

Closing of Banks

Fact of the case:

During the first months of 2012, certain banks established in country L, including banks C and B, faced financial difficulties. In this context, country L. considered it necessary to recapitalize them and submitted a request for financial assistance to the European Stability Mechanism (ESM), which was approved. Under this agreement, a bail-in through bank deposits was required. The country L. announced the closing of banks in order to avoid mass withdrawals from depositors.

A and B held deposits in those banks. The application of the measures provided for in the issued decrees, resulted in their deposits suffering a significant reduction in value, which A and B precisely determined.

Arguments to be considered

According to Article 52(2) CFR, rights recognised by the Charter, which are based on the Community Treaties or the Treaty on the European Union, are to be exercised under the conditions and within the limits defined by those Treaties.

Legal Framework

Relevant European Law

Treaty establishing the European Stability Mechanism

The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism. This European Stability Mechanism (“ESM”) has legal personality and is mandated to provide, where needed, financial assistance to euro area Member States.

Article 12 of the ESM Treaty defines the principles governing the provision of stability support and states in paragraph 1 as follows:

‘If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.’

According to article 13, the ESM Board of Governors may decide to grant stability support in the form of a financial assistance facility to the ESM Member requesting it, following an assessment. If such decision is adopted, the European Commission— in liaison with the ECB and, wherever possible, together with the IMF— is responsible for negotiating, with the ESM Member concerned, a memorandum of understanding (an “MoU”) detailing the conditionality attached to the financial assistance facility, and for monitoring compliance thereof. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen.

The MoU shall be fully consistent with the measures of economic policy coordination provided for in the [FEU Treaty], in particular with any act of [EU] law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

Relevant National Law

The MoU

1.26. “Bank C is taking over via a purchase and assumption procedure the assets of Bank B at fair value, as well as the insured deposits and Emergency Liquidity Assistance exposure at nominal value. The uninsured deposits of Bank B will remain in the legacy entity. ... The conversion of 37.5% of the uninsured deposits in Bank C into class A shares with full voting and dividend rights provides the largest part of the capital needs with additional equity contributions from the legacy entity of Bank B”.

1.27. “To ensure that the capitalisation targets are met, ... , and if required, an additional conversion of uninsured deposits into class A shares will be undertaken to ensure that the core tier one target of 9% under stress by end-programme can be met. Should the bank be found to be overcapitalised relative to the target, a share-reversal process will be undertaken to refund depositors by the amount of over-capitalisation”.

Law on the resolution of credit and other institutions entrusts the Central Bank and Ministry of Finance of country L with the resolution of financial institutions. To that end, the CB may, by decree, restructure the debts and obligations of an institution under resolution, using a variety of measures. However, ‘insured deposits’ up to EUR 100.000 are to be excluded from those measures.

Regulatory Administrative Act No 103 on the bailing-in of Bank C provides for the recapitalisation of Bank C in order to enable it to continue to provide banking services. Accordingly, uninsured deposits were converted into Bank C shares (37.5% of each uninsured deposit), into securities which were convertible by Bank C either into shares or into deposits (22.5% of each uninsured deposit), and into securities which were convertible into deposits by the CB (40% of each uninsured deposit).

Regulatory Administrative Act No 104 on the sale of certain operations of Bank B provides for the transfer of certain assets and liabilities from Bank B to Bank C, including deposits of up to EUR 100 000. Deposits over EUR 100.000 remained with Bank B, pending its liquidation.

Questions

1. Can the EU Charter of Fundamental Rights apply in this case?
2. If so, which article of the EU Charter of Fundamental Rights can A and B invoke to substantiate their claims?
3. Does the relative right, deriving from the Charter, constitute an absolute privilege, which is not subject to restrictions?
4. If restrictions can be imposed on the specific right, which grounds should these restrictions be based on? Are there limits to these restrictions?
5. What is, in your opinion, the position of the Court of Justice of the European Union in the above case?