Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 21 March 2024[1]

Joined Cases C-498/22 to C-500/22

Novo Banco SA – Sucursal en España,
Banco de Portugal,
Fundo de Resolução
v
C.F.O. (C-498/22)
J.M.F.T.,
M.H.D.S. (C-499/22)
and
Proyectos, Obras y Servicios de Badajoz SL (C-500/22)

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

(Reference for a preliminary ruling – Reorganisation and winding up of credit institutions – Directive 2001/24/EC – Articles 3 and 6 – Transfer of rights, assets or liabilities to a bridge institution – Transfer back to the credit institution subject to the reorganisation measure – *Lex concursus* – Effect of a reorganisation measure in other Member States – Mutual recognition – Effect of a failure to comply with the obligation to publish the reorganisation measure – Charter of Fundamental Rights of the European Union – Articles 17, 21, 38 and 47 – Right to property – Effective judicial protection – Consumer protection – Principles of legal certainty, the protection of legitimate expectations, equality and the prohibition of any discrimination on grounds of nationality – Directive 93/13/EEC – Unfair terms)

I. Introduction

1. These requests for a preliminary ruling concern the interpretation of Article 3(2) and Article 6 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[2] and of Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts,[3] read in the light of Articles 17, 21, 38 and 47 of the Charter of Fundamental Rights of the European Union[4] and of the principles of legal certainty and the protection of legitimate expectations.

1 Original language: French.
2 OJ 2001 L 125, p. 15.
3 OJ 1993 L 95, p. 29.
4 'The Charter'.

2. The requests have been made in proceedings between Novo Banco SA – Sucursal en España ('Novo Banco Spain'), supported by the Banco de Portugal (Central Bank of Portugal) and the Fundo de Resolução (Resolution Fund, Portugal), and a number of customers of Novo Banco Spain, the successor of Banco Espírito Santo SA – Sucursal en España ('BES Spain'), a branch of the Portuguese credit institution Banco Espírito Santo SA ('BES') which Novo Banco SA succeeded following the reorganisation measures adopted by the Central Bank of Portugal. The requests concern the impact of those reorganisation measures on various contracts for financial products and services.

3. I will propose that the Court, first, hold that the failure to publish a decision, contrary to Article 6 of Directive 2001/24, the purpose of such publication being to enable third parties to bring an appeal against the reorganisation measure in the home Member State, has no bearing on the effects of the mutual recognition of that measure in the host Member States. Secondly, I will propose that the Court find that the individuals concerned cannot rely on a legitimate expectation vis-à-vis a bridge bank created in the context of a reorganisation measure. Thirdly, I will propose that the Court hold that the claims for damages connected with a contract may be retained as liabilities of a bank subject to a reorganisation measure on the creation of a bridge bank to which only certain assets and liabilities are transferred.

II. Legal context

A. European Union law

1. Directive 93/13

4. Article 6(1) of Directive 93/13 provides:

'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

2. Directive 2001/24

5. Recitals 4, 6, 7, 11, 12 and 16 of Directive 2001/24 state:

'(4) It would be particularly undesirable to relinquish [the] unity between an institution and its branches where it is necessary to adopt reorganisation measures or open winding-up proceedings.

…

(6) The administrative or judicial authorities of the home Member State must have sole power to decide upon and to implement the reorganisation measures provided for in the law and practices in force in that Member State. Owing to the difficulty of harmonising Member States' laws and practices, it is necessary to establish mutual recognition by the Member States of the measures taken by each of them to restore to viability the credit institutions which it has authorised.

(7) It is essential to guarantee that the reorganisation measures adopted by the administrative or judicial authorities of the home Member State and the measures adopted by persons or bodies appointed by those authorities to administer those reorganisation measures … are effective in all Member States.

…

(11) It is necessary to notify third parties of the implementation of reorganisation measures in Member States where branches are situated when such measures could hinder the exercise of some of their rights.

(12) The principle of equal treatment between creditors, as regards the opportunities open to them to take action, requires the administrative or judicial authorities of the home Member State to adopt such measures as are necessary for the creditors in the host Member State to be able to exercise their rights to take action within the time limit laid down.

…

(16) Equal treatment of creditors requires that the credit institution is wound up according to the principles of unity and universality, which require the administrative or judicial authorities of the home Member State to have sole jurisdiction and their decisions to be recognised and to be capable of producing in all the other Member States, without any formality, the effects ascribed to them by the law of the home Member State, except where this Directive provides otherwise.'

6. Article 1(1) of that directive provides:

'This Directive shall apply to credit institutions and their branches set up in Member States other than those in which they have their head offices, as defined in points (1) and (3) of Article 1 of Directive 2000/12/EC, [5] subject to the conditions and exemptions laid down in Article 2(3) of that Directive.'

7. In accordance with the seventh indent of Article 2 of Directive 2001/24, 'reorganisation measures' are to mean 'measures which are intended to preserve or restore the financial situation of a credit institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims'.

8. Title II of that directive, entitled 'Reorganisation measures', comprises Articles 3 to 8.

5 Directive of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1).

9. Article 3 of the Directive, entitled 'Adoption of reorganisation measures – applicable law', provides:

'1. The administrative or judicial authorities of the home Member State shall alone be empowered to decide on the implementation of one or more reorganisation measures in a credit institution, including branches established in other Member States.

2. The reorganisation measures shall be applied in accordance with the laws, regulations and procedures applicable in the home Member State, unless otherwise provided in this Directive.

They shall be fully effective in accordance with the legislation of that Member State throughout the [European Union] without any further formalities, including as against third parties in other Member States, even where the rules of the host Member State applicable to them do not provide for such measures or make their implementation subject to conditions which are not fulfilled.

The reorganisation measures shall be effective throughout the [European Union] once they become effective in the Member State where they have been taken.'

10. Article 6 of Directive 2001/24, entitled 'Publication', reads as follows:

'1. Where implementation of the reorganisation measures decided on pursuant to Article 3(1) and (2) is likely to affect the rights of third parties in a host Member State and where an appeal may be brought in the home Member State against the decision ordering the measure, the administrative or judicial authorities of the home Member State, the administrator or any person empowered to do so in the home Member State shall publish an extract from the decision in the *Official Journal of the* [*European Union*[6]] and in two national newspapers in each host Member State, in order in particular to facilitate the exercise of the right of appeal in good time.

2. The extract from the decision provided for in paragraph 1 shall be forwarded at the earliest opportunity, by the most appropriate route, to the Office for Official Publications of the [European Union] and to the two national newspapers in each host Member State.

…

4. The extract from the decision to be published shall specify, in the official language or languages of the Member States concerned, in particular the purpose and legal basis of the decision taken, the time limits for lodging appeals, specifically a clearly understandable indication of the date of expiry of the time limits, and the full address of the authorities or court competent to hear an appeal.

5. The reorganisation measures shall apply irrespective of the measures prescribed in paragraphs 1 to 3 and shall be fully effective as against creditors, unless the administrative or judicial authorities of the home Member State or the law of that State governing such measures provide otherwise.'

[6] 'The OJ'.

11. Article 7 of that directive, entitled 'Duty to inform known creditors and right to lodge claims', provides, in paragraph 1 thereof:

'Where the legislation of the home Member State requires lodgement of a claim with a view to its recognition or provides for compulsory notification of the measure to creditors who have their domiciles, normal places of residence or head offices in that State, the administrative or judicial authorities of the home Member State or the administrator shall also inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, in accordance with the procedures laid down in Articles 14 and 17(1).'

12. Under Article 23(1) of the Directive, the adoption of reorganisation measures is not to affect the right of creditors to demand the set-off of their claims against the claims of the credit institution, where such a set-off is permitted by the law applicable to the credit institution's claim.

13. Article 32 of the same directive, entitled 'Lawsuits pending', provides:

'The effects of reorganisation measures or winding-up proceedings on a pending lawsuit concerning an asset or a right of which the credit institution has been divested shall be governed solely by the law of the Member State in which the lawsuit is pending.'

