Provisional text

JUDGMENT OF THE COURT (Third Chamber)

5 May 2022 (*)

(Reference for a preliminary ruling – Directive 2014/59/EU – Resolution of credit institutions and investment firms – General principles – Article 34(1) – Bail-in – Effects – Article 53(1) and (3) – Write-down of capital instruments – Article 60(2), first subparagraph, points (b) and (c) – Articles 73 to 75 – Protection of the rights of shareholders and creditors – Directive 2003/71/EC – Prospectus to be published when securities are offered to the public or admitted to trading – Article 6 – Incorrect information in the prospectus – Action for damages brought after a resolution decision – Action for a declaration of nullity of a share purchase contract brought against the universal successor of the credit institution subject to a resolution decision)

In Case C-410/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Provincial de A Coruña (Provincial Court, A Coruña, Spain), made by decision of 28 July 2020, received at the Court on 2 September 2020, in the proceedings

Banco Santander SA

v

J.A.C.,

M.C.P.R.,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, N. Jääskinen, M. Safjan, N. Piçarra (Rapporteur) and M. Gavalec, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

Banco Santander SA, by J.M. Rodríguez Cárcamo and A.M. Rodríguez Conde, abogados,

J.A.C. and M.C.P.R., by C. Camba Méndez, procuradora, and X.A. Pérez-Lema López, abogado,

the Spanish Government, initially by J. Rodríguez de la Rúa Puig and by A. Gavela Llopis and S. Centeno Huerta, and subsequently by J. Rodríguez de la Rúa Puig and A. Gavela Llopis, acting as Agents,

the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

the Portuguese Government, by L. Inez Fernandes and J. Cunha Marques and by P. Barros da Costa and S. Jaulino, acting as Agents,

the European Commission, initially by D. Triantafyllou, A. Nijenhuis and J. Rius Riu and by A. Steiblytė, and subsequently by D. Triantafyllou and A. Nijenhuis and by A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 December 2021,

gives the following

Judgment

The request for a preliminary ruling concerns the interpretation of Article 34(1)(a), Article 53(1) and (3), and Article 60(2), first subparagraph, points (b) and (c), of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

The request has been made in proceedings between Banco Santander SA, in its capacity as successor of Banco Popular Español SA ('Banco Popular'), and J.A.C. and M.C.P.R., two investors, in relation to Banco Santander's civil liability on the basis of the information given in the prospectus issued under Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ 2003 L 345, p. 64), as amended by Directive 2008/11/EC of the European Parliament and of the Council of 11 March 2008 (OJ 2008 L 76, p. 37) ('Directive 2003/71'), on the basis of which those investors subscribed to Banco Popular shares.

Legal context

European Union law

Directive 2003/71

Directive 2003/71 was repealed, with effect from 21 July 2019, by Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (OJ 2017 L 168, p. 12). However, at the time of the main proceedings, the provisions of Directive 2003/71 were still in force.

Recital 18 of that directive stated:

'The provision of full information concerning securities and issuers of those securities promotes, together with rules on the conduct of business, the protection of investors. Moreover, such information provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make this information available is to publish a prospectus.'

Article 6 of that directive, entitled 'Responsibility attaching to the prospectus', provided:

'1. Member States shall ensure that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

2. Member States shall ensure that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus.

…'

Directive 2014/59

Recitals 45, 49, 51 and 120 of Directive 2014/59 state:

In order to avoid moral hazard, any failing institution should be able to exit the market, irrespective of its size and interconnectedness, without causing systemic disruption. A failing institution should in principle be liquidated under normal insolvency proceedings. However, liquidation under normal insolvency proceedings might jeopardise financial stability, interrupt the provision of critical functions, and affect the protection of depositors. In such a case it is highly likely that there would be a public interest in placing the institution under resolution and applying resolution tools rather than resorting to normal insolvency proceedings. …

