular II)* (C-775/22, C-779/22 and C-794/22, EU:C:2024:679) ('the *Banco Santander (Resolution of Banco Popular II)*').

[5] Directive 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] According to the order for reference, D.E. relied on Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1) ('MiFID I').

12. On 31 May 2017, the Juzgado de Primera Instancia (Court of First Instance, Spain) granted D. E.'s application for a declaration of nullity and declared null and void the subscription to the Subordinated Bonds I/2009 and II/2012.[7] It appears from the national file that that court confirmed that Banco Popular did not carry out an 'appropriateness' test in respect of D.E., either in his personal capacity or as director of the Company, to assess whether he, in either capacity, had the necessary knowledge and experience to understand the risk inherent in the convertible bonds at issue.[8] Banco Popular appealed that decision to the Audiencia Provincial (Provincial Court, Spain).

13. On 7 June 2017, the Single Resolution Board adopted the Resolution Decision in respect of Banco Popular, which the European Commission approved on the same day.

14. Specifically, that resolution involved a combination of the bail-in and the sale of business tool[9] and was carried out as follows. First, by application of the bail-in tool, the value of existing shares of Banco Popular was reduced to zero. Thereafter, those shares were cancelled. The same treatment was accorded to those shares that were created by the conversion of part of the outstanding liabilities of Banco Popular (Tier 1 liabilities). Another part of those outstanding liabilities (Tier 2 liabilities) was converted into new shares, which were transferred to Banco Santander, S.A. ('Banco Santander'). Banco Popular was then sold to Banco Santander, the defendant in the main proceedings, which acquired all of Banco Popular's remaining assets through a merger by acquisition, at which point Banco Popular's legal personality was extinguished. Banco Santander also succeeded Banco Popular in the dispute in the main proceedings.

15. On 29 March 2019, the Audiencia Provincial (Provincial Court) overturned the judgment of the first-instance court on the ground that D.E. did not have standing to bring proceedings in the first place. Instead, it was considered that the Company should have brought the action.

16. Against that judgment, D.E. has brought an appeal in cassation before the Tribunal Supremo (Supreme Court, Spain). Despite opposition by both parties, the Tribunal Supremo (Supreme Court) has decided to make a preliminary reference in the present case. That court also explains that differing interpretations of, inter alia, Article 53(3) of the BRRD by Spanish courts have led to a substantial number of appeals before it, implying that guidance from the Court of Justice will assist in the resolution of a number of those cases.

17. In the light of those facts, the Tribunal Supremo (Supreme Court) submitted the following questions to the Court of Justice for a preliminary ruling:

'(1) 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 [the BRRD] 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] following an action for damages arising from

[7] According to the national file, that judgment was served on the parties on 8 June 2017.

[8] The 'appropriateness' test is mandated by Article 19(5) of MiFID I. It is further elaborated in Articles 36 and 37 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ 2006 L 241, p. 26) ('the MiFID I Implementing Directive').

[9] See, respectively, Article 24 and Article 27 of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1) ('the SRM Regulation').

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 [the BRRD], 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 [was] concluded?

(2) 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 [BRRD] – or "liability already accrued" at the time of the resolution of the bank – Article 60(2)(b) – and, as such, [is] 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 [was] concluded?'

III. Analysis

A. Setting the scene, arguments of the parties and the structure of this Opinion

18. The referring court's question turns on the interpretation of the concept of 'accrual', as it appears in Article 53(3) and Article 60(2)(b) of the BRRD.

19. Article 53(3) of the BRRD provides:

'Where a resolution authority reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability by means of the power referred to in point (e) of Article 63(1), that liability and any *obligations or claims* arising in relation to it *that are not accrued* at the time when the power is exercised *shall be treated as discharged* for all purposes, and shall not be provable in any subsequent proceedings in relation to the institution under resolution or any successor entity in any subsequent winding up.' [10]

20. In the relevant part, Article 60(2) of the BRRD provides:

'2. 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'. [11]

[10] Emphasis added.

[11] Emphasis added.

21. The BRRD does not define the concept of 'accrual'. Furthermore, some language versions of the BRRD use the same word in both Article 53(3) and Article 60(2)(b) thereof, whereas others, including the Spanish-language version, use two different words.[12] That makes it difficult to decide on the common meaning of that concept.

22. That directive, in any case, does not make reference to the law of the Member States in order to infuse that concept with meaning, indicating that that expression should be attributed an autonomous EU meaning.[13]

23. Given that 'accrued' liabilities are not affected by a bail-in, it seems clear from the text of both Article 53(3) and Article 60(2)(b) of the BRRD that a decision on whether or not a liability is 'accrued' has consequences. Indeed, according to Article 60(2)(b) of the BRRD, no liability to the holder of the relevant capital instrument that is written down 'shall remain', whereas liability towards that person remains if his or her claim is 'accrued' at the moment when the resolution decision is taken.

24. Furthermore, Article 53(3) of the BRRD also refers to the concept of an 'outstanding amount', which is reduced when the bail-in tool is used. That reference clarifies that when using that tool, the resolution authorities may only discharge the *outstanding* obligations of the bank under resolution, that is to say, those debts existing but not yet payable (that is to say, matured). That suggests that the concept of 'accrual', which, in this context, is used to exclude a liability from the bail-in, concerns those obligations that a bank has already undertaken and which are already payable (that is to say, matured) at the moment of the resolution decision.

