Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 18 February 2016[1]

Case C‑526/14Kotnik and Others

(Request for a preliminary ruling from the

Ustavno sodišče (Constitutional Court, Slovenia))

(State aids — Banking Communication — Burden-sharing — Directive 2001/24/EC — Reorganisation measures — Directive 2012/30/EU — Pafitis case-law — Directive 2014/59/EU)

1. A financial crisis of the magnitude of that which started in 2007, and quickly spread globally after the collapse of Lehman Brothers in September 2008, is often defined as a 'multidimensional event', driven by several concomitant factors. Politicians and economists do not always share the same views on the deeper causes of such crises, but they mostly agree on the possible consequences flowing from them: collapse of financial institutions, drop in stock markets, failure of both large and small businesses, decline in consumer wealth and increase in unemployment.[2]

2. It is generally accepted that, in order to combat a financial crisis, different forms of public intervention may be needed, in particular to ensure the stability of the financial markets. To that end, during the recent financial crisis, several States both in the European Union and in the rest of the world had recourse to a variety of 'bail-in' measures to restore the viability of banks.

3. The present case — the first reference for a preliminary ruling from the Ustavno sodišče (Constitutional Court) — concerns, in fact, 'bail-in' measures of the sort referred to in points 40 to 46 of the latest Banking Communication[3] (referred to as 'burden-sharing measures'), issued by the Commission to provide a framework for the assessment of the compatibility of State aid to banks during the crisis. The referring court, in particular, seeks guidance from the Court on the validity and interpretation of the provisions of that communication, raising a number of important legal issues which I will address in this Opinion.

[1] — Original language: English.

[2] — Claessens, S., Kose, A.M., 'Financial Crises: Explanations, Types, and Implications', IMF Working Paper WP/13/2, 2013 International Monetary Fund.

[3] — 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).

I – **Legal framework**

A – *EU law*

1. The Banking Communication

4. The Banking Communication is the seventh communication adopted since the beginning of the financial crisis[4] to provide guidance on the criteria for the compatibility of State aid with the internal market pursuant to Article 107(3)(b) TFEU for the financial sector during that crisis.[5]

5. Pursuant to point 15 of the Banking Communication:

'… [E]ven 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.'

6. Section 3.1.2 of the Banking Communication (points 40 to 46) concerns provisions on burden-sharing by the shareholders and the subordinated creditors of banks. These points are worded as follows:'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. …

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 EU 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 … 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. ….

[4] — See the list of previous communications in footnote 1 of the Banking Communication.

[5] — See point 1 of the Banking Communication.

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.’

2. Directive 2001/24/EC

7. According to Article 2, seventh indent, of Directive 2001/24,[6] ‘reorganisation measures’ are ‘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’.

3. Directive 2012/30/EU

8. Directive 2012/30[7] is Directive 77/91 recast.[8] According to Article 29(1) of Directive 2012/30, ‘[a]ny increase in capital must be decided upon by the general meeting’.

9. Article 34 of Directive 2012/30 provides that ‘any reduction in the subscribed capital, except under a court order, must be subject at least to a decision of the general meeting …’. Article 35 of the same directive states that ‘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’. In turn, Article 40(1) of that directive states:

‘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 authorised merely 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. Under the terms of Article 42 of Directive 2012/30:

‘In the cases covered by … 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.’

[6] — Directive 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).

[7] — Directive 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 [TFEU], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 2012 L 315, p. 74).

[8] — Second Council Directive 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).

4. Directive 2014/59/EU

11. On 15 May 2014, Directive 2014/59 was adopted, establishing a framework for recovery and resolution of credit institutions.[9] Article 117 of that directive amends Article 2 of Directive 2001/24. Article 123 of the same directive amends Article 45 of Directive 2012/30.

B – *National law*

12. The relevant provisions of Slovenian law are set out in the law on the banking sector (Zakon o bančništvu, 'the ZBan-1') and the law amending or completing the ZBan-1 (Zakon o spremembah in dopolnitvah Zakona o bančništvu, hereinafter 'the ZBan-1L').

13. Article 134 of the ZBan-1 ('The banks additional capital') provides that the bank's additional capital comprises Additional Capital I and Additional Capital II. Additional Capital I includes the following: base capital, subordinated liabilities and other elements that are similar in terms of status and purpose, while Additional Capital II includes subordinated liabilities and other elements which, due to their status and purpose, are suitable for meeting the capital requirements of market risks.

14. Article 253 of the ZBan-1 ('Extraordinary measures') provides:

'(1) In accordance with the conditions laid down in the Law, the Bank of Slovenia may, by decision, require banks to adopt the following extraordinary measures:

…

1.a. the writing-off or conversion of certain eligible liabilities;

…

(3) The extraordinary measures shall form part of the reorganisation measures provided for by Directive 2001/24/EC.'

15. Article 261.a of the ZBan-1 ('Measures for the writing-off or conversion of eligible liabilities'), provides:

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

1. eligible liabilities are written off or written down,

…

(5) In writing off or converting the 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) The bank's eligible liabilities are represented by:

1. the bank's base capital (class I liabilities);

[9] — Directive 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).

2. liabilities in relation to holders of hybrid financial instruments … (class II liabilities);

3. liabilities in relation to holders of hybrid financial instruments, which, in accordance with Article 134 of the present law, must be taken into account in calculating the bank's additional capital, unless such liabilities are not already included in the definitions set out at points 1 or 2 of this paragraph (class III liabilities);

4. liabilities not including 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 non-preferred debts (class IV liabilities).'

16. Article 261.c. of the ZBan-1 ('Extent of the writing-off or conversion of eligible liabilities'), in the relevant part, 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.'

II – **Facts, procedure and the questions referred**

17. On 17 December 2013, Banka Slovenije (the Central Bank of Slovenia), in accordance with the provisions of ZBan-1, adopted a decision concerning extraordinary measures and ordered five banks (Nova Ljubljanska banka, d.d., Nova Kreditna banka Maribor, d.d., Abanka Vipa, d.d., Probanka, d.d., and Factor banka, d.d., the 'banks at issue') to write off all the eligible liabilities referred to in Article 261.a(6) of ZBan-1 ('the measures at issue').

18. On 18 December 2013, the European Commission authorised State aid to the banks at issue.

19. The Državni svet (the National Council), the Varuh človekovih pravic (the Ombudsman) and a number of individuals ('Kotnik and Others') have brought proceedings before the Ustavno sodišče (Constitutional Court) seeking review of the constitutionality of certain provisions of ZBan-1 and ZBan-1L which constituted the basis of the measures referred to in point 17 ('the national legislation at issue').

20. In its order for reference, the Ustavno sodišče (Constitutional Court) explains that the purpose of the national legislation at issue was to establish a legal framework for burden-sharing in accordance with the requirements of the Banking Communication. In particular, the eligible liabilities referred to in Article 261.a(6) of ZBan-1 correspond to the definitions of equity, hybrid capital and subordinated debt contained in the Banking Communication. On that basis, that court takes the view that the applicants' complaints in the main proceedings are directed against the provisions of that communication too. In its view, those complaints raise issues of the validity and interpretation of the Banking Communication.

21. In those circumstances, the referring 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 the State aid sector, in accordance with Article 3(1)(b) [TFEU], and the Commission has competence to give decisions relating to the State aid sector, 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 easily be 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 capital, hybrid capital and subordinated debt and/or to convert into capital hybrid capital instruments and subordinated debt instruments, in order to limit the amount of aid to the minimum necessary in the light of the need to take account of the moral hazard — compatible with Articles 107 TFEU, 108 TFEU and 109 TFEU, in so far as they exceed the Commission's competence, as defined in those FEU Treaty provisions on 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 to write off capital and/or convert into capital, in so far as that requirement relates to shares (capital), hybrid capital instruments and subordinated debt instruments issued before the publication of the Banking Communication, all or some of which, at the time they were issued, could have been written off without any provision for compensation only in the event of the bank's collapse — 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 capital, hybrid capital and subordinated debt instruments and/or to convert into capital hybrid capital instruments and subordinated debt instruments, 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 of Fundamental Rights of the European Union?