3. Directive 2014/59/EU

14. Article 83 of Directive 2014/59/EU,[7] entitled 'Procedural obligations of resolution authorities', provides in paragraphs 4 and 5 thereof:

'4. The resolution authority shall publish or ensure the publication of a copy of the order or instrument by which the resolution action is taken, or a notice summarising the effects of the resolution action, and in particular the effects on retail customers and, if applicable, the terms and period of suspension or restriction referred to in Articles 69, 70 and 71, by the following means:

(a) on its official website;

(b) on the website of the competent authority, if different from the resolution authority, and on the website of the [European Banking Authority (EBA)];

(c) on the website of the institution under resolution;

(d) where the shares, other instruments of ownership or debt instruments of the institution under resolution are admitted to trading on a regulated market, the means used for the disclosure of the regulated information concerning the institution under resolution in accordance with Article 21(1) of [Directive 2004/109/EC]. [8]

[7] 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).

[8] Directive of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ 2004 L 390, p. 38).

5. If the shares, instruments of ownership or debt instruments are not admitted to trading on a regulated market, the resolution authority shall ensure that the documents providing proof of the instruments referred to in paragraph 4 are sent to the shareholders and creditors of the institution under resolution that are known through the registers or databases of the institution under resolution which are available to the resolution authority.'

15. Article 117 of that directive, entitled 'Amendments to Directive [2001/24]', provides, in point 1 thereof, for the addition, in Article 1 of the latter directive, of a paragraph 5, under which 'Articles 4 and 7 of this Directive shall not apply where Article 83 of Directive [2014/59] applies'.

16. Pursuant to Article 130(1) of Directive 2014/59, the deadline for transposition of that directive was fixed at 31 December 2014.

17. In accordance with Article 131 of that directive, the Directive entered into force on the twentieth day following that of its publication in the OJ, that is to say, on 2 July 2014.

B. Spanish law

18. Article 19(1) of Ley 6/2005 sobre saneamiento y liquidación de las entidades de crédito (Law 6/2005 on the reorganisation and winding up of credit institutions) [9] of 22 April 2005, which transposed Directive 2001/24 into the Spanish legal order, provides:

'Where a reorganisation measure has been adopted or winding-up proceedings have been opened against a credit institution authorised in a Member State … which has at least one branch or provides services in Spain, that measure or those proceedings shall be fully effective in Spain without any further formality, as soon as it is effective in the Member State in which the measure was adopted or the proceedings were opened.'

C. Portuguese law

19. Article 145-C et seq. of the Regime Geral das Instituições de Crédito e Sociedas Financeiras (General Regulatory Framework for Credit Institutions and Finance Companies), inserted by Decreto-Lei nº 31-A/2012 (Decree-Law No 31-A/2012) [10] of 10 February 2012 govern the measures for the reorganisation and winding up of credit institutions and finance companies.

III. The facts of the disputes in the main proceedings and the questions referred for a preliminary ruling

A. Case C-498/22

20. On 11 December 2006, C.F.O., a consumer, took out with BES Spain a loan secured by a mortgage containing a 2% minimum interest rate clause or 'floor' clause.

[9] BOE No 97 of 23 April 2005, p. 13912.

[10] *Diário da República*, Supplement 1, Series 1, No 30, of 10 February 2012.

21. By judgment of 9 May 2013, the Tribunal Supremo (Supreme Court, Spain) declared such 'floor' clauses to be unfair because they are not transparent. Upon a request made by C.F.O. to BES Spain to cease applying the 'floor' clause in his mortgage loan contract, BES Spain did so with effect from June 2013.

22. Pursuant to the General Regulatory Framework for Credit Institutions and Finance Companies, and in view of the serious financial difficulties suffered by BES, the Board of Directors of the Central Bank of Portugal adopted, by decision of 3 August 2014, as amended by decision of 11 August 2014 ('the August 2014 decision'), so-called "resolution" measures with respect to that credit institution.

23. By that decision, the Central Bank of Portugal decided to set up a bridge bank, Novo Banco, to which were transferred the assets, liabilities and other off-balance sheet items of BES, as set out in Annex 2 to that decision.

24. The liabilities excluded from the transfer to Novo Banco included inter alia 'any liability or contingency, in particular those arising from fraud or infringement of regulatory, penal or administrative provisions or decisions'.

25. Following that transfer, Novo Banco Spain became the mortgagee of the loan taken out on 11 December 2006 and began to collect from C.F.O. the monthly repayments of that loan.

26. On 3 October 2014, the Banco de España (Central Bank of Spain) published a notice in the *Boletín Oficial del Estado* (Official State Gazette, Spain) in which it stated that, by the August 2014 decision, the Central Bank of Portugal had applied a resolution measure in respect of BES consisting in the partial transfer of the latter's assets to the bridge bank Novo Banco, which would carry on BES' ordinary business without interruption; that measure was deemed to be a reorganisation measure with the meaning of Article 2 of Directive 2001/24.

27. On 29 December 2015, the Central Bank of Portugal adopted two decisions amending and clarifying Annex 2 to the August 2014 decision ('the decisions of 29 December 2015') which stipulated inter alia, that, with effect from that date, 'claims and indemnities related to the alleged annulment of certain terms in loan contracts in which BES was the lender' were not transferred to Novo Banco.

28. In January 2017, C.F.O. requested that Novo Banco Spain reimburse the sums collected by BES Spain pursuant to the 'floor' clause in his mortgage loan.

29. By letter of 21 March 2017, Novo Banco refused that request on the ground that the bank had acted with full transparency concerning the information relating to that 'floor' clause, which had been signed on 24 November 2006, that is to say, before the signature of the notarised mortgage deed.

30. On 4 May 2017, C.F.O. brought an action against Novo Banco Spain seeking a declaration of the invalidity of the 'floor' clause contained in the mortgage loan taken out with BES Spain on the ground of that term's unfairness, and an order requiring Novo Banco Spain to reimburse him the sums unduly paid pursuant to that clause.

31. Novo Banco Spain contested the action, raising a plea of a lack of standing to be sued because the claim that might arise in favour of C.F.O., namely the reimbursement of the sums collected by BES Spain pursuant to the 'floor' clause, had not been transferred to Novo Banco by the reorganisation measures adopted by the Central Bank of Portugal in respect of BES.

32. Both the court of first instance and, on appeal, the Audiencia Provincial (Provincial Court, Spain) dismissed the plea raised by Novo Banco Spain and upheld the action brought by C.F.O.

33. Novo Banco Spain brought an appeal in cassation before the Tribunal Supremo (Supreme Court), which granted the Central Bank of Portugal and the Resolution Fund leave to intervene in support of that appeal.

34. In the first place, the referring court observes that, even though the August 2014 decision and the decisions of 29 December 2015 taken by the Central Bank of Portugal are deemed to be reorganisation measures within the meaning of Directive 2001/24,[11] and although they could affect third parties, those decisions were not published, contrary to the requirements of Article 6(1) to (4) of that directive. In that regard, the referring court notes that the information communicated by the Central Bank of Portugal on its website, in English and in Portuguese, and to the Spanish media on the BES crisis and the creation of Novo Banco was very generic and did not enable the customers concerned to identify the liabilities excluded from the transfer of assets and liabilities or to ascertain the limitation of their rights entailed by that exclusion. In addition, the referring court observes that the notice published by the Central Bank of Spain, referred to in point 26 of this Opinion, similarly does not fulfil the conditions laid down in the abovementioned provision.

35. That failure to publish in the manner required by that provision prevented almost all of BES Spain's customers residing in Spain from bringing proceedings against the decisions of the Central Bank of Portugal and led to them bringing actions against Novo Banco Spain, in the course of which however the latter pleaded that it lacked standing to be sued because the reorganisation measures did not transfer the obligation to refund the sums paid by those customers under an unfair term.

36. The referring court doubts whether Article 6(5) of Directive 2001/24, under which the reorganisation measures are to apply and be effective irrespective of the publication measures prescribed in paragraphs 1 to 3 of that article, can cover a prolonged failure to publish information, in the host Member State, about the limitations and the loss of rights imposed by those measures on the customers of the entity concerned, as well as about the legal remedies and appeal procedures available to them.

37. The referring court therefore asks whether the obligation to recognise, in the host Member State, the effects of the reorganisation measures adopted in the home Member State, as set out in Article 3(2) of Directive 2001/24, can be consistent with the principle of effective judicial protection enshrined in Article 47 of the Charter, with the prohibition of any discrimination on grounds of nationality, laid down in Article 21(2) of the Charter, and with the principle of legal certainty, where such measures have not been published in the manner required by Article 6(1) to (4) of that directive.

