Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 November 2020[1]

Case C-504/19

Banco de Portugal,
Fondo de Resolución,
Novo Banco SA
v
VR

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

(Request for a preliminary ruling – Banking supervision – Reorganisation and winding up of credit institutions – Directive 2001/24/EC – Reorganisation measure adopted by an administrative authority in the home Member State of a credit institution – Transfer of rights, assets or liabilities to a bridge institution – Transfer back to the credit institution under resolution – Article 3(2) – Effect of a reorganisation measure in other Member States – Article 32 – Effects of a reorganisation measure on a pending lawsuit – Charter of Fundamental Rights of the European Union – Article 47 – Effectiveness of judicial protection – Principles of legal certainty and protection of legitimate expectations – Directive 2014/59/EU – Applicability *ratione temporis*)

I. Introduction

1. Where a bank has to file for insolvency, its critical functions cannot always be maintained. As this may have far-reaching consequences for both depositors and the real economy, it is in the interests of the economy to avoid bank insolvencies and to resort instead to reorganisation or orderly resolution measures.[2]

2. Although many banks are part of a group of undertakings operating on a cross-border basis, there was, until the adoption of Directive 2014/59 ('the BRRD'),[3] no uniform set of tools available to the national supervisory authorities for dealing with such situations. On the contrary, EU law was limited in this regard to the provisions of Directive 2001/24,[4] which provides that the reorganisation and winding up measures laid down in the national law of the Member States are, in principle, to be recognised in the other Member States without any further formalities.

1 Original language: German.

2 See the Commission Fact Sheet of 15 April 2014 on the 'Bank Recovery and Resolution Directive' (BRRD) (see reference in footnote 3), MEMO/14/297.

3 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, 2001/35/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).

4 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ 2001 L 125, p. 15).

3. One tool for the reorganisation and orderly resolution of banks that is recognised both in Portuguese law and, now, in the BRRD is the creation of a so-called 'bridge bank'. All of an ailing bank's healthy lines of business are transferred to the bridge bank in order to stabilise the ailing bank's previous business and protect deposit holders. The remaining 'bad bank' then undergoes an orderly resolution.

4. The backdrop to the main proceedings was the imminent insolvency in 2014 of what had been the second largest bank in Portugal, Banco Espírito Santo ('BES'). In the course of that process, the Portuguese Central Bank and then supervisory authority, Banco de Portugal, created a bridge institution by the name of Novo Banco, to which it transferred all of BES's healthy lines of business in August 2014. So-called toxic liabilities were kept within the assets of BES and its subsidiaries, making them the 'bad bank'.

5. The applicant in the main proceedings ('the applicant') had originally been an investor in BES's Spanish subsidiary. From August 2014, however, contractual relations were maintained by Novo Banco Spain. After the applicant had brought an action against Novo Banco Spain to have the contract in question annulled on the ground that she had been given defective advice by BES at the time when she made her investment, Banco de Portugal decided to transfer certain liabilities – including BES's liability in connection with the conclusion of the applicant's investment contract – back to BES with retrospective effect.

6. The present request for a preliminary ruling is now concerned with whether, in accordance with Directive 2001/24, that decision must automatically be recognised by the Spanish courts, given that this will lead to the dismissal of the applicant's action against Novo Banco Spain. For, in the view of the referring court, the Tribunal Supremo (Supreme Court, Spain), that outcome could be contrary to the principles of effective judicial protection and legal certainty. The case is particularly contentious inasmuch as the referring court thus implicitly calls into question the validity of the obligation under Directive 2001/24 for resolution measures to be recognised unconditionally.

II. Legal framework

A. Directive 2001/24

7. Recitals 6, 23 and 30 of Directive 2001/24 are worded as follows:

'(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.

…

(23) Although it is important to follow the principle that the law of the home Member State determines all the effects of reorganisation measures or winding-up proceedings, both procedural and substantive, it is also necessary to bear in mind that those effects may conflict with the rules normally applicable in the context of the economic and financial activity of the credit institution in question and its branches in other Member States. In some cases reference to the law of another Member State represents an unavoidable qualification of the principle that the law of the home Member State is to apply.

…

(30) The effects of reorganisation measures or winding-up proceedings on a lawsuit pending are governed by the law of the Member State in which the lawsuit is pending, by way of exception to the application of the *lex concursus*. The effects of those measures and procedures on individual enforcement actions arising from such lawsuits are governed by the legislation of the home Member State, in accordance with the general rule established by this Directive.'

8. Article 2 of Directive 2001/24 defines the term 'reorganisation measures' as measures 'intended to preserve or restore the financial situation of a credit institution or an investment firm … 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; those measures include the application of the resolution tools and the exercise of resolution powers provided for in Directive 2014/59/EU'.

9. Article 3 of Directive 2001/24, 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 Community 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 Community once they become effective in the Member State where they have been taken.'

10. Article 6(1) to (3) of Directive 2001/24 governs the obligation to publish in the *Official Journal of the European Union* decisions relating to reorganisation measures which may affect the rights of third parties in a host Member State and which may be challenged in the home Member State. Paragraphs 4 and 5 of that article are worded as follows:

'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.'

11. Article 32 of Directive 2001/24, on the other hand, 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.'

B. Directive 2014/59 (the BRRD)

12. Recitals 4, 5 and 59 of the BRRD read, in extract, as follows:

'(4) There is currently no harmonisation of the procedures for resolving institutions at Union level. Some Member States apply to institutions the same procedures that they apply to other insolvent enterprises, which in certain cases have been adapted for institutions. There are considerable substantial and procedural differences between the laws, regulations and administrative provisions which govern the insolvency of institutions in the Member States. In addition, the financial crisis has exposed the fact that general corporate insolvency procedures may not always be appropriate for institutions as they may not always ensure sufficient speed of intervention, the continuation of the critical functions of institutions and the preservation of financial stability.

(5) A regime is therefore needed to provide authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution's critical financial and economic functions, while minimising the impact of an institution's failure on the economy and financial system. The regime should ensure that shareholders bear losses first and that creditors bear losses after shareholders …

…

(59) The resolution tools should include the sale of the business or shares of the institution under resolution, the setting up of a bridge institution, the separation of the performing assets from the impaired or under-performing assets of the failing institution, and the bail-in of the shareholders and creditors of the failing institution.'

13. Article 40 of the BRRD governs the 'bridge institution tool':

'1. In order to give effect to the bridge institution tool and having regard to the need to maintain critical functions in the bridge institution, Member States shall ensure that resolution authorities have the power to transfer to a bridge institution:

(a) shares or other instruments of ownership issued by one or more institutions under resolution;

(b) all or any assets, rights or liabilities of one or more institutions under resolution.

Subject to Article 85, the transfer referred to in the first subparagraph may take place without obtaining the consent of the shareholders of the institutions under resolution or any third party other than the bridge institution, and without complying with any procedural requirements under company or securities law.