(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 capital, hybrid capital and subordinated debt instruments and/or to convert into capital hybrid capital instruments and subordinated debt instruments, in so far as the implementation of those measures calls for a reduction and/or increase in the base capital of public limited liability companies on the basis of the decision of the competent administrative body, not that of the general meeting of shareholders of the public limited liability company — compatible with 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, in principle, laid down in points 43 and 44 of the communication, to convert or write down hybrid capital and subordinated debt instruments before granting State aid, may the Banking Communication be interpreted as meaning that those measures do not require Member States seeking 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/EC 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 Common Equity Tier 1, hybrid capital, subordinated debt instruments and the conversion into capital of hybrid capital instruments and subordinated debt instruments) may also be classified as reorganisation measures?'

22. Written observations in the present proceedings have been submitted by T. Kotnik, J. Sedonja, A. Pipuš, F. Marušič, J. Forte, Fondazione Cassa di Risparmio di Imola, the Državni svet, the Državni zbor (the National Assembly of Slovenia) and the Banka Slovenije, and also by Ireland, the Italian, Slovenian and Spanish Governments, and by the Commission. T. Kotnik, J. Sedonja, Fondazione Cassa di Risparmio di Imola, J. Forte, I. Karlovšek, the Državni svet, Banka Slovenije, Ireland, the Spanish and Slovenian Governments, and the Commission presented oral argument at the hearing on 1 December 2015.

III – **Analysis**

A – *Jurisdiction of the Court*

23. At the outset, the Commission points out that the Banking Communication is not an act addressed to individuals and is not intended to create rights for individuals. On that basis, the Commission expresses doubts as to the Court's jurisdiction to answer the questions referred.

24. The Commission's argument is, in my view, ill founded. The mere fact that an act is not addressed to individuals or intended to create rights for individuals does not mean that such an act falls outside the scope of the Article 267 TFEU procedure.[10] The Commission's argument would introduce distinctions between different acts of which there is no trace in that Treaty provision. What is key under Article 267 TFEU is, in fact, whether an answer from the Court on the interpretation or validity of the act in question is necessary to enable the national court to give judgment.

25. In addition, as I will explain in the following, acts of 'soft law' (such as the Banking Communication), even if not binding for individuals, may nevertheless produce other kinds of legal effects. The Court has, accordingly, on numerous occasions answered questions referred by national courts on provisions contained in acts of 'soft law'.[11]

B – *The questions referred*

1. Preliminary remarks

26. Before starting my analysis of the issues raised in these proceedings, I would like to make some preliminary remarks.

27. A certain number of the questions referred seem to be based on the premiss that the Banking Communication is, if not *de jure*, at least *de facto* binding on the Member States. Otherwise, there would be no reason for the referring court to question the validity of such a communication.

28. However, that premiss is not correct. As I will explain in detail in my answer to the first question, the Banking Communication is not binding on the Member States. Member States are thus not obliged, as a matter of EU law, to adopt internal legislation implementing the provisions of the Banking Communication.

29. That seems to me to entail, logically, that the doubts as to the validity of that instrument raised by the referring court can be rather easily dispelled.

[10] — See, to that effect, judgments in *Deutsche Shell*, C-188/91, EU:C:1993:24, paragraphs 18 and 19; and *JVC France*, C-312/07, EU:C:2008:324, paragraph 29, 32, and 33 to 37.

[11] — See, among others, judgments in *Grimaldi*, C-322/88, EU:C:1989:646, paragraphs 7 to 9; and *Lodato & C.*, C-415/07, EU:C:2009:220, paragraph 23.

30. Yet I believe that if the Court were to limit its analysis to the validity of the Banking Communication, the legal issues encountered by the referring court in the main proceedings might not be entirely resolved. Regardless of the legal effects of the Banking Communication, it is undisputed that the contested provisions of the ZBan-1 and ZBan-1L have been adopted with a view to complying with that communication. In fact, the aid measures granted to the banks at issue were quickly approved by the Commission.

31. Thus, as suggested by the Slovenian Government, the Court's analysis should extend, where possible, to the compatibility with EU law of provisions such as the national legislation at issue, or of the measures at issue. To that end, I will reformulate some of the questions referred by the Ustavno sodišče (Constitutional Court) and devote a significant part of this Opinion to those issues.

2. Question 1

32. By its first question, the referring court seeks guidance on the legal effects of the Banking Communication. In essence, that court asks whether the Banking Communication should be considered as *de facto* binding on the Member States.

33. The first question should, to my mind, be answered in the negative.

34. According to Article 13(2) TEU, each institution of the Union is to act 'within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'.

35. It is clear that, under Article 108 TFEU, the assessment of the compatibility of specific aid measures with the internal market in principle falls within the exclusive competence of the Commission, subject to review by the EU Courts.[12] In that assessment, which involves the appreciation and weighting of different elements of an economic and social nature within a pan-European context,[13] the Commission enjoys broad discretion.[14]

36. Conversely, in this field the Commission has no general legislative power. Only the Council is empowered, under Article 109 TFEU, to adopt any appropriate regulations for the application of Articles 107 and 108 TFEU, on a proposal from the Commission and after consulting the European Parliament. In that context, the Council may delegate certain regulatory powers to the Commission.[15]

37. This means that the Commission is not empowered to lay down general and abstract binding rules governing, for example, the situations in which aid may be considered compatible because it is aimed at remedying a serious disturbance in the economy of a Member State under Article 107(3)(b) TFEU. Any such body of binding rules would be null and void.[16]

[12] — See, to that effect, judgments in *van Calster and Others*, C-261/01 and C-262/01, EU:C:2003:571, paragraph 75; *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 38; and *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 28.

[13] — See order in *Banco Privado Português and Massa Insolvente do Banco Privado Português* v *Commission*, C-93/15 P, EU:C:2015:703, paragraph 61.

[14] — See judgment in *Italy* v *Commission*, C-310/99, EU:C:2002:143, paragraph 45 and the case-law cited.

[15] — See, in particular, Article 108(4) TFEU.

[16] — See, by analogy, judgment in *France* v *Commission*, C-57/95, EU:C:1997:164.

38. Yet, for reasons of transparency, and in order to ensure equal treatment and legal certainty, the Commission may publish acts of 'soft law' (such as guidelines, notices or communications) with a view to announcing how it intends to make use, in certain situations, of the aforementioned discretion.[17] Although the Court has held that the provisions of such acts of 'soft law' are, by virtue of the duty of sincere cooperation enshrined in Article 4(3) TEU, to be taken into due account by the Member States' authorities,[18] that duty cannot be understood as making those rules binding — not even *de facto* — on pain of eluding the legislative procedure set out in the FEU Treaty.

39. Therefore, those principles and rules are not binding upon Member States. The only effect those rules may directly produce is vis-à-vis the Commission, and even then merely as a limit on the exercise of its discretion: that institution is bound to accept measures which comply with those rules and it may not depart from them, unless it provides a valid reason for doing so. Failing a valid reason, a departure from those self-imposed rules may result in a breach of general principles of law, such as equal treatment or the protection of legitimate expectations.[19] The Commission is thus bound by those rules, provided — however — that they are not contrary to the Treaties or other applicable legislation.[20]

40. As a result, an instrument such as the Banking Communication cannot be considered to be, *de jure* or *de facto*, binding upon the Member States. Any effect of those rules upon Member States can at most be incidental or indirect. Even after the publication of such a communication, Member States remain at liberty to notify the Commission of aid measures which they consider compatible, even without meeting the conditions set out in that communication.[21] Upon such a notification, the Commission would be under a duty to diligently examine the compatibility of such aid measures in the light of the Treaty provisions.

41. Accordingly, the mere fact that one or more rules in the Banking Communication are not complied with would not, in itself, constitute a valid reason for the Commission to declare the aid incompatible.[22] The Commission can — and thus should, in justified cases — derogate from the principles laid down in the Banking Communication.[23] An erroneous refusal to do so could naturally be challenged before the EU Courts under Articles 263 and 265 TFEU.[24]

[17] — See, to that effect, judgments in *Germany and Others* v *Kronofrance*, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraphs 60 and 61; and, by analogy, *Commission* v *Greece*, C-387/97, EU:C:2000:356, paragraph 87.

