EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

ECHR 061 (2023)
23.02.2023

Inadmissibility decision in a case concerning the financial impact on the applicant of the winding-up of a failing private bank

In its decision in the case of Freire Lopes v. Portugal (application no. 58598/21) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerned the failure to buy back 3,700 financial products sold to the applicant in 2012, under a financial intermediary agreement, by the bank Banco Espírito Santo (BES), which was subsequently resolved by Portugal's central bank (BdP) under the latter's powers of oversight of the banking sector.

In view of the economic context and BES's weak financial position at the relevant time, the Court acknowledged at the outset that the State, through the BdP, had had a degree of discretion in determining what measures, both preventive and remedial, to take in relation to BES. In this case, the resolution of the bank had been aimed at removing from BES all the products deemed to be toxic owing to their exposure to the debts of the Espírito Santo Group (GES), which had thrown BES into serious financial turmoil, and thus at preventing the complete collapse of BES, a situation that would have had far-reaching consequences for the entire domestic and indeed European banking system. The Court understood that the fact that the applicant's claim had not been transferred to the bridge bank, which had recently been the subject of a public bailout, had lessened his prospects of securing repayment of the sum owed to him by BES. However, it reiterated that Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights could not be interpreted as imposing any general obligation on the Contracting States to cover the debts of private entities. Moreover, given BES's very weak financial position at the time of the events, there was no guarantee that it would have been able to honour its debt towards the applicant.

The Court held that a fair balance had been struck between the public interest pursued and the property rights of the applicant and of any other persons in the same situation. The application was therefore manifestly ill-founded.

A legal summary of this case will be available in the Court's database HUDOC (link).

Principal facts

The applicant, Diamantino Freire Lopes, is a Portuguese national who was born in 1944 and lives in Portugal.

At the relevant time the applicant and his wife held a current account with BES, one of Portugal's leading commercial banks, which belonged to the Espírito Santo Group (GES), a complex holding structure. Over 20% of the shares in BES were held by Espírito Santo Financial Group, S.A. (ESFG), a holding company registered in Luxembourg, 49% of whose shares were owned by Espírito Santo Irmãos SGPS, a company registered in Portugal, which in its turn was wholly owned by Rio Forte Investments, S.A. (Rio Forte). Rio Forte was wholly owned by the parent holding company Espírito Santo International (ESI), also registered in Luxembourg.

In August 2012 the applicant acquired 3,700 securities issued by the company Poupança Plus Investments Jersey Limited, for a total amount of 185,000 euros (EUR). BES, acting as a financial intermediary, undertook to buy back the products on 24 August 2014, together with EUR 20,202 in interest.

In May 2014 the Luxembourg authorities discovered irregularities in ESI's accounts. In July 2014 ESI, ESFG and Rio Forte applied to the Luxembourg authorities for judicial reorganisation on the grounds that they were no longer able to pay their debts.

In July 2014 BES published its half-yearly financial results, which revealed record losses of EUR 3.57 billion incurred as a result of its exposure to GES's debt. BES informed Portugal's central bank (BdP) that it was not in a position to recapitalise the company under the prescribed conditions and within the prescribed time-limits. The BdP therefore adopted a number of measures including those detailed below.

In a decision of 30 July 2014 the BdP decided with immediate effect to prohibit BES from early repayment of any loan or other type of credit it had taken out, to make any total or partial repayment or even straightforward bank debits subject to prior authorisation by the BdP, and to prohibit the payment by BES of any sums owed by ESI, ESFG or Rio Forte or any entity linked to those companies.

On 3 August 2014 the BdP decided to resolve BES in order to shore up the bank's financial position and preserve the stability of the Portuguese financial system. The BdP set up a bridge bank called Novo Banco, S.A. (N.B.), to which it transferred, in particular, various assets, liabilities and other items. The BdP stated that "the aim of this urgent decision of clear public interest [was] to avert the threat to financial stability and to relieve the new bank of the low-quality assets which led to this situation."

In a decision of 11 August 2014 the BdP specified which assets and liabilities were to be transferred to the bridge bank N.B.

By a decision of 29 December 2015, with a large number of civil actions being brought against the bank N.B., the BdP clarified its decision of 3 August 2014, specifying in particular which liabilities had not been transferred from BES to the bridge bank.

In the meantime, in August 2014, the European Central Bank (ECB) decided to suspend BES's counterparty status in respect of Eurosystem monetary policy operations. BES was thus obliged to repay EUR 10 billion in debt to the Eurosystem. In July 2016 the ECB revoked BES's banking licence. Following that decision the BdP, of its own motion, started winding-up proceedings in respect of BES. Those proceedings are still pending in the Lisbon Commercial Court.

Following the resolution of BES by the BdP, the applicant brought proceedings against the bridge bank N.B. seeking repayment of the sum of EUR 185,000 plus EUR 20,202 in interest, arguing that the amounts owed to him formed part of BES's liabilities that had been transferred to the bridge bank. He alleged that he had purchased the shares without having been informed of the nature and risks of such a financial investment, adding that BES had sold the product to him as a secure savings product offering favourable returns.

In July 2016 the Santarém Court of First Instance allowed the applicant's claims and ordered the bank N.B. to pay him the full amount of EUR 205,202 which he had sought. The BdP and the bank N.B. appealed against that judgment.

