



Press and Information

Court of Justice of the European Union

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Judgment in Case C-83/20
BPC Lux 2 and Others

The Portuguese legislation which provides the basis for the resolution action in respect of Banco Espírito Santo is compatible with the right to property

By transposing the directive on the recovery and resolution of credit institutions only in part prior to the expiry of the period prescribed for transposition, Portugal has not compromised the result prescribed by that directive

Banco Espírito Santo SA ('BES') was one of the main credit institutions in the Portuguese banking system. On account of its financial situation and the serious and grave risk that it would be in default of its obligations, that credit institution was the subject of a resolution decision taken by Banco de Portugal (Bank of Portugal) on 3 August 2014 ('the resolution action'). That action, which was taken under national legislation on the resolution of credit institutions,¹ as amended by a Decree-Law of 1 August 2014,² resulted in the creation of a bridge bank, Novo Banco SA, to which certain assets, liabilities, off-balance sheet items and assets managed by BES were transferred.

The applicants in the main proceedings ('BPC Lux 2 and others') are holders of subordinated bonds issued by BES. Massa Insolvente held, directly and indirectly, shares in the share capital of BES. Before the national administrative courts, BPC Lux 2 and others and Massa Insolvente challenged the resolution action and, in that context, claimed, inter alia, that that action had been taken in breach of EU law.

The Portuguese Supreme Administrative Court, before which two appeals had been brought by BPC Lux 2 and others and Massa Insolvente, had doubts as to the compatibility of the national legislation, under which the BES resolution action had been taken, with EU law, in particular with Directive 2014/59³ and Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'),⁴ on account of the failure to transpose a whole series of requirements set out in that directive.

In addition, that court was uncertain whether the Portuguese legislature was liable seriously to have compromised the result prescribed by Directive 2014/59⁵ by adopting the Decree-Law of 1 August 2014, which transposed that directive only in part prior to the expiry of the period for transposition of that directive set at 31 December 2014.

By its judgment, the Court finds that the national legislation under which the BES resolution action was taken is compatible with Article 17(1) of the Charter. It also rules that the

¹ Regime Geral das Instituições de Crédito e Sociedades Financeiras (General Provisions governing Credit Institutions and Finance Companies), as stem from Decree-Law No 31-A/2012 of 10 February 2012.

² Decree-Law No 114-A/2014 of 1 August 2014.

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, 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).

⁴ Article 17 of the Charter guarantees protection of the right to property.

⁵ In accordance with the principle established in the line of authority emanating from the judgment of 18 December 1997, *Inter-Environnement Wallonie*, C-129/96 (see Press Release No 80/97), concerning the obligations of Member States during the period for transposition of a directive.

transposition by a Member State, only in part, of certain provisions of a directive before the expiry of the period prescribed for its transposition is not, as a matter of principle, liable seriously to compromise the result prescribed by that directive.

Findings of the Court

First of all, the Court examines the applicability to the dispute in the main proceedings of the provisions of Directive 2014/59⁶ relied on. In that regard, it points out that the period for transposition of that directive expired on 31 December 2014. It follows that, on the date on which the resolution action at issue was taken, namely 3 August 2014, the period for transposition had not expired. After recalling its settled case-law in this area,⁷ the Court observes that the applicants in the main proceedings cannot rely before the referring court on the provisions of Directive 2014/59, since they are not applicable to the dispute in the main proceedings.

As regards the applicability of Article 17 of the Charter, the Court points out that, under Article 51(1) thereof, the provisions of the Charter are addressed to the Member States only when they are implementing EU law. After noting, first, that the Decree-Law of 10 February 2012 was intended to implement one of the commitments entered into by the Portuguese Republic in the context of a Memorandum of Understanding on economic policy conditionality concluded with the joint mission of the European Commission, the International Monetary Fund (IMF) and the European Central Bank (ECB), and, secondly, that the Decree-Law of 1 August 2014 constitutes a measure for the transposition in part of Directive 2014/59, the Court considers that EU law is being implemented, within the meaning of Article 51(1) of the Charter, with the result that the provisions of the Charter are applicable to the dispute in the main proceedings.

In that regard, the Court notes that Article 17(1) of the Charter contains three distinct rules. The first, which is expressed in the first sentence and is of a general nature, gives concrete expression to the principle of respect for property. The second, set out in the second sentence of that paragraph, refers to a person being deprived of property and subjects that deprivation to certain conditions. The third, which is contained in the third sentence of that paragraph, recognises States' power, *inter alia*, to regulate the use of property in so far as is necessary for the general interest. The Court adds that these are not unrelated rules, since the second and third rules relate to specific examples of infringements of the right to property, and are to be interpreted in the light of the principle enshrined in the first rule.