…

The limitations on the rights of shareholders and creditors should be in accordance with Article 52 of the Charter [of Fundamental Rights of the European Union]. The resolution tools should therefore be applied only to those institutions that are failing or likely to fail, and only when it is necessary to pursue the objective of financial stability in the general interest. In particular, resolution tools should be applied where the institution cannot be wound up under normal insolvency proceedings without destabilising the financial system and the measures are necessary in order to ensure the rapid transfer and continuation of systemically important functions and where there is no reasonable prospect for any alternative private solution, including any increase of capital by the existing shareholders or by any third party sufficient to restore the full viability of the institution. …

…

For the purpose of protecting the right of shareholders and creditors, clear obligations should be laid down concerning the valuation of the assets and liabilities of the institution under resolution and, where required under this Directive, valuation of the treatment that shareholders and creditors would have received if the institution had been wound up under normal insolvency proceedings. It should be possible to commence a valuation already in the early intervention phase. Before any resolution action is taken, a fair and realistic valuation of the assets and liabilities of the institution should be carried out. Such a valuation should be subject to a right of appeal only together with the resolution decision. In addition, where required under this Directive, an *ex post* comparison between the treatment that shareholders and creditors have actually been afforded and the treatment they would have received under normal insolvency proceedings should be carried out after resolution tools have been applied. If it is determined that shareholders and creditors have received, in payment of, or compensation for, their claims, the equivalent of less than the amount that they would have received under normal insolvency proceedings, they should be entitled to the payment of the difference where required under this Directive. As opposed to the valuation prior to the resolution action, it should be possible to challenge that comparison separately from the resolution decision. …

…

Union company law directives contain mandatory rules for the protection of shareholders and creditors of institutions which fall within the scope of those directives. In a situation where resolution authorities need to act rapidly, those rules may hinder effective action and use of resolution tools and powers by resolution authorities and appropriate derogations should be included in this Directive. In order to guarantee the maximum degree of legal certainty for stakeholders, the derogations should be clearly and narrowly defined, and they should only be used in the public interest and when resolution triggers are met. …'

Article 2(1) of that directive states:

'For the purposes of this Directive the following definitions apply:

…

"normal insolvency proceedings' means collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to institutions under national law and either specific to those institutions or generally applicable to any natural or legal person;

…

"bail-in tool" means the mechanism for effecting the exercise by a resolution authority of the write-down and conversion powers in relation to liabilities of an institution under resolution in accordance with Article 43;

…

"shareholders" means shareholders or holders of other instruments of ownership;

…

"affected creditor" means a creditor whose claim relates to a liability that is reduced or converted to shares or other instruments of ownership by the exercise of the write down or conversion power pursuant to the use of the bail-in tool;

