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Preventive Restructuring Frameworks

Pre-Packaged Restructurings in South Korea

Extraterritoriality Arguments Rule Extraneous

- If the privileged creditor maintains, according to Articles 56 and 57 of the Spanish Insolvency Act, the right of a separate enforcement of the guarantee, this creditor must consent to the sale. If there are various privileged creditors affected, at least 75 per cent of the privileged credits affected by the sale must consent to the sale, according to article 94.2 of the Spanish Insolvency Act.
- If the privileged creditor has lost its right to enforce separately its guarantee as per Article 57.3 of the Spanish Insolvency Act, its consent will not be necessary.

Note

1 625/2017, 21 November 2017, Spanish Supreme Court.

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The principle of 'no creditor worse off' under Portuguese law

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Directive 2014/59/EU of the European Parliament and of the Council dated 15 May 2014 established a framework for the recovery and resolution of credit institutions and investment firms (the 'Bank Recovery and Resolution Directive' or BRRD),[1] and is of major interest. The underlying principle is that a bank resolution occurs when national authorities determine that a failing bank cannot go through normal insolvency proceedings without harming public interest and causing financial instability. This article deals with the Portuguese implementation of the 'no creditor worse off' approach.

According to Article 34 of the BRRD, the shareholders of the institution under resolution are the first to bear losses (eg, national authorities may decide to transfer the shares or all or part of the assets of the bank to a private purchaser without the consent of shareholders). 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 (eg, national authorities may decide that only some liabilities are transferred out of the failing institution to a new institution). However, there are two important exceptions. First, deposits that are covered by a guarantee scheme are fully protected. Second, no creditor shall incur greater losses than would have been incurred if the bank had been wound up under normal insolvency proceedings instead of resolution measures. This is known as the 'no creditor worse off' principle (the 'NCWO principle'). The principle goes back to the Roman rule of equal treatment of creditors, the famous Magna Carta of every insolvency legislation.

Article 74 of the BRRD obliges the Member States to ensure that a valuation is carried out by an independent person as soon as possible after the resolution action or actions have been effected. The aim of such valuation is to determine whether the treatment of the creditors that will result from the resolution measures will put the creditors in a position at least equal to that they would have received in normal insolvency proceedings. Moreover, Member States must ensure that, if the valuation shows that a creditor will incur greater losses than that the creditor would incur in a winding up under normal insolvency proceedings, that creditor is entitled to the payment of the difference from the resolution financing arrangements.

Portugal implemented the NCWO principle into its existing Act on Financial Institutions (*Regime Geral das Instituições de Crédito e Sociedades Financeiras* or RGICSF). Pursuant to the original wording of Article 145.º-B, 145.º-F and 145.º-H of the RGICSF, which became effective in August 2014,[2] creditors whose claims had not been transferred to another financial institution were entitled to claim the difference from the state fund if, upon termination of the winding-up of the bank, it appeared that they would have received a more

favourable treatment if the bank had been wound up in normal insolvency proceedings. Moreover, the then RGICSF provided that the valuation was to be carried out at the end of the winding up of the bank, taking into account the estimated amount of money each class of creditors would have, depending on their priority ranking, received in normal insolvency proceedings.

The articles originally read as follows:[3]

'Article 145b: 1 – When applying resolution measures, in order to achieve the aims of such measures set out in the previous article, it shall be ensured that:

(a) the shareholders of the credit institution shall first bear the losses of the institution concerned;
(b) the creditors of the credit institution shall then assume, on equitable terms, the remaining losses of the institution concerned in accordance with the ranking of the various classes of creditors;
(c) no creditor of the credit institution may assume a loss greater than that which he would have incurred if the credit institution had gone into liquidation.

Where it is established, upon termination of the winding-up of the credit institution being the object of the resolution measures, that the creditors of that institution whose claims have not been transferred to another credit institution or to a transitional bank have incurred a loss which is greater than the amount estimated in accordance with the assessment provided for in Articles 145f(6) and 145h(4) that they would have incurred if the institution had entered into winding-up proceedings immediately before the resolution measure was implemented, the creditors shall receive the difference from the Resolution Fund.

...

Article 145f:... 6 – For the purposes of Article 145b(3), the assessment referred to in the previous paragraph also includes an estimate of the amount which, as regards the claims of each class of creditors, would have been recovered, in accordance with the order of priority established by law, in the case of liquidation proceedings of the credit institution at the moment immediately prior to the implementation of the resolution measures.'

