Novo Banco immunity to consumer lawsuits concerning unfair terms in contracts entered into with Banco Espírito Santo

(CJEU, Fourth Chamber, of 5 September 2024, Case C-498/2022)

The regulation of bank restructurings is not favourable to consumers.

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This is the second time this has happened, after the first setback suffered by consumers in relation to the European restructuring measure whereby Banco Santander was assigned the entire banking business of the 'bankrupt' Banco Popular Español.

Now it revolves around the effects of reorganisation measures on Banco Espiritu Santo with regard to Spanish consumers who contracted its products and are litigating against the bridge bank set up by the Bank of Portugal, Novo Banco.

In the context of Banco Espírito Santo's serious financial difficulties, the Bank of Portugal adopted, by decision of August 2014, various 'resolution measures' in respect of that credit institution. A 'bridge bank' or 'bridge institution' was created, namely Novo Banco, to which Banco Espírito Santo assets, liabilities and other off-balance sheet items were transferred. However, certain liabilities remained in the estate of Banco Espírito Santo, namely 'any responsibility or risk, in particular those arising from fraud or infringement of regulatory, criminal or administrative provisions or decisions'. On 3 October 2014, the Bank of Spain published a notice in the Official Journal of Spain stating that, by decision of August 2014, the Bank of Portugal had applied to Banco Espírito Santo a resolution measure consisting of the partial transfer of the latter's business to Novo Banco, which would continue the ordinary business of Banco Espírito Santo without interruption.

The case resulted in a reference for a preliminary ruling from the Spanish Supreme Court following claims by Spanish customers against Novo Banco concerning the invalidity of certain financial contracts. Novo Banco asserted a lack of standing to be sued in these claims. In any event, the reply of the Court of Justice of the European Union to the questions raised by the Supreme Court leads to the conclusion that the reorganisation measure adopted by the Bank of Portugal and the continuation of liabilities in Banco Espírito Santo are acceptable.

The relevant part of the decision of the Court of Justice of the European Union states that the retroactive change in the identity of the debtor in relation to the claim can be reasonably justified by the objective of general interest mentioned above. It is therefore not excluded that the legitimate expectations of the creditor were duly respected, a point which will in any event be for the referring court to determine. Consumer protection cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the banking system. If the protection afforded by Directive 93/13 were required to authorise each consumer in the host Member State who is a creditor of the failing credit institution to frustrate recognition of the measures by which the allocation of financial liabilities between that institution and the bridge bank has been decided by the home Member State, the intervention by the public authorities of the home Member State, which is aimed at ensuring protection of the stability of the banking system, could be rendered ineffective in all the Member States in which the failing credit institution has branches. Consequently, consumers cannot unconditionally claim that financial liabilities consisting of claims relating to the invalidity of unfair terms should pass to the bridge bank to which the business is 'split off', even if the contractual assets (mortgage contracts) bearing these liabilities have indeed passed to the new bank.

Contingent liabilities with consumers stay in the bad bank

The matter is striking because, under the law of separation of banking business units, the Spanish Supreme Court has held that the transferee cannot be considered as lacking standing to be sued for the present purposes, even if the contingent liabilities had remained with the transferor in the contract for the transfer of the branch of activity.

This, strictly speaking, is what Supreme Court judgment no. 10/2019 of 11 January holds: CaixaBank contends that it does not have standing to be a defendant in an action to declare void because, when the contract for the transfer of Bankpyme's banking business to CaixaBank was signed, the contract for the sale and purchase of the securities had been consummated, as it was a non-continuing contract whose services had already been provided at the time of the transfer of the banking business. The Supreme Court rejected this contention. Bankpyme and CaixaBank formally structured the transfer by Bankpyme to CaixaBank of the former's "banking business as an economic unit" as a transfer of assets and liabilities inherent to that banking business, which included the transfer of the contracts entered into by Bankpyme with its customers. It is true that the case law of this Court has affirmed that, for a contract to be transferred, it must be a contract with yet unfulfilled equivalent and reciprocal mutual consideration. However, the business concluded between Bankpyme and CaixaBank must be analysed in its entirety, without artificially decomposing it, in order to decide whether CaixaBank has standing to be a defendant in actions relating to the contracts that the claimants concluded with Bankpyme.

The purpose of the legal transaction entered into by the two banks was not the transfer of certain contracts entered into by Bankpyme, but the transfer of its banking business (which was the very activity of its corporate purpose) as an economic unit. In the context of that transfer of the banking

business as an economic unit, Bankpyme divested itself of the balance sheet items necessary to carry on the banking business, which it transferred to Caixabank, including the transfer of the contracts entered into with its customers, and shortly afterwards relinquished its authorisation to operate as a credit institution. The reason for the transfer of the banking contracts by Bankpyme to Caixabank is precisely the transfer of the banking business as an economic unit, in which it was framed and made sense. The particularity of this reason for the transfer of the contracts means that the transfer of contracts provided for in the contract for the transfer of the banking business included the claims, rights and, in general, the asset positions of the transferor bank with respect to its customers and the obligations, liabilities and, in general, passive positions of said institution with respect to its customers. These include the obligation to be a defendant in the actions to declare void the contracts entered into by Bankpyme with its customers and for restitution of the benefits received in the event that such actions are upheld.

Supreme Court judgments no. 652/2017 and no. 667/2018 already ruled that this unbundling of assets and liabilities is not admissible in law; and a series of subsequent rulings have repeated this argument. But why is it not? Let us note that the operation is neither a partial division nor a separation (Arts. 60, 61 of RDL 5/2023), and therefore the kind of residual joint and several liability of Article 70 of the Royal Decree-law is not applicable. However, even if it were an improper separation, Article 70 only imposes joint and several liability when the defaulted liability has been attributed to the beneficiary, but not when it has been retained by the transferor company, which then defaults; Article 65 also implicitly considers the retention of the liability in the transferor company to be neither problematic nor in need of a rule of extension of liability. CaixaBank would therefore be exempt from claims for this liability if it had structured the transaction in accordance with the aforementioned law, but it will not be if it is limited to an ordinary purchase of the banking business in its universality, i.e. an overall purchase of contractual positions. But in the end the Supreme Court gets it right. Because the Supreme Court does not note that the action brought is to declare void. The action to declare void is structural, not a liability claim. However 'close' the contractual relationship was with the exclusion of the assumption of liabilities, it was still consistent enough to bring an action to declare void against the transferee on the grounds of vitiated consent.

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