[18] — See, to that effect, judgment in *Grimaldi*, C-322/88, EU:C:1989:646, paragraphs 18 and 19; and Opinion of Advocate General Kokott in *Expedia*, C-226/11, EU:C:2012:544, point 38.

[19] — See, with regard to the 2008 Banking Communication, judgment in *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, paragraph 69 and the case-law cited. A similar effect of estoppel may also arise with regard to authorities of the Member States that have expressly engaged to abide by the principles contained in a 'soft law' instrument adopted by the Commission: an unjustified departure from those principles may be opposed to those authorities by the individuals affected, in line with the maxim *venire contra factum proprium non valet*. See, to that effect, judgment in *Expedia*, C-226/11, EU:C:2012:795, paragraphs 26 and 27.

[20] — See judgments in *Deufil* v *Commission*, 310/85, EU:C:1987:96, paragraph 22; and *Spain* v *Commission*, C-351/98, EU:C:2002:530, paragraph 53.

[21] — See, to that effect, order in *EREF* v *Commission*, T-694/14, EU:T:2015:915, paragraphs 26 and 29.

[22] — The opposite conclusion would, in essence, imply that the Commission is vested with a legislative power in this field. I cannot, therefore, subscribe to the interpretation of the Treaty rules or to the reading of the existing case-law proposed in the Opinion of Advocate General Sharpston in *Greece* v *Commission*, C-431/14 P, EU:C:2015:699, footnote 21.

[23] — See, to that effect, Opinion of Advocate General Jacobs in *Commission* v *Portugal*, C-391/01, EU:C:2002:270, point 38 and the case-law cited. See also judgment of the General Court in *Fachvereinigung Mineralfaserindustrie* v *Commission*, T-375/03, EU:T:2007:293, paragraphs 140 and 141; and, by analogy, order of the General Court in *Smurfit Kappa Group* v *Commission*, T-304/08, EU:T:2010:279, paragraphs 86 to 97.

[24] — See order in *EREF* v *Commission*, T-694/14, EU:T:2015:915, paragraphs 26 and 29.

42. Admittedly, it may often not be easy for a Member State to convince the Commission that, because of the particular features of a case, one of the basic principles laid down in the Banking Communication (for instance, that of burden-sharing) should not apply. It is likely that, because of the more complex legal analysis required by the Commission (the case does not fall within one of the situations examined a priori in the communication), the examination of the compatibility of the planned aid may become more uncertain as to its outcome and more time-consuming, possibly leading to the opening of a formal investigation procedure under Article 108(2) TFEU.[25]

43. It may even be assumed that, in situations such as those prevailing in the main proceedings (financial crisis which risked undermining the stability of the whole financial system of a Member State), a government may not always be ready to take the risk of notifying the Commission of aid measures not fully in line with the provisions of the Banking Communication. I do appreciate that, in certain circumstances, a smooth and swift approval of the notified aid may be of particular importance for a government. Nevertheless, those are considerations of expediency which may be relevant for the adoption of policy decisions by a government, but cannot affect the nature and effects of an EU act, as stemming from the rules of the Treaties. The fact that a Member State runs the risk of having to prolong the standstill period of planned aid and that its burden to convince the Commission of the compatibility of the aid measure may be cumbersome, is a mere consequence of fact and not a legal effect originating from an allegedly binding nature of the Banking Communication.[26]

44. What is key is that, from a legal point of view, a Member State might be able to show that, despite the lack of burden-sharing (or the non-fulfilment of any other criterion laid down in the Banking Communication), aid to an ailing bank still meets the requirements of Article 107(3)(b) TFEU. Situations can indeed be imagined, in addition to those already provided in the Banking Communication itself, in which a government might show that the rescue and restructuring of a bank is, for example, less costly to the State, and quicker and easier to manage, if no burden-sharing measure vis-à-vis all or some of the investors referred to in the Banking Communication is adopted.[27]

45. In the light of the foregoing considerations, the answer to the first question should, in my view, be that the Banking Communication is not binding on the Member States.

3. Question 2

46. By its second question, the referring court asks whether points 40 to 46 of the Banking Communication, regarding burden-sharing by the shareholders and the subordinated creditors of a bank, exceed the competence devolved to the Commission under Articles 107 to 109 TFEU.

a) Does the Commission always require burden-sharing?

47. The second question seems, as mentioned above, based on the idea that the Banking Communication, *de facto*, lays down rules which the Member States are bound to comply with.

[25] — Cf. order in *EREF* v *Commission*, T-694/14, EU:T:2015:915, paragraph 29.

[26] — See, by analogy, judgments in *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 19; and *Italy* v *Commission*, C-301/03, EU:C:2005:727, paragraph 30. See also judgment of the General Court in *Germany* v *Commission*, T-258/06, EU:T:2010:214, paragraph 151.

[27] — That may be so, for instance, where — in application of the ‘no creditor worse off principle’ — the contribution required by the investors would be rather limited and the authorities may anticipate costly litigation and/or procedural complexities to put the burden-sharing measures into effect. In those circumstances, it cannot be excluded that a Member State might consider itself injecting the (limited) extra funds required for the restructuring of the bank.

48. However, for the reasons illustrated in response to the first question, that premiss is not correct: the Banking Communication, including points 40 to 46 thereof, is not binding on the Member States. Accordingly, it is clear that the Commission cannot consider burden-sharing, such as that illustrated in the Banking Communication, a *condicio sine qua non* for declaring planned aid to a bank in distress compatible under Article 107(3)(b) TFEU. An aid measure may indeed fulfil the requirements of that Treaty provision, despite not providing for any burden-sharing. After all, burden-sharing does not appear in the wording of Article 107(3)(b) TFEU.

49. That conclusion is all the more valid since the text of the Banking Communication itself states that burden-sharing is required only 'normally' (points 41 and 43), 'in principle' (points 43 and 44), and cannot be required where it may infringe fundamental rights (point 19), or endanger financial stability or lead to disproportionate results (point 45). In exceptional circumstances, therefore, no burden-sharing measure is required by the Commission.

b) Does the Commission infringe State aid rules by normally requiring burden-sharing?

50. That said, the question put by the national court could also be interpreted as asking whether the Commission misinterprets or misapplies the State aid rules by considering that, in the situations governed by the Banking Communication, aid to banks in distress normally requires burden-sharing measures to be compatible under Article 107(3)(b) TFEU.

51. To my mind, the answer to that question should be in the negative.

52. As mentioned in point 35 above, the Commission enjoys broad discretion in assessing whether State aid may be declared compatible with the internal market under Article 107(3) TFEU. No State aid rule appears to preclude the Commission from taking into account, for the purpose of that assessment, whether and, if so, to what extent burden-sharing measures have been adopted. On the contrary, it seems to me that a favourable view regarding the adoption of any such measure may be consistent with the very principles underlying the Treaty provisions on State aid. As I will explain, that seems even more applicable in the situations governed by the Banking Communication.

53. According to settled case-law, aid can be declared compatible only when it is *necessary* to achieve one of the objectives set out in Article 107(3) TFEU. Aid which goes beyond what is strictly necessary to achieve the objective pursued gives rise to an unjustified competitive advantage granted to the beneficiary of the aid. Such an aid cannot, consequently, be considered compatible with the internal market.[28]

54. Clearly, a requirement that a bank in difficulty mobilise its internal resources to cover at least part of the losses before any public support is granted and that, where necessary and appropriate, investors in that bank also contribute to its recapitalisation, appears apt to limit the aid to the essential minimum. Therefore, the raison d'être of points 40 to 46 of the Banking Communication would seem to be consistent with the principles underlying the Treaty provisions on State aid.

55. In fact, even before the crisis the Commission's practice with regard to aid for the rescue and restructuring of firms in difficulty — endorsed by the EU Courts[29] — has generally been to require aid beneficiaries to make an appropriate contribution to the restructuring costs.[30] It is true that EU State aid rules do not necessarily require any form of 'bail-in' measures by shareholders and creditors of a

[28] — See, to that effect, judgments in *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraphs 68 and 69 and the case-law cited; and *Germany* v *Commission*, C-400/92, EU:C:1994:360, paragraphs 12, 20 and 21.