…'
Article 34 of that directive, entitled 'General principles governing resolution", states, in paragraph 1:
'Member States shall ensure that, when applying the resolution tools and exercising the resolution powers, resolution authorities take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:
the shareholders of the institution under resolution bear first losses;
creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings, save as expressly provided otherwise in this Directive;
…
no creditor shall incur greater losses than would have been incurred if the institution or entity referred to in point (b), (c) or (d) of Article 1(1) had been wound up under normal insolvency proceedings in accordance with the safeguards in Articles 73 to 75;
…'
Article 53 of the same directive, entitled 'Effect of bail-in', states:
'1. Member States shall ensure that where a resolution authority exercises a power referred to in Article 59(2) and in points (e) to (i) of Article 63(1), the reduction of principal or outstanding amount due, conversion or cancellation takes effect and is immediately binding on the institution under resolution and affected creditors and shareholders.
…
3. Where a resolution authority reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability by means of the power referred to in point (e) of Article 63(1), that liability and any obligations or claims arising in relation to it that are not accrued at the time when the power is exercised shall be treated as discharged for all purposes, and shall not be provable in any subsequent proceedings in relation to the institution under resolution or any successor entity in any subsequent winding up.
…'
Article 60 of Directive 2014/59, entitled 'Provisions governing the write down or conversion of capital instruments', states, in the first subparagraph of paragraph 2, points (b) and (c):
'Where the principal amount of a relevant capital instrument is written down:
…
no liability to the holder of the relevant capital instrument shall remain under or in connection with that amount of the instrument, which has been written down, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write-down power;
no compensation is paid to any holder of the relevant capital instruments other than in accordance with paragraph 3.'
Article 73 of that directive, entitled 'Treatment of shareholders and creditors in the case of partial transfers and application of the bail-in tool', states, in point (b), that 'Member States shall ensure that … in particular for the purposes of Article 75 … where resolution authorities apply the bail-in tool, the shareholders and creditors whose claims have been written down or converted to equity do not incur greater losses than they would have incurred if the institution under resolution had been wound up under normal insolvency proceedings'.
Article 74 of that directive, entitled 'Valuation of difference in treatment', states, in paragraph 1:
'For the purposes of assessing whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings, including but not limited to for the purpose of Article 73, Member States shall ensure that a valuation is carried out by an independent person as soon as possible after the resolution action or actions have been effected. …'
According to Article 75 of the same directive, entitled 'Safeguard for shareholders and creditors':
'Member States shall ensure that if the valuation carried out under Article 74 determines that any shareholder or creditor referred to in Article 73 … has incurred greater losses than it would have incurred in a winding up under normal insolvency proceedings, it is entitled to the payment of the difference from the resolution financing arrangements.'
Decision of the Single Resolution Board
By Decision SRB/EES/2017/08 of 7 June 2017, the Single Resolution Board adopted the resolution scheme in respect of [Banco Popular], endorsed by the Commission in its Decision (EU) 2017/1246 (OJ 2017 L 178, p. 15).
Spanish law
The Civil Code
Article 1307 of the Código Civil (Civil Code) provides:
'When the contracting party required to effect restoration of something pursuant to a finding of nullity is incapable of so doing because that thing has been lost, it must restore the profits received and the value of the thing at the time it was lost, plus interest from the same date.'
Law 11/2015
Ley 11/2015 de recuperación y resolución de entidades de crédito y empresas de servicios de inversión (Law 11/2015 on the recovery and resolution of credit institutions and investment firms) of 18 June 2015 (BOE No 146 of 19 June 2015, p. 50797) transposes Directive 2014/59 into Spanish law.
Decision of the Fund for Orderly Bank Restructuring
Decision SRB/EES/2017/08 of the Single Resolution Board was implemented by the decision of the Fondo de Reestructuración Ordenada Bancaria (Fund for Orderly Bank Restructuring, Spain) (BOE No 155 of 30 June 2017, p. 55470), the third legal basis of which reads as follows:
'As for the scope of the write-down measure adopted pursuant to this Decision, in accordance with Article 39(2) of Law 11/2015 …, the write-down in question is permanent, and compensation shall not be paid to the holders [of the written-down shares] … No liability to the holder of the written-down shares shall remain, except for any liability

already accrued, or liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write-down power.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

In June 2016, J.A.C. and M.C.P.R. purchased Banco Popular shares as part of a capital increase that was the subject of a public offer to subscribe.

In accordance with the decision of the Fund for Orderly Bank Restructuring of 7 June 2017, the nominal value of Banco Popular's share capital was reduced to zero and all shares making up that share capital were fully written down without compensation.

Banco Santander acquired all the new Banco Popular shares issued following that decision and carried out a merger by acquisition in 2018. As a result of that operation, Banco Popular's legal personality was extinguished and Banco Santander became the successor of that entity.

In March 2018, J.A.C. and M.C.P.R. brought an action against Banco Popular seeking a declaration of nullity of the share purchase contract by reason of an error, inasmuch as the contract had been signed on the basis of information relating to the company's accounts and net worth as contained in the prospectus published in accordance with Directive 2003/71 that was inaccurate and incomplete, or by reason of deception on account of deliberately falsified or concealed information about the company's financial position.

