JUDGMENT OF THE COURT (Grand Chamber)

19 July 2016 (*)(i)

[Text rectified by order of 30 September 2016]

(Reference for a preliminary ruling — Validity and interpretation of the Banking Communication from the Commission — Interpretation of Directives 2001/24/EC and 2012/30/EU — State aid to banks in the context of the financial crisis — Burden-sharing — Writing off equity capital, hybrid capital and subordinated debt — Principle of protection of legitimate expectations — Right to property — Protection of the interests of shareholders and others — Reorganisation and winding up of credit institutions)

In Case C-526/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Ustavno sodišče (Constitutional Court, Slovenia), made by decision of 6 November 2014, received at the Court on 20 November 2014, in the proceedings

Tadej Kotnik and Others,

Jože Sedonja and Others,

Fondazione cassa di risparmio di Imola,

Andrej Pipuš and Others,

Tomaž Štrukelj,

Luka Jukič,

Angel Jaromil,

Franc Marušič and Others,

Stajka Skrbinšek,

Janez Forte and Others,

Državni svet Republike Slovenije,

Varuh človekovih pravic Republike Slovenije,

Igor Karlovšek,

Marija Karlovšek,

Janez Gosar

v

Državni zbor Republike Slovenije,

intervening parties:

Vlada Republike Slovenije,

Banka Slovenije,

Okrožno sodišče v Ljubljani,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz, J.L. da Cruz Vilaça (Rapporteur), A. Arabadjiev, C. Toader and D. Šváby, Presidents of Chambers, M. Safjan, M. Berger, E. Jarašiūnas, C.G. Fernlund and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 1 December 2015,

after considering the observations submitted on behalf of:

– Mr Kotnik and Others, by M. Kunič and J. Sladič, odvetniki,

– Mr Sedonja and Others, by T. Kek, odvetnica,

– the Fondazione cassa di risparmio di Imola, by U. Ilić, M. Jan, B. Ilić, A. Arko, odvetniki, P. Trifoni, C.G. Sinatra and G. Altomare, avvocati,

– Mr Pipuš and Others, by Mr Pipus himself, avocat,

– Mr Jukič, by himself,

– Mr Marušič and Others, by B. Rejc, odvetnik,

– Mrs Skrbinšek, by T. Bromše, odvetnik,

– Mr Forte and Others, by Z. Fritz,

– the Državni svet Republike Slovenije, by M. Bervar, H. Butolen, odvetnica, and B. Kekec, J. Slivšek and D. Štrus,

– Mr and Mrs Karlovšek, by Mr I. Karlovšek, odvetnik,

– Mr Gosar, by Mr Gosar himself,

– the Državni zbor Republike Slovenije, by M. Brglez,

– the Banka Slovenije, by B. Jazbec, R. Grilc, odvetnik, and T. Lübbig, Rechtsanwalt,

– the Slovenian Government, by V. Klemenc, T. Mihelič Žitko, acting as Agents,

– [as rectified by order of 30 September 2016] Ireland, by E. Creedon, L. Williams and A. Joyce, acting as Agents, and by E. McCullough, Senior Counsel, and A. O'Neill, Barrister-at-Law,

– the Spanish Government, by A. Rubio González, acting as Agent,

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

– the European Commission, by L. Flynn, P.J. Loewenthal, K.-Ph. Wojcik and M. Žebre, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 February 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the validity and interpretation of points 40 to 46 of the Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ 2013, C 216, p. 1), and the interpretation of Articles 29, 34, 35 and 40 to 42 of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 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 of the Treaty on the Functioning of the European Union, 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 2012 L 315, p. 74), and of the seventh indent of Article 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 (OJ 2001 L 125, p. 15).

2 The request has been made in proceedings for review of the constitutionality of certain provisions of the Zakon o bančništvu (law on the banking sector) of 23 November 2006), in the version applicable to the main proceedings (Uradni list RS, No 99/10) ('the law on the banking sector'), which provide for exceptional measures designed to ensure the recovery of the banking system.

Legal context

EU law

Directive 2001/24

3 Recitals 5 and 6 in the preamble to Directive 2001/24 read as follows:

'(5) The adoption of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes [(OJ 1994, L 135, p. 5)], which introduced the principle of compulsory membership by credit institutions of a guarantee scheme in their home Member State, brings out even more clearly the need for mutual recognition of reorganisation measures and winding-up proceedings.

(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.'

4 Under the seventh indent of Article 2 of Directive 2001/24, 'reorganisation measures' are to mean 'measures which are intended to preserve or restore the financial situation of a credit institution 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.'

Directive 2012/30

5 Recitals 3 and 5 in the preamble to Directive 2012/30 are worded as follows:

‘(3) … in order to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies, the coordination of national provisions relating to their formation and to the maintenance, increase or reduction of their capital is particularly important;

…

(5) Union provisions are necessary for maintaining the capital, which constitutes the creditors’ security, in particular by prohibiting any reduction thereof by distribution to shareholders where the latter are not entitled to it and by imposing limits on the company’s right to acquire its own shares.’

6 Article 29(1) of that directive provides:

‘Any increase in capital must be decided upon by the general meeting ...’

7 The first paragraph of Article 34 of that directive states:

‘Any reduction in the subscribed capital, except under a court order, must be subject at least to a decision of the general meeting …’

8 Article 35 of Directive 2012/30 provides: ‘Where there are several classes of shares, the decision by the general meeting concerning a reduction in the subscribed capital shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.’

9 Article 40(1) of that directive provides:

‘Where the laws of a Member State may allow companies to reduce their subscribed capital by compulsory withdrawal of shares, they shall require that at least the following conditions are observed:

...

(b) where the compulsory withdrawal is merely authorised by the statutes or instrument of incorporation, it shall be decided upon by the general meeting unless it has been unanimously approved by the shareholders concerned.’