[29] — See, for example, judgment in *France* v *Commission*, C-17/99, EU:C:2001:178, paragraph 36; and judgment of the General Court in *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraph 66.

[30] — See, for example, Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2), points 7 and 43 to 45.

company which a Member State wants to restructure. Yet a more significant contribution by the company itself, or by its shareholders and creditors — potentially taking the form of the burden-sharing measures referred to in points 40 to 46 of the Banking Communication — may be regarded as more compelling because of the situations governed by the Banking Communication.[31]

56. The Banking Communication was adopted on the basis of Article 107(3)(b) TFEU, which allows for aid to remedy a serious disturbance in the economy of a Member State.[32] That is a form of aid which can be granted only in exceptional circumstances: the disturbance must be ‘serious’ and affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory.[33] In the present case, recourse to the legal basis of Article 107(3)(b) TFEU seems even more justified because several Member States were affected by a serious disturbance of their economy, which derived, to different degrees, from a global financial crisis.

57. For the reasons which follow, I do not find it unreasonable that, first, the exceptional nature of the situations governed by the Banking Communication requires a particularly rigorous assessment of whether the notified aid is truly reduced to the essential minimum; and, second, that such a rigorous assessment is carried out, in principle, in all similar cases notified to the Commission.

58. Financial services, and banking services in particular, constitute activities which should be considered — at least from the State aid angle — in the same way as any other economic activity. It is an activity which several (privately-held or publicly-held) companies carry out in an open and competitive market. As for any other economic activity, individuals invest in undertakings active on that market, with the aim, normally, to realise a profit on their investment. It is in the nature of any economic activity that some undertakings — generally the most poorly performing — will fail and leave the market, and their investors, consequently, lose all or part of their investments.[34]

59. At the same time, however, financial services play a very distinct role in modern economic systems. Banks and other credit institutions are a vital source of finance for (most) undertakings active on any given market. Furthermore, banks are often closely interconnected and many of them operate at an international level. That is why the crisis of one or more banks risks quickly spreading to other banks (both in the home State and in other Member States) and that, in turn, risks producing negative spill-over effects in other sectors of the economy (often referred to as the ‘real economy’).[35] This effect of contagion is liable, ultimately, to severely affect the lives of private individuals.

60. Accordingly, during a financial crisis, public authorities face the challenging task of having to act, often within great urgency, in order to strike a delicate balance between different competing interests. On the one hand, authorities need to ensure the stability of their financial system and avoid, or reduce, any contagion to ‘healthy’ banks and to the real economy. On the other hand, however, the authorities need to limit, as much as possible, the public resources involved, since the costs for the public budget to ensure that stability may be considerable. A too large exposure of the State may in fact contribute to turn a financial crisis into a sovereign debt crisis, with possible repercussions also on the whole Economic and Monetary Union (‘EMU’). Moreover, as pointed out by the Slovenian Government, a massive public intervention, providing for full and unconditional support to ailing banks, may provoke serious distortions of competition and compromise the integrity of the internal market: well-run

[31] — Cf. judgments of the General Court in *ABN Amro Group* v *Commission*, T-319/11, EU:T:2014:186, paragraph 43; and *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraph 266.

[32] — See recital 3 of the Banking Communication.

[33] — See judgment of the General Court in *Freistaat Sachsen and Others* v *Commission*, T-132/96 and T-143/96, EU:T:1999:326, paragraph 167; upheld on appeal (judgment in *Freistaat Sachsen and Others* v *Commission*, C-57/00 P and C-61/00 P, EU:C:2003:510, paragraphs 97 and 98).

[34] — Cf. Opinion of Advocate General Bot in *KA Finanz*, C-483/14, EU:C:2015:757.

[35] — Cf. point 25 of the Banking Communication.

companies may be penalised by the aid granted to less-performing competitors. Furthermore, moral hazard may be encouraged: credit institutions might be induced to make more risky investments, with the hope of realising larger profits, since in case of financial troubles the public authorities appear ready to step in and save them with public money.

61. There is, furthermore, a good argument for the Commission to require burden-sharing measures *generally*. The Commission would be actually un-levelling the playing field for banks if it required such measures only when the Member State concerned would be unable to add the extra funds necessary to replace those measures. Indeed, banks should not be treated differently depending on the size of, and economic conditions prevailing in, the Member State in which they are established.[36]

62. Against this background, I believe that the Commission is entitled to consider that, in situations such as those governed by the Banking Communication, burden-sharing by investors may normally be regarded as necessary for aid to be considered to be compatible under Article 107(3)(b) TFEU.

63. In the light of the above, I take the view that points 40 to 46 of the Banking Communication do not exceed the competence devolved to the Commission under Articles 107 to 109 TFEU. Moreover, the Commission does not misinterpret or misapply the State aid rules by considering that, in the situations governed by the Banking Communication, aid to banks in distress normally requires burden-sharing measures to be compatible with Article 107(3)(b) TFEU.

4. Questions 3 and 4

64. By its third and fourth questions, which can be examined jointly, the referring court essentially asks whether burden-sharing, as provided for in points 40 to 46 of the Banking Communication, is compatible with, respectively, the principle of the protection of legitimate expectations and the right to property (hereinafter collectively referred to as ‘the rights at issue’).

65. The principle of the protection of legitimate expectations is considered by the Court to be a general and superior principle of EU law for the protection of the individual.[37] Also, according to Article 17(1) of the Charter, the right to property constitutes one of the fundamental rights recognised in the EU legal order.

66. That said, I do not share the view of the applicants in the main proceedings that the Banking Communication breaches the rights at issue. At the outset, I would reiterate that that instrument is not binding upon Member States: an aid measure may be deemed compatible with the internal market, in the situations governed by that instrument, even if the rules contained therein (including those relating to burden-sharing) are not followed to the letter.

67. Moreover, as pointed out above,[38] the Banking Communication expressly states that burden-sharing will not always be required, in particular where doing so would infringe fundamental rights. Therefore, no provision of EU State aid rules (including the principles stated in the Banking Communication), can be interpreted as requiring burden-sharing where that would breach one of the rights at issue.

[36] — Cf. points 9 and 18 of the Banking Communication.

[37] — See judgment in *Mulder and Others* v *Council and Commission*, C-104/89 and C-37/90, EU:C:2000:38, paragraph 15.

[38] — Supra, point 49.

a) Does the Banking Communication infringe the principle of protection of legitimate expectations?

68. More specifically, as regards the principle of the protection of legitimate expectations, I would observe that, according to settled case-law, any such expectation may arise only where a person has received precise, unconditional and consistent assurances originating from authorised and reliable sources.[39] I do not see when and how the applicants in the main proceedings would have received any assurance that their investments would in no way be affected by the public measures aimed at saving and restructuring the banks in distress. The fact that, before the publication of the Banking Communication, the Commission did not systematically require burden-sharing measures to be imposed upon creditors and other similar types of investors in order for aid to be declared compatible under Article 107(3)(b) TFEU[40] cannot be regarded as constituting 'precise, unconditional and consistent assurances' within the meaning of the aforementioned case-law. Failing any clear and express engagement by the Commission, a prudent and circumspect investor cannot have any expectation that an existing situation which is capable of being altered by the competent authorities in the exercise of their discretionary power will be maintained.[41] The Commission must be able to adapt its analysis under Article 107 TFEU to the changing circumstances in the markets affected by the aid and, more generally, in the whole EU economy.[42] The Commission should, furthermore, be able to learn from its past practice and consequently adapt its methods of evaluating notified aid by virtue of its accrued experience.[43]

69. Nor can there be a breach of the protection of legitimate expectations because the Commission did not provide, in the Banking Communication, for a transition period before the new principles would be applicable. It is true that transition periods are often suitable to allow economic operators to adapt to a change of policy in a given area of law. That may not always be so, however. For example, the Banking Communication states that, in the situations it governs, outflows of funds (especially from hybrid capital holders and subordinated debt holders) must be prevented, so as to ensure that aid is truly limited to the minimum necessary.[44] Therefore, there may be cases in which transition periods are unnecessary, impossible or even counter-productive. A change of policy or a new administrative practice may need to be carried out particularly swiftly and, at times, without prior notice.

