Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 November 2015[1]

**Case C-483/14**

**KA Finanz AG**
**v**
**Sparkassen Versicherung AG Vienna Insurance Group**
(Request for a preliminary ruling

from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling — Company law — Concept of 'the law of companies' — Cross-border merger of companies — Protection of creditors — Applicable law and conflict-of-law rules in the case of a cross-border merger of companies — Holders of securities, other than shares, to which special rights are attached)

1. In the present case, the Oberster Gerichtshof (Supreme Court) seeks to determine the law applicable to a dispute between the acquiring company and a creditor of the company being acquired and to ascertain whether, in the event of a cross-border merger, the acquiring company is entitled to terminate unilaterally the legal relationship between it and a subscriber to subordinated liabilities and to satisfy in full the latter's claims.

2. In this Opinion, I shall explain the reasons why I take the view that, where, in the course of a merger, the company being acquired has issued subordinated liabilities of the kind under examination in the case in the main proceedings, those liabilities are transferred to the acquiring company only to the extent that, on the day of the merger, the supplementary capital thus raised was still extant, an issue which it falls to the national court to determine. If that is the case, I shall explain why, to my mind, Article 14(1) of Directive 2005/56/EC[2] must be interpreted as meaning that, in the context of a cross-border merger, contracts such as those at issue in the main proceedings which have been concluded by the company being acquired are transferred to the acquiring company and thus trigger the application of the law chosen by the parties at the time when those contracts were first concluded. Next, I shall set out the reasons why I am of the opinion that Article 4(1) and (2) of that directive, read in conjunction with Article 13(1) of Third Directive 78/855/EEC,[3] must be interpreted as meaning that claims arising from financial instruments such as the subordinated liabilities at issue in the main proceedings are, in view of their nature, eligible only for a level of protection equivalent to that from which they benefited prior to the cross-border merger.

1 — Original language: French.

2 — Directive of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ 2005 L 310, p. 1).

3 — Council Directive of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies (OJ 1978 L 295, p. 36).

## I – **Legal framework**

### A – *The Rome Convention*

3. Article 1 of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980,[4] states the following:

‘1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

…

(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;

…’

4. The Rome Convention was replaced by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).[5]

### B – *EU law*

#### 1. Third Directive 78/855

5. Third Directive 78/855 sought to guarantee, in all the Member States, a minimum level of protection for the interests of members and third parties in the event of mergers of public limited liability companies.[6] In particular, it sought to ensure that a merger does not adversely affect the interests of creditors, including debenture holders, and persons having other claims on the merging companies.[7]

6. Thus, Third Directive 78/855 provided as follows:

‘…

*Article 13*

1. The laws of the Member States must provide for an adequate system of protection of the interests of creditors of the merging companies whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication.

2. To this end, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards.

4 — OJ 1980 L 266, p. 1, ‘the Rome Convention’.

5 — OJ 2008 L 177, p. 6, and the corrigendum in OJ 2009 L 309, p. 87; ‘the Rome I Regulation’.

6 — See the third and fourth recitals of that directive.

7 — See the sixth recital of the directive.

3. Such protection may be different for the creditors of the acquiring company and for those of the company being acquired.

*Article 14*

Without prejudice to the rules governing the collective exercise of their rights, Article 13 shall apply to the debenture holders of the merging companies, except where the merger has been approved by a meeting of the debenture holders, if such a meeting is provided for under national laws, or by the debenture holders individually.

*Article 15*

Holders of securities, other than shares, to which special rights are attached must be given rights in the acquiring company at least equivalent to those they possessed in the company being acquired, unless the alteration of those rights has been approved by a meeting of the holders of such securities, if such a meeting is provided for under national laws, or by the holders of those securities individually, or unless the holders are entitled to have their securities repurchased by the acquiring company.

…

*Article 19*

1. A merger shall have the following consequences ipso jure and simultaneously:

(a) the transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;

(b) the shareholders of the company being acquired become shareholders of the acquiring company;

(c) the company being acquired ceases to exist.

2. No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:

(a) by the acquiring company itself or through a person acting in his own name but on its behalf;

(b) by the company being acquired itself or through a person acting in his own name but on its behalf.