10 Article 41(1) of that directive states:

‘In the case of a reduction in the subscribed capital by the withdrawal of shares acquired by the company itself or by a person acting in his own name but on behalf of the company, the withdrawal must always be decided on by the general meeting.’

11 Article 42 of that directive provides:

‘In the cases covered by …, point (b) of Article 40(1) …, when there are several classes of shares, the decision by the general meeting concerning redemption of the subscribed capital or its reduction by withdrawal of shares shall be subject to a separate vote, at least for each class of shareholders whose rights are affected by the transaction.’

Directive 2014/59/EU

12 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) was adopted on 15 May 2014.

13 Article 117 of Directive 2014/59 amended, inter alia, the definition of 'reorganisation measures' set out in the seventh indent of Article 2 of Directive 2001/24. As amended, 'reorganisation measures' are to mean 'measures which are intended to preserve or restore the financial situation of a credit institution or an investment firm as defined in Article 4(1), point (2) of Regulation (EU) No 575/2013 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'.

14 Article 130(1) of Directive 2014/59 provides:

'Member States shall adopt and publish by 31 December 2014 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

Member States shall apply those measures from 1 January 2015.

However, Member States shall apply provisions adopted in order to comply with Section 5 of Chapter IV of Title IV from 1 January 2016 at the latest.'

The Banking Communication

15 Points 2 and 3 of the Banking Communication state:

'2. The Crisis Communications provide a comprehensive framework for coordinated action in support of the financial sector so as to ensure financial stability while minimising distortions of competition between banks and across Member States in the single market. They spell out the conditions for access to State aid and the requirements which need to be ensured to find such aid compatible with the internal market in light of State aid principles set out in the Treaty. Through the Crisis Communications, State aid rules governing public assistance to the financial sector have been regularly updated where necessary to adapt to the evolution of the crisis. Recent developments require a further update of the Crisis Communications.

3. The Crisis Communications, as well as all individual decisions on aid measures and schemes falling within the scope of those Communications, were adopted on the basis of Article 107(3)(b) of the Treaty, which exceptionally allows for aid to remedy a serious disturbance in the economy of a Member State.'

16 Point 15 of that communication reads as follows:

'The Crisis Communications clearly spell out that even during the crisis the general principles of State aid control remain applicable. In particular, in order to limit distortions of competition between banks and across Member States in the single market and address moral hazard, aid should be limited to the minimum necessary and an appropriate own contribution to restructuring costs should be provided by the aid beneficiary. The bank and its capital holders should contribute to the restructuring as much as possible with their own resources. State support should be granted on terms which represent an adequate burden-sharing by those who invested in the bank.'

17 Point 17 of that communication states:

'In the first phases of the crisis, Member States did not generally go beyond the minimum requirements set by State aid rules with regard to burden-sharing ex ante, and creditors were not required to contribute to rescuing credit institutions for reasons of financial stability.'

18 Part 3 of the Banking Communication relates to recapitalisation and impaired asset measures. Section 3.1.2. of Part 3, headed 'Burden-sharing by the shareholders and the subordinated creditors' contains points 40 to 46 of that notice.

19 Points 40 to 46 of that communication state:

'40. State support can create moral hazard and undermine market discipline. To reduce moral hazard, aid should only be granted on terms which involve adequate burden-sharing by existing investors.

41. Adequate burden-sharing will normally entail, after losses are first absorbed by equity, contributions by hybrid capital holders and subordinated debt holders. Hybrid capital and subordinated debt holders must contribute to reducing the capital shortfall to the maximum extent. Such contributions can take the form of either a conversion into Common Equity Tier 1 … or a write-down of the principal of the instruments. In any case, cash outflows from the beneficiary to the holders of such securities must be prevented to the extent legally possible.

42. The Commission will not require contribution from senior debt holders (in particular from insured deposits, uninsured deposits, bonds and all other senior debt) as a mandatory component of burden-sharing under State aid rules whether by conversion into capital or by write-down of the instruments.

43. Where the capital ratio of the bank that has the identified capital shortfall remains above the [European Union] regulatory minimum, the bank should normally be able to restore the capital position on its own, in particular through capital raising measures as set out in point 35. If there are no other possibilities, including any other supervisory action such as early intervention measures or other remedial actions to overcome the shortfall as confirmed by the competent supervisory or resolution authority, then subordinated debt must be converted into equity, in principle before State aid is granted.

44. In cases where the bank no longer meets the minimum regulatory capital requirements, subordinated debt must be converted or written down, in principle before State aid is granted. State aid must not be granted before equity, hybrid capital and subordinated debt have fully contributed to offset any losses.

45. An exception to the requirements in points 43 and 44 can be made where implementing such measures would endanger financial stability or lead to disproportionate results. This exception could cover cases where the aid amount to be received is small in comparison to the bank's risk weighted assets and the capital shortfall has been reduced significantly in particular through capital raising measures as set out in point 35. Disproportionate results or a risk to financial stability could also be addressed by reconsidering the sequencing of measures to address the capital shortfall.

46. In the context of implementing points 43 and 44, the "no creditor worse off principle" … should be adhered to. Thus, subordinated creditors should not receive less in economic terms than what their instrument would have been worth if no State aid were to be granted.'

Slovenian law

20 Article 253(3) of the law on the banking sector provides that 'the exceptional measures shall form part of the reorganisation measures provided for by Directive 2001/24/EC.'

21 Article 261a of that law states:

'(1) By its decision requiring exceptional measures, the Bank of Slovenia shall provide that:

1. eligible liabilities shall be written off or written down, or

2. a bank's eligible liabilities … shall be converted in whole or in part into new ordinary shares in the bank following an increase of that bank's share capital by means of the transfer of consideration in kind in the form of the claims of creditors, which claims shall constitute eligible liabilities.

...

(5) In writing off or converting a bank's eligible liabilities, the Bank of Slovenia must satisfy itself that individual creditors do not incur, as a result of the writing off or conversion of the bank's eligible liabilities, greater losses than they would have done in the event of the bank's insolvency.