25. The obligation to compensate creditors for illegalities that arise from the acquisition of financial instruments issued by a bank, and which is disputed before a court of law, must, at the moment when the resolution decision is taken, be viewed as a 'potential' liability of the bank under resolution. Before a court rules on such an obligation, its existence is uncertain. However, where a court confirms that payment obligation, the resulting liability and its maturity arise *ex tunc* that is, from before the date of the resolution decision.

26. Are such 'potential' liabilities 'accrued', within the meaning of the BRRD, at the moment when the resolution decision is taken?

27. Two interpretations are possible.

28. On the one hand, said liabilities may be seen as 'accrued' as, once confirmed by a court, they would have existed and would therefore have been payable before the resolution decision. On the other hand, given that those liabilities depend on the outcome of judicial proceedings, they could be seen as only 'potentially' accrued at the moment when the resolution decision is taken. In other words, they could be understood as debt outstanding at the moment of resolution, for which reason they may be understood as 'not accrued'.

[12] In some language versions, the same word is used in Article 53(3) and Article 60(2)(b) of the BRRD. Alongside the English-language version of the BRRD, that is also the case in the French- (which uses the concept of 'échu' in both provisions), the German- (which uses the concept of 'angefallen'), the Italian- (referring to the concept of 'maturati') and the Croatian- (which uses the concept of 'obračunati') language versions. Other language versions use two different words in Article 53(3) and Article 60(2)(b) of the BRRD. As the referring court explains, the Spanish-language version of the BRRD uses 'vencidas' in Article 53(3) and 'devengados' in Article 60(2) thereof. In the same vein, the Dutch-language version uses 'vorderbaar' in Article 53(3) of the BRRD and 'te betalen' in Article 60(2) thereof.

[13] The Court has already so considered in Banco Santander (Resolution of Banco Popular II), paragraph 48.

29. In the judgments in *Banco Santander (Resolution of Banco Popular)* and in *Banco Santander (Resolution of Banco Popular II)*, the Court interpreted such 'potential' liabilities, in relation to which the legal action is brought after the resolution decision is taken, as not accrued and therefore caught by the bail-in decision. That has the effect that creditors of such 'potential' liabilities therefore lose their claims against the bank under resolution in the bail-in exercise. That loss obviously influences creditors' EU-based rights, including the fundamental right to effective judicial protection. Nevertheless, in the judgments at issue, the Court considered that, on balance, the public interest in preventing financial collapse and maintaining financial stability prevails over the EU-based rights of creditors.

30. Relying on those two judgments, Banco Santander and the Spanish, Italian and Portuguese Governments all take the position that liabilities that may result from judicial proceedings, even if brought *before* the resolution, may not be considered to have been 'accrued'.

31. They explain that those claims would likely involve an outflow of funds from the bank under resolution and thus potentially hinder the effectiveness of the resolution decision. Accordingly, only claims or rights which have been recognised as being due by means of a judgment of the competent national court before the date of the resolution decision should be deemed to be 'accrued', within the meaning of the BRRD.

32. The Commission, however, takes the opposite view. It considers that the concept of 'accru[al]', as used in Article 53(3) of the BRRD, should include a liability or obligation which, at the point of resolution, is only 'provisionally' matured, and which a subsequent judgment would, even after a resolution decision is taken, merely confirm.

33. According to the Commission, that interpretation is warranted by the requirement of Article 36 of the BRRD that the valuation is 'fair, prudent and realistic'. Such a valuation should take into account contingent liabilities of pending judicial proceedings. Moreover, it would not appear justified to deny compensation to a person who brought judicial proceedings prior to the point that a resolution decision is taken.

34. The present case thus raises the question of whether the balance between the interest of financial stability and the effective judicial protection of the EU-based rights of creditors, for the protection of which judicial proceedings were brought before the resolution decision was taken, should be struck in the same way as when those actions are brought only after the resolution decision is taken.

35. That question presents itself in the form of seeking guidance on whether 'potential' liabilities, which are already subject to judicial proceedings when the resolution decision is taken, must be deemed to be 'accrued', within the meaning of the BRRD. To answer that question, I will proceed as follows. I will first explain why I consider this reference to be admissible (B). As to the substance, I will start by briefly recalling the reasoning underlying the two judgments in which the Court considered that actions brought *after* the resolution decision are precluded by the BRRD (C). I will then turn to the question of whether the same reasoning is also applicable if the actions before the courts are brought *prior to* the resolution decision (D). My analysis will lead me to propose that the Court find that the purpose of the resolution framework established by the BRRD is not capable of overriding the right to effective judicial protection of the EU-based rights of consumers or investors, when the action concerning those rights is brought *before* the resolution decision (IV).

B. Admissibility

36. Banco Santander questions the admissibility of this reference. It explains that the questions referred for a preliminary ruling would be irrelevant to the resolution of the dispute in the main proceedings, since the national court allegedly decided to forego an assessment, under national law, of whether the applicant at first instance had standing to bring proceedings at all.