[11] It refers to the judgment of 29 April 2021, *Banco de Portugal and Others* (C-504/19, EU:C:2021:335; the 'judgment in *Banco de Portugal and Others*').

38. In the second place, the referring court observes that, in its response to C.F.O.'s claim, Novo Banco Spain did not question the transfer of responsibility for the liabilities, in particular the obligation to reimburse the sums paid by C.F.O. to BES Spain, pursuant to the application of a 'floor' clause, which was subsequently deemed unfair. On the contrary, Novo Banco Spain replied addressing the merits of the claim, observing that the 'bank acted with full transparency', at a time when it was under the control of the Resolution Fund, which was itself a public body dependent on the Central Bank of Portugal. Accordingly, C.F.O. initiated legal proceedings fully confident in the belief that Novo Banco Spain, as the branch of a banking institution under the control of a public authority acting in accordance with EU law, did indeed have the status of lender under the mortgage loan contract.

39. The referring court therefore asks whether, in a situation in which a consumer, who resides in the host Member State, could have based his or her legitimate expectations on the conduct of the bridge bank, which was under the control of a public authority of the home Member State, the obligation to recognise the effects of the reorganisation measures, as set out in Article 3(2) of Directive 2001/24, is compatible with Article 47 of the Charter and with the principle of legal certainty.

40. In the third place, the referring court asks about the legality, in the light of EU law, in particular of Article 6(1) of Directive 93/13, of the fragmentation of the contractual relationship arising from the reorganisation measures at issue in the main proceedings, namely the fact that the consumer is bound by his or her obligations in respect of Novo Banco Spain, by paying to the latter the monthly repayments of the mortgage loan initially taken out with BES Spain, whereas, at the same time, Novo Banco Spain is exempt from the obligation to reimburse the sums collected by BES Spain pursuant to the 'floor' clause, meaning that that consumer is bound by that unfair term because he or she could not recover those amounts from BES, given the latter's insolvency. That situation could constitute disproportionate inference with that consumer's right to property, contrary to Article 17 of the Charter.

41. In that context, the referring court doubts that the stability of the financial system takes precedence over the rights of consumers. [12]

42. In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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

[12] It refers to the judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980; the 'judgment in *Gutiérrez Naranjo and Others*'), in which the Court held to be contrary to Article 6(1) of Directive 93/13 case-law of the Tribunal Supremo (Supreme Court) which limited the restitutory effects of the declaration of invalidity of 'floor' clauses in contracts concluded by a seller or supplier with a consumer, in order to guarantee the stability of the Spanish financial system, which was in serious crisis at the time.

(2) Is an interpretation of Article 3(2) of Directive 2001/24 which entails the recognition in a host Member State of the effects of a decision by the competent administrative authority of the home Member State which excluded certain obligations and responsibilities from the transfer to a "bridge bank" of the ordinary business and a number of the assets and liabilities of the bank to which the reorganisation measures apply compatible with the fundamental right to effective judicial protection under Article 47 of the Charter and the general principle of legal certainty, where the subsequent conduct of the "bridge bank", acting under the control of a public authority applying EU law, itself created among customers in the host Member State a legitimate expectation that the "bridge bank" had assumed the liabilities corresponding to the responsibilities and obligations which the bank forming the subject of the reorganisation measure held in relation to those customers?

(3) Is an interpretation of Article 3(2) of Directive 2001/24 which entails the recognition in a host Member State of the effects of a decision of the competent administrative authority of the home Member State which transfers to a "bridge bank" the creditor position under a mortgage loan contract but leaves with the failing bank the obligation to reimburse to the consumer borrower the sums collected pursuant to an unfair term in that contract compatible with the fundamental right to property under Article 17 of the Charter, the principle of a high level of consumer protection under Article 38 of the Charter, Article 6(1) of [Directive 93/13] and the general principle of legal certainty?'

B. Case C-499/22

43. J.M.F.T. and M.H.D.S. opened a securities account and entered into an investment portfolio management contract with BES Spain. On 3 October 2007, they concluded an atypical financial contract ('the AFC') with BES Spain, which matured on 11 October 2014, the date on which it was terminated and settled by Novo Banco, which had, in the meantime, succeeded BES. On 28 April 2008, they also entered into a contract relating to a structured financial product with BES Spain, which matured on 28 April 2013 and was settled at a loss by BES Spain.

44. In August 2014, J.M.F.T. received a number of communications from Novo Banco stating that, further to the decisions taken by the Central Bank of Portugal in respect of BES, banking relations would continue between the customers of BES Spain and the new entity Novo Banco Spain, and a financial statement for the AFC.

45. On 17 April 2017, J.M.F.T. and M.H.D.S. brought an action against Novo Banco seeking, primarily, the annulment of the two financial contracts on the grounds of an error of consent, on account of the incorrect information provided to them by BES, and the reciprocal reimbursement of the sums received by each party, together with interest from the date of each payment, and, in the alternative, compensation for the losses suffered in acquiring the two financial products, together with interest calculated at the statutory interest rate from the notification of the action.

46. Novo Banco Spain contested the action, raising a plea of a lack of standing to be sued because the claim that might arise in favour of J.M.F.T. and M.H.D.S., namely the reimbursement of the sums paid by them in connection with the financial products on account of the possible invalidity of the contracts or the compensation for the losses suffered because those customers were not informed of the risks of the financial instruments at issue, had not been transferred to Novo Banco by the reorganisation measures adopted by the Central Bank of Portugal in respect of BES.

47. The action was upheld at first instance.

48. Further to the appeal lodged by Novo Banco Spain, the Audiencia Provincial (Provincial Court) granted that appeal in so far as it concerns the contract concluded on 28 April 2008, on the ground that that contract had been settled by BES Spain on 28 April 2013, that is to say, before Novo Banco was set up as part of the BES reorganisation measures. It was therefore a transaction which exhausted its effects prior to those measures, and therefore no obligation or liability arising from that contract had been transferred to Novo Banco.

49. However, the Audiencia Provincial (Provincial Court) dismissed the appeal in so far as it concerns the AFC, the management and settlement of which in October 2014 were administered by Novo Banco. That court also found that the August 2014 decision excluded from the transfer not a structural product such as the AFC, but rather the debt instruments issued by BES' institutions. It added that the clarifications provided by the subsequent decisions of the Central Bank of Portugal were irrelevant because the contract had previously been declared expired and settled.

50. Further to appeals in cassation lodged before it by J.M.F.T. and M.H.D.S., on the one hand, and by Novo Banco Spain, supported by the Central Bank of Portugal and the Resolution Fund, on the other hand, the Tribunal Supremo (Supreme Court) gives the same reasons for its request for a preliminary ruling as those stated in relation to Case C-498/22. [13]

51. In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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

(2) Is an interpretation of Article 3(2) of Directive 2001/24 which entails the recognition in a host Member State of the effects of a decision by the competent administrative authority of the home Member State which excluded certain obligations and responsibilities from the transfer to a "bridge bank" of the ordinary business and a number of the assets and liabilities of the bank to which the reorganisation measures apply compatible with the fundamental right to effective judicial protection under Article 47 of the Charter and the general principle of legal certainty, where the subsequent conduct of the "bridge bank", acting under the control of a public authority applying EU law, itself created among customers in the host Member State a legitimate expectation that the "bridge bank" had assumed the liabilities corresponding to the responsibilities and obligations which the bank forming the subject of the reorganisation measures held in relation to those customers?

[13] See points 34 to 40 of this Opinion.

(3) Is an interpretation of Article 3(2) of Directive 2001/24 which entails the recognition in a host Member State of the effects of a decision of the competent administrative authority of the home Member State which transfers to a "bridge bank" the creditor position under the contractual relationship entered into [with] the bank forming the subject of the reorganisation measures but leaves with the failing bank the obligation to reimburse to the customer the sums paid by the latter under contracts annulled because of an error of consent brought about by insufficient information provided by the bank compatible with the fundamental right to property under Article 17 of the Charter, the principle of a high level of consumer protection under Article 38 of the Charter and the general principle of legal certainty?'

C. Case C-500/22

52. On 17 November 2014, the company Proyectos, Obras y Servicios de Badajoz SL ('POSB') acquired on the secondary market a senior bond entitled 'Senior Bond NB 6.875% maturity July 2016', maturing on 15 July 2016.