3. The foregoing shall not affect the laws of Member States which require the completion of special formalities for the transfer of certain assets, rights and obligations by the acquired company to be effective as against third parties. The acquiring company may carry out these formalities itself; however, the laws of the Member States may permit the company being acquired to continue to carry out these formalities for a limited period which cannot, save in exceptional cases, be fixed at more than six months from the date on which the merger takes effect.

…'

7. Third Directive 78/855 was replaced by Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies.[8]

8 — OJ 2011 L 110, p. 1.

2. Directive 2005/56

8. The purpose of Directive 2005/56 is to facilitate cross-border mergers between various types of limited liability company governed by the laws of different Member States.[9]

9. Recital 3 of the directive states:

'In order to facilitate cross-border merger operations, it should be laid down that, unless this Directive provides otherwise, each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law which would be applicable in the case of a national merger. None of the provisions and formalities of national law, to which reference is made in this Directive, should introduce restrictions on freedom of establishment or on the free movement of capital save where these can be justified in accordance with the case-law of the Court of Justice and in particular by requirements of the general interest and are both necessary for, and proportionate to, the attainment of such overriding requirements.'

10. Article 4 of Directive 2005/56 is worded as follows:

'1. Save as otherwise provided in this Directive,

(a) cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States, and

(b) a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject …

2. The provisions and formalities referred to in paragraph 1(b) shall, in particular, include those concerning the decision-making process relating to the merger and, taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees as regards rights other than those governed by Article 16. A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger.'

11. Article 14 of that directive provides as follows:

'1. A cross-border merger carried out as laid down in points (a) and (c) of Article 2(2) shall, from the date referred to in Article 12, have the following consequences:

(a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;

(b) the members of the company being acquired shall become members of the acquiring company;

(c) the company being acquired ceases to exist.

…'

9 — See recital 1 of that directive.

C – *Austrian law*

12. Paragraph 226(1) of the Law on limited liability companies (Aktiengesetz) of 31 March 1965,[10] in the version applicable to the facts of the main proceedings ('the AktG'), states that, provided that they come forward within a period of six months from publication of the registration of the merger, creditors of the companies concerned must be given guarantees if they cannot seek the satisfaction of their claims. However, that right is afforded to creditors only if they are able to furnish credible evidence to show that the merger poses a risk to the payment of their claim. Creditors are to be advised of that right when the merger registration is published.

13. Paragraph 226(2) of the AktG states that the right to seek guarantees does not extend to creditors who, in the context of insolvency proceedings, are entitled to the preferential satisfaction of claims from an insolvency estate that has been established in accordance with the law for the purposes of their protection and is subject to the supervision of the competent authority.

14. According to Paragraph 226(3) of the AktG, holders of debentures and participation certificates are to be granted rights of equal value or else be paid reasonable compensation for the alteration of those rights or for the right itself.

15. The referring court explains that that provision is intended to transpose Article 15 of Third Directive 78/855.

## II – **The dispute in the main proceedings**

16. In the course of 2005, Sparkassen Versicherung AG Vienna Insurance Group ('Sparkassen Versicherung'), established in Austria, subscribed to liabilities under two subordinated loans ('Notes') issued by Kommunalkredit International Bank Ltd ('the issuer'), established in Cyprus.

17. According to clause 3(1) of the Conditions of Issue of those two loans, the Notes are to bear interest at the rates of 4.01% and 3.84% respectively. Furthermore, in accordance with clause 2 of those Conditions, claims under those Notes constitute unsecured and subordinated claims against the issuer which enjoy equal rank as between themselves and with any other subordinated claim against the issuer. In the event of the dissolution, liquidation or bankruptcy of the issuer, the claims arising from the Notes may be settled only after the non-subordinated claims have been satisfied. Consequently, no amounts may be paid under the Notes until the claims of all non-subordinated creditors of the issuer have been settled in full or have been adequately provided for. In addition, a holder may not set off his claims under the Notes against claims held by the issuer. Clause 2 also provides that neither the issuer nor any third party may now or at any time in the future furnish a contractual security to guarantee the rights of the holders under the Notes. No future agreement may limit the subordinated nature of claims under those Notes as described in the aforementioned clause 2, bring forward the maturity date of the Notes or reduce the applicable notice period.