37. In that regard, I recall that the national court, in principle, holds the responsibility to determine the need and relevance of the questions referred, such that its questions enjoy a presumption of relevance. The Court of Justice may refuse to answer only where it is quite obvious that the answer to the question cannot be of any use in the main proceedings.[14]

38. As the Spanish Government explains, an answer to the questions referred is necessary for the referring court, since, if the Court of Justice were to reply that the action at issue is precluded by the BRRD, the referring court would have to dismiss D.E.'s claim without the need to examine whether he would have had standing to bring an action in the first place.

39. Accordingly, it is not manifestly obvious that the reference is inadmissible. The Court of Justice should, therefore, answer the referring court's questions.

C. The two earlier judgments and the present situation

40. As I have stated, the present preliminary reference arises against the background of the judgments in Banco Santander (Resolution of Banco Popular) and in Banco Santander (Resolution of Banco Popular II). In those judgments, the Court considered that a decision to resolve Banco Popular had the effect of precluding the bringing of judicial proceedings by which the applicants at issue claimed compensation arising from the failure of that bank to abide by certain standards of marketing financial instruments.

41. The case giving rise to the judgment in *Banco Santander (Resolution of Banco Popular)* concerned a nullity action brought by two natural persons who had purchased Banco Popular shares in 2016 as part of a capital increase that was the subject of a public offer to subscribe. After the resolution of that bank and the reduction of its share capital to zero, in 2018, those natural persons claimed that their initial consent to the share purchase agreement was invalid, inter alia, by reason of the incomplete or inaccurate nature of the prospectus at issue. In the resulting first-instance judgment, the national court took the position that the rules of EU law on civil liability in relation to the information given in a prospectus, as contained in the Prospectus Directive,[15] could take precedence over the principles governing the resolution of credit institutions, as imposed by the BRRD.[16] It therefore declared the share purchase agreement at issue void and ordered the reimbursement of the amount invested by the applicants, together with interest.[17]

[14] See, for example, judgment of 10 December 2018, Wightman and Others (C-621/18, EU:C:2018:999, paragraphs 26, 27 and 30 and the case-law cited).

[15] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ 2003 L 345, p. 64).

[16] See the judgment in Banco Santander (Resolution of Banco Popular), paragraph 23.

[17] See Banco Santander (Resolution of Banco Popular), paragraph 22.

42. The Court did not uphold that interpretation. In a preliminary ruling, sought on appeal, the Court held, on the contrary, that the BRRD permits a derogation from rights based on other EU-law instruments. It explained that the nature of the resolution regime, as a derogation, 'implies that the application of other provisions of Union law may be disregarded where these are likely to hinder the implementation of the resolution procedure or deprive it of practical effect'. [18]

43. Therefore, in order to ensure the full effectiveness of the resolution procedure envisaged by the BRRD, shareholders whose shares are cancelled by a resolution decision are prevented from bringing an action for a declaration of nullity or for damages *after* the resolution decision is adopted.

44. The above logic was extended by the Court in Banco Santander (Resolution of Banco Popular II) to actions brought by holders of bonds that were converted into shares before the resolution and then cancelled, [19] and by holders of bonds that were converted into shares during the resolution but transferred to Banco Santander without compensation. [20] As in Banco Santander (Resolution of Banco Popular), the creditors in Banco Santander (Resolution of Banco Popular II) brought actions for nullity and damages after the resolution, claiming the illegality of the original issue of those financial instruments, which were later converted into shares. [21] In those cases, too, the Court held that an action for damages or a declaration of nullity of the original bonds could not be brought *after* the resolution decision was taken. [22]

45. The situation in the present case is similar. It is closest to the situation in Cases C-775/22 and C-779/22, the first two of the three joined cases in Banco Santander (Resolution of Banco Popular II), as the bonds, the legality of the purchase of which is challenged by D.E., were converted into shares prior to the resolution of Banco Popular. The important difference between the two cases, however, lies in the fact that the applicants in the former proceedings brought their actions in court only *after* the resolution of Banco Popular, whereas D.E. brought his action some eight months *before* the Resolution Decision was taken.

46. It is, therefore, first necessary to understand the reasons which led the Court to find that the bringing of actions for nullity or for damages is precluded by the BRRD after a resolution decision is taken. Only thereafter may one pose the question of whether the same rationale is also applicable to a situation where such actions are brought before the date of the resolution decision.

47. In Banco Santander (Resolution of Banco Popular) and in Banco Santander (Resolution of Banco Popular II), the Court clarified that a derogation from other provisions of EU law that bestow rights on individuals may be explained by the 'overriding public interest' to 'preserve the financial stability of the Member States' in an exceptional and urgent economic context. [23]

48. The Court held that if those other provisions of EU law, such as the Prospectus Directive, were to be applied, that would be 'likely to hinder the implementation of the resolution procedure or deprive it of practical effect'. [24]

[18] See Banco Santander (Resolution of Banco Popular), paragraph 37.

[19] That was the situation at issue in Cases C-775/22 and C-779/22.

[20] That was the situation in Case C-794/22.

[21] See *Banco Santander (Resolution of Banco Popular II)*, paragraphs 29 and 37.

[22] See *Banco Santander (Resolution of Banco Popular II)*, paragraphs 61 and 70.

[23] See, in that respect, Banco Santander (Resolution of Banco Popular), paragraph 37; repeated in Banco Santander (Resolution of Banco Popular II), paragraph 56.