…

7. Resolution authorities may transfer shares or other instruments of ownership, or assets, rights or liabilities back from the bridge institution in one of the following circumstances:

(a) the possibility that the specific shares or other instruments of ownership, assets, rights or liabilities might be transferred back is stated expressly in the instrument by which the transfer was made;

(b) the specific shares or other instruments of ownership, assets, rights or liabilities do not in fact fall within the classes of, or meet the conditions for transfer of shares or other instruments of ownership, assets, rights or liabilities specified in the instrument by which the transfer was made.

Such a transfer back may be made within any period, and shall comply with any other conditions, stated in that instrument for the relevant purpose.

8. Transfers between the institution under resolution, or the original owners of shares or other instruments of ownership, on the one hand, and the bridge institution on the other, shall be subject to the safeguards referred to in Chapter VII of Title IV.

…'

14. The protective provisions of Title IV, Chapter VII, comprise Articles 73 to 80 of the BRRD.

15. Article 83 of the BRRD, entitled 'Procedural obligations of resolution authorities', provides as follows:

'…

2. The resolution authority shall notify the institution under resolution and the following authorities, if different:

(a) the competent authority for the institution under resolution;

(b) the competent authority of any branch of the institution under resolution;

…

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;

…

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

…'

16. Article 131 of the BRRD provides that the directive is to enter into force on the 20th day following that of its publication in the Official Journal on 12 June 2014. In accordance with Article 130 of the BRRD, Member States are to adopt and publish by 31 December 2014 the laws, regulations and administrative provisions necessary to comply with that directive and are to apply those measures from 1 January 2015.

III. Facts and main proceedings

17. On 10 January 2008, the applicant in the main proceedings concluded in the Bilbao branch of Banco Espírito Santo SA, Sucursal en España ('BES Spain') a contract for the purchase of preference shares in Kaupthing Bank, [5] for which she paid EUR 166 021.

5 Kaupthing Bank, which had previously been the largest bank in Iceland, was placed under State control on 9 October 2008, in the course of the financial crisis. On 31 October 2008, the Icelandic supervisory authority declared Kaupthing Bank insolvent.

18. After BES fell into a serious crisis, the Portuguese central bank, Banco de Portugal, acting in its role as supervisory authority, elected, by decision of 3 August 2014, as amended by decision of 11 August 2014 ('the decision of August 2014'), to put BES into resolution. To that end, that decision established a bridge bank, Novo Banco, SA ('Novo Banco'), to which part of BES's business, in the form of its assets, liabilities and other items described in Annex 2 to that decision, was transferred. Excluded from the transfer were '[the] liabilities or contingencies, in particular those arising from fraud or breach of regulatory, criminal or administrative provisions or decisions'.

19. BES Spain subsequently became the branch of Novo Banco in Spain. That branch continued its business relationship with the applicant by safeguarding and managing securities and receiving the contractually prescribed fees in return.

20. On 4 February 2015, the applicant brought an action against Novo Banco Spain. She claimed that the order to buy preference shares in Kaupthing Bank should be annulled on the ground of an error of consent and that Novo Banco Spain should be ordered to repay to her the purchase price of EUR 166 021. In the alternative, she sought an order declaring the abovementioned contract to be terminated on the ground that BES had failed to discharge its duties of diligence and loyalty and its obligation to provide information, and requiring Novo Banco Spain to pay her the same sum by way of damages. Novo Banco Spain rebutted those claims by stating that it lacked capacity to be sued because the liability asserted was not one that had been transferred to it by Banco de Portugal's decision of August 2014.

21. By judgment of 15 October 2015, the Juzgado de Primera Instancia de Vitoria (Court of First Instance, Vitoria, Spain) upheld the action on the ground that, in its view, the liability at issue was covered by the transfer. It held that there had been an error of consent, since the applicant, who was aged 68 when the contract was concluded and had no financial knowledge, had not been adequately informed by BES of the nature and risks of the preference shares she had purchased. That court declared the contract void and ordered Novo Banco Spain to reimburse the full purchase price to the applicant.

22. On appeal, Novo Banco Spain produced two decisions adopted by Banco de Portugal on 29 December 2015 ('the decision of December 2015'), according to which the following liabilities were not transferred to Novo Banco:

'Any obligations, warranties, liabilities or contingencies assumed in the marketing, brokerage, contracting and distribution of financial instruments issued by any institutions …'

23. Those decisions also stated that, of BES's liabilities, the following in particular had not been transferred to Novo Banco: 'any damages in connection with breach of contracts … which had been entered into before 3 August 2014'; 'any damages and claims arising from the annulment of transactions carried out by BES as a provider of financial services and investments'; and 'any liability that is the subject of any of the procedures described in Annex I'. Annex I lists a series of legal proceedings under way in various States, including the proceedings brought by the applicant in Spain. Finally, the decision of December 2015 provides:

'In so far as any asset, liability or other off-balance sheet item … should have remained part of BES's assets and liabilities but was in fact transferred to Novo Banco, those assets, liabilities or other off-balance sheet items are transferred back from Novo Banco to BES with effect from 3 August 2014.'

24. Novo Banco Spain's appeal, based on Novo Banco Spain's lack of capacity to be sued, was nonetheless dismissed by the appeal court, which confirmed the decision given at first instance in its entirety. Against that judgment, Novo Banco Spain brought before the referring court an extraordinary appeal on grounds of infringements of procedure and an appeal in cassation.

IV. The order for reference and the procedure before the Court of Justice

25. By order of 25 June 2019, received at the Court on 2 July 2019, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is an interpretation of Article 3(2) of Directive 2001/24/EC under which, in legal proceedings pending in other Member States, the courts must, without any further formalities, recognise the effects of a Decision by the competent administrative authority of the home Member State that is intended retrospectively to change the legal framework that existed at the time the proceedings were commenced and that renders ineffective any judgments that do not accord with the provisions of the new decision, compatible with the fundamental right to an effective remedy in Article 47 of the Charter of Fundamental Rights of the EU, the principle of the rule of law in Article 2 of the Treaty on European Union, and the general principle of legal certainty?'

26. Written observations on that question have been submitted by Banco de Portugal, the Fondo de Resolución, Novo Banco, the Portuguese Republic, the Italian Republic, the Kingdom of Spain, the European Commission, the Council of the European Union and the European Parliament. Apart from the Italian Republic, those parties were also represented at the hearing on 30 September 2020.

V. Legal assessment

A. Introductory comments

27. Banco de Portugal, Novo Banco and the Portuguese Government take the view that the liability asserted by the applicant in the main proceedings was never transferred to Novo Banco. For, in accordance with Annex 2 to the decision of August 2014, BES's liabilities arising 'from fraud or breach of regulatory, criminal or administrative provisions or decisions' were not transferred to Novo Banco. Consequently, the question of a transfer back to BES by decision of December 2015 and of the effects of that decision on the pending lawsuit does not arise in the first place.