18. Clause 4(1)(b) of the Conditions of Issue of the two loans, which concerns the payment of interest, provides that payments in reimbursement of the nominal value and settlement of interest may be made only on condition that they do not cause the relevant own funds of the issuer to fall below the minimum requirements set out in the corresponding guidelines on the calculation of the own funds of banks issued by the Central Bank of Cyprus.

10 — BGBl. I, 98/1965, p. 1089.

19. Clause 9(1) of the Conditions of Issue states that, in the event of the liquidation or dissolution of the issuer (other than where this is with a view to or in consequence of a merger, restructuring or reorganisation which arises while the issuer is solvent and in the course of which the continuing entity essentially takes over all of the assets and liabilities of the issuer), each holder may declare his Note due and seek its immediate redemption at the early redemption amount, together with any interest accrued up until the date of redemption.

20. In accordance with Clause 12(1) of the Conditions of Issue, the form and content of the Notes and all the rights and obligations of the holders and the issuer are to be governed by German law.

21. By late 2008, the issuer had ceased to meet the minimum requirements applicable to own funds laid down in the guidelines issued by the Central Bank of Cyprus. It therefore stopped paying interest as stipulated in the Conditions of Issue.

22. On 18 September 2010, the merger of the issuer (the company being acquired) with KA Finanz AG ('KA Finanz') (the acquiring company), established in Austria, was registered in the companies register. It is also reported, by the referring court and Sparkassen Versicherung, that KA Finanz unilaterally terminated the two subordinated loans subscribed to by Sparkassen Versicherung. Sparkassen Versicherung submits more specifically that the joint merger plan of 27 April 2010 states that those loans are regarded as special rights, that they are not held by KA Finanz, that they were the subject of an assessment and that, following that assessment, their value was calculated as being zero. That plan thus states that those rights are to be terminated on the date on which the cross-border merger takes effect and that no compensation is to be granted in return.

23. In so far as the issuer had stopped paying interest, Sparkassen Versicherung brought an action before the Austrian courts with a view to obtaining an order requiring KA Finanz to pay the sum of EUR 1.57 million by way of interest accrued on the two subordinated loans over the course of 2009 and 2010. Sparkassen Versicherung submits that KA Finanz, as the company acquiring the issuer, is the universal successor in title to the issuer. In the alternative, it seeks a declaration that KA Finanz has an obligation to confer on it rights of equal value within the meaning of Paragraph 226(3) of the AktG and is liable for all damage arising from its failure to do so. For its part, KA Finanz argues that it did not take over the issuer's liabilities, which, on the contrary, the merger had the effect of terminating. It contends that, in so far as the payment of interest and repayment of capital depended on the status of the issuer's own funds, the liabilities at issue were in the nature of own funds and thus carried with them a risk of total loss. They therefore constituted participation certificates within the meaning of that provision. Consequently, KA Finanz sought a declaration that the two subordinated loans were terminated in the course of the acquisition of the issuer, and, in the alternative, that the issuer's liabilities were not transferred to it.

24. At first instance, the Handelsgericht Wien (Commercial Court, Vienna), by interlocutory judgment of 26 June 2012, dismissed KA Finanz's interim application for a declaration and its alternative claim. It found that the liabilities in question were neither participation certificates nor securities of any other kind similar to shares, since they were not in the nature of own funds and did not depend on the company's profits. Consequently, the Handelsgericht Wien (Commercial Court, Vienna) held that KA Finanz was not entitled to terminate the liabilities at issue as part of the merger. On the contrary, it considered that the loans had been transferred to KA Finanz as part of the universal transfer of the issuer's assets and liabilities. The referring court points out that the Handelsgericht Wien (Commercial Court, Vienna) did not rule on the question of the law applicable to the dispute which had been brought before it.

25. By judgment of 26 April 2013, the Oberlandesgericht Wien (Higher Regional Court, Vienna), ruling on appeal, confirmed the judgment of the Handelsgericht Wien. It took the view, inter alia, that the legal effects of a merger were a component of a company's status in law and that, consequently, the transfer of assets and liabilities as part of that merger had to be assessed according to the law governing the status of KA Finanz, the acquiring company, in other words, Austrian law.