[24] See the judgment in Banco Santander (Resolution of Banco Popular), paragraphs 37 and 40, and the judgment in Banco Santander (Resolution of Banco Popular II), paragraph 56.

49. That is because both an action for a declaration of nullity and an action for damages, if successful, would require the bank under resolution, or its successor, to reimburse in full the sums invested during the subscription of shares (or bonds converted into shares) that have, however, been written down as a result of the resolution decision. Such actions, the Court considered, would therefore call into question the entire valuation upon which the resolution decision is based. [25]

50. During the valuation, the obligations to reimburse or pay damages that might be confirmed in actions before the courts are only 'potential' liabilities of the bank under resolution, as their existence is contingent on the outcome of pending judicial proceedings. Furthermore, where proceedings have not yet been brought at the moment of the valuation, which serves as a basis for the resolution decision, the resolution authorities would not be aware of the existence of such 'potential' liabilities.

51. Accordingly, the Court considered that 'potential' liabilities, subject to actions initiated *after* the date that the resolution decision is taken, must be interpreted as 'not accrued' and therefore as discharged for all purposes, as provided for in Article 53(3) of the BRRD, and as implied in the first subparagraph of Article 60(2) thereof. [26]

52. That is because the effect of a successful action would retroactively create liabilities which were not accounted for when the resolution decision was taken, thus reducing the amount of the capital instruments subject to bail-in. [27]

53. In other words, the Court held that the concept of 'accrued' obligations or claims, within the meaning of Article 53(3) of the BRRD, excludes those types of claims that would result from successful actions brought *after* the adoption of the resolution decision at issue. [28]

54. In Banco Santander (Resolution of Banco Popular) and in Banco Santander (Resolution of Banco Popular II), the Court was, however, not asked to decide whether the same logic also precludes actions for a declaration of nullity and for damages where those actions are brought *before* the date of a resolution decision.

55. The liabilities of the bank under resolution in such a scenario are also only 'potential' liabilities, as their existence is not certain until the outcome of the judicial proceedings is known. However, in that scenario, the proceedings are already pending before a court at the moment when the liabilities of the bank under resolution are assessed.

56. The question is, therefore, left open as to whether 'potential' liabilities that are contingent on judicial proceedings brought *before* a resolution decision, but not yet decided at the moment that that resolution decision was taken, must be considered 'accrued' within the meaning of the BRRD.

57. To my mind, even if the reasoning behind the judgments in Banco Santander (Resolution of Banco Popular) and in Banco Santander (Resolution of Banco Popular II) is largely also applicable to a situation such as the one at issue in the present case, there are additional factors that warrant a different interpretation. It is those factors to which I shall now turn.

[25] See Banco Santander (Resolution of Banco Popular), paragraph 43. Similarly, Banco Santander (Resolution of Banco Popular II), paragraph 59.

[26] See, to that effect, Banco Santander (Resolution of Banco Popular), paragraphs 41 and 42.

[27] See, to that effect, *Banco Santander (Resolution of Banco Popular II)*, paragraph 53.

[28] See *Banco Santander (Resolution of Banco Popular II)*, paragraphs 49 and 50.

D. Are 'potential' liabilities subject to judicial proceedings brought before the resolution decision 'accrued' or 'not accrued'?

1. The purpose of the BRRD – are claims in pending judicial proceedings capable of undermining the resolution decision?

58. As I have explained, the judgments in Banco Santander (Resolution of Banco Popular) and in Banco Santander (Resolution of Banco Popular II) are based on the consideration that the purpose of the BRRD – to ensure the stability of the financial system – may be jeopardised if the valuation of the assets of a bank, on the basis of which a resolution decision is adopted, could subsequently be modified by means of judicial proceedings filed after the resolution decision is taken.

59. To my mind, the same logic cannot be extended to 'potential' liabilities, that is to say, those that might materialise if the action brought before the resolution decision is taken is successful.

60. In respect of the valuation of the assets of the bank under resolution, there is an important difference between actions brought before the valuation and those brought thereafter. The former are known, or at least have the potential of being known, to the valuer and, consequently, to the resolution authorities. Conversely, the valuer or competent authority cannot predict the latter.

61. Taking that difference into consideration, would interpreting such proceedings as an 'accrued' liability jeopardise the resolution procedure and deprive the resolution decision of its practical effect?

62. The Commission argues that, should the principles of valuation be respected, treating prior actions as accrued liabilities would not undermine the effectiveness of the resolution procedure.

63. Banco Santander, on the contrary, claims that such treatment of potential but uncertain liabilities might discourage the acquisition of a bank under resolution and thus bring into question the effectiveness of the sale of business tool when combined with a bail-in, as was the case in the resolution of Banco Popular.

64. According to Article 36(1) of the BRRD, any resolution action must be based on 'a fair, prudent and realistic valuation of the assets and liabilities' of the entity under resolution. [29]

65. In other words, the valuation must provide a realistic picture as to what extent a 'potential liability' may represent a loss on the assets of the bank under resolution.

66. Whereas the valuation of an entity under resolution cannot take into consideration 'potential' liabilities arising from judicial proceedings not yet initiated at that point in time, the same cannot be said of proceedings that are pending at that point in time.