70. In fact, the Court has accepted that 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 are still subject to change.[45] To my mind, the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition constitute overriding public interests of that kind.

[39] — See, among many, judgment in *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132 and the case-law cited.

[40] — See points 16 to 18 of the Banking Communication.

[41] — See, to that effect, by analogy, judgment in *Plantanol*, C-201/08, EU:C:2009:539, paragraph 53 and the case-law cited.

[42] — Cf. judgments in *Delacre and Others* v *Commission*, C-350/88, EU:C:1990:71, paragraph 33; and *British Steel* v *Commission*, C-1/98 P, EU:C:2000:644, paragraph 52.

[43] — Cf. point 18 of the Banking Communication.

[44] — See points 16, 41 and 47 of the Banking Communication.

[45] — See judgment in *Affish*, C-183/95, EU:C:1997:373, paragraph 57 and the case-law cited.

b) Does the Banking Communication infringe the right to property?

71. As regards, next, the right to property, I must point out that the Banking Communication does not require any particular form for, or procedure for the adoption of, the burden-sharing measures referred to in points 40 to 46. Indeed, such measures can also be adopted voluntarily by, or with the consent of, the bank or its investors. Therefore, the Banking Communication does not necessarily require national authorities to adopt measures which affect the right to property of the investors.[46]

72. In addition, point 46 of the Banking Communication makes clear that Member States are to respect the 'no creditor worse off principle': 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. More generally, point 20 states that measures to limit distortions of competition[47] 'should be calibrated in such a way so as to approximate as much as possible the market situation which would have materialised if the beneficiary of the aid had exited the market without aid' (I will refer to this principle as the 'market-approximation principle').

73. These principles — which I will discuss below — clearly require Member States to give due consideration to the property rights of the investors when restructuring a bank in distress.

74. In the light of the above, I conclude that points 40 to 46 of the Banking Communication are compatible with the principle of the protection of legitimate expectations and the right to property.

c) Do the measures at issue infringe the rights at issue?

75. That said, the questions of the referring court may also be considered to seek to know whether, rather than the Banking Communication, the measures at issue infringe the rights at issue. Clearly, the fact that points 40 to 46 of the Banking Communication do not automatically lead to any breach of those rights does not imply that burden-sharing measures actually adopted by a Member State which comply with that communication are necessarily compatible with those rights.

76. For the reasons given above, it is therefore clear that points 40 to 46 of the Banking Communication cannot be read as implying that national authorities have been granted, by virtue of EU law, an unrestricted 'licence to expropriate' equity, hybrid capital or subordinated debt in banks in distress. The Banking Communication neither requires, nor permits, Member States to infringe the rights at issue. Nor does approval of the aid by the Commission imply that the measures notified escape the possibility of a review as to their compatibility with fundamental rights, insofar as those measures fall within the scope of EU law. The case-law of this Court as well as of the European Court of Human Rights (the 'ECtHR') concerning the rights at issue remains, to my mind, fully applicable to situations such as those in the main proceedings.

77. Such an analysis seems to me more important as concerns the right to property of the investors in the banks at issue. Indeed, it cannot be disputed that burden-sharing measures such as those referred to in points 40 to 46 of the Banking Communication, if adopted against the will of the shareholders and creditors of banks to be recapitalised, may severely affect their property rights.

78. It is, however, not for this Court to rule on that issue, even where those measures fall within the scope of EU law. Indeed, the factual, economic and legal framework in the main proceedings is of particular complexity and the Court does not have all the information that would be required for a thorough assessment.

[46] — In that regard, it should be called to mind that, pursuant to Article 345 TFEU, '[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'.

[47] — Those measures include, in my view, also burden-sharing measures.

79. In addition, there is a more fundamental reason to leave that assessment to the national courts. At this juncture, it may be useful to stress that, under EU State aid rules, no undertaking can claim a right to receive State aid; or, to put it differently, no Member State can be considered obliged, as a matter of EU law, to grant State aid to a company.

80. It is true that, after the establishment of the EMU — involving coordination of economic policy, a common monetary policy and a common currency[48] — Member States have a number of obligations to fulfil vis-à-vis the Union (and the other Member States) regarding, in particular, compliance with the objectives of maintaining stable prices, sound public finances and monetary conditions and a sustainable balance of payments.[49] Clearly, ensuring the stability of the financial system in each Member State must be regarded as key to the achievement of the abovementioned objectives. It is not disputed that, as stressed by Banka Slovenije, Member States are not entirely free when they act with a view to rescuing and restructuring banks of systemic importance. It is also in the interest of the Union that Member States intervene to prevent (or limit) the externalities that the collapse of one or more banks in their territory could have on the stability and functioning of the EMU.

81. In the case under consideration, in fact, the restructuring of the banks at issue was part of a more comprehensive intervention of the Slovenian authorities to remedy the existing macroeconomic imbalances and ensure the stability of the banking system. In that context, among the possible measures envisaged by the EU institutions was in fact the recapitalisation of systemic banks, where necessary by providing extra public funds in case of additional shortfalls.[50]

82. Yet the fact remains that, despite possible suggestions or recommendations from the EU institutions, under EU law, Member States are not obliged to grant aid in specific circumstances. Member States have at their disposal a variety of tools to address the problematic issues identified by the EU institutions. Accordingly, whether it is appropriate to grant State aid, at a given moment, to one or more specific undertakings, is a decision which ultimately belongs to the national authorities. The national authorities are likewise responsible to take a decision on the amount of public funds to be used and the structure of the measures.[51] The Commission is required only to review the planned measure in order to assess its compatibility with the internal market. It may accordingly veto a measure, or allow it under certain conditions, but never take decisions *in lieu* of the national authorities.

83. This does not mean, obviously, that the Commission is prevented from giving guidance to the national authorities on how to render notified aid compatible with the internal market.[52] Guidance can be provided beforehand, through the publication of acts of ‘soft law’, as mentioned in point 38 above, and ad hoc, in the context of ongoing procedures under Article 108 TFEU.

84. However, the fact remains that it is the Member States’ authorities that are legally responsible for deciding to grant aid in a situation and ensuring that envisaged aid measures comply with any other applicable EU, national or international rule.[53] That is so notwithstanding the fact that, politically, its decisions in this matter may be, more or less significantly, influenced by suggestions and recommendations of the EU institutions.

[48] — See, in particular, Article 3(4) TEU and Articles 119 to 144 TFEU.

[49] — See especially Article 119(3) TFEU. See also, more generally, judgment in *Pringle*, C-370/12, EU:C:2012:756.

[50] — See, in particular, Council Recommendation of 9 July 2013 on the National Reform Programme 2013 for Slovenia and delivering a Council opinion on the Stability Programme of Slovenia, 2012-2016 (OJ 2013 C 217, p. 75) and European Commission, European Economy — Macroeconomic Imbalances, Slovenia 2013 (Occasional Papers 142, April 2013).

[51] — See, to that effect, by analogy, order in *EREF* v *Commission*, T-694/14, EU:T:2015:915, paragraph 28.

[52] — On the contrary, the Commission is under a duty to assist the Member States’ authorities on that matter, pursuant to Article 4(3) TEU.

[53] — See, to that effect, by analogy, judgment in *Iglesias Gutiérrez and Rion Bea*, C-352/14 and C-353/14, EU:C:2015:691, paragraph 29.

85. Consequently, national courts are generally better placed than the Court to examine whether, when aid measures are put into effect, the fundamental rights of certain individuals have been infringed.

86. Turning to the case at hand, without therefore taking a definitive stance on the arguments put forward by the applicants in the main proceedings, I would make the following observations, with the hope of providing useful guidance to the referring court.

87. Article 17 of the Charter states that the right to property is not absolute but must be viewed in relation to its function in society. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed.[54]

88. As the referring court also emphasises in its order for reference, the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition does constitute an objective of public interest which may justify certain restrictions of the right to property.[55]

89. As regards the matter of whether the measures at issue constitute an intolerable interference, impairing the very substance of the property rights of the investors, I must refer again to the principles laid down in points 20 and 46 of the Banking Communication: market-approximation and ‘no creditor worse off’.[56]

90. These principles imply that, if executed correctly, State intervention reduces only the nominal value of the equity and debt instruments affected, because that value no longer corresponds to their real value. The depreciation of those instruments is thus merely formal. From an economic point of view, the position of the investors should, on the whole, be unchanged: in the worst-case scenario, they are globally not any worse off than they would have been, had the State not intervened.[57] That would mean, in my view, that the very essence of the right to property of the investors is not affected.