(6) A bank's eligible liabilities are represented by:

1. the bank's share capital (Class I liabilities),

2. liabilities in relation to holders of hybrid capital ... (Class II liabilities),

3. liabilities in relation to holders of financial instruments, which, …, must be taken into account in calculating the bank's additional capital, unless such liabilities are already included in the definitions set out at points 1 or 2 of this paragraph (Class III liabilities),

4. liabilities not included in the definitions set out in points 1, 2 or 3 of this paragraph, which, in the event of insolvency proceedings in respect of the bank, would be paid after the payment of ordinary debentures (Class IV liabilities).'

22 Article 261c of the law on the banking sector provides:

'(1) In its decision concerning the writing off of eligible liabilities …, the Bank of Slovenia shall require the bank's eligible liabilities to be written off to the extent necessary to cover the bank's losses, in the light of the valuation of the net assets as referred to in the preceding article ...'

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

23 After the global financial crisis, which began in 2007 and which deepened in the years that followed, the Banka Slovenije (the Bank of Slovenia) determined, in September 2013, that five Slovenian banks, namely Nova Ljubljanska banka d.d., Nova Kreditna banka Maribor d.d., Abanka Vipa d.d., Probanka d.d. and Factor banka d.d., were showing capital shortfalls. Given the scale of those shortfalls, those banks did not have sufficient assets to satisfy their creditors and to cover the value of deposits.

24 On 17 December 2013 the Bank of Slovenia adopted decisions putting in place exceptional measures to effect the recapitalisation of the first two banks, the rescue of the third, and the winding up of the last two banks ('the contested measures').

25 On 18 December 2013 the Commission authorised the granting of State aid to the five banks concerned, prior notice of that aid having been given by the Slovenian authorities.

26 The contested measures, which were adopted on the basis of the law on the banking sector, in particular Article 261a to 261c and Article 261e of that law, included writing off equity capital, as well as hybrid capital and subordinated debt (together: 'subordinated rights').

27 It is apparent from the file submitted to the Court that subordinated rights are constituted by financial instruments which share certain characteristics with debt products and certain characteristics with shares in equity capital. In the event of the insolvency or winding up of the issuing entity, the holders of subordinated rights ('subordinated creditors') are paid after the holders of ordinary debentures, but before shareholders. In exchange for the financial risk thus assumed by

their holders, those financial instruments offer a higher rate of return.

28 A number of applications for review of constitutionality were brought before the Ustavno sodišče (Constitutional Court, Slovenia) by, on the one hand, private individuals and, on the other, by the Državni svet Republike Slovenije (the National Council, Slovenia) and the Varuh človekovih pravic Republike Slovenije (the Slovenian Ombudsman). Those applications related to whether provisions of the law on the banking sector, on the basis of which the contested measures were adopted, were compatible with the Slovenian Constitution, and in particular with the principle of non-retroactivity, the principles of protection of legitimate expectations and proportionality, and the right to property.

29 It is stated in the order for reference that the objective of the provisions of the law on the banking sector was to transpose the Banking Communication into national law, in order to enable the national authorities to grant to undertakings in that sector State aid that was compatible with the internal market. Consequently, according to the referring court, while the objections of the applicants in the main proceedings are directed against those provisions, their actual target is the Banking Communication. Those applicants consider that that communication is contrary not only to the Slovenian Constitution, but also to Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter') and to Directives 2012/30 and 2001/24. The referring court considers that it has jurisdiction to assess the constitutionality of provisions of national law which implement a directive. However, the referring court believes that it does not have jurisdiction when a question is raised as to the interpretation or validity of a rule of EU law which represents the legal basis for the provision of national law whose constitutionality is challenged. In that situation, it considers that the Court has exclusive jurisdiction to answer questions as to the validity and interpretation of that rule, so that it can thereafter assess, in the case pending before it, the constitutionality of the provisions at issue of the national legislation.

30 In those circumstances, the Ustavno sodišče (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Having regard to the legal effects actually produced by the Banking Communication, and given that the European Union has exclusive competence in relation to State aid, in accordance with Article 3(1)(b) [TFEU], and the Commission has competence to give decisions relating to State aid, pursuant to Article 108 [TFEU], must the Banking Communication be regarded as binding on Member States seeking to remedy a serious disturbance in the economy by granting State aid to credit institutions, where such aid is intended to be permanent and cannot be easily revoked?

(2) Are points 40 to 46 of the Banking Communication — which make the possibility of granting State aid intended to remedy a serious disturbance in the national economy conditional upon compliance with the requirement to write off equity capital, [and subordinated rights] and/or to convert [subordinated rights] into equity, in order to limit the amount of aid to the minimum necessary in the light of the need to take account of moral hazard — incompatible with Articles 107 to 109 [TFEU], in so far as they exceed the Commission's competence, as defined in the provisions of the [FEU] Treaty relating to State aid?

(3) If Question 2 is answered in the negative, are points 40 to 46 of the Banking Communication — which make the possibility of granting State aid conditional on the requirement of writing off and/or converting into equity capital, in so far as that requirement relates to shares (equity capital), and [subordinated rights] issued before the publication of the Banking Communication and which, at the time of issue, could have been written off or written down without full compensation only in the event of the bank's insolvency — compatible with the principle of the protection of legitimate expectations enshrined in EU law?

(4) If Question 2 is answered in the negative and Question 3 in the affirmative, are points 40 to 46 of the Banking Communication — which make the possibility of granting State aid conditional on the requirement to write off equity capital, [and subordinated rights] and/or to

convert [subordinated rights] into equity, without the initiation and conclusion of an insolvency procedure by which the debtor's assets may be liquidated by means of judicial proceedings in which the holders of subordinated financial instruments would have the opportunity to participate as parties to the proceedings — compatible with the right to property enshrined in Article 17(1) of the Charter?