[29] Additionally, Article 36(3) and (4) of the BRRD explains that 'the objective of the valuation shall be to assess the value of the assets and liabilities' of the institution at issue, with the purpose of ensuring that, 'in all cases, … any losses on the assets of the institution or entity … are fully recognised at the moment the resolution tools are applied or the power to write down or convert relevant capital instruments is exercised'. Moreover, as Article 36(5) and (6) in the relevant part lays down, the valuation must 'be based on prudent assumptions, including as to rates of default and severity of losses' and 'be supplemented by … an updated balance sheet' and 'the list of outstanding on balance sheet and off balance sheet liabilities shown in the books and records of the institution or entity' at issue.

67. Accordingly, to the extent that 'potential' liabilities, contingent on the outcome of *pending* judicial proceedings, may be accounted for at the moment of resolution, such proceedings are not capable of undermining the resolution process.

68. It is true that the BRRD does not lay down how to establish the liabilities envisaged in Article 36 thereof. [30]

69. However, it is apparent from the first valuation report in the resolution of Banco Popular of 5 June 2017 that that report was 'drafted taking into account … the valuation methodology criteria of chapter II' [31] of the applicable regulatory technical standards of the European Banking Authority. [32] In the relevant part, those standards provide that 'the valuer shall particularly focus on … legal disputes and regulatory actions, the expected cash flows of which may be subject to varying degrees of uncertainty relating to their amount and/or timing'. [33]

70. It is also apparent from the second valuation report of 6 June 2017, to which Banco Santander refers in its observations, that, in the valuation of Banco Popular, account was taken of loss of fair value estimates on litigation concerning 'mis-selling claims on convertible notes' in its accounting statements. [34] As the clarification document on the third valuation report explains, those include, with a low and a high scenario, claims arising from the Subordinated Bonds II/2012, precisely the financial instruments at issue in the present case. [35]

71. Banco Santander contends that, given the extreme urgency in which a resolution typically takes place, there may be instances where a valuation occurs on the basis of a report that does not take account of all pending judicial proceedings.

72. While it is indeed possible that some pending litigation will not be accounted for, that level of uncertainty is apparent in any 'stock-taking' exercise, and so arguably forms part of the general risk undertaken by the acquiring entity.

73. Moreover, as observed by the Spanish Government, the potential liabilities arising from judicial proceedings of the type that are at issue in the present case are reflected, at least to some extent, in a publicly listed bank's financial statements. In that regard, I observe that it arises from

[30] It should be noted, however, that, in 2019, the Single Resolution Board published a framework for valuation to lay down the principles and methodologies for valuation reports for resolution decisions, which mandates that the valuer take into consideration 'contingent liabilities related to litigations'; see Single Resolution Board, Framework for Valuation, February 2019, p. 22, available at: https://www.srb.europa.eu/system/files/media/document/2019-02-01%20Framework%20for%20Valuation.pdf.

[31] See Single Resolution Board, 'Valuation report for the purposes of Article 20(5)(a) of Regulation (EU) No 806/2014 informing the determination of whether the conditions for resolution or the conditions for the write down or conversion of capital instruments are met', 5 June 2017, available at: https://www.srb.europa.eu/system/files/media/document/valuation_1_report_updated_on_30_10_2018.pdf ('the first valuation report'), p. 1.

[32] European Banking Authority, 'Regulatory technical standards on valuation for the purposes of resolution and on valuation to determine difference in treatment following resolution under Directive 2014/59/EU on recovery and resolution of credit institutions and investment firms' (EBA/RTS/2017/05 and EBA/RTS/2017/06) ('the EBA Technical Standards'), 23 May 2017, available at: https://www.eba.europa.eu/documents/10180/1853532/88566587-ff6f-4116-a08e-282eb4ea2f78/Final%20draft%20RTSs%20on%20valuation%20in%20resolution%20(EBA-RTS-2017-05%20&%20EBA-RTS-2017-06).pdf.

[33] See Article 8 of the EBA Technical Standards.

[34] See point 2.4 of the 'Hippocrates provisional valuation report – Sale of business scenario', 6 June 2017, available at: https://www.srb.europa.eu/system/files/media/document/2023-08-25_BPE_%20Revised%20NCV_Valuation-2-Report.pdf (in which Deloitte highlights that 'we have accepted the loss of fair value estimate as reasonable, but adjusted upwards the population of affected customers, with a low and high scenario.' The first valuation report of 5 June 2017 does not reflect any details on loss of fair value estimates arising from litigation; see https://www.srb.europa.eu/system/files/media/document/valuation_1_report_updated_on_30_10_2018.pdf.

[35] See point 5.11.2 of Deloitte's 'Clarification document of valuation of difference in treatment – Banco Popular Español', 18 December 2019, available at: https://www.srb.europa.eu/system/files/media/document/annex_ii_-_clarification_document_en.pdf.

points 3 and 5 of the Resolution Decision that Banco Popular is the parent company of Banco Popular Group, and is listed on the Spanish stock exchange, that is to say, a regulated market within the meaning of Article 4(14) of MiFID I. By virtue of the International Accounting Standards Regulation, publicly traded companies on such markets must prepare their consolidated financial statements in conformity with certain international accounting standards [36] that the Commission adopts into EU law. [37] Among the many [38] standards that the Commission had adopted into EU law at the point in time when the Resolution Decision in the present case was taken were specific requirements to reflect in the accounts the uncertainty arising, inter alia, from potential costs 'of litigation in progress'. [39]

74. Accordingly, I find it neither convincing nor correct to assert that pending litigation, including that relating to the mis-selling of capital instruments, would not be reflected in the valuation of a bank for the purposes of resolution. That is so particularly if the valuation is conducted in conformity with the principles of a 'fair, prudent and realistic valuation', within the meaning of Article 36 of the BRRD. [40]

75. Therefore, unlike actions brought only after the resolution decision is taken, actions brought beforehand cannot be deemed capable of calling into question the valuation on the basis of which the resolution decision is taken.