28. It is sufficient to note in this regard that the question as to whether the liability asserted by the applicant in the main proceedings constitutes a liability arising 'from fraud or breach of regulatory, criminal or administrative provisions or decisions' calls for a legal assessment which, in accordance with the division of jurisdiction between the national courts and the Court of Justice in the context of a reference for a preliminary ruling, falls to be answered by the referring court alone. In accordance with settled case-law, after all, that court is responsible for defining the factual and legislative context of the case, the accuracy of which is not a matter for the Court of Justice to determine.[6]

29. Accordingly, when it comes to answering the question referred for a preliminary ruling, it must be assumed, on the basis of the account given by the Tribunal Supremo (Supreme Court), that the liability for the defective investment advice given to the applicant was first transferred to Novo Banco by Banco de Portugal's decision of August 2014. It was not until Banco de Portugal's further decision of December 2015 – and, therefore, not until after the action had been brought in February 2015 and the judgment at first instance had been delivered in October 2015 – that that liability was transferred back to BES Spain, with retrospective effect to 3 August 2014.

6 See, to that effect, judgments of 12 October 2010, *Rosenbladt* (C-45/09, EU:C:2010:601, paragraph 33); of 31 January 2017, *Lounani* (C-573/14, EU:C:2017:71, paragraph 56); and of 13 June 2018, *Deutscher Naturschutzring* (C-683/16, EU:C:2018:433, paragraph 29).

30. As a result of the obligation to recognise that substantive legal position, which is laid down in principle in Article 3(2) of Directive 2001/24, the Tribunal Supremo (Supreme Court) considers itself to be faced with issues relating to judicial protection and legal certainty. For, by its account, it must, in such circumstances, set aside the judgments of the lower courts and dismiss the action on appeal, even though those judgments – at least on the basis of the legal position obtaining at the time – contained no error of law.

31. In this regard, its reference for a preliminary ruling unquestioningly presupposes that the principle laid down in Article 3(2) of Directive 2001/24, according to which reorganisation measures '[are to be] fully effective' in accordance with the legislation of the home Member State, 'throughout the [European Union] without any further formalities, including … where the rules of the host Member State … do not provide for such measures or make their implementation subject to conditions which are not fulfilled', is actually applicable in the present case. In other words – as almost all of the parties to the proceedings before the Court have pointed out – the issue described above would not arise if the referring court did not have to recognise the transfer of the liability back to BES at all in the present case.

32. The Spanish and Italian Governments, the Commission, the Council and the Parliament take the view that that outcome could be achieved by applying Article 32 of Directive 2001/24 in the main proceedings. According to that provision, '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'.

33. It is therefore necessary, first of all, to examine whether Article 32 of Directive 2001/24 is applicable in the present case and whether its application really does have the consequence of rendering Banco de Portugal's decision of December 2015 ineffective in the main proceedings (see section B). If that question has to be answered in the negative, it must then be determined whether the referring court may make recognition of that decision subject to observance of the principles of legal certainty and effective judicial protection (see section C). Finally, it remains to be examined whether, in the particular circumstances of the dispute in the main proceedings, recognition of the decision itself leads to a breach of those principles (see section D).

B. Applicability and possible legal consequences of Article 32 of Directive 2001/24 in the main proceedings

34. It is true that the conditions for the application of Article 32 of Directive 2001/24 are satisfied. However, the application of that provision does not lead to the outcome that the transfer of the liability back to BES produces no effects in the dispute in the main proceedings. This may be the reason why the Tribunal Supremo (Supreme Court) did not expressly include that provision in its reference for a preliminary ruling.

1. Applicability of Article 32 of Directive 2001/24 in the main proceedings

35. The individual conditions for the application of Article 32 of Directive 2001/24 are satisfied in the present case.

36. Thus, in the first place, the transfer of the liability back to BES is a 'reorganisation measure' within the meaning of Article 2 of Directive 2001/24, since it is intended to restore or preserve BES's financial situation inasmuch as it serves to ensure the proper functioning of the bridge institution.

37. The whole purpose of a bridge institution is not to bear the losses and damage of the ailing bank but, above all, to protect depositors.[7] The fact that the transfer back of the liability is technically a reorganisation measure is confirmed by Article 40 of the BRRD, which expressly provides in paragraph 1(b) and paragraph 7 thereof that the transfer of all 'assets, rights or liabilities' and their transfer back may form part of the resolution measure known as 'the setting up of a bridge institution'. Article 2 of Directive 2001/24 provides for its part that all resolution measures within the meaning of the BRRD are to be regarded as reorganisation measures within the meaning of Directive 2001/24.

38. Secondly, the measure relates to an 'asset or a right of which the credit institution has been divested'. This criterion, the wording of which is in any event framed in very broad terms in many language versions of the Directive,[8] must ultimately cover all objects of reorganisation measures which might potentially form the subject matter of a lawsuit. In particular, it must cover, inter alia, (pre)contractual or tortious claims pursued by and against the credit institution under resolution, since these are the very objects that may be transferred to other institutions.[9] Any change of hands of a right, a claim, a liability or any other asset in the course of a pending lawsuit triggers the need for the provisions of Article 32 of Directive 2001/24.[10]

39. Thirdly, the dispute in the main proceedings must be regarded as a 'pending lawsuit' within the meaning of that provision, since this term covers any proceedings on the substance which were already pending at the time when the measure in question was adopted.[11] In this connection, regard is to be had exclusively to the account provided by the Tribunal Supremo (Supreme Court), according to which Banco de Portugal's decision retrospectively changed the legal position in December 2015, that is to say, at a time when it is common ground that the lawsuit in the main proceedings was already pending. The fact that a judgment of a lower court has already been given does not mean that the lawsuit is not pending, provided that the proceedings have not been finally concluded.

40. However, Article 32 of Directive 2001/24 does not simply provide that, where the conditions for its application are met – that is to say, in particular, in the case where a lawsuit is pending in a Member State – a foreign reorganisation measure is per se not to produce effects or be recognised in that Member State. On the contrary, that provision provides that the effects of the reorganisation measure on the pending lawsuit are to be governed exclusively by the law of the Member State in which the lawsuit is pending.

41. Thus, in the dispute in the main proceedings, the conclusion that the transfer of the liabilities back to BES is immaterial would be drawn only if two additional conditions were met. First, the reference to Spanish law in Article 32 of Directive 2001/24 would have to be construed as meaning that the question as to whether a measure produces any effects at all in this regard – that is to say, the assessment of its validity for the purposes of the lawsuit – is governed by the law of the host Member State. Secondly, the transfer back would have to be invalid under Spanish law.[12]

7 It is to be noted in passing that share deposits such as that made by the applicant do not fall within the scope of the deposit guarantee scheme, since this covers only credit balances in an account; see Article 2(1)(3) of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149).

8 The German term 'Vermögensgegenstand', like the English version 'assets' or the Polish term 'aktyw[a]', for example, may refer to any legal position having a financial value.

9 Such as, for example, where a bridge institution or another credit institution acquires certain lines of business of an ailing credit institution by way of a takeover.