(5) If Question 2 is answered in the negative and Questions 3 and 4 in the affirmative, are points 40 to 46 of the Banking Communication — which make the possibility of granting State aid conditional on the requirement to write off equity capital, and/or to convert [subordinated rights] into equity, in so far as the implementation of those measures calls for a reduction and/or increase in the share capital of a public limited liability company on the basis of the decision of a competent administrative body, not that of the general meeting of shareholders of that company — contrary to Articles 29, 34, 35 and 40 to 42 of Directive 2012/30 …?

(6) With regard to point 19 of the Banking Communication, in particular the requirement laid down in that provision to respect fundamental rights, to point 20, and to the affirmation of the requirement, as a matter of principle, laid down in points 43 and 44 of the communication, to convert or write down [subordinated rights] before granting State aid, may the Banking Communication be interpreted as meaning that those measures do not compel Member States that seek to remedy a serious disturbance in their economy by granting State aid to credit institutions to impose an obligation to adopt such conversion and writing down measures as a condition for the grant of State aid on the basis of Article 107(3)(b) [TFEU], or as meaning that, in order to be able to grant State aid, it is sufficient that the conversion or writing down measure should merely operate in a manner that is proportionate?

(7) May the seventh indent of Article 2 of [Directive 2001/24] be interpreted as meaning that the measures requiring burden-sharing by shareholders and subordinated creditors provided for in points 40 to 46 of the Banking Communication (write-down of equity capital [and subordinated rights] and the conversion into equity of [subordinated rights] may also be classified as reorganisation measures?'

Consideration of the questions referred for a preliminary ruling

Preliminary observation

31 The Slovenian Government and the Commission express doubts as to whether the second, third, fourth and fifth questions referred for a preliminary ruling, on the validity of points 40 to 46 of the Banking Communication, are admissible, since that communication produces no legal effects directly on third parties.

32 It must be observed that what lies behind this case is, in essence, the fact that State aid was granted by the Slovenian Government with the objective of ensuring the recovery of the national banking system.

33 More specifically, this case concerns the compatibility, with a number of provisions of EU law, of the condition laid down by the Commission that there must be burden-sharing by shareholders and subordinated creditors, if it is to be able to find, under Article 107(3)(b) TFEU, that the State aid granted in the banking sector is compatible with the internal market. The validity of such a condition must be capable of being reviewed by the Court in the procedure provided for by Article 267 TFEU, and that is precisely the subject-matter of the second, third, fourth and fifth questions referred.

34 Consequently, those questions are admissible.

The first question referred

35 By its first question, the referring court seeks, in essence, to ascertain whether the Banking Communication must be interpreted as meaning that it is binding on the Member States.

36 Article 108(3) TFEU establishes a prior control of alterations to existing aid and of plans to grant new aid. The aim of that system of prior control is that only aid that is compatible with the internal market may be implemented (see judgment of 21 November 2013, Deutsche Lufthansa, C-284/12, EU:C:2013:755, paragraphs 25 and 26).

37 The assessment of the compatibility of aid measures with the internal market, under Article 107(3) TFEU, falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union (see judgment of 21 November 2013, Deutsche Lufthansa, C-284/12, EU:C:2013:755, paragraph 28).

38 In that regard, the Commission enjoys wide discretion, the exercise of which involves complex economic and social assessments (see, to that effect, judgments of 11 September 2008, Germany and Others v Kronofrance, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 59, and of 8 March 2016, Greece v Commission, C-431/14 P, EU:C:2016:145, paragraph 68).

39 In the exercise of that discretion, the Commission may adopt guidelines in order to establish the criteria on the basis of which it proposes to assess the compatibility, with the internal market, of aid measures envisaged by the Member States.

40 In accordance with settled case-law, in adopting such guidelines and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of that discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (judgment of 8 March 2016, Greece v Commission, C-431/14 P, EU:C:2016:145, paragraphs 69 and 70 and the case-law cited).

41 That said, the Commission cannot waive, by the adoption of guidelines, the exercise of the discretion that Article 107(3)(b) TFEU confers on it (see, to that effect, judgment of 8 March 2016, Greece v Commission, C-431/14 P, EU:C:2016:145, paragraph 71). The adoption of a communication such as the Banking Communication does not therefore relieve the Commission of its obligation to examine the specific exceptional circumstances relied on by a Member State, in a particular case, for the purpose of requesting the direct application of Article 107(3)(b) TFEU, and to provide reasons for its refusal to grant such a request (judgment of 8 March 2016, Greece v Commission, C-431/14 P, EU:C:2016:145, paragraph 72).

42 In this case, it is apparent from points 41, 43 and 44 of the Banking Communication that the adequate burden-sharing which is stated by that communication to be a prerequisite for the grant of State aid entails, first, that losses are absorbed by equity, then, as a general rule, by a contribution from subordinated creditors. An exception to the requirements stated in points 43 and 44 of that communication may be made, under point 45 thereof, where such a contribution ‘might endanger financial stability or lead to disproportionate results’.

43 It follows from the foregoing, on the one hand, that the effect of the adoption of the guidelines contained in that communication is equivalent to the effect of a limitation imposed by the Commission on itself in the exercise of its discretion, so that, if a Member State notifies the Commission of proposed State aid which complies with those guidelines, the Commission must, as a general rule, authorise that proposed aid. On the other hand, the Member States retain the right to notify the Commission of proposed State aid which does not meet the criteria laid down by that communication and the Commission may authorise such proposed aid in exceptional circumstances.

44 It follows that the Banking Communication is not capable of imposing independent obligations on the Member States, but does no more than establish conditions, designed to ensure that State aid granted to the banks in the context of the financial crisis is compatible with the internal market,

which the Commission must take into account in the exercise of the wide discretion that it enjoys under Article 107(3)(b) TFEU.

45 In the light of the foregoing, the answer to the first question referred is that the Banking Communication must be interpreted as meaning that it is not binding on the Member States.