76. The purpose of the BRRD does not, therefore, require that such claims be excluded from the concept of 'accrued' liabilities, within the meaning of Article 53(3) and Article 60(2) of the BRRD.

2. Balancing the purpose of the resolution procedure and the right to effective judicial protection

77. Given the urgency of the resolution and the uncertainties of whether a valuation in such conditions is capable of accounting for all 'potential' liabilities, one could argue that it might seem a far simpler solution to consider that claims based on judicial proceedings that are pending at the date of a resolution decision should be deemed 'not accrued', and therefore discharged by a bail-in. It might even be that potential acquirers of a failing bank would have a

[36] See Article 4 Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ 2002 L 243, p. 1) ('the International Accounting Standards Regulation'). As Article 2 of that regulation further explains, '"international accounting standards" shall mean International Accounting Standards (IAS), International Financial Reporting Standards (IFRS) and related Interpretations (SIC-IFRIC interpretations), subsequent amendments to those standards and related interpretations, future standards and related interpretations issued or adopted by the International Accounting Standards Board (IASB)'.

[37] See Article 3(1) and (4) of the International Accounting Standards Regulation.

[38] By virtue of Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ 2008 L 320, p. 1) ('Regulation (EC) 1126/2008'), the Commission adopted 'all standards presented by the International Accounting Standards Board (IASB) as well as all interpretations presented by the International Financial Reporting Interpretations Committee (IFRIC) and adopted within the Community by 15 October 2008 in full, except for IAS 39 (related to recognition and measurement of financial instruments), of which limited parts have been omitted' (see recital 2 and Article 2 thereof).

[39] See paragraph 117 of International Accounting Standard 1 in the annex to Regulation (EC) 1126/2008, which, in the version applicable at the time of the Resolution Decision, explains in the relevant part that 'Determining the carrying amounts of some assets and liabilities requires estimation of the effects of uncertain future events on those assets and liabilities at the balance sheet[,] for example … provisions subject to the future outcome of litigation in progress. … These estimates involve assumptions about such items as the risk adjustment to cash flows or discount rates used'. See also paragraph 34 of International Accounting Standard 11 in the same annex, which relates to contract costs that need to be recognised as an expense, which include 'the outcome of pending litigation', and which requires, pursuant to paragraph 36 et seq. of International Accounting Standard 37 thereof, the measurement of best estimates.

[40] As I explain in footnote 34 of this Opinion, in the case of *Banco Popular*, Deloitte did, in fact, adjust the amount of affected customers arising from the type of proceedings as those in the present case, and thus sought to reflect a more accurate loss of fair value estimate.

greater incentive to agree to a takeover if the assets they would acquire are free of *any* 'potential' liabilities, including those contingent on pending judicial proceedings. In this way, the purpose of ensuring the effectiveness of the resolution procedure may be better served.

78. However, one should not forget that that solution would also discharge those rights which legal subjects derive from EU law, such as the Prospectus Directive and MiFID I.

79. Such rights are protected by the right to effective judicial protection, a general principle of EU law, expressed today in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. That fundamental right guarantees anyone who claims that his or her EU-based rights have been infringed access to a court with the power to provide effective legal remedies.

80. By advocating that pending judicial proceedings should be treated as 'not accrued' for the purposes of the BRRD, Banco Santander and the Spanish, Italian and Portuguese Governments, in effect, consider that the resulting interference with the right to an effective remedy is justified.

81. In *Banco Santander (Resolution of Banco Popular II)*, in which the applicants relied, among other things, on their right to effective judicial protection, the Court recalled that that right is not absolute, and may be limited for the sake of other important public interests, such as the maintenance of financial stability. [41]

82. Without providing many details, in its balancing exercise, the Court considered that precedence should be given to the interest of the stability of the financial system over the effective protection of the EU-based rights of investors. The Court relied on its earlier case-law, in which it held that 'although there is a clear public interest in ensuring, throughout the European Union, 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'. [42]

83. However, in the paragraph cited above, the Court was careful to indicate that the interest of investors cannot be held to prevail '*in all circumstances*' over the public interest of the stability of the financial system.

84. By treating pending judicial proceedings as 'accrued' liabilities, that objective of financial stability is not undermined in the same way as it is by allowing actions post-dating the resolution decision. That is so because the valuation on which a resolution decision is based could take pending actions into consideration. From that perspective, the present case differs from the circumstances at issue in Banco Santander (Resolution of Banco Popular) and in Banco Santander (Resolution of Banco Popular II).

85. Furthermore, whereas, in the latter two cases, the investors had not yet exercised their right of access to a court to defend their EU-based rights before the resolution decision interfered with those rights, in the circumstances of the present case, D.E. ascertained his rights and obligations and took steps to protect them at a point in time prior to the Resolution Decision, altering the framework within which he found himself.