By a judgment of 3 June 2019, the Juzgado de Primera Instancia nº 2 de A Coruña (Court of First Instance No 2, A Coruña, Spain) held that the share purchase contract was void and ordered that the money invested be reimbursed to J.A.C. and M.C.P.R. together with interest. Banco Santander appealed against that judgment before the Audiencia Provincial de A Coruña (Provincial Court, A Coruña, Spain), which is the referring court in this case.

That court considers it necessary to establish whether the rules of Union law on civil liability in relation to the information given in a prospectus, as interpreted by the Court in its judgment of 19 December 2013, *Hirmann* (C-174/12, EU:C:2013:856), can take precedence over the principles governing the resolution of credit institutions and investment firms imposed by Directive 2014/59, in particular the principle whereby the shareholders of an institution or firm under resolution must bear first losses.

More specifically, the referring court is concerned about the possibility of upholding an action for damages based on the information given in the prospectus, brought under Article 6 of Directive 2003/71, following the conclusion of the procedure for the resolution of the issuing credit institution or investment firm, or an application for nullity, by reason of an error invalidating consent, of the subscription contract for the shares acquired on the basis of an inaccurate prospectus, specifically under Article 1307 of the Spanish Civil Code, even after that procedure has been concluded. On that point, the court notes that the retroactive nature of a declaration of nullity under Spanish law implies that the share subscription contract concluded by J.A.C. and M.C.P.R. was never effective, and they therefore would ultimately have to be treated as creditors to the banking institution concerned rather than as shareholders.

In those circumstances, the Audiencia Provincial de A Coruña (Provincial Court, A Coruña) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

Where, in the course of a procedure for the resolution of a financial institution, all of the shares into which the share capital was divided have been redeemed, must Articles 34(1)(a), 53(1) and (3) and 60(2), [first subparagraph,] [points] (b) and (c) of Directive 2014/59 … be interpreted as meaning that they preclude persons having acquired their shares a number of months prior to the start of the resolution procedure, on the occasion of a capital increase with a public offer to subscribe, from bringing claims for compensation or claims having equivalent effect which are based on defective information in the issue prospectus against the issuing institution or against the institution emerging from a subsequent merger by acquisition?

In the same situation as that referred to in the [first] question, do Articles 34(1)(a), 53(3) and 60(2), [first subparagraph,] [point] (b) of Directive 2014/59 … preclude the courts from imposing on the issuing institution or on the institution that succeeds to it universally any obligations to reimburse the equivalent value of the shares subscribed and to pay interest as a result of the retroactively effective (*ex tunc*) declaration as to the nullity of the share subscription contract, pursuant to claims brought after the institution has been resolved?'

The request to reopen the oral part of the procedure

After having read the Opinion of the Advocate General, on 2 December 2021 J.A.C. and M.C.P. R. filed a request by a document lodged at the Court Registry on 5 April 2022 asking the Court to order that the oral part of the procedure be reopened, in application of Article 83 of the Rules of Procedure of the Court of Justice.

In support of their request, J.A.C. and M.C.P. R. stated that they disagreed with the Opinion submitted by the Advocate General. They argue, in particular, that the Opinion in question contains assertions that conflict with the case-law of the Tribunal Supremo (Supreme Court, Spain) and challenge the proposed interpretation of Directive 2014/59.

It is true that, pursuant to Article 83 of its Rules of Procedure, the Court may, at any time, after hearing the Advocate General, order that the oral part of the procedure be opened or reopened, in particular if it considers that it lacks sufficient information or where a party has submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union (see, to that effect, judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 20).

However, the content of the Advocate General's Opinion cannot constitute in itself a new fact that can be invoked by the parties to respond to that Opinion. The Court has had the opportunity of underlining that, in accordance with Article 252 TFEU, the role of the Advocate General is to make, in open court, acting with complete impartiality and independence, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement in order to assist the Court in the performance of the task assigned to it, which is to ensure that in the interpretation and application of the Treaties the law is observed.