The second question referred

46 By its second question, the referring court seeks, in essence, to ascertain whether Articles 107 to 109 TFEU must be interpreted as precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and subordinated creditors as a prerequisite to the authorisation of State aid.

47 The Banking Communication was adopted on the basis of Article 107(3)(b) TFEU.

48 It is apparent from that provision that the Commission may consider to be compatible with the internal market aid that is designed to remedy a serious disturbance in the economy of a Member State.

49 Within the discretion conferred on it by Article 107(3)(b) TFEU, the Commission is entitled to refuse the grant of aid where that aid does not induce the recipient undertakings to adopt conduct likely to assist attainment of one of the objectives referred to in that provision. Such aid must be necessary for the attainment of the objectives specified in that provision, in the sense that, without it, market forces alone would not succeed in getting the recipient undertakings to adopt conduct likely to assist attainment of those objectives. Aid which improves the financial situation of the recipient undertaking but is not necessary for the attainment of the objectives specified in Article 107(3) TFEU cannot be considered to be compatible with the internal market (judgment of 13 June 2013, HGA and Others v Commission, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 104 and the case-law cited).

50 As regards the adoption of points 40 to 46 of the Banking Communication on the basis of that provision, it must be observed that financial services play a central role in the economy of the European Union. Banks and credit institutions are an essential source of funding for businesses that are active in the various markets. In addition, the banks are often interconnected and a number of them operate internationally. That is why the failure of one or more banks is liable to spread rapidly to other banks, either in the Member State concerned or in other Member States. That is likely, in its turn, to produce negative spill-over effects in other sectors of the economy.

51 As the Advocate General stated, in point 56 of his Opinion, recourse to the legal basis of Article 107(3)(b) TFEU is all the more justified by the fact that, in the context of the global financial crisis, which led to the adoption of that communication, the economies of many Member States were subject to serious disturbances.

52 In this case, it is apparent from point 2 of the Banking Communication that the Commission's aim, by means of that communication, was to spell out the conditions for access to State aid designed to provide assistance to the financial sectors of Member States and the requirements which that aid must satisfy if it is to be found to be compatible with the internal market.

53 One of those requirements, stated in points 40 to 46 of the Banking Communication, is the condition of burden-sharing: both shareholders and subordinated creditors must be involved in meeting the costs of restructuring distressed banks in order to reduce their capital shortfalls. As a consequence, after losses are absorbed by equity capital, subordinated creditors are also called upon to contribute to the attainment of that objective either by the conversion of their claims into equity, or a write-down of the principal of those claims.

54 When reviewing the compatibility of State aid measures with the internal market, the Commission

could take the view that, as stated in point 15 of the Banking Communication, burden-sharing measures were essential in order that State aid in the banking sector should be limited to the minimum necessary and that any distortions of competition in the internal market should be limited.

55 First, such burden-sharing measures can be understood as being designed to prevent recourse to State aid merely as a tool to overcome the financial difficulties of the banks concerned.

56 Second, the burden-sharing measures are designed to ensure that, prior to the grant of any State aid, the banks which show a capital shortfall take steps, with their investors, to reduce that shortfall, in particular by raising equity capital and by obtaining a contribution from subordinated creditors, since such measures are likely to limit the amount of the State aid granted.

57 To act otherwise would be liable to cause distortions of competition, since banks whose shareholders and subordinated creditors had not contributed to the reduction of the capital shortfall would receive State aid of an amount greater than that which would have been sufficient to overcome the residual capital shortfall. In those circumstances, such aid would not, as a general rule, be compatible with EU law.

58 Moreover, in order to overcome the problem of 'moral hazard', which is linked to the fact that individuals are inclined to engage in risk-taking when the possible negative consequences of so doing are borne by the community as a whole, it is important to ensure that banks are not encouraged by the possibility of obtaining State aid to have recourse to financial instruments that carry greater risk and are more likely to cause significant losses, the effect of which would be to create serious distortions of competition and to jeopardise the integrity of the internal market.

59 Last, it must be observed that, in adopting the Banking Communication, the Commission did not encroach on the competences conferred on the Council of the European Union by Articles 108 and 109 TFEU. Since that communication does no more than establish guidelines whose effect is to limit the Commission in the exercise of the discretion conferred on it by Article 107(3)(b) TFEU, it does not impinge on the power granted to the Council, in the third subparagraph of Article 108(2) TFEU, to declare, on application by a Member State, State aid to be compatible with the internal market in exceptional circumstances, and does not constitute a regulation of the kind referred to in Article 109 TFEU, which is, pursuant to the second paragraph of Article 288 TFEU, binding and of general application.

60 In the light of all the foregoing, the answer to the second question is that Articles 107 to 109 TFEU must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and subordinated creditors as a prerequisite to the authorisation of State aid.

The third and fourth questions referred

61 By its third and fourth questions, which can be examined together, the referring court seeks, in essence, to ascertain whether the principle of protection of legitimate expectations and the right to property must be interpreted as precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and subordinated creditors as a prerequisite to the authorisation of State aid.

62 As regards, first, the principle of protection of legitimate expectations, in accordance with settled case-law, the right to rely on that principle presupposes that precise, unconditional and consistent assurances, originating from authorised, reliable sources, have been given to the person concerned by the competent authorities of the European Union. That right applies to any individual in a situation in which an institution, body or agency of the European Union, by giving that person precise assurances, has led him to entertain well-founded expectations (judgments of 16 December 2010, Kahla Thüringen Porzellan v Commission, C-537/08 P, EU:C:2010:769, paragraph 63, and of 13 June 2013, HGA and Others v Commission, C-630/11 P to C-633/11 P, EU:C:2013:387,

paragraph 132).

63 However, the shareholders and subordinated creditors of banks who are subject to burden-sharing measures, laid down in points 40 to 46 of the Banking Communication, such as those at issue in the main proceedings, cannot rely on the principle of protection of legitimate expectations as a ground of objection to implementation of the contested measures.