10 See also point 43 et seq. of this Opinion.

11 See, in that regard, judgment of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 54).

12 The referring court certainly seems to assume implicitly that this is the case.

42. I take the view, however, that the reference in Article 32 of Directive 2001/24 to the law of the host Member State is confined exclusively to the procedural effects of a reorganisation measure on a pending lawsuit [13] and cannot therefore affect the substantive effects of the transfer back.

2. The scope of the reference to the 'law of the Member State in which the lawsuit is pending' in Article 32 of Directive 2001/24

43. At first glance, the view might be taken that the 'effects on the lawsuit' extend to the substantive outcome of that lawsuit. However, it is clear, in particular, from the legislative context and the objectives of Article 32 of Directive 2001/24 that that provision is not to be understood in this way.

44. First, contrary to the view expressed by some of the parties to the proceedings, that provision is not based on the notion that, for reasons of legal certainty, the outcome of a lawsuit that is already pending cannot be influenced by subsequent events. For, on the one hand, it cannot be assumed that the taking into account of facts which arise after a lawsuit is pending generally leads to an infringement of the principle of legal certainty. On the other hand, if that were the case, Article 32 of Directive 2001/24 would simply have to provide that a foreign reorganisation measure is not to produce any effects on a pending lawsuit, which is to say that a pending lawsuit must remain unaffected by such a measure. However, that is precisely not the case. On the contrary, that provision provides that the effects on the lawsuit are to be governed by the law of the host Member State. The reorganisation measure in question could, however, be lawful under the law of the host Member State too. In such a situation, the outcome of a lawsuit that is already pending might therefore be altered by a subsequent event notwithstanding the application of Article 32.

45. In other words, even on a broad interpretation, Article 32 of Directive 2001/24, by the standard of its wording alone, does not have the effect of 'favouring' creditors who already have a lawsuit pending. Nowhere else in Directive 2001/24 is there any indication to support the assumption that such creditors are to be favoured, either.

46. Secondly, it is unclear why a pending lawsuit in particular should justify the need for *all* the effects of a reorganisation measure to be assessed in accordance with the law of the host Member State. Such an understanding of Article 32 would constitute a particularly extensive departure from the principle informing Directive 2001/24, according to which all the effects of a reorganisation or winding-up measure are to be determined by the *lex concursus*, and is not therefore consistent with the general scheme of the directive. [14]

47. By way of comparison, reference is made to the provisions of Articles 20 to 27 of Directive 2001/24. Those provisions too contain exceptions to the principle of the application of the *lex concursus*. However, they clearly specify which substantive legal positions are not affected by reorganisation measures. Those provisions do not stipulate that all of the substantive effects of a reorganisation measure are to be assessed in the light of the legislation of the host Member State in the case where that measure concerns one of the situations mentioned there.

13 See also, to this effect, Opinion of Advocate General Cruz Villalón in *LBI* (C-85/12, EU:C:2013:352, point 86 et seq.).

14 See, in that regard, judgment of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 55).

48. Accordingly, Article 32 of Directive 2001/24 must be understood as meaning that it is only the procedural effects that are to be governed by the law of the host Member State, not the validity of the measure as such for the purposes of the proceedings. This is borne out in particular by the fact that, according to the Court's case-law, Directive 2001/24, and Article 32 thereof in particular, is intended to ensure that the availability of the assets administration is not limited.[15] Thus, the understanding proposed here is also consistent with the need to interpret that provision restrictively in this regard, in its capacity as an exception.[16]

49. Thirdly, it would often be practically impossible for all of the effects of a reorganisation or winding-up measure to be determined in full by reference to the law of the host Member State. After all, Directive 2001/24 does not harmonise the national legislation on measures for the reorganisation and winding up of credit institutions;[17] a reorganisation measure adopted in one Member State may thus have no equivalent in the law of another Member State and would, as a result, never be able to satisfy the conditions of that law. So it is that Article 3(2) of Directive 2001/24 expressly provides that a foreign reorganisation measure must be recognised even 'where the rules of the host Member State … do not provide for such measures or make their implementation subject to conditions which are not fulfilled'.

50. That is why even Articles 20 to 27 of Directive 2001/24 are confined to certain substantive legal positions which are determined by the law of the host Member State, and Article 32 is confined to the procedural effects on the pending lawsuit.

51. In the light of those effects, however, the departure from the principle of the *lex concursus* is a necessity in the case of a lawsuit that is already pending. For only the law of the host Member State can determine whether the [reorganisation] measure makes it necessary, for example, to amend the application, declare the case to be disposed of or replace one of the parties. Prior to the commencement of legal proceedings, on the other hand, even the procedural effects of a reorganisation or winding-up measure can be governed by the law of the home Member State. Thus, the law of the home Member State may provide, for example, that, as a result of the opening of winding-up proceedings, a credit institution loses its capacity to sue and be sued and must therefore be represented in legal proceedings by an insolvency administrator.

52. So far as the present proceedings are concerned, therefore, it follows from Article 32 of Directive 2001/24 only that the effects which the transfer of liability back to BES, pursuant to Portuguese law, has on the proceedings instituted in Spain are those provided for in Spanish law.[18] More specifically, these manifest themselves, according to the account provided by the Tribunal Supremo (Supreme Court), in the fact that Novo Banco loses its capacity to be sued, it cannot be replaced as defendant and the action brought against it must be dismissed as a result.[19]

15 Judgment of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 55).

16 Judgment of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 52).

17 Judgments of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 39), and of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 104).

18 See also, to that effect, Opinion of Advocate General Cruz Villalón in *LBI* (C-85/12, EU:C:2013:352, points 86 and 87).

19 Under German law, for example, the proceedings against Novo Banco could proceed notwithstanding that change; the finality of the judgment, however, would extend to BES; see the provisions of Paragraphs 265(2) and 325 of the Zivilprozessordnung (Code of civil procedure; 'the ZPO'). See, in that regard, points 96 and 97 of this Opinion, below.

53. It is true that the Tribunal Supremo (Supreme Court) considers this consequence to be unsatisfactory. However, given that the principle of the application of the *lex concursus* is of paramount importance to the universal effectiveness of reorganisation measures, which is the objective pursued by Directive 2001/24,[20] it would be unacceptable to draw the conclusion that the measure at issue must be divested of *all* its effects in the pending proceedings. This, in my view, would amount to throwing the proverbial baby out with the bath water. The solution to this issue is to be sought, rather, in Spanish procedural law, which must be applied in the light of EU law.[21]

54. It follows from the foregoing considerations that, in the dispute in the main proceedings, the substantive effectiveness of the transfer of liability back to BES is not to be assessed in the light of Spanish law. Only the procedural consequences of that measure on the pending proceedings are determined by the law of that Member State. It follows that the referring court cannot refuse to recognise that substantive legal position on the ground that it is contrary to Spanish law.