The Opinion does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the Court. It is not therefore an opinion addressed to the judges or to the parties which stems from an authority outside the Court, but rather, it is the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself. The Advocate General’s Opinion cannot, therefore, be debated by the parties (see, to that effect, judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 21).

In this case, the Court finds, after hearing the Advocate General, that the arguments asserted by J.A.C. and M.C.P. R. do not disclose any new fact capable of having a decisive influence on the decision that it is called upon to deliver in the present case and that it is not necessary to make that decision on the basis of an argument which has not been debated between the parties and interested persons. The Court has at its disposal all the elements necessary, and it is thus sufficiently informed to make a ruling. Consequently, the Court considers that it is not necessary to order that the oral part of the procedure be reopened.

Consideration of the questions referred

By its two questions, which should be examined together, the referring court is asking, essentially, whether the provisions of Article 34(1)(a) in conjunction with those of Article 53(1) and (3) and those of Article 60(2), first subparagraph, points (b) and (c), of Directive 2014/59 should be interpreted as precluding a situation where, following the total write down of the shares representing the share capital of a credit institution or investment firm under resolution, the persons who have acquired the shares, as part of a public offer to subscribe issued by that institution or firm, prior to the start of the resolution procedure, might bring an action for damages against that institution or firm or against a successor institution or firm based on the information given in the issue prospectus, as permitted under Article 6 of Directive 2003/71, or an action for nullity of the share subscription contract, under national law, which, given its retroactive effect, results in the reimbursement of the equivalent value of those shares, plus interest accrued from the date when the contract was concluded.

It should be borne in mind from the outset that Article 34(1)(a) and (b) of Directive 2014/59 establishes the principle whereby it is the shareholders, followed by the creditors, of a credit institution or investment firm under resolution that are required to bear the first losses incurred as a result of the application of that procedure.

Where the resolution procedure involves a bail-in, under Article 2(1)(57) of Directive 2014/59, Article 53(1) of that directive provides that the reduction of capital, conversion or cancellation permitted by that bail-in is immediately binding on the affected creditors and shareholders. As stated in Article 53(3) of that directive, where a resolution authority reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability, any obligations or claims arising in relation to it that are not accrued at the time when the institution or firm is resolved shall be treated as discharged for all purposes, and shall not be provable in relation to the credit institution or investment firm under resolution or any successor entity in any subsequent winding up.

Article 60 of Directive 2014/59 on the write down or conversion of capital instruments, states in paragraph 2, first subparagraph, point (b), that no liability to the holder of the capital instruments written down under the resolution decision shall remain, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write-down power. Similarly, according to Article 60(2), first subparagraph, (c), of that directive, no compensation is paid, in principle, to holders of the relevant capital instruments.

Those provisions should be interpreted, in particular, in the light of recital 49 of Directive 2014/59, which indicates that the resolution tools should only be applied, to cover situations of extreme urgency, to those credit institutions and investment firms that are failing or likely to fail, and only when it is necessary to pursue the objective of financial stability in the general interest. A procedure of that kind should therefore be applied where the credit institution or investment firm concerned cannot be wound up under normal insolvency proceedings without destabilising the financial system. As stated in recital 45 of that directive, the resolution procedure is intended to reduce moral hazard in the financial sector by making shareholders bear first losses incurred as a result of the liquidation of a credit institution or investment firm, so as to avoid situations where such liquidations might reduce public funds and affect the protection of depositors.

The Court has also acknowledged that the objectives of ensuring the stability of the banking and financial system and preventing a systemic risk are objectives of public interest pursued by the European Union (judgment of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 92 and the case-law cited). Furthermore, although there is a clear public interest in ensuring, throughout the European Union, strong and consistent protection of investors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system (judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 91, and of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 54).