64 The reason is that, on the one hand, the shareholders and the subordinated creditors of the banks concerned were given no guarantee from the Commission to the effect that it would approve State aid designed to overcome the capital shortfall of those banks. On the other hand, those investors received no assurance that, with respect to measures designed to deal with the capital shortfalls of banks who were the recipients of the State aid authorised by the Commission, some of those measures would not be liable to be prejudicial to their investments.

65 Further, the fact that, in the first phases of the international financial crisis, the subordinated creditors were not called upon to contribute to the rescue of credit institutions, as noted by the Commission in point 17 of the Banking Communication, does not put the creditors concerned in the main proceedings in a position to rely on the principle of protection of legitimate expectations.

66 Indeed, such a circumstance cannot be regarded as a precise, unconditional and consistent assurance capable of engendering a legitimate expectation on the part of the shareholders and the subordinated creditors that they would not be subject to burden-sharing measures in the future. As the Court has previously held, while the principle of protection of legitimate expectations is one of the fundamental principles of the European Union, economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the EU institutions in the exercise of their discretion will be maintained, particularly in a field such as State aid in the banking sector, whose subject matter involves constant adjustment to reflect changes in the economic situation (see, by analogy, judgment of 26 June 2012, Poland v Commission, C-335/09 P, EU:C:2012:385, paragraph 180).

67 The referring court raises the question, further, whether it is necessary that the Member States should be allowed, in any event, a transitional period in order to adjust to the Commission's new requirements in relation to burden-sharing by the shareholders and the subordinated creditors.

68 In that regard, the Court has previously held that, even if the European Union were first to have created a situation capable of giving rise to legitimate expectations, which it has not in this case, an overriding public interest may preclude transitional measures from being adopted in respect of situations which arose before the new rules came into force but which are still subject to change (see judgments of 17 July 1997, Affish, C-183/95, EU:C:1997:373, paragraph 57, and of 17 September 2009, Commission v Koninklijke FrieslandCampina, C-519/07 P, EU:C:2009:556, paragraph 85).

69 As the Advocate General stated in point 70 of his Opinion, the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition constitutes an overriding public interest of that kind.

70 As regards, in the second place, the right to property enshrined in Article 17(1) of the Charter, it must be recalled that, as stated in point 44 of this judgment, the Banking Communication is not capable of imposing an obligation on Member States to adopt burden-sharing measures such as those laid down in points 40 to 46 of that communication.

71 It is apparent from point 15 of the Banking Communication that the burden-sharing by the shareholders and the subordinated creditors is no more than a criterion governing the Commission's authorisation of State aid granted to banks that show a significant capital shortfall, the result being that aid can be limited to the minimum necessary and that the recipient of that aid will contribute appropriately to the costs of restructuring.

72 As the Advocate General stated in point 71 of his Opinion, the Banking Communication does not require any particular form or procedure for the adoption of the burden-sharing measures referred to in points 40 to 46 of that communication. Such measures can accordingly be adopted voluntarily by the shareholders and by means of an agreement between the credit institution concerned and its subordinated creditors, which cannot be regarded as interference with their right to property.

73 Further, as regards the shareholders of the banks, it must be recalled that, in accordance with the general rules applicable to the status of shareholders of public limited liability companies, they must fully bear the risk of their investments. It follows from recital 5 of the preamble to Directive 2012/30 that the aim of that directive is to maintain the share capital that constitutes the creditors' security.

74 Since shareholders are liable for the debts of the bank up to the amount of its share capital, the fact that points 40 to 46 of the Banking Communication require that, in order to overcome a bank's capital shortfall, prior to the grant of State aid, those shareholders should contribute to the absorption of the losses suffered by that bank to the same extent as if there were no State aid, cannot be regarded as adversely affecting their right to property.

75 The scale of losses suffered by shareholders of distressed banks will, in any event, be the same, regardless of whether those losses are caused by a court insolvency order because no State aid is granted or by a procedure for the granting of State aid which is subject to the prerequisite of burden-sharing.

76 As regards the subordinated creditors, as the Court has stated in paragraph 27 of this judgment, subordinated rights are constituted by financial instruments which share certain characteristics with debt products and certain characteristics with equity capital, which entails that, in the event of the issuer of such instruments becoming insolvent, the holders of those instruments are paid after the holders of ordinary debentures, but before shareholders.

77 However, it is apparent from points 41, 43 and 44 of the Banking Communication that those creditors are to contribute to reducing the capital shortfall (i) only after losses are first absorbed by equity and (ii) only 'if there are no other possibilities' available to overcome any capital shortfall in the bank concerned or where that bank no longer meets the minimum regulatory capital requirements. Further, point 46 of that communication provides that 'the "no creditor worse off principle" should be adhered to. Thus, subordinated creditors should therefore not receive less, in economic terms, than what their instrument would have been worth if no State aid were to be granted.'

78 It follows from point 46 that the burden-sharing measures on which the grant of State aid in favour of a bank showing a shortfall is dependent cannot cause any detriment to the right to property of subordinated creditors that those creditors would not have suffered within insolvency proceedings that followed such aid not being granted.

79 That being the case, it cannot reasonably be maintained that the burden-sharing measures, such as those laid down by the Banking Communication, constitute interference in the right to property of the shareholders and the subordinated creditors.

80 The answer, therefore, to the third and fourth questions is that the principle of protection of legitimate expectations and the right to property must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and subordinated creditors as a prerequisite to the authorisation of State aid.

The fifth question

81 By its fifth question, the referring court seeks, in essence, to ascertain whether Articles 29, 34, 35 and 40 to 42 of Directive 2012/30 must be interpreted as precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and

subordinated creditors as a prerequisite to the authorisation of State aid.

82 Articles 29, 34, 35 and 40 to 42 of Directive 2012/30 provide, in essence, that any increase or reduction in the capital of a public limited liability company must be subject to a decision by the general meeting of the company.