53. That bond had been issued by BES but, when it was acquired by PSOB through an investment undertaking, that unsubordinated debt instrument was part of the assets and liabilities of Novo Banco, to which it had been transferred pursuant to the August 2014 decision.

54. In July 2015, Novo Banco paid income to POSB in connection with the bond yields corresponding to the 2014-2015 annuity.

55. When the bond matured on 15 July 2016, Novo Banco neither paid the bond yields in respect of the 2015-2016 annuity nor reimbursed the nominal value of that bond to POSB.

56. In response to a complaint made by POSB, Novo Banco stated that the refusal of payment was founded on the decisions of 29 December 2015 which had 'transferred back' the liabilities connected with that bond from Novo Banco to BES. Those decisions provided, inter alia, for the 'transfer back' of unsubordinated bonds from Novo Banco to BES, including the rights and obligations arising, inter alia, from the 'Senior Bond NB 6.875% maturity July 2016'.

57. On 25 June 2017, POSB brought an action against Novo Banco for payment of the bond yields corresponding to the 2015-2016 annuity and for reimbursement of the amount corresponding to the nominal value of the bond.

58. Novo Banco contested that action, raising a plea of a lack of standing to be sued because the liabilities connected with that bond had been 'transferred back' to BES.

59. Both the court seised of the proceedings at first instance and, on appeal, the Audiencia Provincial (Provincial Court) rejected the plea raised by Novo Banco and upheld the action.

60. Further to an appeal in cassation lodged by Novo Banco Spain, supported by the Central Bank of Portugal and the Resolution Fund, the Tribunal supremo (Supreme Court) observes, inter alia, that holding an unsubordinated debt instrument affords POSB the protection of the fundamental right to property recognised in Article 17 of the Charter. However, the 'transfer back' to BES of the responsibilities and obligations connected with that debt instrument would mean, in practice, POSB being denied its right to property, since BES is a failing bank that has been stripped of its assets. Denial of that right, without fair compensation in good time, may also constitute a breach

of the principle of legal certainty. [14]

61. In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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

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

62. By decision of the President of the Court of Justice of 29 September 2022, Cases C-498/22, C-499/22 and C-500/22 were joined for the purposes of the written and oral parts of the procedure and of the judgment.

63. C.F.O., J.M.F.T. and M.H.D.S., Novo Banco Spain, the Central Bank of Portugal, the Spanish and Portuguese Governments and the European Commission submitted written observations.

64. C.F.O., POSB, Novo Banco Spain, the Central Bank of Portugal, the Spanish and Portuguese Governments, and the Council of the European Union, the Commission and the European Parliament participated in the hearing held on 26 October 2023, in the course of which they responded to questions for an oral answer put by the Court.

IV. Analysis

A. The first questions in Cases C-498/22, C-499/22 and C-500/22

65. In each of the three cases, the referring court asks the Court whether an interpretation of Article 3(2) of Directive 2001/24 which entails the recognition in a host Member State of the effects of a decision by the competent administrative authority of the home Member State which has not been published in the manner required by Article 6(1) to (4) of that directive is compatible with the fundamental right to effective judicial protection under Article 47 of the Charter, the general principle of legal certainty and the principle of equality and the prohibition of any discrimination on grounds of nationality under Article 21(2) of the Charter.

[14] See points 34 to 37 of this Opinion in relation to the reasons given for the first question referred for a preliminary ruling.

66. In other words, the referring court wishes to ascertain the effects of not publishing, contrary to the provisions of Article 6 of Directive 2001/24, the extract of the national decision ordering the reorganisation measure, adopted by the administrative or judicial authorities of the home Member State, the administrator or any other person empowered to do so in the home Member State, in the OJ and in two national newspapers in each host Member State.

67. First of all, it should be observed that, under Article 6(1) of Directive 2001/24, such publication must be made if two conditions are met: first, the reorganisation measure must be likely to affect the rights of third parties in a host Member State and, second, it must be possible for an appeal to be brought in the home Member State against the decision ordering the measure. The two conditions appear to be satisfied in the present case since an appeal may be brought in Portugal against the reorganisation measure [15] and the appellants in the main proceedings are creditors affected by that measure.

68. Next, it follows from the actual wording of Article 6(1) of Directive 2001/24 that that publication is intended to protect the right of creditors in the host Member States to bring an appeal against the reorganisation measure before the court having jurisdiction in the home Member State since it ends with the following words: 'in order in particular to facilitate the exercise of the right of appeal in good time'.

69. Finally, the use of the plural, and the wording of recitals 11 and 12 of Directive 2001/24, could have suggested that all of the creditors' actions against the reorganisation measure itself, as well as against their debtor, were to be protected. However, the condition relating to the existence of an appeal against the reorganisation measure does not allow an extensive view to be taken of the right of appeal which publication is meant to protect. Publication is not mandatory where there is no appeal against the reorganisation measure in the home Member State. In that situation, creditors all have, equally, rights which may be exercised against the debtor. In addition, the nature of the information to be published in accordance with Article 6(4) of that directive, namely an extract of the decision specifying 'the purpose and legal basis of the decision taken, the time limits for lodging appeals, specifically a clearly understandable indication of the date of expiry of the time limits, and the full address of the authorities or court competent to hear an appeal', supports the interpretation that the appeals at issue are those directed against the reorganisation measure and not all possible appeals by creditors against the credit institution or the bridge bank.

70. That is the only interpretation capable of ensuring consistency between the principles laid down in Article 3(2) and in Article 6(5) of Directive 2001/24. It follows from that first provision that the reorganisation measures are to be fully effective without any formalities, including as against third parties, throughout the European Union once they become effective in the Member State where they have been taken. The second provision states that the reorganisation measures are to apply irrespective of the publications prescribed in Article 6(1) to (3) of that directive and be fully effective as against creditors.

71. Those principles give concrete expression to the objective pursued by Directive 2001/24, which is a directive providing for the mutual recognition of the effects of a reorganisation measure adopted in a home Member State in the other host Member States, in which branches are established, with, as corollary, the application of the principles of unity and universality of

[15] See Article 145 N of the General Regulatory Framework for Credit Institutions and Finance Companies.

proceedings (only one court with jurisdiction and one single applicable law, namely those of the home Member State),[16] without exceptions, in particular in the case of pending proceedings in the host Member State which remain governed solely by the law of the host Member State.[17]

72. In addition, the individual notification to creditors is provided for, in Article 7 of that directive, only if the legislation of the home Member State requires the lodgement of a claim with a view to its recognition or provides for compulsory notification of the reorganisation measure to creditors who have their domiciles, normal places of residence or head offices in that State. It follows from that, as I have already set out in points 68 and 69 of this Opinion, that the purpose of that notification is not to protect all the remedies available to creditors against the debtor, but rather to ensure that those creditors can assert their rights in the context of that measure according to the national law of the home Member State.

73. Thus, generally speaking, Directive 2001/24 is not concerned with individual actions brought by creditors against the credit institution or the bridge bank, in the case of a reorganisation measure, save where certain contracts or rights are concerned (in particular employment contracts, rights in respect of immovable property registered in a public register, rights *in re*, rights based on a reservation of title clause[18]) or in the case of a pending lawsuit which remains governed by the law of the host Member State in which that lawsuit is pending.[19]

74. In the cases in the main proceedings, it is established that the publication required by Article 6 of that directive was not made and, therefore, the question arises as to the penalty for such non-publication.

75. A number of views are put forward by the various parties before the Court. Some argue that, in a case of non-publication, the reorganisation measure is ineffective outside the home Member State. The Commission adds that that penalty applies only once a certain period of time has passed, with that period being linked to the inherent constraints on the timelines for publication in the OJ. Others argue that the failure to publish, contrary to Article 6 of Directive 2001/24, has no effect because publication pursuant to Article 83 of Directive 2014/59 was made.

76. In my opinion, the first view, namely that reorganisation measures have no effect in the host Member States, is contrary to the letter of Directive 2001/24 and inconsistent with the objective of that directive of ensuring the mutual recognition of those measures with, as corollary, the application of the principles of unity and universality of the proceedings. In addition, it is inconceivable for there to be effects which are immediate but persist only for a 'certain period', the time needed for publication in the OJ. In a case of non-publication or late publication, it would be impossible to determine the date on which mutual recognition would cease to be effective. Thus, that approximate period would run directly counter to the objectives of Directive 2001/24 of restoring the viability of credit institutions.[20]

77. As for the second view, which involves publication as laid down in Article 6 of Directive 2001/24 being replaced by that provided for in Article 83(4) of Directive 2014/59, it likewise appears to me to be incompatible with Article 117 of the latter directive, which amends Article 1

16 See recitals 4 and 16 of Directive 2001/24 and judgment of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 49), and judgment in *Banco de Portugal and Others* (paragraph 33).