26. KA Finanz lodged an appeal on a point of law before the referring court. The latter states that that appeal concerns whether Paragraph 226(3) of the AktG applies to the subordinated liabilities subscribed to by Sparkassen Versicherung.

## III – **The questions referred for a preliminary ruling**

27. Harbouring doubts as to the interpretation to be given to EU law, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 1(2)(e) of the Rome Convention to be interpreted as meaning that the "company law" excepted area includes:

(a) reorganisations such as mergers and divisions, and

(b) in connection with reorganisations, the creditor protection provision in Article 15 of [Third] Directive 78/855?

(2) Is the conclusion the same if Article 15 of Directive 2011/35 is applicable?

(3) If the replies to Questions 1 and 2 are in the affirmative, does the excepted area in Article 1(2)(d) of the Rome I Regulation — as the successor provision to Article 1(2)(e) of the Rome Convention — lead to the same conclusion, or must it be interpreted differently? If so, how?

(4) Are any requirements concerning the treatment of mergers in relation to conflict of laws to be inferred from European primary law such as the freedom of establishment under Article 49 TFEU, the freedom to provide services under Article 56 TFEU and the free movement of capital and payments under Article 63 TFEU, in particular as to whether the national law of the State of the outwardly merging company or the national law of the target company is to be applied?

(5) If Question 4 is answered in the negative, are any principles concerning treatment in relation to conflict of laws to be inferred from European secondary law such as Directive 2005/56, Directive 2011/35 or the Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty concerning the division of public limited liability companies, [[11]] in particular as to whether the national law of the State of the outwardly merging company or the national law of the target company is to be applied, or are national conflict-of-law rules free to decide to which substantive national law reference should be made?

(6) Is Article 15 of [Third] Directive 78/855 to be interpreted as meaning that the issuer is entitled, as against holders of securities, other than shares, to which special rights are attached, particularly in the case of subordinated loans, to terminate the legal relationship and to pay off the persons entitled in the case of a cross-border merger?

(7) May the same conclusion be reached by applying Article 15 of Directive 2011/35?'

11 — OJ 1982 L 378, p. 47.

## IV – **My analysis**

28. Pursuant to Article 28 and the second paragraph of Article 29 of the Rome I Regulation, that regulation is to apply from 17 December 2009 and to contracts concluded from that date.

29. In accordance with Article 33 of Directive 2011/35, that directive entered into force on 1 July 2011.

30. Accordingly, those two texts do not apply to the situation at issue in the main proceedings.

31. Sixth Directive 82/891 governs matters relating to the division of public limited liability companies. Since the dispute in the main proceedings concerns the merger of such companies, that directive is not relevant to its resolution.

32. To my mind, therefore, there is no need to answer the second, third and seventh questions, or the fifth question in so far as it relates to Sixth Directive 82/891 and Directive 2011/35.

33. So far as concerns the substance of the law which the Court is called upon to interpret, it seems to me that the solution turns on the actual nature of the particular form of corporate financing at issue here, that is to say subordinated liabilities.

34. The rationale behind the subordinated security at issue, from the point of view of the investor, is to make funds available to the issuer over a particularly long period of time, in this case 25 years.[12] A higher return than would be yielded by an ordinary loan serves to reward both the term over which the capital invested is committed and the associated risk attaching to its repayment. After all, the capital is repayable only after the claims of all other creditors, including unsecured creditors, have been satisfied.

35. The agreed term of the commitment obviously poses a risk from the point of view of the future position of the company at the end of such long, and sometimes even indefinite, periods.

36. To my mind, this has two different but complementary consequences, one in relation to the investor and the other in relation to the issuer. From the investor’s point of view, the contract is unquestionably exposed to risk. Who is to say whether the company will still be in existence or will still be solvent in 25 years’ time? From the issuer’s point of view, the funds thus represent a long-term capital commitment and will be treated as such. Far from being short-term debts, those funds will enable the issuer to improve the structure of its balance sheet in the same way as own funds would, even though they do not satisfy the legal definition of own funds.

37. To reiterate a commonly held view, it is fair to say that the wide range of opinion expressed in the legal literature on this subject supports the finding of a lack of conceptual unity in a field which is far from harmonised.