Directive 2014/59 therefore establishes the use, in an exceptional economic context, of a procedure that may affect in particular the rights of shareholders and creditors of a credit institution or investment firm, in order to preserve the financial stability of the Member States, by creating an insolvency regime derogating from the ordinary law governing insolvency proceedings, which may only be applied in exceptional circumstances and must be justified by an overriding public interest. The nature of this regime as a derogation implies that the application of other provisions of Union law may be disregarded where these are likely to hinder the implementation of the resolution procedure or deprive it of practical effect.

On that point, recital 120 of Directive 2014/59 states that the derogations laid down by that directive from the mandatory rules for the protection of shareholders and creditors of institutions which fall within the scope of Union company law directives, which may hinder effective action and use of resolution tools and powers by resolution authorities, should not only be appropriate but should also be clearly and narrowly defined, in order to guarantee the maximum degree of legal certainty for stakeholders.

As reflected in particular in its recital 18, Directive 2003/71 was intended to protect investors at the time they decide to purchase securities from a credit institution or investment firm. The publication of a prospectus for the sale of securities, in so far as it should provide complete, reliable and easily accessible information about those securities, makes it possible to increase public confidence in those securities and thus contributes to the proper functioning and development of the markets concerned by ensuring that they are not hindered by irregularities (see, to that effect, judgment of 17 September 2014, *Almer Beheer and Daedalus Holding*, C-441/12, EU:C:2014:2226, paragraph 33).

That directive therefore materially constitutes one of the 'Union company law directives', within the meaning of recital 120 of Directive 2014/59. That directive makes it possible to derogate from the provisions of Union law, such as those in Directive 2003/71, in so far as the application of those provisions could hinder the implementation of a resolution procedure or deprive it of practical effect, even though those provisions are not explicitly mentioned in Directive 2014/59 as being covered by the derogations it provides.

With regard, in particular, to the action for damages based on the information given in the issue prospectus as required under Article 6 of Directive 2003/71, as the Advocate General has noted in point 53 of his Opinion, that action for damages falls within the category of obligations or claims that are treated as discharged for all purposes if they are not accrued on the day of the resolution, and cannot therefore be proven in subsequent proceedings in relation to the credit institution or investment firm under resolution or to the successor entity, as is stated in the actual wording of Article 53(3) of Directive 2014/59 and implied in Article 60(2), first subparagraph, of that directive.

The same applies for an action for a declaration of nullity of a share purchase contract brought against the credit institution or investment firm issuing the prospectus or against the successor entity, after the resolution procedure has been implemented.

Indeed, both an action for damages and an action for a declaration of nullity essentially require that the credit institution or investment firm under resolution, or the successor of those entities, compensate shareholders for the losses incurred as a consequence of the exercise by a resolution authority of the write-down and conversion powers in relation to liabilities of that institution or firm, or require that it reimburse in full the sums invested during the subscription of shares that have been written down as a result of that resolution procedure. Such actions would call into question the entire valuation upon which the resolution decision is based because the breakdown of the capital forms part of the objective data for that valuation. As noted by the Advocate General in points 82 and 95 of his Opinion, the resolution procedure itself as well as the objectives pursued by Directive 2014/59 would thus be frustrated.

Given the above, the application of Article 34(1)(a), Article 53(1) and (3), and Article 60(2), first subparagraph, points (b) and (c), of Directive 2014/59 excludes the possibility of an action for damages under Article 6 of Directive 2003/71 or an action for nullity of the share subscription contract, under Spanish law, against the credit institution or investment firm issuing the prospectus or the successor entity, after a resolution decision has been adopted on the basis of those provisions.

That conclusion is not called into question by the judgment of 19 December 2013, *Hirmann* (C-174/12, EU:C:2013:856, paragraphs 23 and 28), in which the Court held, in particular, that the provisions of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the [second paragraph of Article 54 TFEU], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1), with the objective of those provisions being to ensure that the share capital of public limited liability companies is maintained and that there is equal treatment of shareholders, are not such as to preclude national legislation transposing Directive 2003/71 which establishes that a company issuing shares incurs liability by reason of the dissemination of inaccurate information and that, under that liability, that company is obliged to repay to the purchaser a sum equivalent to the purchase price of the shares and to redeem those shares.