C. Whether an exception to the principle of mutual recognition is applicable

55. Article 3(2) of Directive 2001/24 provides that reorganisation measures adopted in accordance with the legislation of the home Member State are to be fully effective throughout the European Union without further formalities. The principle of mutual recognition expressed in that provision is based on the principle of mutual trust.[22] This states that the legality of a measure adopted in accordance with the rules of the home Member State is not to be reviewed by the authorities and courts of the host Member State.[23]

56. Mutual trust is for its part founded on the assumption that comparable guarantees, in particular as regards the underpinning fundamental values of the rule of law and democracy and the fundamental rights of the European Union, are present in all the Member States.[24] That assumption is the only justification for conducting no further review as to the compatibility of a measure to be applied on the basis of mutual recognition with the higher-ranking law of the host Member State.[25]

57. What is more, recognition of the decision of December 2015 in the present case is not subject to compliance with any other provisions of EU law either.

58. For, in the first place, the transfer of liability back to BES is not to be assessed in the light of the BRRD (see, in that regard, section 1). Secondly, since, for that reason, the adoption of that reorganisation measure does not, by extension, constitute an implementation of EU law, the general legal principles and the fundamental rights of EU law are not applicable (see, in that regard, section 2). And thirdly, none of the situations identified in the case-law of the Court as being ones in which a national measure subject to the principle of mutual recognition must, exceptionally, be reviewed for compliance with fundamental principles of EU law is present here (see, in that regard, section 3).

20 See, in that regard, judgment of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 55).

21 See, in that regard, point 94 et seq. of this Opinion.

22 See, in this connection, judgments of 22 December 2010, *Aguirre Zarraga* (C-491/10 PPU, EU:C:2010:828, paragraph 70), and of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 77).

23 I would point out purely for the sake of completeness that there is in any event no doubt about the legality [of the reorganisation measure at issue] under Portuguese law. In particular, the Portuguese Government, in the course of the proceedings before the Court, expressly confirmed once again that Article 145-H(5) of the RGICSF is a suitable legal basis in Portuguese law for the decision of December 2015, and that Banco de Portugal complied with all the other procedural and substantive rules of Portuguese law, too.

24 See Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraph 191); and judgments of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 78), and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 35).

25 Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 37).

1. Applicability ratione temporis *of the BRRD*

59. The provisions of the BRRD are not applicable *ratione temporis* to the transfer of liability back to BES pursuant to Banco de Portugal's decision of December 2015.

60. It will be recalled that the BRRD entered into force on 2 July 2014.[26] In August 2014, Banco de Portugal set up Novo Banco for the purposes of putting BES into resolution and transferred to the former, inter alia, the liabilities asserted by the applicant in the main proceedings. The time limit for transposing the BRRD expired on 31 December 2014.[27] In December 2015, Banco de Portugal adopted the decision to transfer the liability at issue back to BES with retrospective effect to 3 August 2014.

61. In this connection, however, the transfer of liabilities back to BES in December 2015 must be regarded as being no more than an inseparable part of the recovery measure entitled 'set-up of the Novo Banco bridge institution', which had been decided upon in August 2014 and thus prior to the expiry of the time limit for transposing the BRRD. This holistic view is supported by the fact that it would be artificial to assess the various reorganisation measures in isolation solely because they are chronologically separate, notwithstanding that they are in fact substantively linked and pursue the same objective, namely to set up Novo Banco and allocate performing and non-performing assets.

62. The foregoing notion is illustrated by the provision contained in Article 40(7) of the BRRD. That provision makes the permissibility of transferring liabilities back to the 'bad bank' – a measure adopted, in the present case, after the time limit for discharging the obligation to transpose had expired – subject to the condition that that possibility was already provided for in the instrument setting up the bridge bank, which predated the expiry of the time limit for transposition. The creation of the bridge institution is thus, on the one hand, inseparably linked to the transfer and transfer back of liabilities. On the other hand, any attempt to examine the transfer back in the light of Article 40(7) of the BRRD would, moreover, amount ultimately to applying to the decision of August 2014 specific requirements inferred from the BRRD even though it is common ground that, at the time of the transfer back, the time limit for transposing that directive had not yet expired.[28] It is not therefore possible to view the various measures separately. This holds good irrespective of the fact that the provisions contained in Article 40(7) of the BRRD were actually met in the present case.

63. If the aforementioned measures were to be viewed individually, even the administrative competence to adopt later measures in connection with the resolution of BES would have to be split. For, when Regulation No 806/2014[29] entered into force, competence to adopt resolution measures concerning banks of the size and significance of BES was transferred to the Single Resolution Board (SRB).[30]

26 See Article 131 of the BRRD: the 20th day following the date of publication in the Official Journal on 12 June 2014 was 2 July 2014.

27 See Article 130 of the BRRD.

28 It is true that, according to settled case-law, it follows from Article 4(3) TEU and the third paragraph of Article 288 TFEU and the directive in question that, during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it. However, that case-law supports the inference only of obligations to refrain from taking action but not of any positive obligations to act; see, in particular, judgment of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraphs 121 and 122).

29 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 255, p. 1) ('the SRM Regulation').

30 Article 5(1) in conjunction with Article 7(2)(a)(i) of the SRM Regulation.

64. In that regard, it follows from the case-law of the Court that the application of a previous legal position to situations which arose during the period of validity of that position and continue in being following the entry into force of the new legal position may be justified where the new rules form an indivisible whole and have resulted in what might be called a change of system. [31] That is the case with the BRRD.

65. It is therefore only reasonable to assess the legality of the measures adopted by Banco de Portugal in connection with the resolution of BES as a single package of measures based on the legal position applicable in August 2014, that is to say, at a time when the time limit for transposing the BRRD had not yet expired.

66. What is more, there is no reason why the resolution measures in the present case should warrant the early application of the BRRD. It is true that, during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it. [32] However, there is nothing to indicate that the transfer of liability back to BES is contrary to the objectives of the BRRD, in particular Article 40 thereof.

67. On the contrary, a bridge institution is intended to maintain only the healthy lines of business of an ailing bank. The purpose of such an institution is specifically *not* to take over liability for high-risk and potentially harmful conduct on the part of that bank. Rather, that tool is designed (in accordance with the general objectives of the bank resolution scheme [33]), in particular, to protect deposit holders and to mitigate any potential consequences for the banking system as a whole. As I have already said, however, the applicant's share portfolio is not a protected deposit. [34]

68. Novo Banco's set-up and capitalisation in the amount of EUR 4 900 million was funded from State resources. [35] Now, if Novo Banco were to be liable for those business practices engaged in by BES which the Spanish courts have classified as unlawful, and which consisted in selling inexperienced investors shares in the ailing Icelandic Kaupthing Bank up until shortly before the latter's insolvency, it would ultimately fall once again to the taxpayer to 'carry the can' for mistakes made by banks. It has, however, been the stated objective of all the reforms in the field of banking regulation which were implemented in the wake of the financial crisis in 2008 to call a halt to the so-called 'moral hazard' in the financial sector and to minimise the cost to the general public of bank rescues. [36]

69. It may, it is true, seem unsatisfactory at first sight that the applicant, who, according to the findings of the Spanish courts, was unable to appreciate the implications of her investment, should end up losing her money as a result. The reason for this, however, lies in the fact that the applicant's case involved the materialisation of no fewer than two general risks. First, Kaupthing Bank failed and was put into resolution. If the applicant had had a sound share portfolio in her securities account with BES, she would in all probability not have brought an action for defective investment advice to begin with. Secondly, BES failed too, with the result that the applicant, despite having a claim for defective investment advice, no longer has any prospect of recovering her money from that institution. It does not follow from this, however, that those two risks must be passed on to the State or the general public. Consideration should be given instead to the personal liability of the investment consultants or to criminal-law consequences.