In February 2021 the Évora Court of Appeal set aside the first-instance judgment and dismissed the applicant's claims, holding that the sums owed to him constituted BES liabilities that had not been transferred to the bank N.B. Referring to the BdP's decision of 29 December 2015, the Court of Appeal found that the responsibilities and risks linked to BES's activity as a financial intermediary had not been assumed by the bank N.B.

In June 2021 the Supreme Court upheld the judgment of the Évora Court of Appeal, finding that BES's responsibility for the damage caused by its activity as a financial intermediary constituted "risks" within the meaning of the BdP's decisions of 3 August 2014 and 29 December 2015, and that they had not been transferred to the bank N.B.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 18 November 2021.

In the proceedings before the Court the applicant stated that he had invested EUR 185,000, representing his life savings from work in Germany, in financial products purchased from BES under a financial intermediary agreement, without being aware of the nature of the products and the risk involved, as he had been assured that an investment of that kind was risk-free and offered high returns. He alleged that he had lost his money as a result of the resolution of BES by the BdP, a measure which in his view had been unlawful and disproportionate and in breach of the principle of investor confidence. He also complained of the decisions of the Évora Court of Appeal and the Supreme Court overturning the judgment of the Santarém Court of First Instance which had allowed his claims.

The Court decided to examine the applicant's complaints under Article 1 of Protocol No. 1 (protection of property) to the Convention.

The decision was given by a Chamber of seven judges, composed as follows:

Gabriele **Kucsko-Stadlmayer** (Austria), *President*,
Tim **Eicke** (the United Kingdom),
Faris **Vehabović** (Bosnia and Herzegovina),
Branko **Lubarda** (Serbia),
Armen **Harutyunyan** (Armenia),
Anja **Seibert-Fohr** (Germany),
Ana Maria **Guerra Martins** (Portugal),

and also Ilse **Freiwirth**, *Deputy Section Registrar.*

Decision of the Court

Article 1 of Protocol No. 1

The Court noted that the present case arose out of a commercial relationship between an individual and a private bank. It observed that the measures taken by the BdP in relation to BES – under its powers of oversight of the banking sector – had had repercussions on the applicant's claim. First of all, BES had been prohibited as of 30 July 2014 from early repayment of any securities issued by it, a measure that had had a direct impact on the applicant's claim *vis-à-vis* BES. In addition, following BES's resolution on 3 August 2014, the bank's assets, liabilities and other items that were considered to be sound had been transferred to the bridge bank, N.B. Accordingly, BES had become a "bad bank" which held only assets and liabilities deemed to be problematic; according to the domestic courts, these included the applicant's claim. Lastly, the Court noted that BES had ultimately been wound up by the BdP after the ECB had revoked BES's banking licence. The Court held that it could not speculate as to the sum that the applicant would have received had the resolution measure not been adopted. Like any financial investment, the products in question had been subject to the vagaries of the market in a context of widespread economic crisis; this was especially true since the market in question had been unregulated.

The Court noted that the resolution of the bank had been carried out under Articles 144 (b) and 145-C of the General Regulations on Credit Institutions and Financial Companies (RGICSF) and that the winding-up of BES initiated by the BdP of its own motion had been based on Article 145-M of the RGICSF. Thus the measures at issue had been in accordance with domestic law.

It was likewise beyond doubt that those measures had formed part of the measures introduced by the European Union in the wake of the 2008 financial crisis, in order to harmonise and improve the instruments available to manage banking crises in Europe.

Equally, it was clear that the measures had pursued an aim in the public interest as they had been designed to ensure the continuity of essential financial services, prevent systemic risk, protect the interests of taxpayers and of the Treasury and maintain investor confidence, in a situation where the ECB had recently suspended BES's counterparty status in respect of Eurosystem monetary policy operations.

In view of the economic context and BES's weak financial position at the relevant time, the Court acknowledged at the outset that the State, through the BdP, had had a degree of discretion in determining which measures, both preventive and remedial, to take in relation to BES. In this case, as previously noted, the resolution of the bank had been aimed at removing from BES all the products deemed to be toxic owing to their exposure to the debts of GES, which had thrown BES into serious financial turmoil, and thus at preventing the complete collapse of BES, a situation that would have had far-reaching consequences for the entire domestic and indeed European banking system. The Court understood that the fact that the applicant's claim had not been transferred to the bridge bank, which had recently been the subject of a public bailout, had lessened his prospects of securing repayment of the sum owed to him by BES. However, it reiterated that Article 1 of Protocol No. 1 to the Convention could not be interpreted as imposing any general obligation on the Contracting States to cover the debts of private entities. Moreover, given BES's very weak financial position at the time of the events, there was no guarantee that it would have been able to honour its debt towards the applicant.

With regard to the assessment of the facts by the domestic courts ruling on the applicant's civil actions against the bank N.B., the Court noted that the courts' interpretation did not appear arbitrary or unreasonable and was consistent with the case-law of the Supreme Court in similar cases.

Lastly, the Court observed that the applicant could have asserted his claim in the proceedings for the winding-up of BES that were pending in the Lisbon Commercial Court. It seemed clear that, in that context, he could not have incurred greater losses than if BES had been wound up immediately, as provided for by Article 145-B § 1 (c) of the RGICSF. The Court noted that had this not proved to be the case it would have been open to the applicant, under Article 145-B § 3 of the RGICSF, to apply to the Resolution Fund seeking compensation in respect of any damage sustained in connection with the recovery of the debt.

The Court accordingly held that a fair balance had been struck between the public interest pursued and the property rights of the applicant and of any other persons in the same situation. The application was therefore manifestly ill-founded.

The decision is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.