[41] Banco Santander (Resolution of Banco Popular II), paragraph 80.

[42] Banco Santander (Resolution of Banco Popular II), paragraph 81.

86. If the resolution decision were permitted, in and of itself, to discontinue pending judicial proceedings, that would constitute a significant interference with the right to effective judicial protection. [43]

87. To my mind, therefore, the circumstances of the present case require the Court to attribute, on the one hand, more weight to the right of investors to effectively protect their EU-based rights in judicial proceedings brought before the resolution decision and, on the other hand, less weight to the objective of financial stability, given that the latter is achievable even where effective judicial protection is afforded precedence.

88. By bringing proceedings to protect his EU-law rights some eight months prior to the Resolution Decision, and therefore, arguably, entirely independently of that subsequent procedure, D.E. placed himself in a different position from other holders of the Subordinated Bonds II/2012. [44]

89. The maxim *iura vigilantibus*, which is respected if the pending actions are given their deserved weight in the balancing exercise, is an additional argument for the foregoing conclusion that it would constitute an unjustified restriction of the right to an effective remedy if the Court interpreted the BRRD as permitting the retroactive curtailing of judicial proceedings that were commenced prior to the point that a resolution decision was taken, and which remain pending at that time.

90. In addition, such a solution would enhance trust in the judicial system, which the opposite finding might undermine.

91. In conclusion, the limitation of the right to effective judicial protection of investors based on EU law cannot be justified by the objective of maintaining financial stability in a situation where judicial proceedings to protect an EU-based right are brought prior to and independently of a resolution decision.

3. Additional issues

(a) Who should bear the costs of an infringement of the EU-based rights of creditors of the bank under resolution?

92. A few more arguments by Banco Santander warrant reflection.

93. It argues that pending cases should be treated as 'unaccrued' liabilities as, otherwise, those 'potential' liabilities would be transferred to it as successor bank, even though that bank had nothing to do with the actions of Banco Popular that form the basis of the pending judicial proceedings.

[43] See, by analogy, judgment of 29 April 2021, Banco de Portugal and Others (C-504/19, EU:C:2021:335, paragraph 63).

[44] See, along the same lines, Opinion of Advocate General Richard de la Tour in Banco Santander (Resolution of Banco Popular) (C-410/20, EU:C:2021:976, point 65) (explaining, in relation to an argument alleging a breach of equality, that 'objectively, the shareholders who acquired their securities on the basis of an incorrect or inaccurate prospectus are not in the same situation if they obtained a judgment ordering payment of compensation before the resolution decision or if they initiate legal proceedings only after that decision').

94. In the circumstances of the present case, D.E. claims an infringement of a mandatory provision of MiFID I that seeks to protect purchasers of financial instruments from inappropriate purchases. Those rules include the 'appropriateness' test, laid down in Article 19(5) of MiFID I, which, as a rule,[45] requires financial institutions to obtain information about a client's knowledge and experience to understand the risks involved in relation to an investment service or transaction, prior to that transaction taking place, and to warn that client if need be.[46]

95. An infringement of those rules may lead to the nullity of the agreement by which the relevant financial instrument was purchased and entitle the purchaser to reimbursement of the purchase price, together with interest, or damages.

96. According to Banco Santander, given that D.E. was, at the moment of resolution, a shareholder of Banco Popular, in accordance with the principle that shareholders should bear first losses,[47] his claim should be treated as not accrued, and therefore as discharged prior to the transfer of any 'accrued' liabilities to the successor entity.

97. To my mind, D.E.'s claim for reimbursement or damages, which would be confirmed if his action is successful, does not prevent the shares he owned prior to a national court's decision from being cancelled in the resolution procedure, or his bonds from being convereted into shares and cancelled or transferred without compensation. The successful outcome of pending judicial proceedings would place D.E. in a position of a different type of creditor. His claim would not be a claim of an investor in bonds, but would rather emanate from the mis-sale of those bonds of which he would cease to be an owner. The obligation of Banco Santander to meet that claim would have existed and been payable (that is to say, it would have matured) before the Resolution Decision was taken, just like other 'accrued' liabilities.

98. Banco Santander considers, however, that such a claim should nevertheless be treated as not accrued at the moment of resolution. D.E.'s loss due to the bail-in decision should thus be categorised as the kind of loss of any other creditor with a claim pending at the moment of resolution, that is, the kind of claim that is discharged by reason of the bail-in. Such creditors have rights under the 'no creditors worse off principle'.[48] Under that principle, a creditor who, after a valuation and comparison between two procedures (resolution and normal insolvency procedure), is found to be entitled to payment of his claim or part of his claim, may, on the basis of Article 75 of the BRRD, demand the difference from a resolution financing arrangement.[49] Such liability should, therefore, according to Banco Santander, be mutualised, and not incurred by the successor of the bank under resolution. However, such a solution would clearly not enable D.E. to have reimbursed the entire amount that is owed to him, even though the successful outcome of his judicial proceedings would entitle him to that amount.

[45] See judgment of 30 May 2013, Genil 48 and Comercial Hostelera de Grandes Vinos (C-604/11, EU:C:2013:344, paragraph 31). See also paragraphs 39 and 47 of that judgment, which highlight that the purpose of Article 19 of MiFID I is, among other things, to protect investors.