In the Preamble to the amendment to the RGICSF, the Portuguese legislator pointed out that the new articles were meant to safeguard the legitimate interests of the customers of a bank, especially as regards their deposits. However, the Portuguese legislation deviated from the European requirements. Whereas the BRRD provides that the valuation is to be carried out as soon as possible after the resolution action or actions have been effected, the RGICSF, in its original wording, shifted this valuation to the end of the winding-up. This was a significant difference, given that there may be years from the implementation of the resolution action to the termination of the winding-up. Under Portuguese law, creditors had to wait a long time until they might have been entitled to claim monies from the state fund.

It is highly doubtful if, in August 2014, the state of Portugal was in a position to lawfully pass this amendment to the RGICSF. At this time, the BRRD was already in force. Admittedly, the period prescribed by the BRRD for its transposition had not yet expired. However, according to settled case law of the Court of Justice of the European Union, even during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable to seriously compromise the attainment of the result prescribed by that directive.[4]

Meanwhile, the Portuguese legislator again amended the RGICSF.[5] Since March 2015, it provides that the National Bank of Portugal has to appoint an independent entity to conduct a valuation immediately after the resolution action or actions have been effected. Moreover, the National Bank has to fix a reasonable delay within which that entity must carry out the valuation. This new legislation is in line with the BRRD. The wording is as follows:[6]

'Article 145.º-D: 1: When applying resolution measures, in order to achieve the aims set out in the previous article:

(a) the shareholders of the credit institution under resolution shall first bear the losses of the institution;
(b) the creditors of the credit institution under resolution shall then bear the losses of the credit institution on an equal footing according to the ranking of their claims;
(c) no shareholder or creditor of the credit institution under resolution shall bear a loss greater than that which they would have incurred if the credit institution had gone into liquidation;
(d) Depositors shall not bear losses in respect of deposits guaranteed by the Deposit Guarantee Fund in accordance with the provisions of Article 166.

Article 145h: 14 - For the purposes of Article 145(1)(c) of Directive 2006/112/EC, immediately after the resolution action applies, Banco de Portugal shall designate an independent entity, at the expense of the credit institution under resolution, to assess, within a reasonable period of time, whether, if the resolution action had not been taken and the credit institution under resolution had gone into liquidation at the time the resolution measure was implemented, the shareholders and creditors of the

credit institution under resolution... would bear a loss lower than that incurred as a result of the application of the resolution measure, being it understood that that assessment shall determine the following:

(a) the losses that the shareholders and creditors ... would have incurred if the credit institution under resolution had gone into liquidation;

(b) the losses that the shareholders and creditors ... actually incurred as a result of implementing the resolution measure; and

(c) the difference between the losses referred to in point (a) and the losses incurred referred to in point (a).'

Pursuant to Article 26, the new dispositions[7] entered into force on the day following their promulgation. The law does not contain any transitional rule regarding its application *ratione temporis*. Therefore, the general principles of law apply according to which norms of procedure apply immediately after their entry into force, even to procedures which are already pending. This means that the new Portuguese law, which is in line with the European Directive, applies to any bank resolution that was commenced before March 2015 but not yet completed.

Actually, any other interpretation would probably generate liability to the Portuguese state for any damages resulting from the deficiencies in the previous law. According to settled case law of the Court of Justice of the European Union,[8] Member States are obliged to transpose a directive into their national legislation within the prescribed period. If they fail to do so, individuals suffering losses from the non-implementation into national law may claim damages from the Member State if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered.

Notes

1 Official Journal, L 173, 12 June 2014, p 190.

2 Cf Decreto-Lei no 114-A/2014 of 1 August 2014. See Diário da República (Official Journal of the Portuguese Republic) no 147/2014, 1º Suplemento, Série I de 2014-08-01.

3 In Portuguese: '*Artigo 145.º-B:*

1 - Na aplicação de medidas de resolução, tendo em conta as finalidades das medidas de resolução estabelecidas no artigo anterior, procura assegurar-se que:

(a) Os acionistas da instituição de crédito assumem prioritariamente os prejuízos da instituição em causa;

(b) Os credores da instituição de crédito assumem de seguida, e em condições equitativas, os restantes prejuízos da instituição em causa, de acordo com a hierarquia de prioridade das várias classes de credores;

(c) Nenhum credor da instituição de crédito pode assumir um prejuízo maior do que aquele que assumiria caso essa instituição tivesse entrado em liquidação.