17 See Article 32 of Directive 2001/24.

18 See Articles 20 to 27 of Directive 2001/24.

19 See Article 32 of Directive 2001/24 and judgment in *Banco de Portugal and Others*.

20 See recital 6 of Directive 2001/24.

of Directive 2001/24 to clarify, in a new paragraph 5, that 'Articles 4 and 7 of this Directive shall not apply where Article 83 of Directive [2014/59] applies'. It follows, *a contrario*, that publication under Article 6 of Directive 2001/24 must be made even if the publication provided for in Article 83 of Directive 2014/59 is made. Accordingly, the question of whether Directive 2014/59 is applicable *ratione temporis* in the present case is immaterial.

78. Furthermore, in the absence of detailed procedural rules laid down by EU law for giving effect to a right, and in accordance with settled case-law of the Court, it is for the national legal system of each Member State to lay down procedural rules to ensure the safeguarding of rights which individuals derive from EU law. Those rules must not, however, be less favourable than those governing similar domestic remedies (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of the rights conferred by EU law (principle of effectiveness). [21]

79. In addition, as I have already set out, the publication provided for in Article 6 of Directive 2001/24 guarantees the protection of the right to challenge the reorganisation measure before the court of the home Member State on account of the mutual recognition to which that directive gives effect. If such an action were to be brought by the appellants in the main proceedings, the Portuguese court would have to take into account the failure to publish, contrary to Article 6 of that directive, in order to assess whether that non-publication rendered practically impossible or excessively difficult the exercise of that remedy in the light of the national rules on the time limits for exercising remedies against that type of decision.

80. That analysis is borne out by analysis of the origin of Article 6 of Directive 2001/24. In the Council's initial draft, [22] first, publication in the OJ and the individual notifications were left to the discretion of the competent authorities of the country in which the head office of the credit institution concerned is located. Secondly, it was stated that the reorganisation measures were to apply irrespective of the publicity measures and were fully effective as against creditors. Thirdly, except in the case of individual notification, the time for lodging an appeal was to run from publication in the OJ. Thus, unlike the initial draft, the starting point for the deadline for bringing an action has been left to the discretion of the Member States within the context of their procedural autonomy, but must be consistent with the principles of equivalence and effectiveness.

81. The Council and the Parliament intervened at the hearing to observe that Directive 2001/24 was the end result of fifteen years of negotiations and that the harmonisation measures did not appear until Directive 2014/59. They added, first, that the purpose of the mutual recognition mechanism established was to enable the swift and consistent implementation of urgent measures intended to prevent knock-on effects and to ensure the stability of the financial system, [23] in particular the continuation of the bank's essential functions and the protection of public funds, and, second, that it fell to the Member States to give sufficient publicity to the measures adopted. They explained that the publicity organised by Article 83(4) of that directive was adequate to inform third parties in the other Member States. The purpose of their intervention was to show the compatibility of the mechanisms established by Directive 2001/24 with primary law.

[21] See judgments of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11, paragraph 62 and the case-law cited), and of 20 September 2018, *Rudigier* (C-518/17, EU:C:2018:757, paragraph 61 and the case-law cited).

[22] Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to the reorganisation and the winding-up of credit institutions (COM(85) 788 final).

[23] They referred, in that regard, to the judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraphs 68 and 69).

82. The interpretation of Articles 3 and 6 of Directive 2001/24 which I propose demonstrates that compatibility. [24]

83. Even though the publication provided for in Article 6 of Directive 2001/24 is not intended to protect rights of appeal other than that directed against the reorganisation measure, the appellants in the main proceedings are in a situation covered by EU law. The mutual recognition of the reorganisation measures to which that directive gave effect meant that the effects of the creation of the Novo Banco bridge bank in Portugal were extended to its Spanish branch; the creation of that bridge bank was accompanied by a transfer of only some of BES' assets and liabilities to the bridge bank and to its branches. In that regard, the rights of the appellants in the main proceedings were impacted because their alleged claims were not, ultimately, transferred to Novo Banco Spain, the Spanish branch of the bridge bank. Consequently, they can rely on the right to effective judicial protection, as guaranteed by Article 47 of the Charter, the general principle of legal certainty and the prohibition of any discrimination on grounds of nationality, as required by Article 21(2) of the Charter.

84. With regard to effective judicial protection, the Court has recalled that the effectiveness of the judicial review guaranteed by the first paragraph of Article 47 of the Charter requires, inter alia, that the person concerned is able to defend his or her rights in the best possible conditions and to decide, in full knowledge of the facts, whether it would be useful to bring an action against a given entity before the competent court. [25]

85. In the absence of any penalty laid down in EU law for a failure to publish, contrary to Article 6 of Directive 2001/24, the objective of which, I note, is not to inform all creditors of the detailed rules governing actions brought by them against the credit institution, it is for the court to apply its national law and to take into account all the information available which may shed light on the creditor's choice within the limits laid down by the principles of equivalence and effectiveness.

86. First of all, as the Spanish Government stated in its written observations, a provision of Spanish law requires publication in the *Boletín Oficial del Estado* in the case of a reorganisation measure concerning a credit institution with a branch in Spain. [26] Next, the customers in Cases C-498/22 and C-499/22 were informed of the creation of the bridge bank by letters sent by Novo Banco telling them of the continuation of the commercial relationship with a bank unencumbered by the risks which threatened the sustainability of BES. Lastly, regardless of whether Directive 2014/59 is applicable in the present case, the national court must take account of the information published pursuant to Article 83(4) of that directive in order to assess the ability of the individual concerned to come to a decision as regards exercising a remedy.

87. When the Court ruled in another case relating to the creation of the bridge bank Novo Banco, which concerns proceedings pending on the day on which the claim concerned in the dispute in question was 'transferred back' to BES, with retroactive effect to a date prior to that on which the action had been initiated, by the decisions of 29 December 2015, it held that, on 4 February 2015, the individual concerned had all the information necessary to make a fully informed decision as to whether to bring such an action, as well as to identify with certainty the person against whom the action was to be directed. [27] In that judgment, the Court also recognised that it was possible for the host Member State to amend, even with retroactive effect, the legal rules applicable to the

[24] See points 78 and 79 of this Opinion.

[25] See judgment in *Banco de Portugal and Others* (paragraph 57 and the case-law cited).

[26] See Article 19 of Law 6/2005 on the reorganisation and winding up of credit institutions.

[27] See judgment in *Banco de Portugal and Others* (paragraph 53)

reorganisation measures.[28] Nevertheless, it concluded that Article 3(2) and Article 32 of Directive 2001/24, read in the light of the first paragraph of Article 47 of the Charter, had to be interpreted as precluding recognition, without further conditions, of the effects of the second reorganisation measure which 'transferred back' the claim to BES, where such recognition had the result that Novo Banco could no longer be sued, with retroactive effect, for the purposes of the pending proceedings, thereby calling into question judicial decisions already adopted in favour of the applicant.[29]

88. However, the legal actions in the cases in the main proceedings were brought before the Spanish court in a very different context since they were brought after the debtor of the alleged claims was determined by the reorganisation measures (including the decisions of 29 December 2015) and, therefore, within a stable and relevant legal framework. Accordingly, it fell to the appellants in the main proceedings to determine which of Novo Banco Spain or BES Spain was their debtor, taking into account the information available both under the national legislation and pursuant to the voluntary application of Article 83(4) of Directive 2014/59.

89. The reorganisation measure did not, in actual fact, change the identity of their debtor, rather that debtor's financial situation, on account of which that measure was adopted, adversely affected the value of the alleged claim. In addition, the appellants in the main proceedings do not set out why it would have been impossible to bring proceedings against BES Spain. Their right to take action was not therefore called into question by the reorganisation measure.

90. Turning to the principle of non-discrimination guaranteed by Article 21 of the Charter, it is not claimed that the national provisions applicable in the present case apply differently depending on whether the individual concerned is of one nationality or another.