[46] See Article 19(5) of MiFID I, read alongside recitals 58 to 60 and Articles 36 and 37 of the MiFID I Implementing Directive. However, as the second paragraph of Article 36 of the MiFID I Implementing Directive highlights, 'an investment firm shall be entitled to assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or product, for which the client is classified as a professional client'.

[47] See Article 34(1)(a) of the BRRD.

[48] Where the bail-in tool, as reflected in Article 73(b) of the BRRD, has been applied, that principle requires that 'the shareholders and creditors whose claims have been written down or converted to equity do not incur greater losses than they would have incurred if the institution under resolution had been wound up under normal insolvency proceedings'.

[49] A resolution financing arrangement is an arrangement which Member States must institute on the basis of Article 100 of the BRRD and which allows for the mutualisation of the types of financial burden listed in Article 101 thereof.

99. If, however, that 'potential' liability is transferred to the successor bank, Banco Santander, in the present situation, D.E. would retain his entire claim, provided his judicial proceedings succeed. That solution would be consistent with the proposed balancing of outcomes in the circumstances in which a creditor brings an action to protect his or her EU-based rights before a resolution decision is taken.

100. I do not see an issue with Banco Santander taking over such a 'potential' liability in the sale of business arrangement, given that the effect of those liabilities on the value of the assets of Banco Popular was accounted for in the valuation decision. The fact that Banco Santander cannot be held responsible for any and all infringements of EU law by Banco Popular prior to resolution has no bearing on the fact that, as part of the resolution arrangement, Banco Santander assumed a certain amount of business risk linked to Banco Popular.

101. That being said, there is nothing that would speak against the resolution authorities envisaging, in the resolution decision, that such 'potential' liabilities, even if 'accrued', are *not* to be transferred to the successor bank, but that such liabilities, should they materialise, are to be mutualised instead, either by means of a resolution financing arrangement or through the Single Resolution Fund. [50]

102. That, however, is a matter of discretion, reflected in the choices made in each resolution procedure and in the negotiations between the resolution authorities and the acquiring entity. In the absence of such arrangements, Banco Santander cannot complain, at a point in time after those negotiations have been finalised by means of the sale of business tool, that it should not be held responsible for liabilities transferred to it pursuant to the resolution framework.

103. In other words, Banco Santander's arguments that the successor bank should not incur liability for claims resulting from judicial proceedings against a failing bank, even though the acquirer knew, or should have known, about such 'potential' liabilities prior to offering to acquire said bank, do not influence my proposal to treat pending judicial proceedings as 'accrued' liabilities.

(b) Possible abusive judicial proceedings

104. Banco Santander further contends that the interpretation that 'potential' claims contingent on pending judicial proceedings are 'accrued' liabilities would lead, in future resolutions, to a situation in which shareholders and creditors could circumvent the effect of the bail-in tool by bringing judicial proceedings prior to the adoption of a resolution decision. Such practices, if permitted, would limit the powers of the resolution authorities to write down or reduce the equity and outstanding amounts due when resorting to the bail-in tool.

105. It is indeed possible that those creditors that learn about the potential for a resolution decision ahead of time might try to hedge their investments by bringing judicial proceedings, which, if interpreted as 'accrued' liabilities under the BRRD, would prevent their investment from being written off in the application of the bail-in tool.

[50] See, in that respect, Article 76(1) and (2) of the SRM Regulation.

106. However, while there is, of course, potential for that type of litigation, it must be taken into consideration that bringing judicial proceedings carries cost, which will not be covered if an action stands no chance of succeeding. Furthermore, a resolution decision is supposed to be taken urgently and in secrecy. Therefore, investors, even where they suspect a possible resolution, are unlikely to know its details.

107. Nevertheless, there might be a reason to consider as 'accrued' only those claims contingent on actions brought up to a certain date before the resolution decision, such as, for example, the date taken into consideration for the purposes of the valuation of a failing bank, on the basis of which a resolution decision is taken.

108. In that respect, Banco Santander explains that Deloitte's valuation took into consideration the situation as it existed on 31 March 2017, whereas the Resolution Decision was adopted on 7 June 2017. It could thus be possible to treat actions brought after 31 March 2017 in the same way as actions brought after a resolution decision is taken, and therefore as 'not accrued' at that point in time.

109. While that argument warrants reflection, it does not affect the position of D.E. in the circumstances of the present case, in which his action was brought some eight months prior to the Resolution Decision being taken.

110. Therefore, the arguments of Banco Santander based on the possible abuse of the Court's interpretation whereby prior actions are treated as 'accrued' liabilities cannot be accepted as important enough to outweigh other arguments in favour of such an interpretation.

IV. Conclusion

111. In the light of the foregoing, I propose that the Court of Justice answer the questions referred by the Tribunal Supremo (Supreme Court, Spain) as follows:

Article 53(1) and (3) and Article 60(2)(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, read in the light of the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as meaning that a claim or right that arises from judicial proceedings that are commenced before the competent courts of a Member State against a financial institution or entity prior to the point that that institution or entity becomes the subject of a resolution decision, but which remain pending at that point in time, constitutes an 'accrued' liability.