83 According to the referring court, to the extent that the Banking Communication provides that certain alterations to the share capital of banks do not have to be decided upon or approved by the general meeting, that communication is incompatible with that directive.

84 However, as stated in paragraph 72 of this judgment, the Banking Communication contains no specific provision on the legal procedures whereby the burden-sharing measures set out in points 40 to 46 of that communication are to be implemented.

85 Consequently, while the Member States may possibly find it necessary, in a particular situation, to adopt such burden-sharing measures without the agreement of the general meeting of the company, that circumstance cannot however call into question the validity of the Banking Communication in the light of the provisions of Directive 2012/30.

86 Further, it must be observed that, according to recital 3 in the preamble of Directive 2012/30, the aim of that directive is to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies. To that end, that directive coordinates the national provisions relating to the formation of such companies, and to the maintenance, increase and reduction of their capital.

87 The background to Directive 2012/30 is the attainment of freedom of establishment in the internal market, and its principal objective is the protection of the interests of shareholders and others. The directive is intended to reassure investors that their rights will be respected throughout the internal market by the governing bodies of the companies in which they have invested, particularly when a company is formed and when its share capital is increased and reduced. Consequently, the measures provided for by Directive 2012/30 in order to guarantee that protection relate to the normal operation of public limited liability companies.

88 By contrast, the burden-sharing measures involving both shareholders and subordinated creditors constitute, when they are imposed by the national authorities, exceptional measures. They can be adopted only in the context of there being a serious disturbance of the economy of a Member State and with the objective of preventing a systemic risk and ensuring the stability of the financial system.

89 Contrary to what is claimed by the applicants in the main proceedings, Directive 2010/30 does not preclude measures relating to share capital being adopted, in certain specific circumstances, such as those mentioned in the Banking Communication, without the approval of the company general meeting. That interpretation cannot, moreover, be called into question by the judgment of 12 March 1993, Pafitis and Others (C-441/93, EU:C:1996:92).

90 In that judgment, the Court interpreted 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 58 of the Treaty, 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), in the context of a dispute characterised by the insolvency of a single bank, whereas, in the main proceedings, the burden-sharing measures that are the subject of points 40 to 46 of the Banking Communication are envisaged as a prerequisite for the grant, to banks faced with a capital shortfall, of State aid intended, in an exceptional context of a national economy being affected by a serious disturbance, to overcome a systemic financial crisis capable of adversely affecting the national financial system as a whole and the financial stability of the European Union.

91 It must be emphasised, in that regard, that, as the Advocate General stated in points 105 and 107 of his Opinion, the national measures that were challenged in Pafitis and Others (C-441/93, EU:C:1996:92) had been adopted in the 1986-1990 period and the Court delivered its judgment in 1996, thus well before the start of the third stage for the implementation of the Economic and Monetary Union, with the introduction of the euro, the establishment of the Eurosystem and the related amendments to the EU Treaties. Although there is a clear public interest in ensuring throughout the European Union a 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.

92 The referring court considers, however, that the provisions of Directive 2014/59 may lead to a finding that the Banking Communication is incompatible with Directive 2012/30.

93 However, in addition to what was stated in paragraphs 72 and 84 of this judgment, the fact that, under Article 123 of Directive 2014/59, from 1 January 2016, Articles 29, 34 and 35, and 40 to 42 of Directive 2012/30 do not apply in the case of use of the resolution mechanisms provided for by Directive 2014/59, does not permit the conclusion that, before that date, derogations of that kind were prohibited.

94 In the light of the foregoing, the answer to the fifth question is that Articles 29, 34, 35 and 40 to 42 of Directive 2012/30 must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and subordinated creditors as a prerequisite to the authorisation of State aid.

The sixth question

95 By its sixth question, the referring court seeks, in essence, to ascertain whether the Banking Communication must be interpreted as meaning that the measures for conversion of subordinated rights or write-down of the principal thereof, as provided for in point 44 of that communication, constitute a necessary and sufficient condition for State aid falling within the scope of that communication to be declared to be compatible with the internal market or whether it is sufficient, for that aid to be authorised, that the subordinated rights are converted or written down in a proportionate manner.

96 It is apparent from the order for reference that, by that question, the Ustavno sodišče (Constitutional Court) wants to know whether, in the event that a bank does not meet the minimum regulatory capital requirements, within the meaning of point 44 of the Banking Communication, measures to ensure the writing down of subordinated rights are to be undertaken in such a way that they offset in full all the identified losses of the bank or whether those measures may be applied partially, in a proportionate manner.

97 Under point 44 of that communication, in the event that a bank does not meet the minimum capital requirements, which means that its capital is not sufficient, in itself, to absorb the bank's losses, subordinated debt must be converted, or the principal thereof must be written down, as a general rule, before the grant of State aid to that bank. Further, again under point 44, State aid must not be granted before equity and subordinate debt have fully contributed to offset any losses of the bank.

98 As stated in paragraphs 40 and 41 of this judgment, in adopting guidelines and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those guidelines, if it is not to be found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations. Further, the adoption of such guidelines does not relieve the Commission of its obligation to examine specific exceptional circumstances that are relied on by a Member State.

99 It follows that the fact that a measure of State aid meets the criteria set out in point 44 of the

Banking Communication constitutes a condition that is, as a general rule, sufficient ground for the Commission to declare that measure to be compatible with the internal market, but is not strictly necessary to that end.

100 A Member State is not therefore compelled to impose on banks in distress, prior to the grant of any State aid, an obligation to convert subordinated rights into equity or to effect a write-down of the principal thereof, or an obligation to ensure that those rights contribute fully to the absorption of losses. In such circumstances, it will not however be possible for the contemplated State aid to be regarded as having been limited to what is strictly necessary, as required by point 15 of the Banking Communication. The Member State, and the banks who are to be the recipients of the contemplated State aid, take the risk that a Commission decision declaring the aid incompatible with the internal market will stand in its way.