91. As for the principle of legal certainty, the Court recalls that, according to settled case-law, that principle requires, on the one hand, that the rules of law be clear and precise and, on the other hand, that their application be foreseeable for those subject to the law, in particular where they may have adverse consequences for individuals and undertakings. More specifically, in order to meet the requirements of that principle, legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly.[30]

92. In the present case, it is clear, in accordance with the provisions of Directive 2001/24, that the effects of the reorganisation measure adopted in Portugal are recognised in Spain and that it is for the individual concerned to examine the exact provisions of the reorganisation measure to establish who is his or her debtor following the partial transfer of the liabilities to the newly created bridge bank.

93. For all of those reasons, I propose that the Court reply that Article 3(2) and Article 6 of Directive 2001/24, read in the light of Article 21(2) and the first paragraph of Article 47 of the Charter, must be interpreted as not precluding, where publication as provided for in Article 6(1) of that directive is not made, the recognition in a Member State other than the home Member State of the effects of a reorganisation measure which created a bridge bank together with a partial transfer of obligations and responsibilities, prior to legal proceedings being brought for

[28] See judgment in *Banco de Portugal and Others* (paragraph 61 and the case-law cited).

[29] See judgment in *Banco de Portugal and Others* (paragraph 66 and operative part).

[30] See judgment in *Banco de Portugal and Others* (paragraph 51 and the case-law cited).

the recognition and payment of a claim initially held as against the banking institution which was subject to that reorganisation measure, provided that the principles of equivalence and effectiveness are respected, which is for the referring court to determine.

B. The second questions in Cases C-498/22 and C-499/22

94. The referring court asks the Court whether the interpretation of Article 3(2) of Directive 2001/24, which entails the recognition in a host Member State of the effects of a decision of the competent authority of the home Member State that excluded certain obligations and liabilities from the transfer to a bridge bank of the ordinary business and of a number of the assets and liabilities of the bank to which the reorganisation measures apply, is compatible with the fundamental right to effective judicial protection under Article 47 of the Charter and the general principle of legal certainty, where the subsequent conduct of the bridge bank, acting under the control of a public authority applying EU law, itself created among customers in the host Member State a legitimate expectation that the bridge bank had also assumed the liabilities corresponding to the responsibilities and obligations which the bank forming the subject of the reorganisation measures held in relation to those customers.

95. In order to answer that question, it is necessary, first of all, to consider whether or not the appellants in the main proceedings can rely on the principle of the protection of legitimate expectations in their favour.

96. According to the case-law of the Court, the principle of the protection of legitimate expectations is among the fundamental principles of the European Union.[31] The Court has explained that the right to rely on the principle of the protection of legitimate expectations extends to any person whom an institution of the European Union has caused, by giving him or her precise assurances, to entertain justified expectations. By contrast, a person may not plead breach of that principle unless he or she has been given those assurances.[32] The Court has also accepted that that principle must be observed by the Member States when implementing EU law,[33] including through national administrative authorities.[34]

97. In the present case, the appellants in main proceedings submit, first, that the control of Novo Bank, at the time of its creation, by the Central Bank of Portugal, which gave rise to the reorganisation measures and, second, the explanations provided in the letters sent by Novo Banco as regards the continuation of the contractual relationships which those appellants had with BES could have created a legitimate expectation on their part relating to the scope of Novo Banco Spain's obligations in regard to them.

98. However, to regard Novo Banco Spain as an administrative authority implementing EU law, even though, in the first place, the control exerted by the Central Bank of Portugal is temporary and takes the form of the reorganisation measure consisting in the creation of a bridge bank and, in the second place, that bank was created in the form of a credit institution governed by private law without any power falling outside the scope of the ordinary law for the purpose of performing

[31] See judgments of 7 June 2005, *VEMW and Others* (C-17/03, EU:C:2005:362, paragraph 73 and the case-law cited), and of 14 March 2013, *Agrargenossenschaft Neuzelle* (C-545/11, EU:C:2013:169, paragraph 23 and the case-law cited).

[32] See judgment of 16 December 2020, *Council* v *K. Chrysostomides & Co. and Others* (C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 178 and the case-law cited).

[33] See judgment of 11 July 2002, *Marks & Spencer* (C-62/00, EU:C:2002:435, paragraph 44 and the case-law cited).

[34] See judgments of 22 September 2022, *Admiral Gaming Network and Others* (C-475/20 to C-482/20, EU:C:2022:714, paragraph 62), and of 17 November 2022, *Avicarvil Farms* (C-443/21, EU:C:2022:899, paragraph 39 and the case-law cited).

a public service mission, goes beyond what has been accepted by the Court in relation to legitimate expectations.[35] For instance, the Court has held that an operator cannot rely on the principle of the protection of legitimate expectations against its supplier in order to claim a right to deduct input value added tax (VAT).[36]

99. In any event, first, the letters sent to BES' customers stating that Novo Banco was the same bank as BES and that the relationship with the bank was in no way changed and, second, the conduct of Novo Banco Spain – which responded in 2017 to the appellant in the main proceedings in Case C-498/22 informing him that he was not eligible for the reimbursement sought because the term complained of was not unfair and which settled one of the two contracts held by the appellants in the main proceedings in Case C-499/22 – are not sufficient to constitute precise assurances upon which a legitimate expectation can be founded, namely that Novo Banco Spain would assume all of BES Spain's liabilities, in terms of the latter's contractual or pre-contractual responsibility.

100. The letters simply announced the continuation of the commercial relationship between the customers and the bank, whilst explaining that the risks which threatened BES' sustainability had been removed and that the new bank was free of BES' problematic assets. In addition, contesting the unfairness of a term does not amount to agreeing to assume responsibility in relation to that term. Similarly, paying out an AFC on maturity cannot provide assurance that the bank will assume the pre-contractual responsibility associated with that contract. In that regard, I share the view taken by Advocate General Kokott in her Opinion in *Banco de Portugal and Others*[37] regarding the creation of Novo Banco, namely that 'the mere fact that [that bank] became (at least in part) the successor in law to BES, … and, moreover, continue[d] to manage the applicant's share portfolio, could not … support a legitimate expectation that Novo Banco would also take on liabilities connected with BES' defective investment advice which existed before it took over that business relationship'.

101. Furthermore, in order to assess the legitimacy of the assurances provided, account must be taken of the context in which the bridge bank was set up to address BES' difficulties. The Court has held that, even in a situation capable of giving rise to a legitimate expectation, an overriding public interest could preclude transitional measures from being adopted in respect of situations which arose before the new rules came into force but which are still subject to change, and that the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition constituted an overriding public interest of that kind.[38] It inferred from the foregoing that the principle of the protection of legitimate expectations could be relied on in support of a challenge to a Banking Communication from the Commission, but did not preclude certain points of that communication relating to a condition of burden-sharing by shareholders and subordinated creditors as a prerequisite to the authorisation of State aid.[39]

102. It follows from all of the foregoing that the appellants in the main proceedings cannot rely on a breach of the principle of the protection of legitimate expectations in respect of Novo Banco Spain.

35 See judgment of 17 November 2022, *Avicarvil Farms* (C-443/21, EU:C:2022:899), in relation to an agency for the financing of rural investments and an agency for payments and intervention in agriculture.

36 See judgment of 21 February 2018, *Kreuzmayr* (C-628/16, EU:C:2018:84, paragraph 47).

37 C-504/19, EU:C:2020:943, point 82.

38 See judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraphs 68 and 69).

39 See judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraphs 40 and 80).

103. I propose that the Court answer the second questions in Cases C-498/22 and C-499/22 to the effect that Article 3(2) of Directive 2001/24, read in the light of Article 47 of the Charter and the general principle of legal certainty, must be interpreted as meaning that individuals cannot rely on the principle of the protection of legitimate expectations in relation to a bridge bank, a body governed by private law with no powers going beyond the ordinary law, set up by way of a reorganisation measure of a bank of which those individuals were initially customers, to hold that bridge bank liable in respect of the pre-contractual and contractual obligations related to contracts concluded with the bank to which the reorganisation measure applies.