91. The fulfilment in the case at hand of the two conditions above is, however, for the referring court to verify. In its review of the measures at issue, that court must obviously take into account all relevant circumstances. In particular, that court may, on the one hand, need to consider the necessity of particularly swift action on the part of national authorities, the risks that the financial system in Slovenia could have incurred without any such action, and the need to avoid excessive repercussions on the public budget. On the other hand, that court may also need to check whether the economic evaluations made by the public authorities (for example of the capital shortfall of the bank and of the real economic value of the investments pre- and post-State intervention) were, despite the urgency within which they had to be made, reasonable and based on reliable data.

[54] — See, for example, judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 355.

[55] — Cf. also the judgment of the ECtHR in *Olczak v. Poland* (dec.), no. 30417/96, ECHR 2002-X (extracts) and the case-law cited.

[56] — See above, point 72 of this Opinion.

[57] — From this perspective, one could even question the terms employed in the Banking Communication since, insofar as no economic loss is in theory suffered by the investors, no actual burden appears to be shared. Be that as it may, the principles set out in the Banking Communication seem to me to be consistent with the case-law of the ECtHR: according to well-established case-law of that court, taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 of Protocol No 1. Yet Article 1 does not guarantee a right to full compensation in all circumstances, since legitimate objectives of ‘public interest’, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. In exceptional circumstances, even the absence of any compensation might be justified (see *Lithgow and Others v. the United Kingdom*, 8 July 1986, Series A no. 102).

92. The answer to the third and fourth questions should thus be that points 40 to 46 of the Banking Communication are compatible with the principle of the protection of legitimate expectations and the right to property; it is for the national courts to verify that, when aid measures adopted in accordance with that communication are executed, those rights have not been infringed.

5. Question 5

93. By its fifth question, the referring court asks whether points 40 to 46 of the Banking Communication infringe the provisions of Directive 2012/30 under which the increase or reduction of capital in public limited liability companies may only be made after a decision of the meeting of shareholders or following a court order.

94. At the outset, I observe that points 40 to 46 of the Banking Communication do not, either explicitly or implicitly, take a position on the nature of the body (private or public and, if the latter, administrative or judicial) having to adopt burden-sharing measures. Actually, those measures could also be adopted voluntarily, without any intervention by the public authorities. As the Slovenian Government and the Commission point out, how those measures are to be decided and put into effect is a question of national law, not affected by the provisions of the Banking Communication.

95. Therefore, the premiss on which the arguments put forward by some of the parties in the main proceedings rest in order to challenge the validity of the Banking Communication — that it arguably obliges Member States to entrust administrative authorities with the power to adopt burden-sharing measures — is erroneous. Accordingly, points 40 to 46 of the Banking Communication do not infringe the provisions of Directive 2012/30.

96. That said, the question put by the referring court may also be interpreted as seeking to ascertain whether national provisions which entrust the adoption of the burden-sharing measures envisaged in points 40 to 46 of the Banking Communication to the national central bank are compatible with Directive 2012/30.

97. Quite clearly, Directive 2012/30 does not contain any explicit derogation from the application of its provisions in situations such as that experienced by Slovenia (and other Member States) during the financial crisis. The fundamental issue raised by this question is thus whether decisions such as those at issue are precluded by Directive 2012/30.

98. In the following, I will explain why I take the view that that question should be answered in the negative.

a) Purpose and scope of Directive 2012/30

99. First of all, it must be emphasised that Directive 2012/30 is not a measure providing for total harmonisation in the field of law it covers. That directive simply coordinates national provisions relating to the formation of and to the maintenance, increase or reduction of the capital of public limited liability companies, in order to ‘ensure minimum equivalent protection for both shareholders and creditors’ of those companies throughout the Union.[58]

[58] — See recital 3 of Directive 2012/30. See also judgment in *Pafitis and Others*, C-441/93, EU:C:1996:92, paragraph 38.

100. Directive 2012/30 was thus conceived to ensure that investors throughout the internal market could be guaranteed that companies had a certain structure, and that certain organs of the companies would be responsible for certain decisions. The essential purpose of this legal instrument is thus to maintain the balance of powers between the different organs of the company, especially in case of conflicts between those organs.[59]

101. Accordingly, it has been argued — to my mind, convincingly — that the protection granted to shareholders under Directive 2012/30 is primarily protection against the other organs of the company, but not necessarily also against measures taken by the State.[60] Directive 2012/30 was not meant to harmonise (let alone harmonise completely) shareholders' safeguards against State measures adopted in situations of emergency or crisis. Any such additional protection may thus only be ancillary or incidental: that which inevitably stems from the safeguards introduced by Directive 2012/30.

b) The *Pafitis* judgment and the new EU provisions

102. It is true that the judgment in *Pafitis and Others* ('Pafitis'),[61] to which the applicants in the main proceedings refer, seems to point to a different reading of Directive 2012/30. In that case, the Court ruled that the provisions of Directive 77/91 (now recast in Directive 2012/30) precluded national legislation under which the capital of a bank which is, as a result of its debt burden, in exceptional circumstances, may be increased by an administrative decision, without a resolution of the general meeting.

103. Nevertheless, I would caution against reading *Pafitis* as laying down a principle of general application. That judgment was delivered against the background of a rather different set of factual circumstances and legal landscape.

104. To begin with, the factual background in *Pafitis* is not entirely comparable to that in the main proceedings. The former case concerned an act adopted by a temporary administrator (not directly by a national central bank), in a situation of mere financial difficulties of a single credit institution in one Member State (not in a situation in which the entire financial system of a Member State was threatened by a systemic crisis, with potential repercussions on the whole EMU).[62]

105. More importantly, both EU primary and secondary law have significantly evolved in the meantime. The national measures challenged in *Pafitis* were 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 EMU, with the introduction of the euro as currency of the Eurozone, the establishment of the Eurosystem and the related amendments to the EU Treaties.

106. Article 131 TFEU now provides that '[e]ach Member State shall ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB'. In turn, Article 3.3 of Protocol (No 4) on the Statute of the ESCB and of the ECB, states that the ESCB is to 'contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system'.

[59] — Cf. recitals 4 to 7 and 11 of Directive 2012/30.

[60] — Cf. Kersting, C., 'Combating the Financial Crisis: European and German Corporate and Securities Laws and the Case for Abolishing Sovereign Debtors' Privilege', *Texas International Law Journal*, 2012, 269-324 at 279.

[61] — Judgment in *Pafitis and Others*, C-441/93, EU:C:1996:92.

[62] — Emphasising the importance of the factual circumstances in *Pafitis*: Hüpkes, E.G.H., *The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States and Canada*, Kluwer, 2000, p. 63.

107. Although there is a clear public interest in ensuring, throughout the Union, a strong and consistent protection of investors, that interest cannot be considered to prevail, in all circumstances, over the public interest of ensuring the stability of the financial system. Those two interests should be balanced against each other. A different position would be difficult to reconcile with the abovementioned Treaty provisions; in particular, because ensuring the stability of the financial system is of the utmost importance in a union which has, among its main aims, that of establishing an EMU.[63] In this context, it may be worth recalling that the adoption by Banka Slovenije of the measures at issue followed the completion of a stress test on the banks at issue under the supervision of, among others, the ECB.