101 It may be added that the Banking Communication provides, in point 45 thereof, that an exception to the requirements of, inter alia, point 44 of that communication may be made where the implementation of measures for converting debt or writing down its principal 'would endanger financial stability or lead to disproportionate results'. Accordingly, an obligation to effect the conversion, or write-down, of subordinate rights in their entirety before the granting of State aid cannot be imposed on a bank if, inter alia, the conversion, or write-down, of a part of the subordinate rights would have been sufficient to overcome the capital shortfall of the bank concerned.

102 In the light of all the foregoing, the answer to the sixth question is that the Banking Communication must be interpreted as meaning that the measures for converting subordinate rights or writing down their value, as provided for in point 44 of that communication, must not exceed what is necessary to overcome the capital shortfall of the bank concerned.

The seventh question

103 By its seventh question, the referring court seeks, in essence, to ascertain whether the seventh indent of Article 2 of Directive 2001/24 must be interpreted as meaning that the burden-sharing measures involving both shareholders and subordinated creditors, as provided for in points 40 to 46 of the Banking Communication, fall within the scope of the concept of 'reorganisation measures', within the meaning of that provision of Directive 2001/24.

104 It must be observed that Directive 2001/24, as is apparent from recital 6 of its preamble, has the objective of putting in place a system for the mutual recognition of reorganisation measures, but does not seek to harmonise national legislation in that field (see judgment of 24 October 2013, LBI, C-85/12, EU:C:2013:697, paragraph 39).

105 That objective entails that the reorganisation measures taken by the administrative or judicial authorities of the home Member State, that is, the Member State in which a credit institution has been authorised, must have, in all the other Member States, the effects which the law of the home Member State confers on them (see, to that effect, judgment of 24 October 2013, LBI, C-85/12, EU:C:2013:697, paragraph 22).

106 In accordance with the seventh indent of Article 2 of Directive 2001/24, the concept of 'reorganisation measures' is to be regarded as meaning measures 'which are intended to preserve or restore the financial situation of a credit institution 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'.

107 As argued by all the parties to the main proceedings who have expressed a view on this question, it follows from the very wording of that provision, and from the broad definition of the concept of 'reorganisation measures' stated therein, that burden-sharing measures such as those provided for in points 40 to 46 of the Banking Communication can be included within the concept of 'reorganisation measures', within the meaning of Directive 2001/24.

108 First, given that the aim of the burden-sharing measures is to restore the financial position of credit institutions and to overcome their capital shortfall, as set out in point 43 of the Banking Communication, the purpose of those measures is to preserve or re-establish the financial situation of a credit institution.

109 Second, the burden-sharing measures, in particular the conversion of the principal of subordinated rights into equity or the write-down of the principal, are, by their very nature, likely adversely to affect the pre-existing rights of third parties and, accordingly, to lead to a reduction of creditors' claims.

110 To fall within the scope of the concept of 'reorganisation measures', within the meaning of Directive 2001/24, it is however necessary, as is apparent from, inter alia, recital 6 and Article 3(1) of that directive, that the burden-sharing measures should be adopted by an administrative or judicial authority. In contrast, where the burden-sharing measures are decided upon and implemented by the shareholders or the subordinated creditors, without any action on the part of the administrative or judicial authorities, those measures cannot constitute reorganisation measures, within the meaning of Directive 2001/24.

111 In addition, the referring court has doubts as to whether the fact that the seventh indent of Article 2 of Directive 2001/24 was amended by Article 117 of Directive 2014/59, so as expressly to include, in the concept of 'reorganisation measures', the resolution instruments provided for by Directive 2014/59 — which are comparable to the burden-sharing measures involving both shareholders and subordinated creditors –, allows the inference that, at the material time, those latter measures did not fall within the scope of the concept of 'reorganisation measures', within the meaning of Directive 2001/24.

112 Such an interpretation cannot be accepted.

113 As the Advocate General stated in point 143 of his Opinion, that amendment must be read in the light of the fact that the aim of Directive 2001/24 was not to harmonise the relevant legislation of the Member States, but solely to provide a system of mutual recognition. However, Directive 2014/59 now imposes on the Member States the obligation to introduce certain measures designed to reorganise banks, which necessitates that those measures should be expressly identified in order to guarantee the uniform application of Directive 2014/59 in the European Union. That does not, however, imply that similar public measures were not covered previously by the definition of reorganisation measures.

114 The answer therefore to the seventh question is that the seventh indent of Article 2 of Directive 2001/24 must be interpreted as meaning that burden-sharing measures such as those provided for in points 40 to 46 of the Banking Communication fall within the scope of the concept of 'reorganisation measures', within the meaning of that provision of that directive.

Costs

115 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 (Grand Chamber) hereby rules:

1. **The Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') must be interpreted as meaning that it is not binding on the Member States.**

2. **Articles 107 to 109 TFEU must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and holders of subordinated rights as a prerequisite to the authorisation of State aid.**

3. **The principle of the protection of legitimate expectations and the right to property must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and holders of subordinated rights as a prerequisite to the authorisation of State aid.**

4. **Articles 29, 34, 35 and 40 to 42 of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 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 of the Treaty on the Functioning of the European Union, 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, must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and holders of subordinated rights as a prerequisite to the authorisation of State aid.**

5. **The Banking Communication must be interpreted as meaning that the measures for converting hybrid capital and subordinate debt or writing down their principal, as provided for in point 44 of that communication, must not exceed what is necessary to overcome the capital short-fall of the bank concerned.**

6. **The seventh indent of Article 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 must be interpreted as meaning that burden-sharing measures such as those provided for in points 40 to 46 of the Banking Communication fall within the scope of the concept of 'reorganisation measures', within the meaning of that provision of that directive.**

[Signatures]

---

* Language of the case: Slovenian.

---

i The wording of paragraph 28 of this document has been modified after it was first put online.