C. The third questions in Cases C-498/22 and C-499/22 and the second question in Case C-500/22

104. By those questions, the referring court asks the Court about the compatibility of an interpretation of Article 3(2) of Directive 2001/24 which entails the recognition in the host Member State of a decision of the competent administrative authority providing for the creation of a bridge bank and the retention within the liabilities of the failing bank of the obligation to reimburse the interest collected under an unfair term or to pay the amounts due in connection with a pre-contractual or contractual responsibility with the right to property as guaranteed in Article 17 of the Charter, the principle of legal certainty, the principle of a high level of consumer protection under Article 38 of the Charter and Article 6(1) of Directive 93/13.

105. As a preliminary point, I wish to point out that, in Case C-499/22, the appellants in the main proceedings contest the quality of the pre-contractual information provided by BES Spain prior to the signature of the AFC, bearing in mind that the court of appeal found that the other contract, signed on 28 April 2008, had matured before Novo Banco was created and that no responsibility related to that contract could therefore be transferred.

1. Compatibility with the right to property as guaranteed in Article 17 of the Charter

106. With regard to the compatibility with the right to property as guaranteed in Article 17 of the Charter, a question raised in the three requests for a preliminary ruling, it should be recalled that the Court has already found the creation of the bridge bank Novo Banco and the consequences arising therefrom to be compatible with that article in the case of shareholders and holders of subordinated bonds.[40]

107. As a reminder, under Article 17(1) of the Charter, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. 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. In accordance with the link made in Article 52(3) of the Charter between the rights set out in the Charter and those protected by the Convention for the Protection of Human Rights and Fundamental Freedoms[41] where those sets of rights correspond, Article 17 of the Charter must be interpreted taking into

[40] See judgment of 5 May 2022, *BPC Lux 2 and Others* (C-83/20, EU:C:2022:346; the 'judgment in *BPC Lux 2 and Others*').

[41] Signed in Rome on 4 November 1950; 'ECHR'.

account the case-law of the European Court of Human Rights on Article 1 of Protocol No 1 to the ECHR, in which the protection of the right to property is enshrined as the minimum threshold of protection. [42]

108. The Court has recalled that the protection afforded by Article 17 of the Charter concerns rights with an asset value creating an established legal position under the legal system concerned, enabling the holder to exercise those rights autonomously and for his or her own benefit. [43] It concluded therefrom that bonds that can be traded on capital markets were such rights eligible for that protection, as is apparent from the case-law of the European Court of Human Rights on Article 1 of Protocol No 1 to the ECHR. [44]

109. Therefore, it appears to me that the relevant criterion when examining this question in the light of the right to property is whether the situation at issue in each case concerns a right creating an established legal position, enabling the holder to exercise those rights autonomously and for his or her own benefit.

110. As I have already stated in point 108 of this Opinion, a tradeable bond, including a senior bond as in Case C-500/22, constitutes, according to the Court, a right eligible for the protection guaranteed by Article 17 of the Charter.

111. It would appear to me that the same is true of the claim at issue in Case C-498/22. That claim related to the obligation of a bank to refund interest collected under a 'floor' clause contained in a mortgage loan contract – which is an obligation arising from case-law of the Court based on Article 6(1) of Directive 93/13 [45] – constitutes a right manifestly creating an established legal position, since the restitutory effects cannot be limited in time to the period after the declaration that that term is unfair. That analysis is likewise consistent with the criteria applied by the European Court of Human Rights, since the concept of 'possessions' eligible for the protection of the right to property, as laid down in Article 1 of Protocol No 1 to the ECHR, can cover both 'existing possessions' and assets, including claims, in respect of which the applicant can argue that he has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. [46] In the present case, the 'floor' clauses have been deemed unfair and the restitutory effect must be complete without any possibility of that effect being limited in time in accordance with the case-law of the Court.

112. By contrast, as regards the claim invoked in Case C-499/22, that is to say, compensation payable on account of defective pre-contractual information, I doubt that an applicant relying on such a claim can benefit from the protection afforded by Article 17 of the Charter. That alleged claim does not correspond to an established legal position, since the defective nature of pre-contractual information must be assessed by a court.

113. In addition, according to the case-law of the European Court of Human Rights, a claim for damages can have an asset value if it is shown that that claim has a sufficient basis in national law, for example where there is settled case-law of the courts confirming it. [47] However, the

[42] See judgment in *BPC Lux 2 and Others* (paragraph 37 and the case-law cited).

[43] See judgment in *BPC Lux 2 and Others* (paragraph 39 and the case-law cited).

[44] See judgment in *BPC Lux 2 and Others* (paragraphs 40 and 41 and the case-law cited).

[45] See judgment in *Gutiérrez Naranjo and Others*.

[46] See ECtHR judgment of 2 May 2013, *Panteliou-Darne and Blantzouka v. Greece*, (CE:ECHR:2013:0502JUD002514308, § 28 and the case-law cited).

[47] See ECtHR judgment of 6 October 2005, *Draon v. France* (CE:ECHR:2005:1006JUD000151303, § 65 and the case-law cited).

person relying on that claim must still have a legitimate expectation. According to the case-law of that court, first, applicants do not have a 'legitimate expectation' where it cannot be said that they had an immediately enforceable claim that was reasonably established and, second, the existence of a 'genuine dispute' or an 'arguable claim' is not viewed as a criterion for determining whether there is a 'legitimate expectation' protected by Article 1 of Protocol No 1 to the ECHR. [48] That case-law clarifies that a mere hope does not constitute a legitimate expectation without a judgment that has acquired the force of *res judicata*. [49] The alleged claim in Case C-499/22 does not appear to me to satisfy those conditions and any holders of that claim cannot benefit from the protection of property guaranteed in Article 17 of the Charter.

114. Since only the claims at issue in Cases C-498/22 and C-500/22, which are legally established, fall within the scope of Article 17 of the Charter, it is necessary to examine whether the protection guaranteed by that article can apply to such claims.

115. The Court has already ruled on the compatibility of the BES reorganisation measure, that is to say, the partial transfer of assets and liabilities to a newly created bridge bank, a measure adopted in accordance with the legislation at issue in the main proceedings, with Article 17 of the Charter. It found that that reorganisation measure had to be viewed as regulating the use of property meeting objectives of general interest recognised by the European Union within the meaning of Article 52(1) of the Charter, such as ensuring the stability of the banking system of the euro area as a whole and preventing a systemic risk. [50]

116. In the present case, the compatibility of the national measure itself, which sets up the bridge bank and transfers assets, is not contested, but rather the fact that it made applicable in Spain, in accordance with the mutual recognition of a reorganisation measure adopted in Portugal, the assignment to the liabilities of the failing bank of, first, the obligation to reimburse the interest collected under a 'floor' clause in a mortgage loan (Case C-498/22) and, second, the obligations and liabilities connected with a senior bond (Case C-500/22).

117. I am of the view, however, that the same line of reasoning can be followed. Thus, in reality, the mechanism of mutual recognition has no bearing on the alleged infringement of the right to property. In addition, the decision not to transfer those claims to the liabilities of the bridge ban is akin not to a deprivation of the right of property (since the loss of value of those alleged claims on the part of BES stems from the failure of that bank and not from the reorganisation measure) but rather to a regulation of its use. [51]

118. Finally, it is necessary to examine whether such use was regulated in so far as was necessary for the general interest, in accordance with the wording of the third sentence of Article 17(1) of the Charter.

119. With regard to the obligation to refund interest, first, the reorganisation measure entailing that restriction on the right to property was adopted in accordance with Portuguese law and pursues the same general interest as that which led to the measure creating a bridge bank, which makes sense only if the assets and liabilities of the failing bank are triaged in order to maintain the stability of the financial system and prevent a systemic risk. It does not appear to me, therefore,

[48] See ECtHR judgment of 6 October 2005, *Draon v. France* (CE:ECHR:2005:1006JUD000151303, § 68 and the case-law cited).

[49] See ECtHR's decision on admissibility of 19 October 2004, *Caisse régionale de crédit agricole mutuel Nord de France v. France* (CE:ECHR:2004:1019DEC005886700).

[50] See judgment in *BPC Lux 2 and Others* (paragraphs 44 to 55 and the case-law cited).

[51] See judgment in *BPC Lux 2 and Others* (paragraph 48).

that, within the context of the discretion afforded to the Member States, the reorganisation measure goes beyond what is necessary for the general interest. Second, with regard to the senior bond, the Court's analysis in the judgment in *BPC Lux 2 and Others* in relation to bondholders can be adopted. [52]

120. The argument related to the infringement of the right to property must therefore be rejected in respect of all of the creditors.