...

3 - Caso se verifique, no encerramento da liquidação da instituição de crédito objeto da medida de resolução, que os credores dessa instituição cujos créditos não tenham sido transferidos para outra instituição de crédito ou para um banco de transição assumiram um prejuízo superior ao montante estimado, nos termos da avaliação prevista no n.º 6 do artigo 145.º-F e no n.º 4 do artigo 145.º-H, que assumiriam caso a instituição tivesse entrado em processo de liquidação em momento imediatamente anterior ao da aplicação da medida de resolução, têm os credores direito a receber essa diferença do Fundo de Resolução.

Artigo 145.º-F:... 6 - Para efeitos do disposto no n.º 3 do artigo 145.º-B, a avaliação a que se refere o número anterior inclui também uma estimativa do nível de recuperação dos créditos de cada classe de credores, de acordo com a ordem de prioridade estabelecida na lei, num cenário de liquidação da instituição de crédito em momento imediatamente anterior ao da aplicação da medida de resolução.'

4 Eg, Judgment of 26 May 2011, C-165/09 to C-167/09, Reports of Cases 2011, p I-04599.

5 Cf Lei No 23-A/2015 of 26 March 2015. See Diário da República (Official Journal of the Portuguese Republic) no 60/2015, 1º Suplemento, Série I de 2015-03-26.

6 Lei no 23-A/2015 of 26 March 2015.

7 Eg, Judgment of 8 October 1996, C-178/94 et al, Reports of Cases 1996, p I-04845.

8 In Portuguese: '*Artigo 145.º-D:*

1 - Na aplicação de medidas de resolução, para prossecução das finalidades previstas no artigo anterior:

(a) Os acionistas da instituição de crédito objeto de resolução suportam prioritariamente os prejuízos da instituição em causa;

(b) Os credores da instituição de crédito objeto de resolução suportam de seguida, e em condições equitativas, os prejuízos da instituição em causa, de acordo com a graduação dos seus créditos;

(c) Nenhum acionista ou credor da instituição de crédito objeto de resolução pode suportar um prejuízo superior ao que suportaria caso essa instituição tivesse entrado em liquidação;

(d) Os depositantes não suportam prejuízos relativamente aos depósitos garantidos pelo Fundo de Garantia de Depósitos nos termos do disposto no artigo 166.º

Artigo 145.º-H:... 14 - Para efeitos do disposto na alínea c) do n.º 1 do artigo 145.º-D, imediatamente após a produção de efeitos da medida de resolução, o Banco de Portugal designa uma entidade independente, a expensas da instituição de crédito objeto de resolução, para, em prazo razoável a fixar por aquele, avaliar se, caso não tivesse sido aplicada a medida de resolução e a instituição de crédito objeto de resolução entrasse em liquidação no momento em que aquela foi aplicada, os acionistas e os credores da instituição de crédito objeto de resolução, bem como o Fundo de Garantia de Depósitos e o Fundo de Garantia do Crédito de Agrícola Mútuo, nos casos em que o Banco de Portugal determine a sua intervenção nos termos do disposto no n.º 1 do artigo 167.º-B ou nos termos do disposto no artigo 15.º-B do Decreto-Lei n.º 345/98, de 9 de novembro, alterado pelos Decretos-Leis n.os 126/2008, de 21 de julho, 211-A/2008, de 3 de novembro, 162/2009, de 20 de julho, 119/2011, de 26 de dezembro, e 31-A/2012, de 10 de fevereiro, respetivamente, suportariam um prejuízo inferior ao que suportaram em consequência da aplicação da medida de resolução, determinando essa avaliação:

(a) Os prejuízos que os acionistas e os credores, bem como o Fundo de Garantia de Depósitos e o Fundo de Garantia do Crédito de Agrícola Mútuo, teriam suportado se a instituição de crédito objeto de resolução tivesse entrado em liquidação;

(b) Os prejuízos que os acionistas e os credores, bem como o Fundo de Garantia de Depósitos e o Fundo de Garantia do Crédito de Agrícola Mútuo, efetivamente suportaram em consequência da aplicação da medida de resolução à instituição de crédito objeto de resolução; e

(c) A diferença entre os prejuízos a que se refere a alínea a) e os prejuízos suportados a que se refere a alínea anterior.'

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