108. Furthermore, Directive 2001/24 was not yet in force when *Pafitis* was decided.[64] That directive, adopted after the entry into force of Directive 77/91 (of which Directive 2012/30 is merely a recast), aims at establishing a system for mutual recognition, among Member States, of reorganisation measures and winding-up proceedings of credit institutions.[65]

109. As will be explained in the context of Question 7, measures such as those challenged in the main proceedings may fall within the concept of 'reorganisation measures' for the purposes of Directive 2001/24. In fact, the reorganisation of a credit institution can often involve a number of measures such as those at issue in the main proceedings. Importantly, that directive provides, very clearly, that such measures may also be adopted by administrative authorities.[66]

110. Directive 2001/24 appears to be based on the premiss that national administrative authorities retain those powers, in spite of the existence of the provisions of Directive 77/91, as interpreted by the Court in *Pafitis*. Neither the preamble to nor the provisions of Directive 2001/24 suggest that the legislature intended to introduce a derogation from the rules laid down in Directive 77/91. In any event, even if one were to take the view that Directive 2001/24 had in fact the effect of limiting the scope of application of Directive 77/91, the application of the former — being *lex specialis* and *lex posterior* — should arguably prevail in the main proceedings.

111. Therefore, I would be hesitant to draw any conclusive argument from *Pafitis* as to whether national legislation adopted in pursuit of superior public objectives (such as the stability of the whole financial system) may, in exceptional circumstances, confer powers on administrative authorities which can take priority over the shareholders' rights recognised in Directive 2012/30.[67]

112. In addition, I observe that, in the wake of the global financial crisis, several Member States have introduced mechanisms to deal, more effectively and swiftly, with credit institutions in distress. Among the measures adopted in national laws is to be found the possibility of increasing the share capital of those institutions without shareholders' approval.[68] For example, the national legislation at issue was informally reviewed and approved by the ECB before its adoption.[69] The adoption by several Member States of legislation in this field is precisely one of the reasons which induced the EU legislature to adopt Directive 2014/59.[70]

[63] — See Article 3(4) TEU.

[64] — Cf. paragraph 43 of judgment in *Pafitis and Others*, C-441/93, EU:C:1996:92.

[65] — See recitals 5 and 6 of Directive 2001/24.

[66] — See especially Articles 3 to 8 of Directive 2001/24.

[67] — In legal doctrine the view has also been expressed that the Court's findings in *Pafitis* are not applicable to situations such as those following the global financial crisis: see, for example, Attinger, B.J., 'Crisis Management and Bank Resolution: Quo Vadis Europe?', European Central Bank Legal Working Paper Series No 13, December 2011, p. 29; and Kern, A., 'Bank Resolution Regimes: Balancing Prudential Regulation and Shareholder Rights', *Journal of Corporate Law Studies*, 2009, 61-93, at 75 and 76.

[68] — For an overview of some of those Member States (which include, apart from Slovenia, also Belgium, France, Germany and Italy), see Kern, A., op. cit., at 2.

[69] — See Mnenje Evropske centralne banke z dne 15. oktobra 2013 o ukrepih za reorganizacijo bank (CON/2013/73) (Opinion of the ECB of 15 October 2013 on the measures of restructuring of banks).

[70] — See recitals 4 and 9 of Directive 2014/59.

113. It would thus seem that Directive 2012/30 has been generally interpreted by the Member States' authorities as not precluding, in exceptional circumstances such as those of a financial crisis, administrative measures which result in alteration of the capital of a bank, in the absence of a specific resolution of the shareholders' meeting.[71]

c) Directive 2014/59

114. Finally, I do not believe that the doubts expressed by the referring court stemming from the recent adoption of Directive 2014/59 — a legal instrument which is, *ratione temporis*, not applicable in the main proceedings — are well founded.

115. The referring court wonders whether the fact that Article 123 of Directive 2014/59 introduces an express derogation from the application of a number of provisions of Directive 2012/30 (including Articles 33 to 36, and 40 to 42) when 'the resolution tools, powers and mechanisms provided for in Title IV of the former are being used',[72] means that no such derogation existed previously.

116. I do not find such an argument persuasive.

117. It is true that, after the entry into force of Directive 2014/59, an infringement of the provisions of Directive 2012/30 by the action of a central bank such as that at issue in the main proceedings would seem to be excluded: that action finds an explicit basis in Article 123 of the former directive.

118. However, that does not mean that, previously, such an action was necessarily prohibited as a matter of EU law. Directive 2014/59 pursues the aim of establishing a regulatory framework for the recovery and resolution of credit institutions and investment firms. To that end, Directive 2014/59 laid down new provisions and modified a number of existing legal instruments. In this context, it is obvious that the EU legislature sought to ensure the consistency of the framework as a whole,[73] among other things by coordinating and clarifying the inter-relationship between the different legal instruments amended.

119. For the reason given above, Directive 2001/24 did not need an express provision to allow Member States to derogate, in circumstances as exceptional as those stemming from the financial crisis, from Directive 77/91 (later recast in Directive 2012/30). On the other hand, as Banka Slovenije convincingly argues, Directive 2001/24 did not preclude Member States from granting investors a more extensive protection than that deriving from Directive 77/91: the latter provided only for a minimum standard of protection. Therefore, since Directive 2014/59 seeks to partially harmonise the matter (in particular, as regards resolution tools), it became necessary not to allow Member States to introduce or keep national rules on the protection of investors that would conflict with the new EU rules.

120. Article 123 of Directive 2014/59 cannot be taken, therefore, as an indication that the 'bail-in' measures codified in Title IV of the same directive were, previously, generally precluded by Directive 2012/30.

121. The answer to Question 5 must therefore be that points 40 to 46 of the Banking Communication do not infringe the provisions of Directive 2012/30; national provisions which entrust the adoption of the burden-sharing measures to the national central bank in a situation such as that at issue in the main proceedings are not incompatible with Directive 2012/30.

[71] Although this is not, strictly speaking, a legal argument, one may nevertheless wonder whether — had EU legislation been manifestly an obstacle to the adoption of such national legislation — the EU institutions would not have reacted, either to enforce the provisions allegedly breached or, alternatively, to amend the relevant EU legislation.

[72] The referring court observes that Title IV of Directive 2014/59 provides for various reorganisation tools, including 'bail-in' tools, which are essentially equivalent to those referred to in the Banking Communication.

[73] See recitals 11 and 12 of the directive.

6. Question 6

122. By its sixth question, the referring court wishes to know whether the requirement to convert or write down hybrid capital and subordinated debt instruments, provided in points 40 to 46 of the Banking Communication, is a precondition for the granting of State aid, or if it should be applied only when proportionate.

123. I have illustrated above the reasons why I believe that the adoption of burden-sharing measures cannot constitute a *condicio sine qua non* for considering State aid compatible under Article 107(3)(b) TFEU. A fortiori, this seems to me applicable to measures adopted vis-à-vis investors other than shareholders who generally enjoy stronger legal protection in the case of the insolvency of the company in which they invested. However, I have also explained that, in the situations governed by the Banking Communication, the fact that investors (including holders of hybrid capital and subordinated debt instruments) contribute to the recapitalisation of the bank is generally speaking not against the State aid rules.

124. That said, I must call to mind that the principle of proportionality is a general principle of EU law and requires measures implemented through its provisions to be appropriate in order to attain the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary to achieve them.[74] Therefore, the decision ordering the conversion or the writing-down of hybrid capital and subordinated debt instruments may obviously be subject to a review of proportionality.

125. In fact, the communication itself requires national authorities to have regard to the principle of proportionality when deciding on the contribution due by hybrid capital holders and subordinate debt holders for the restructuring of a bank in difficulty. Such a contribution is required only as a measure of last resort for banks which, despite the capital shortfall, remain above the regulatory minimum (point 43). Only for banks that no longer meet that minimum is the contribution by hybrid capital and subordinated debt generally required (point 44). In any event, under no circumstance is burden-sharing required when that would 'lead to disproportionate results' (point 45).

126. For the reasons expressed in points 78 to 85 above, it falls to the referring court to verify whether the measures at issue observe that principle. As I see it, the fundamental question that should guide the Ustavno sodišče's (Constitutional Court) analysis in that regard is whether the situation in which each category of investors affected by the burden-sharing measures finds itself is, from an economic perspective, globally comparable to that which would have materialised if the bank had, failing any aid, left the market.[75]

127. Among the aspects which the national court may be requested to examine is the overall coherence of the set of burden-sharing measures adopted by the Member State's authorities vis-à-vis the different categories of investors.