31 See, to that effect, judgments of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 11), and of 26 March 2015, *Commission* v *Moravia Gas Storage* (C-596/13 P, EU:C:2015:203, paragraph 36).

32 Judgments of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraph 45); of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraph 57); and of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962, paragraph 55).

33 The resolution objectives are now laid down in Article 14(2) of the SRM Regulation.

34 See, in that regard, point 36 of this Opinion.

35 See Commission press release IP/14/901 of 4 August 2014 on the approval of resolution aid for Banco Espírito Santo.

36 See, for example, the Commission Fact Sheet of 15 April 2014 on the BRRD, MEMO/14/297. See also the second sentence of Article 14(2) of the SRM Regulation.

70. For those reasons, the transfer of liability back to BES which is at issue in the present case is consistent with the objectives of the BRRD. Consequently, the BRRD is not applicable to that measure by reason of any advance effect of that directive either.

2. Whether the general principles and fundamental rights of EU law are applicable

71. In order for the transfer of liability back to BES to be amenable to review against the principles of legal certainty and effective judicial protection under EU law, that transfer would have to be capable of being regarded as 'implementing Union law' within the meaning of Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). This would render applicable not only the Charter, namely Article 47 thereof, but also the general principles of EU law.[37] These include, in particular, the principle of legal certainty.[38]

72. However, the transfer of liability back to BES pursuant to the decision of December 2015 – unlike the recognition of that decision – does not constitute an implementation of EU law.

73. That is because Directive 2001/24 does not actually harmonise national provisions on the reorganisation and winding up of credit institutions.[39] It is true that Directive 2001/24 imposes an obligation on the Member States to recognise such measures adopted by other Member States. However, recognition by the host Member State (in this case, Spain) is a measure that must be distinguished from the adoption of the reorganisation measure itself by the home Member State (in this case, Portugal). So far as concerns the adoption and implementation of reorganisation and winding up measures by the authorities and the courts of the home Member State of a credit institution, Directive 2001/24 does not actually contain any specific obligations, such measures being governed instead exclusively by the law of the home Member State.[40] In particular, Directive 2001/24 does not require Member States to adopt or implement specific reorganisation and winding-up measures.[41] It is for this very reason that mutual recognition is needed in the first place.

74. It is true that the adoption of the BRRD had the effect of harmonising measures for the reorganisation and winding up of credit institutions in the European Union.[42] The BRRD provides the supervisory authorities of the Member States with a uniform set of resolution tools, including the setting up of a bridge bank and the transactions associated with its set-up.[43] As has already been established, however, the provisions of the BRRD are not applicable *ratione temporis* to the transfer of liability back to BES at issue in the main proceedings.[44] Rather, Banco de Portugal set up the bridge bank under Portuguese law at a time when the applicable legislation was only Directive 2001/24, which did not actually provide for the harmonisation of resolution measures.

75. The fact therefore remains that the decision of December 2015 does not constitute an implementation of EU law.

37 See the Explanations relating to Article 51 of the Charter (OJ 2007 C 303, p. 32), as well as judgment of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraph 33), and order of 24 September 2019, *Spetsializirana prokuratura (Presumption of innocence)* (C-467/19 PPU, EU:C:2019:776, paragraph 39).

38 Judgment of 1 July 2014, *Ålands Vindkraft* (C-573/12, EU:C:2014:2037, paragraph 125).

39 Judgments of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 39), and of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 104).

40 On the criterion to the effect that EU law must impose specific obligations on Member States in order for the Charter to become applicable, see judgments of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraph 26), and of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraph 35), as well as order of 24 September 2019, *Spetsializirana prokuratura (Presumption of innocence)* (C-467/19 PPU, EU:C:2019:776, paragraph 41).

41 See, to that effect, order of 24 September 2019, *Spetsializirana prokuratura (Presumption of innocence)* (C-467/19 PPU, EU:C:2019:776, paragraph 41 and 42).

42 See recital 10 of the BRRD and judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 113).

43 See Article 40 of the BRRD.

44 See point 59 et seq. of the present Opinion, above.

76. To regard every national decision that is subject to mutual recognition under EU law – that is to say, every judgment at criminal [45] and civil [46] law, every maintenance decision, [47] every licence to practise medicine, [48] and so on – as being an implementation of EU law would do more than just extend the scope of the Charter to an extreme degree. First and foremost, it would take the system of mutual recognition to absurd lengths. That is because such a measure, instead of being recognised on the basis of trust in its compatibility with higher-ranking principles, would in every individual case be open to review in the light of the fundamental rights and general principles of EU law. That option, however, is available only in very exceptional cases, the conditions governing which are not satisfied here.

3. Whether there is a need for an exceptional review of compliance with the fundamental values of EU law

77. For, according to the case-law of the Court, exceptions to the principle of mutual recognition may indeed be made, but at most in 'exceptional circumstances'. [49] In this regard, the Court has recognised, in the context of the execution of a European arrest warrant, that a real risk that a legal interest of fundamental importance will be breached as a result of systemic deficiencies may constitute such an exceptional circumstance. More specifically, the Court referred in this connection to the prohibition of inhuman or degrading treatment or punishment [50] laid down in Article 4 of the Charter and to the requirement of judicial independence. [51] Similarly, at the hearing, the Council, presenting argument in the alternative, cited the Court's case-law on the rule of law. [52]

78. In the present case, however, there can be no question of serious and systemic breaches of the rule of law in Portugal. That said, in the event that the Court nonetheless considers it necessary to examine the reorganisation measure in the light of EU law, I should like to look below, in the alternative, at the reasons why the transfer of liability back to BES does not constitute an infringement either of the principle of legal certainty or of the right to effective judicial protection.

(a) In the alternative: the principle of legal certainty, in particular the principle of the protection of legitimate expectations

79. According to settled case-law, the principle of legal certainty requires that national rules of law be sufficiently clear and precise to enable those subject to them to ascertain unequivocally what obligations are imposed on them and what rights are conferred on them and thus take steps accordingly. [53] As a corollary of that principle, the legitimate expectation of the persons concerned that those rules of law will be maintained is, in principle, protected. [54]

45 See Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27).

46 See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

47 See Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1).

48 See Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

49 See Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraph 191); as well as judgments of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 82), and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 43).

50 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 85).

51 Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 48).

52 The Council's representative referred, in particular, to the judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117), and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531).