2. Compatibility with the principle of legal certainty

121. As for compatibility with the principle of legal certainty, I recalled, in point 91 of this Opinion, what is covered by that principle in the view of the Court. Furthermore, the Court has already clarified that the imperative of legal certainty must be observed all the more strictly in the case of rules liable to have financial consequences. [53]

122. However, I take the view that the very principle of the reorganisation measure consisting in the creation of a bridge bank assumes that a triage is made of the assets and liabilities transferred to the new structure. Reorganisation measures as defined in the seventh indent of Article 2 of Directive 2001/24 are measures which are intended to preserve or to restore the financial situation of a credit institution and which may affect third parties' existing rights, including measures involving the possibility of a reduction of claims.

123. In the present case, the Portuguese competent authority opted not to transfer certain obligations (Case C-500/22) and certain legal contingencies (Case C-498/22 and C-499/22). It is true that that authority's reasons were financial rather than legal, but it was authorised to do so by the national legislation, which even permits liabilities to be 'transferred back' to BES, a transaction allowed by the Court. [54]

3. Compatibility with the principle of consumer protection and Article 6(1) of Directive 93/13

124. Turning to compatibility with the principle of consumer protection laid down in Article 38 of the Charter (Cases C-498/22 and C-499/22) and in Article 6(1) of Directive 93/13 (Case C-498/22), it is my view that the admissibility of the question in Case C-499/22 which concerns merely the application of Article 38 of the Charter does not raise any issues. As I have set out in point 83 of this Opinion, the appellants in the main proceedings are in a situation covered by EU law from the point at which, in the context of judicial proceedings, the effects of the mutual recognition of the reorganisation measure adopted in Portugal are relied on against them.

125. On the merits, the argument raised by the appellant in the main proceedings in Case C-498/22 is based on the case-law of the Court that called into question the case-law of the Tribunal supremo (Supreme Court) of 9 May 2013 which, taking into account the difficulties in the banking sector, had limited in time the restitutory effects of the judicial declaration of the unfairness of a term contained in a contract concluded between a consumer and a seller or supplier only to amounts overpaid under that clause after the judicial decision in which that

[52] See paragraphs 50 to 57 of that judgment.

[53] See judgment in *Banco de Portugal and Others* (paragraph 52 and the case-law cited).

[54] See judgment in *Banco de Portugal and Others* (paragraph 61 and the case-law cited).

finding of unfairness was made.[55] In the judgment in *Gutiérrez Naranjo and Others*, the Court held that Article 6(1) of Directive 93/13 must be interpreted as precluding such national case-law.[56]

126. It must be observed that, in that judgment, the Court acknowledged, in accordance with Article 38 of the Charter which lays down a principle of consumer protection, that, given the nature and significance of the public interest constituted by the protection of consumers, Directive 93/13 obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.[57] However, the Court likewise recalled, in that judgment, that consumer protection was not absolute.[58]

127. The Court has, furthermore, made the point that the objectives of ensuring the stability of the banking and financial system and preventing a systemic risk are objectives of public interest pursued by the European Union.[59] Moreover, the Court has held, on several occasions, that, although there is a clear public interest in ensuring throughout the European Union a strong and consistent protection of investors, shareholders or creditors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system.[60]

128. It is therefore necessary to assess to what extent that public interest in ensuring the stability of the financial system can or cannot override consumer protection in situations such as those brought before the referring court.

129. In the first place, the appellants in the main proceedings and the referring court claim that, in so far as the Tribunal supremo (Supreme Court) relied on the financial difficulties of banks in order to limit the restitutory effects in time, the Court took into account, in the judgment in *Gutiérrez Naranjo and Others*, implicitly but necessarily, the financial impacts on the banking system in prioritising consumer protection.

130. I cannot, however, follow that line of reasoning since, in the cases at issue in the main proceedings, the difficulties took the specific form of a reorganisation measure, the mutual recognition of which was given effect in the other Member States in accordance with EU law, and therefore a fresh assessment must be made.

131. It appears to me, in the second place, that the situations at issue in the main proceedings differ markedly from that at issue in the case which gave rise to the judgment in *Gutiérrez Naranjo and Others*, since that case concerned the protection of just one consumer. In the present cases, the reorganisation measure was adopted so as to ensure the stability of the financial system and therefore, ultimately, the systemic protection of other consumers, customers of the bank and of the banking system more broadly.

[55] See judgment in *Gutiérrez Naranjo and Others* (paragraph 46).

[56] See judgment in *Gutiérrez Naranjo and Others* (paragraph 75 and the operative part).

[57] See judgment in *Gutiérrez Naranjo and Others* (paragraph 56 and the case-law cited).

[58] See judgment in *Gutiérrez Naranjo and Others* (paragraph 68).

[59] See judgment of 5 May 2022, *Banco Santander (Resolution of Banco Popular)* (C-410/20, EU:C:2022:351, paragraph 36 and the case-law cited).

[60] See judgments of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 91), which concerns investors, and of 8 November 2016, *Dowling and Others* (C-41/15, EU:C:2016:836, paragraph 54), which concerns shareholders and creditors.

132. In the third place, consumer protection does not extend as far as guaranteeing the reimbursement of overpaid interest in the event of the failure of the debtor bank, which is a different issue from that concerned with the limitation of the restitutory effects in time.

133. In conclusion, I consider that, in the present case, consumer protection cannot take precedence over the public interest of guaranteeing the stability of the financial system.

134. In addition, the Commission envisaged in its observations that the appellant's claim for overpaid interest in Case C-498/22 could be set off against the amount of the monthly repayments which continue to be paid to Novo Banco Spain pursuant to Article 23(1) of Directive 2001/24. Under that provision, the adoption of reorganisation measures is not to affect the right of creditors to demand the set-off of their claims against the claims of the credit institution, where such set-off is permitted by the law applicable to the credit institution's claim. However, that provision does not appear to apply in the present case because, first, on the date of the reorganisation measure, the claim for overpaid interest did not exist as the judgment in *Gutiérrez Naranjo and Others* had not been given, and, second, the debtor of the claim for interest due, a claim which was not transferred to Novo Banco Spain, is not the same person as the creditor of the monthly repayments.

135. In the light of the foregoing, I propose that the Court reply that Article 3(2) of Directive 2001/24 and Article 6(1) of Directive 93/13, read in the light of Articles 17 and 38 of the Charter and the general principle of legal certainty, must be interpreted as not precluding the recognition in a host Member State of the effects of a decision of the competent administrative authority of the home Member State providing, by way of a reorganisation measure, for the creation of a bridge bank and the retention in the liabilities of the failing bank of the obligation to reimburse the interest collected under an unfair term or to pay the sums due in connection with a pre-contractual or contractual responsibility.

V. Conclusion

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

(1) Article 3(2) and Article 6 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, read in the light of Article 21(2) and the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as not precluding, where publication as provided for in Article 6(1) of that directive is not made, the recognition in a Member State other than the home Member State of the effects of a reorganisation measure which created a bridge bank together with a partial transfer of obligations and responsibilities, prior to legal proceedings being brought for the recognition and payment of a claim initially held as against the banking institution which was subject to that reorganisation measure, provided that the principles of equivalence and effectiveness are respected.

(2) Article 3(2) of Directive 2001/24, read in the light of Article 47 of the Charter and the general principle of legal certainty,

must be interpreted as meaning that individuals cannot rely on the principle of the protection of legitimate expectations in relation to a bridge bank, a body governed by private law with no powers going beyond the ordinary law, set up by way of a reorganisation measure of a bank of which those individuals were initially customers, to hold that bridge bank liable in respect of the pre-contractual and contractual obligations related to contracts concluded with the bank to which the reorganisation measure applies.

(3) Article 3(2) of Directive 2001/24 and Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in the light of Articles 17 and 38 of the Charter of Fundamental Rights and the general principle of legal certainty,

must be interpreted as not precluding the recognition in a host Member State of the effects of a decision of the competent administrative authority of the home Member State providing, by way of a reorganisation measure, for the creation of a bridge bank and the retention in the liabilities of the failing bank of the obligation to reimburse the interest collected under an unfair term or to pay the sums due in connection with a pre-contractual or contractual responsibility.