In fact, the case giving rise to that judgment concerned the Union company law directives, the application of which must be balanced, in so far as is possible, while the case in the main proceedings here concerns the application of Directive 2014/59, which, as stated in paragraphs 36 and 37 of this judgment, introduces a regime derogating from the ordinary law governing insolvency proceedings, which is subject to ordinary company law, in order to preserve the public interest in ensuring the stability of the financial system.

It should also be noted that neither the right to property enshrined in Article 17 of the Charter of Fundamental Rights on nor the right to effective judicial protection guaranteed by Article 47 of that charter is an absolute right (see, to that effect, for the right to property, judgment of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraph 51 and the case-law cited, and, for the right to effective judicial protection, judgment of 19 December 2019, *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, paragraph 44 and the case-law cited).

On that point, it is important to note that Directive 2014/59 also provides a safeguard mechanism for the shareholders and creditors of a credit institution or investment firm under resolution. According to Article 73(b) of that directive, to which Article 34(1)(g) of the same directive refers, shareholders and creditors in such proceeding are entitled to receive in payment of, or compensation for, their claims not less than what it is estimated they would have recovered if the whole institution or firm at issue had been wound up under normal insolvency proceedings.

Article 74 of that directive, read in the light of recital 51 of the same directive, establishes that for the purposes of assessing whether shareholders and creditors would have received better treatment if the credit institution or investment firm under resolution had entered into normal insolvency proceedings, an *ex post* comparison between the treatment that shareholders and creditors have actually been afforded and the treatment they would have received under normal insolvency proceedings should be carried out. For that purpose, Member States must ensure that a valuation is carried out by an independent person as soon as possible after the resolution action or actions have been effected. Such a comparison may be challenged separately from the resolution decision.

Article 75 of Directive 2014/59 states that if it is determined as part of a resolution procedure that shareholders and creditors have received, in payment of, or compensation for, their claims, the equivalent of less than the amount that they would have received under normal insolvency proceedings, they are entitled to the payment of the difference. As the Advocate General stated in point 105 of his Opinion, only payment of the difference between the losses incurred under the resolution and those which would have been incurred under a normal winding-up process is therefore guaranteed.

In the light of the foregoing, the answer to the questions referred must be that the combined provisions of Article 34(1)(a), Article 53(1) and (3), and Article 60(2), first subparagraph, points (b) and (c) of Directive 2014/59 must be interpreted as precluding, following a total write-down of shares in the capital stock of a credit institution or investment firm subject to a resolution procedure, persons having acquired shares, in the context of a public offer to subscribe issued by that institution or firm, before the opening of such a resolution procedure, from bringing, against that institution or firm or its successor entity, an action for damages on the basis of the information provided in the prospectus, as provided for in Article 6 of Directive 2003/71, or an action for a declaration of nullity of the purchase contract for such shares, which, given its retroactive effect, results in the restitution of the value of said shares, plus interest from the date of conclusion of the contract.

Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

The combined provisions of Article 34(1)(a), Article 53(1) and (3), and Article 60(2), first subparagraph, points (b) and (c) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, must be interpreted as precluding, following a total write-down of shares in the capital stock of a credit institution or investment firm subject to a resolution procedure, persons having acquired shares, in the context of a public offer to subscribe issued by that institution or firm, before the opening of such a resolution procedure, from bringing, against that institution or firm or its successor entity, an action for damages on the basis of the information provided in the prospectus, as provided for in Article 6 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, as amended by Directive 2008/11/EC of the European Parliament and of the Council of 11 March 2008, or an action for a declaration of nullity of the purchase contract for such shares, which, given its retroactive effect, results in the restitution of the value of said shares, plus interest from the date of conclusion of the contract.

[Signatures]

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* Language of the case: Spanish.