53 Judgment of 1 July 2014, *Ålands Vindkraft* (C-573/12, EU:C:2014:2037, paragraph 127).

54 Judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 77).

80. There can be no legitimate expectation that a situation will be maintained, however, in the case where a prudent and circumspect economic operator could have foreseen a change in the legal position. In particular, according to case-law, an economic operator cannot have a legitimate expectation that an existing situation which is capable of being altered by the national authorities in the exercise of their discretionary power will be maintained.[55]

81. The crucial question in the main proceedings, therefore, would be whether a prudent and circumspect investor could have known that the supervisory authority was able to transfer liabilities back to the bad bank, including retrospectively, on the basis of Article 145-H(5) of the RGICSF. An indication that she could is the fact that that possibility was expressly reiterated in the decision of August 2014, as the Portuguese Government, too, has emphasised during the proceedings before the Court. In that connection, it would have to have been ensured, however, that a prudent and circumspect investor was in a position to know about that decision, and, for this to be the case, that decision would, at least, have to have been published in the Spanish language and in the form customary in that country. It was submitted at the hearing in this regard that Banco de Portugal's decision was widely reported in the Spanish media.

82. In any event, the mere fact that Novo Banco became (at least in part) the successor in law to BES,[56] and, moreover, continues to manage the applicant's share portfolio, could not in my view support a legitimate expectation that Novo Banco would also take on liabilities connected with BES's defective investment advice which existed before it took over that business relationship. Taking over a contract does not necessarily entail the assumption of a pre-existing liability.

83. Moreover, it is at odds with the very spirit and purpose of creating a bridge institution to transfer to it liability for high-risk and potentially harmful conduct on the part of the ailing bank.[57] These considerations, too, may have a role to play in the assessment of compliance with the principles of legal certainty and the protection of legitimate expectations in the dispute in the main proceedings.

84. It should be recalled in this regard, after all, that, according to the case-law of the Court, the protection of legitimate expectations is limited by the principle of legality in the case of unlawful acts.[58] It is true that this is not the place to be assessing the legality of Banco de Portugal's decision of December 2015, since that is not the Court's role. However, in any event, an expectation that such a transfer decision will be maintained can, in my view, enjoy only very limited protection where that decision is clearly contrary to the objectives of the resolution measure.

85. To that effect, the Portuguese Government too expressed the view, in its reply to the written questions put by the Court, that the supervisory authority must be given the opportunity to rectify defective decisions. This is particularly imperative given the time constraints under which the resolution decision must be taken[59] and the considerable financial burdens imposed on the general public as a result of the creation of a bridge bank.

55 See, to that effect, judgments of 7 September 2006, *Spain* v *Council* (C-310/04, EU:C:2006:521, paragraph 81); of 10 September 2009, *Plantanol* (C-201/08, EU:C:2009:539, paragraph 53); and of 11 July 2019, *Agrenergy and Fusignano Due* (C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraph 31).

56 See, on the new legal position, Article 40(9) of the BRRD.

57 See, in that regard, point 67 et seq. of the present Opinion, above.

58 See, to that effect, judgments of 22 March 1961, *Snupat* v *High Authority* (42/59 and 49/59, EU:C:1961:5, p. 172); of 3 March 1982, *Alphasteel* v *Commission* (14/81, EU:C:1982:76, paragraph 10); of 17 April 1997, *de Compte* v *Parliament* (C-90/95 P, EU:C:1997:198, paragraphs 35 and 36); and of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 27).

59 In accordance with the European legal situation currently in force, urgency is a precondition for resolution; see Article 18(1)(b) of the SRM Regulation.

86. In the light of all those circumstances, the applicant would have no reason to expect that BES's transfer to Novo Banco of the liability for defective investment advice, pursuant to the decision of August 2014, would be maintained. There is therefore nothing to indicate that the principle of legal certainty was infringed.

(b) In the alternative: the right to effective judicial protection

87. According to settled case-law, the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States enshrined in Article 47 of the Charter and also in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').[60] Under the first paragraph of Article 47 of the Charter, everyone has the right to an effective remedy before a tribunal. It also follows from the second paragraph of Article 47 of the Charter that access to justice must be ensured. In this regard, the European Court of Human Rights (ECtHR) does not consider a remedy the availability of which is purely formal or theoretical but in practice excluded to be sufficient to guarantee effective access to justice.[61]

88. According to information provided by the Portuguese Government, the applicant in the present case had a right to challenge the decision of December 2015 within three months of the publication of the decision on Banco de Portugal's website on 13 January 2016. In this regard, it would have to be assessed, in the light of all the circumstances of the case, whether that remedy may be regarded as effective within the meaning of the first paragraph of Article 47 of the Charter.

89. It would be important to take into account in this connection the fact that Article 47 of the Charter does not, in principle, preclude the setting of time limits for bringing proceedings.[62] The effectiveness of judicial protection is not compromised or made excessively difficult by a reasonable time limit, provided that that time limit starts to run from the date on which the person concerned was aware of it or at least ought to have been aware of it.[63]

90. Moreover, according to the explanations provided by the Portuguese Government, Banco de Portugal's decision was not only published on 13 January 2016; on 26 January 2016, Novo Bank Spain also entered it in the case file of its dispute with the applicant in Spain. The applicant was represented by legal counsel throughout those proceedings. According to the Portuguese Government, moreover, at least six Spanish investors have brought actions in Portugal against the decision of December 2015.

91. In addition, contrary to the view expressed by the Spanish Government, it cannot be considered generally unreasonable that Banco de Portugal's decision must be challenged in Portugal. It is a necessary corollary of a system of mutual recognition which allows even foreign decisions to produce effects in Member States that the ground of jurisdiction for objections to such a decision may be located in a Member State other than that in which the applicant is resident.[64]

92. In those circumstances, it would have to be assumed that the applicant too enjoyed effective judicial protection against the Banco de Portugal's decision of December 2015.

60 See judgment of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraph 58).

61 According to that case-law, an appeal must not simply be 'theoretical or illusory'; see, for example, ECtHR, judgments of 19 March 1997, *Hornsby v. Greece* (CE:ECHR:1997:0319JUD001835791, §§ 40 and 41), and of 26 February 2002, *Del Sol v. France* (CE:ECHR:2002:0226JUD004680099, § 21).

62 Order of 17 May 2002, *Germany* v *Parliament and Council* (C-406/01, EU:C:2002:304, paragraph 20).

63 See, to that effect, judgments of 7 November 2019, *Flausch and Others* (C-280/18, EU:C:2019:928, paragraph 55), and of 27 February 2020, *TK and Others (Remuneration of civil servants and judges)* (C-773/18 to C-775/18, EU:C:2020:125, paragraph 73).

64 See, to that effect, judgment of 22 December 2010, *Aguirre Zarraga* (C-491/10 PPU, EU:C:2010:828, paragraph 69).

4. Interim conclusion

93. It follows that no exception to the principle of mutual recognition provided for in Article 3(2) of Directive 2001/24 is applicable. The applicant would have to raise any objections to Banco de Portugal's decision before the Portuguese courts.