38. For that reason, I am minded to take as the basis for my assessment the effectively unique nature of the contract at issue and to observe that, in the light of both the term and the risk of the investment, the funds in question are in the nature of own funds, even though, strictly speaking, they would be better described as ‘supplementary capital’, to use the classification adopted by the Basel Committee.[13]

12 — See the annexes to the written observations submitted by Sparkassen Versicherung.

13 — The Basel Committee was established in 1974. It is tasked with enhancing the stability of the global financial system and strengthening prudential supervision and cooperation between banking regulators (https://acpr.banque-france.fr/international/la-cooperation-au-niveau-international/les-instances-internationales/secteur-banque/le-comite-de-bale.html).

39. In its written observations, which were not challenged in this regard at the hearing, Sparkassen Versicherung states that 'from [the clause on payment], and from other provisions of the Conditions of Issue, it is apparent that the Notes in question are lower tier 2 capital elements for the purposes of the practice of banking supervision and the issue of financial instruments under the Basel I and II Accords'.[14] Lower tier 2 securities are regarded as supplementary capital by the Basel Committee on Banking Supervision.[15]

40. The proposition that the Notes at issue are in the nature of own funds is reinforced by the risk associated with the subscription contract, inasmuch as, in the event of a cessation of payments and liquidation, those own funds do not have to be repaid until all other creditors have been reimbursed first, thus reducing the general pool of creditors' debts.

41. If the company's position is such that it cannot conceivably repay those own funds, their loss will, for the investor, represent the realisation of the risk inherent in the nature of the contract itself and, ipso facto, will not be actionable. After all, the disappearance of the funds, being a potential outcome of the risk-weighted contract concluded, would bring about the disappearance of the claim and thereby render nugatory the question of the law applicable.

42. Everything hangs, therefore, on whether, on the day of the merger, Sparkassen Versicherung retained a claim arising from its subscription to the subordinated liabilities, which in turn depends on whether, on the day of that merger, the issuer's position showed that those funds were still extant. After all, even though a merger obviously does not bring about the liquidation of the company being acquired, notwithstanding that the latter has been dissolved, there is clearly a need, at the time of the merger/acquisition, to establish the value of the assets and liabilities passed to the acquiring company in this way, a process that must normally be closely scrutinised by the auditors. Drawing up the accounts at this time strikes me as being a very prudent measure, if only to ensure that items of no value which would in reality constitute fictitious assets are not taken into consideration.

43. The disappearance of the claim, wholly impossible to predict during the life of a company and an event the occurrence of which would thus lead to an unfavourable outcome even if it came about earlier than the term initially agreed, seems to me to be part and parcel of the risk inherent in this type of contract.

44. As I have noted in point 22 of this Opinion, that assessment appears to have taken place, the conclusion having being drawn that the value of the securities evidencing the investment at issue was zero.

45. Nonetheless, this being a point of fact, it will be for the national court to determine whether the company being acquired was in possession of the supplementary capital raised in this way on the day of the merger.

46. We must, however, contemplate the possibility that the company being acquired was solvent.

47. If it was, the question of the law applicable to the dispute in the main proceedings is indeed relevant. In so far as Article 14(1) of Directive 2005/56 provides that one of the consequences of a cross-border merger is that, from the date on which the merger takes effect, all the assets and liabilities of the company being acquired are to be transferred to the acquiring company,[16] the

14 — See paragraph 5 of those observations.

15 — See p. 15 of the document produced by the Basel Committee on Banking Supervision, entitled 'International Convergence of Capital Measurement and Capital Standards', available at the website: http://www.bis.org/publ/bcbs128.pdf.

16 — See also Article 2(2)(a) of that directive, which states, inter alia, that 'merger' means an operation whereby one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company.

acquiring company becomes the universal successor in title to the company being acquired and thus takes over all of the contracts concluded by the latter before the merger, although those contracts are not thereby novated. Consequently, the law chosen by the parties at the time when those contracts were concluded remains the law applicable to the dispute, in this instance German law.

48. That provision must therefore be interpreted as meaning that, in the context of a cross-border merger, contracts such as those at issue in the main proceedings which were concluded by the company being acquired are transferred to the acquiring company, with the result that the law applicable is that which was chosen by the parties at the time when those contracts were first concluded.

