

Case C-735/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date of submission:**

7 October 2019

Referring court:

Augstākā tiesa (Senāts) (Supreme Court, Latvia)

Date of the decision to refer:

30 September 2019

Applicant at first instance and appellant in cassation:

Euromin Holdings (Cyprus) Limited

Defendant at first instance and appellant in cassation:

Finanšu un kapitāla tirgus komisija (Financial and Capital Markets Commission)

Subject matter of the case in the main proceedings

The dispute concerns the methods for establishing the price of shares when making a share buyback offer, i.e. whether the offeree company's assets, which influence the price of the share, should include non-controlling (minority) interests.

Subject matter and legal basis of the reference

On the basis of Article 267 TFEU, the referring court seeks an interpretation of Article 5 of Directive 2004/25/EC in order to determine whether the methods set out in Latvian legislation for establishing the individual share price applicable when making a share buyback offer are in conformity with said Directive. The referring court also questions whether it is possible for national law to provide for a limitation of the compensation for damage caused to an individual as a result of the incorrect application of EU law.

Questions referred

1. Is national legislation which provides that the share price for a mandatory buyback offer is to be calculated by dividing the net assets of the offeree company (including non-controlling (minor) interests) between the number of shares issued contrary to the correct application of Article 5 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids?
2. If the first question is answered in the negative, that is to say, to the effect that the net assets of the offeree company do not have to include non-controlling or minority interests, may a method of determining the share price be regarded as clearly determined, within the meaning of the second subparagraph of Article 5(4) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, if it is necessary to apply a method of legal interpretation – teleological reduction – in order to understand it?
3. Is legislation providing that the highest price out of the following three variants must be used, compatible with Article 5(4) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, that is to say, compatible with the determination of an equitable price?
 - 1) the price at which the offeror or persons acting in concert with the latter acquired the shares of the offeree company in the preceding 12 months. In the event of the acquisition of shares at different prices, the buyback price is to be the highest price at which shares were purchased during the 12 months preceding the legal obligation to submit a buyback offer;
 - 2) the weighted average share price on the regulated market or on the multilateral trading facility via which the largest volume of the shares were traded during the last 12 months. The weighted average share price is to be calculated on the basis of the 12 months preceding the legal obligation to submit a buyback offer;
 - 3) the share value calculated by dividing the net assets of the offeree company by the number of shares issued. Net assets are to be calculated by deducting the offeree company's own shares and liabilities from its total assets. If the offeree company has shares with different nominal values, in order to calculate the share value, the net assets are to be divided by the percentage of each nominal share value in the share capital.
4. If the method of calculation laid down by national law, using the discretion granted [to Member States] by the second subparagraph of Article 5(4) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, results in a higher price than that resulting

- from the application of the first subparagraph of Article 5(4), is it consistent with the objective of the Directive to always choose the higher price?
5. If damage is caused to an individual as a result of the incorrect application of EU law, may national law provide for the limitation of compensation for such damage if that limitation applies equally to damage suffered as a result of the incorrect application of national law and to damage suffered as a result of the incorrect application of EU law?
 6. Do the provisions of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids that are applicable to the present case confer rights on individuals, that is to say, is the corresponding requirement for State liability met?

Provisions of EU law relied on

Recital 9 and Articles 3(1), 5(1) and (4), first and second subparagraphs, and 6 of Council Directive 2004/25/EC of 21 April 2004 on takeover bids.

International Financial Reporting Standard 10, paragraph 22, and Appendix B, paragraphs B94 to B96, of Commission Regulation (EU) No 1254/2012 of 11 December 2012 amending Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Financial Reporting Standard 10, International Financial Reporting Standard 11, International Financial Reporting Standard 12, International Accounting Standard 27 (2011), and International Accounting Standard 28 (2011).

Case-law of the Court of Justice

Judgments of the Court of Justice:

Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428);

Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513);

Judgment of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602, paragraphs 38 and 39);

Judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraphs 24 and 37);

Judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 125);

Judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402, paragraph 69);

Judgment of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe* (C-620/17, EU:C:2019:630, paragraphs 42 and 47).