D. The effects of recognising the reorganisation measure in the main proceedings in the light of the principles of legal certainty and effective judicial protection

94. Against the background of the conclusion set out above, the Tribunal Supremo (Supreme Court) asks whether the obligation under Article 3(2) of Directive 2001/24 to recognise unconditionally the substantive legal position arising from Banco de Portugal's decisions of December 2015 is itself contrary to the principles of legal certainty and effective judicial protection.

95. According to the account provided by that court, the effect in Spanish law of the change of substantive legal position thus brought about in the pending proceedings would be that the appeal would have to be dismissed and the applicant would have to bear the costs. The Tribunal Supremo (Supreme Court) considers it particularly problematic in this connection that it would have to set aside the judgments of the lower courts even though they contained no error of law, at least on the basis of the legal position obtaining at the time. It thus implicitly calls into question the validity of Article 3(2) of the directive in circumstances such as those in the main proceedings.

96. This overlooks the fact, however, that the setting aside of the judgments of the lower courts and the dismissal of the appeal do not in any way follow directly from Article 3(2) of Directive 2001/24. Rather, these are the specific procedural effects which Spanish law – alone applicable in this context pursuant to Article 32 of Directive 2001/24[65] – attaches to a (retrospective) change of substantive legal position in the pending proceedings.

97. In this regard, the Spanish Government confirmed at the hearing that, at the present stage of the proceedings, Spanish law does not provide for the possibility of replacing the defendant or of continuing the proceedings against the original defendant and extending the finality of the judgment given to the 'new' bearer of the liability,[66] and does not have a mechanism such as the *retrait litigieux*.[67] The Tribunal Supremo (Supreme Court) therefore has no choice but to set aside the judgment at first instance, which (at that time) contained no error of law, and, ultimately, to dismiss the action and order the applicant to bear all of the costs. This would certainly not be the inevitable outcome in other legal systems, however.

98. On close inspection, therefore, the issue is not recognition of the substantive legal position – and, thus, Article 3(2) of Directive 2001/24 – but the absence of any procedural options in Spanish law for responding to such a situation. This raises the question – which the Council too implicitly raised in the written procedure before the Court – as to whether national legislation which attaches to the recognition of a foreign reorganisation measure in pending legal proceedings, as required by Directive 2001/24, the procedural consequence that a previously well-founded action is dismissed on appeal, with an award of full costs against the applicant, is compatible with the principles of legal certainty and effective judicial protection.

65 See point 41 et seq. of the present Opinion, above.

66 See, in German law, the provisions of Paragraphs 265(2) and 325 of the ZPO.

67 See, in French law, the provisions of Article 1699 et seq. of the Code civil (Civil Code).

99. For the purposes of answering that question, it is the expression of those principles in EU law that is relevant, since the recognition of a foreign reorganisation measure – unlike the adoption of one[68] – transposes the obligation incumbent on Member States under Article 3(2) of Directive 2001/24 and thus constitutes an 'implement[ation of] EU law' within the meaning of Article 51(1) of the Charter.

1. The principle of legal certainty

100. As regards compatibility with the principle of legal certainty, Spanish procedural law does not, to my mind, present any particular problems. In particular, there can be no legitimate expectation that a decision given by a lower court will be maintained before the proceedings relating to that decision have been finally concluded.

101. Since the possibility of transferring liability back to BES must in itself be regarded as compatible with the principle of legal certainty,[69] the position cannot be otherwise in relation to the procedural consequences of that transfer back. This is because a prudent and circumspect applicant can be expected to be aware of the applicable procedural law. In other words, the applicant should have anticipated that the effect of any change in the substantive legal position would be that her action would be dismissed and she would have to bear all of the costs.

2. The right to effective judicial protection

102. However, there are serious doubts as to whether that conclusion is compatible with the right to an effective remedy and access to justice, as provided for in Article 47 of the Charter.

103. It is true that the effectiveness of a remedy for the purposes of Article 13 of the ECHR and the first paragraph of Article 47 of the Charter cannot be equated with its success.[70] Thus, Article 47 of the Charter does not guarantee that the action will be upheld and that Banco de Portugal's decision of December 2015 will not be recognised.

104. What is problematic, however, is the applicant's obligation to pay costs as a result of the dismissal of the action. The case-law of the Court has recognised in this regard that disproportionately high procedural costs are also capable of adversely affecting the right to an effective remedy and access to justice.[71] Costs must be regarded as disproportionate, however, not only where they are disproportionate to the applicant's economic interest in obtaining a ruling in his or her favour, but also where they are objectively unjustified.

105. It is true that a rule to the effect that an applicant must bear the costs of the dispute if he or she is unsuccessful is therefore common and, in principle, unobjectionable.[72] This is because the objective justification for the obligation to pay costs is that responsibility for ensuring that the action is admissible and well founded lies with the applicant.

106. There may, however, be situations in which that reasoning does not hold good. The dispute in the main proceedings is illustrative of such a situation. In that case, although the action is not (or is no longer) well founded because the substantive legal position changed retrospectively after the event, this is entirely beyond the applicant's sphere of influence and responsibility.

68 See, in that regard, inter alia, point 73 of this Opinion.

69 See, in that regard, point 79 et seq. of this Opinion.

70 ECtHR, judgment of 29 November 1991, *Pine Valley v. Ireland* (CE:ECHR:1991:1129JUD001274287, § 66).

71 See, to that effect, judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 33).

72 See, to that effect, judgments of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 25), and of 13 February 2014, *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67, paragraph 44).

107. It is true that the applicant in the present case should have anticipated that the legal position might change to her detriment, depending on the circumstances, and that, as a result, her claim would ultimately not be granted.[73] The consequence of this should not be, however, that the bringing of the action itself operates to her disadvantage and that she might therefore be deterred from litigating at all. Such an outcome would impact the very essence of the right to effective judicial protection.

108. In such a situation, national law must, therefore, in my view, do one of two things. Either it must provide for a procedural means of responding. One such means might, for example, be a declaration that the case is disposed of, an amendment of the application or any other mechanism for ensuring that an applicant is not unsuccessful solely because the substantive legal position has been retrospectively changed after the event. Or the court must have the power to choose not to order the applicant to pay costs even though the action has been dismissed.

109. The risk of inevitably being unsuccessful and having to pay all of the costs, on the other hand, is such as to deter an applicant from asserting his or her rights through the courts and, therefore, incompatible with Article 47 of the Charter.

VI. Conclusion

110. In the light of the foregoing considerations, I propose that the Court's answer to the question referred by the Tribunal Supremo (Supreme Court, Spain) should be as follows:

'The recognition of a reorganisation measure adopted in one Member State which retrospectively changes the substantive legal position forming the subject of a lawsuit pending in another Member State, in accordance with Article 3(2) 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, cannot have as its consequence in the present dispute that the party to whose detriment that change operates will inevitably be unsuccessful and have to pay all of the costs of the proceedings. Such an outcome makes the bringing of an action itself a risk and is such as to deter an applicant from asserting his or her rights through the courts and, therefore, incompatible with Article 47 of the Charter of Fundamental Rights of the European Union.'

73 See point 79 et seq. of this Opinion.