49. Furthermore, if there are sums owed by way of interest accrued but unpaid prior to the disappearance of the issuer's own funds and supplementary capital, the claim so arising must benefit from a level of protection equivalent to that available under the initial contract and subject to the same risks. Pursuant to Article 4(1) and (2) of Directive 2005/56, a company taking part in a cross-border merger must comply with the provisions and formalities of the national law to which it is subject, which provisions and formalities include, in particular, those concerning the protection of creditors of the merging companies.[17] In so far as the Member States must comply with Articles 13 to 15 of Third Directive 78/855, concerning the protection of creditors in the context of a national merger, I infer from this that Directive 2005/56 is referring to those articles and that, in the context of a cross-border merger, creditors must enjoy the same protection as creditors concerned by a national merger. More specifically, of those articles, only Article 13 of Third Directive 78/855 seems to me to be applicable to the type of liability at issue here, on account of the unique nature of that liability. After all, Article 14 of that directive extends Article 13 to the case of ordinary debenture holders, who cannot be treated in the same way as the holders of subordinated liabilities.

50. Article 15 of that directive concerns securities, other than shares, to which special rights are attached. The holders of such securities are afforded the right to a level of protection at least equivalent to, and potentially more extensive than, that from which they benefited before the merger. Given the nature of the securities at issue here, that provision cannot be applicable to them. After all, the type of liability at issue here cannot, to my mind, be classified as a 'security to which special rights are attached', since its specific nature confers rights that are particularly favourable to the issuer and not to the subscriber. To reverse that imbalance, if only in relation to the payment of interest, the rules governing the collection of which are dictated by the very structure of the contract, would be tantamount here to changing that contract.

51. However, it is essential that the nature of an initial contract of the type under examination here should not be altered in any way, since this would cause the contract to be novated, and novation is intrinsically alien to a merger transaction because it is incompatible with the acquiring company's status as universal successor in title.

52. After all, since that contract carries risk and that risk is borne by the investor, any safeguard that would strengthen the claim would mitigate the risk, if not eliminate it altogether, and therefore change the nature of the initial contract and, potentially, that of the funds thus raised and the rights attached to them.

53. Thus, for example, whichever conflict-of-law rule is applied, it cannot lead to an outcome such as that which would be brought about by Paragraph 226(1) of the AktG, which provides that, in certain cases, a creditor who has not been able to obtain reimbursement, may seek guarantees if he can demonstrate that the merger poses a risk to his reimbursement.

17 — Recital 3 of that directive states that 'each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law which would be applicable in the case of a national merger'.

54. Similarly, in the case of the acquisition of a solvent company, the possibility available to either party to the contract for the issue of a financial instrument of terminating that contract in the event of a subsequent merger can follow only from an express stipulation made in that contract at the time when it was first concluded, any such stipulation being inapplicable in any event where the loss of the own funds arose prior to the merger in question.

55. Accordingly, in the light of the foregoing, I am of the view that Article 4(1) and (2) of Directive 2005/56, read in conjunction with Article 13(1) of Third Directive 78/855, must be interpreted as meaning that claims arising from financial instruments such as the subordinated liabilities at issue in the main proceedings are, in view of their nature, eligible only for a level of protection equivalent to that from which they benefited prior to the cross-border merger.

## V – **Conclusion**

56. In the light of all the foregoing considerations, I propose that the Court answer the questions referred by the Oberster Gerichtshof (Supreme Court) as follows:

Where, in the course of a merger, the company being acquired has chosen to issue subordinated liabilities of the kind under examination in the main proceedings, those liabilities are transferred to the acquiring company only if, on the day of the merger, the supplementary capital thus raised was still extant, an issue which it falls to the national court to determine.

If that is the case, Article 14(1) of Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies must be interpreted as meaning that, in the context of a cross-border merger, contracts such as those at issue in the main proceedings which have been concluded by the company being acquired are transferred to the acquiring company and thus trigger the application of the law chosen by the parties at the time when those contracts were first concluded.

Article 4(1) and (2) of Directive 2005/56, read in conjunction with Article 13(1) of Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies, must be interpreted as meaning that claims arising from financial instruments such as the subordinated liabilities at issue in the main proceedings are, in view of their nature, eligible only for a level of protection equivalent to that from which they benefited prior to the cross-border merger.