In that context, the Court examines, in the first place, whether Article 17(1) of the Charter⁸ is applicable to restrictions on the right to ownership of shares or bonds tradeable on capital markets such as those in the present case. After pointing out, first, that the protection conferred by that provision concerns rights with an asset value creating an established legal position under the legal system concerned, enabling the holder to exercise those rights autonomously and for his or her own benefit, the Court considers that that is true of those shares or bonds tradeable on capital markets. Secondly, the Court finds that those shares or bonds were acquired lawfully. It follows that they come within the scope of Article 17(1) of the Charter.

In the second place, the Court considers that a resolution action taken under national legislation such as that at issue in the present case does not constitute a deprivation of property within the meaning of the second sentence of Article 17(1) of the Charter. The Court finds that that resolution action did not provide for a formal deprivation or expropriation of the shares or bonds concerned. In particular, that action did not forcibly, wholly and definitively deprive their holders of the rights deriving from those shares or bonds.

⁶ Namely, Articles 36, 73 and 74 of Directive 2014/59.

⁷ Judgments in *Inter-Environnement Wallonie*, cited above; of 17 January 2008, *Velasco Navarro*, C-246/06; and of 27 October 2016, *Milev*, C-439/16 PPU.

⁸ As set out in 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 the third place, **the fact remains that taking resolution action under the legislation at issue in the main proceedings**, which provides, inter alia, for the transfer of a credit institution's assets to a bridge bank, **amounts to regulating the use of property**, within the meaning of the third sentence of Article 17(1) of the Charter, **which is liable to infringe the right to property of the credit institution's shareholders, whose economic position is affected, and that of creditors, such as bondholders whose debt instruments have not been transferred to the bridge institution.**

As is clear from the wording of that provision, the use of property may be regulated by law in so far as is necessary for the general interest. After examining in turn the conditions laid down in that provision, the Court holds that, **in the light of the discretion enjoyed by the Member States when adopting decisions on economic matters, the third sentence of Article 17(1) of the Charter does not preclude national legislation, such as that at issue in the main proceedings, which does not contain any express provision ensuring that shareholders do not bear greater losses than they would have incurred if the institution had gone into liquidation at the date on which the resolution action was taken (the *no creditor worse off* principle).**

In the fourth place and lastly, the Court examines whether the transposition by a Member State in part, in national legislation relating to the resolution of credit institutions, of certain provisions of Directive 2014/59 before the expiry of the period prescribed for its transposition is liable seriously to compromise the result prescribed by that directive, within the meaning of the judgment in *Inter-Environnement Wallonie*.

To that end, it notes that the period for transposing Directive 2014/59 expired on 31 December 2014, with the result that it cannot be complained that the Portuguese Republic failed to adopt measures implementing that directive in its legal system at the date on which the resolution action was taken, namely 3 August 2014. The fact remains that, **during the period prescribed for the transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the result prescribed by that directive.** That obligation to refrain, which is incumbent on all the national authorities, must be understood, first, as referring to the adoption of any measure, general or specific, liable to produce such a compromising effect. Secondly, from the date on which a directive has entered into force, the courts of the Member States must refrain, as far as possible, from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.

In that regard, the Court states that, admittedly, it is for the national court to assess whether the national provisions whose legality is challenged are liable seriously to compromise the result prescribed by a directive, and that that determination must necessarily be made on the basis of an overall assessment, taking into account all the policies and measures adopted in the national territory concerned. Nevertheless, **the Court has jurisdiction to rule on whether the transposition by a Member State in part of certain provisions of a directive before the expiry of the period prescribed for its transposition is, as a matter of principle, liable seriously to compromise the result prescribed by that directive.**

In that regard, the Court points out, first of all, that it has previously held that Member States may adopt transitional provisions or implement a directive in stages. In such situations, the incompatibility of transitional provisions of national law with that directive or the failure to transpose certain provisions of the directive would not necessarily compromise the result prescribed by the directive. The Court considers that, in such a situation, that result would always be capable of being achieved by the full and definitive transposition of that directive within the prescribed period.

Next, the obligation to refrain referred to by the Court, in particular in paragraph 45 of the judgment in *Inter-Environnement Wallonie*, must be understood as referring to the adoption of any measure, general or specific, liable seriously to compromise the result prescribed by the directive in question. **Where the adoption by a Member State of a measure is intended to transpose, even if only in part, an EU directive, and that transposition is correct, the adoption of such a partial**

transposition measure cannot be regarded as liable to produce such a compromising effect, since it necessarily aligns the national legislation with the directive which that legislation transposes, and thereby contributes to attaining the objectives of that directive.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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