128. On that aspect, the Banking Communication merely draws a distinction between, on the one hand, shareholders, hybrid capital holders and subordinated debt holders, and, on the other, senior debt holders (point 42). Importantly, however, the Banking Communication does not state that Member States *must* generally treat those two groups differently; it states only that Member States *may*, when they find it appropriate, treat them differently.[76] The position of senior debt holders is, in fact, usually not comparable to that of holders of equity or junior debt, especially during bankruptcy or liquidation procedures, and it may thus be reasonable to take that element into account.

[74] — See judgments in *ABNA and Others*, C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paragraph 68; *S.P.C.M. and Others*, C-558/07, EU:C:2009:430, paragraph 41; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 51.

[75] — See, by analogy, points 20 and 46 of the Banking Communication.

[76] — Indeed, as far as I understand, at least one Member State has, during the recent crisis, also imposed burden-sharing measures upon senior creditors.

129. Differences may also exist between the different categories of investors generally affected by the burden-sharing measures (shareholders, hybrid capital holders and subordinated debt holders), in particular with regard to the order of priority in case of insolvency proceedings. In that regard, the national court may need to verify that none of those categories bears an unjustified and excessive burden, in the light of the facts of the case, and of the national rules (especially of company law and of bankruptcy law) and contractual provisions applicable to them.

130. Therefore, the answer to the sixth question should be that the conversion or writing-down of hybrid capital and subordinated debt instruments, provided for in points 40 to 46 of the Banking Communication, is not a precondition for the granting of State aid and is not required when it would lead to disproportionate results; it is for the national courts to verify that, when aid measures adopted in accordance with the Banking Communication are executed, the principle of proportionality has been observed.

7. Question 7

131. By its seventh question, the referring court seeks to know whether the burden-sharing measures referred to in points 40 to 46 of the Banking Communication can be regarded as reorganisation measures within the meaning of the seventh indent of Article 2 of Directive 2001/24.

132. The reasons which led the Ustavno sodišče (Constitutional Court) to refer this question are not to me self-evident. I understand this question to be connected to the issue, raised in relation to the fifth question, regarding the relationship between the Banking Communication, Directive 2001/24 and Directive 2012/30. In other words, the question appears to be whether the burden-sharing measures referred to in the Banking Communication are to be regarded as 'reorganisation measures' for the purposes of Directive 2001/24 which are consequently not precluded by Directive 2012/30, in accordance with the principle of *lex specialis*.

133. I have already addressed the substance of this issue in my answer to the fifth question. What remains to be explained here are the reasons for which I, like all the parties which submitted observations on this point, take the view that the burden-sharing measures referred to in points 40 to 46 of the Banking Communication may often (although not always) come within the concept of 'reorganisation measures' in Article 2 of Directive 2001/24.

134. Pursuant to that provision, reorganisation measures are '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'.

135. The concept of reorganisation measures appears thus defined rather broadly. This seems to me consistent with the aim pursued by the directive: to establish a system for the mutual recognition, among the Member States, of reorganisation measures and winding-up proceedings of credit institutions. There are three cumulative elements in the definition provided in Directive 2001/24: (i) the measure must be adopted by the competent administrative or judicial authorities of a Member State;[77] (ii) the measure must be adopted with the purpose of preserving or restoring the financial situation of a credit institution; and (iii) the measure must potentially affect third parties' rights. I will examine these three elements in turn, with reference to the measures at issue.

[77] — See Article 2, sixth indent, and Article 3 of Directive 2001/24.

136. First, measures adopted by an authority such as a national central bank can obviously be regarded as having been adopted by an administrative authority of a Member State. Conversely, as mentioned already, burden-sharing measures adopted voluntarily by the investors of a bank may also fulfil the requirements of points 40 to 46 of the Banking Communication. Indeed, there have been cases in which (public and private) investors have voluntarily accepted a 'haircut' to restore the viability of a credit institution. Any such measure would fall outside the scope of application of Directive 2001/24.

137. Second, the aim of the measures referred to in points 40 to 46 of the Banking Communication is obviously to preserve or restore the financial situation of a credit institution. In fact, in the text of the Banking Communication it is clear that those measures are intended to 'reduc[e] the capital shortfall to the maximum extent' (point 41), 'restore the capital position [of the bank]' and 'overcome the shortfall' (point 43).

138. Third, burden-sharing measures which affect hybrid capital holders and subordinated debt holders are, in all evidence, capable of affecting third parties' rights within the meaning of Directive 2001/24. On the other hand, burden-sharing measures which affect shareholders alone do not fall within the scope of application of Directive 2001/24. Recital 8 of that directive states that measures 'affecting the functioning of the internal structure of credit institutions or managers' or shareholders' rights, need not be covered by this Directive to be effective in Member States insofar as, pursuant to the rules of private international law, the applicable law is that of the home State'. Furthermore, recital 10 adds that '[p]ersons participating in the operation of the internal structures of credit institutions as well as managers and shareholders of such institutions, considered in those capacities, are not to be regarded as third parties for the purposes of this Directive'.

139. When contrasted with points 40 to 46 of the Banking Communication, the concept of 'reorganisation measures' under Article 2 of Directive 2001/24 seems therefore to cover some of the measures referred to in the former, but not necessarily all of them.

140. This conclusion is not affected, to my mind, by the fact that the concept of 'reorganisation measures' in Directive 2001/24 has been amended by Article 117 of Directive 2014/59 so as explicitly to include the application of the resolution tools and the exercise of the resolution powers provided in the latter directive.[78]

141. I understand that the referring court wonders whether the amendment of Article 2 of Directive 2001/24 should be read as implying that the previous definition of 'reorganisation measures' included in that provision did not cover that kind of 'bail-in' measures.

142. I do not share the doubts expressed by the referring court on this point. As explained already, because of their very nature and scope, certain measures referred to in points 40 to 46 of the Banking Communication fall squarely within the definition of reorganisation measures contained in Directive 2001/24.

143. As Ireland points out, the amendment referred to in point 141 must be read in light of the fact that Directive 2001/24 did not seek to harmonise the relevant laws of the Member States but only to provide a system of mutual recognition.[79] However, Directive 2014/59 now obliges Member States to introduce certain measures facilitating the reorganisation of banks. It is thus logical that the same directive also lays down provisions designed to ensure that those new measures fit in the existing EU framework. This by no means implies that similar measures existing in national law, failing any harmonising rules, were not caught by the definition of reorganisation measures before.

[78] — As mentioned already, the resolution tools provided for in Directive 2014/59 include some 'bail-in' tools which are similar to the burden-sharing measures challenged by the applicants in the main proceedings.

[79] — See judgment in *LBI*, C-85/12, EU:C:2013:697, paragraph 39.

144. In the light of the foregoing, I take the view that the burden-sharing measures referred to in points 40 to 46 of the Banking Communication may, depending on the circumstances, fall within the definition of reorganisation measures in Directive 2001/24.

IV – **Conclusion**

145. In conclusion, I propose that the Court answer the questions referred for a preliminary ruling by the Ustavno sodišče (Constitutional Court) as follows:

— 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 ('the Banking Communication') is not binding on the Member States;

— points 40 to 46 of that communication do not exceed the competence devolved to the Commission under Articles 107 to 109 TFEU; the Commission does not misinterpret or misapply the State aid rules by considering that, in the situations governed by the Banking Communication, aid to banks in distress normally requires burden-sharing measures to be compatible with Article 107(3)(b) TFEU;

— points 40 to 46 of that communication are compatible with the principle of the protection of legitimate expectations and the right to property; it is for the national courts to verify that, when aid measures adopted in accordance with the Banking Communication are executed, those rights have not been infringed;

— points 40 to 46 of the Banking Communication do not infringe the provisions of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012; national provisions which entrust the adoption of the burden-sharing measures to the national central bank in a situation such as that at issue in the main proceedings are not incompatible with Directive 2012/30/EU;

— conversion or writing down of hybrid capital and subordinated debt instruments, provided for in points 40 to 46 of the Banking Communication, is not an essential precondition for the granting of State aid and is not required when it would lead to disproportionate results; it is for the national courts to verify that, when aid measures adopted in accordance with the Banking Communication are executed, the principle of proportionality has been observed;

— the burden-sharing measures referred to in points 40 to 46 of that communication may, depending on the circumstances, fall within the definition of reorganisation measures in Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001.