Relevant provisions of national law

Finanšu instrumentu tirgus likums (Law on the Financial Instruments Market). Articles 5, 66(1)(1), and 74(1) and (2).

Konsolidēto gada pārskatu likums (Law on Annual Consolidated Financial Statements), which is not currently in force. Articles 14 and 21.

Valsts pārvaldes iestāžu nodarīto zaudējumu atlīdzināšanas likums (Law on Compensation for Damage Caused by Public Authorities). Article 13.

Brief description of the facts and the main proceedings

- 1 The applicant at first instance acquired shares in the company AS Ventspils Nafta. Since it obtained 93.24% of the voting shares in Ventspils Nafta, it was obliged under Article 66(1)(1) of the Law on the Financial Instruments Market ('FITL') to make an offer to buy back shares from Ventspils Nafta shareholders. The applicant at first instance sent to Finanšu a kapitāla tirgus komisija (Financial and Capital Market Commission, 'the Commission') a prospectus for the share buyback offer, indicating, in particular, that the share repurchase price was EUR 3.12 per share.
- 2 The Commission, referring to Article 74(1)(3) of the FITL and to the calculation of net assets set out in that regulation, did not accept the calculation of the applicant at first instance, so, by decision of 15 October 2015, it authorised the applicant at first instance to submit a mandatory share buyback offer at a price per share of EUR 4.56.
- 3 The decision states that, pursuant to Article 74(1)(3) of the FITL, when such an offer is published, the share buyback price may not be lower than the value of the share, which is calculated by dividing the company's net assets by the number of shares issued. Pursuant to Article 74(2) of the FITL, the calculation must be made on the basis of the annual consolidated financial statements of the offeree company. [According to said decision,] the price per share calculation performed by the applicant at first instance, which presented the offeree company's interests in subsidiaries as liabilities (*pasivos*), is incorrect,¹ since that accounting item must be included under own funds).

¹ Translator's Note. In Latvian, '*saistības*' is used to refer to what in accounting is referred to in Spanish as '*pasivos*'; in EN, normally, 'liabilities'; in FR, normally, '*passifs*'. On the other hand, the Latvian term '*pasīvs*' corresponds to what in Spanish is called '*pasivo*' (as in the *ACTIVO/PASIVO* [ASSETS/LIABILITIES] division of the balance sheets). The '*saistības*' form part of the '*pasīvs*'. In Spanish, the '*pasivo*' is made up of '*patrimonio neto/fondos*'

- 4 The applicant at first instance applied to the Administratīvā apgabaltiesa (Regional Administrative Court) for a declaration that the Commission's decision was unlawful and for compensation for the damage caused.
- 5 The applicant at first instance states that the purpose of Article 74 of the FITL is to establish share buyback price calculation methods that are equitable and in conformity with the market situation. Consequently, the share price calculation must take into account the total value of the offeree company's true assets. Minority interests are reflected under the *pasivo* (liabilities) section [on the financial statement], and specifically as own funds, with a separate indication of the portion of the subsidiaries not attributable to the parent company. Non-controlling (minority) interests are neither *activos* (assets) nor *pasivos* (liabilities), but a separate item under the *pasivo* (liabilities) section, which, in accordance with International Financial Reporting Standards, must be included in order not to mislead investors with respect to the company's true assets. The Polish, Estonian and Lithuanian regulations confirm this point of view. If the price of a share is calculated as the Commission did, it is unduly increased. The damage that this caused to the applicant at first instance consists of the difference between the share price determined by the Commission and the price at which, according to the applicant at first instance, the shares should actually be repurchased.
- 6 The Commission indicated in its pleadings that the claim was unfounded for the following reasons.
- 7 International Financial Reporting Standard 10, contained in Regulation No 1254/2012, establishes the principles for preparing annual consolidated financial statements where a company controls one or more companies. Paragraph 22 of that standard merely indicates that, in the consolidated financial statement, the 'net assets' [or own funds] item must include non-controlling interests as well as controlling interests. International Financial Reporting Standards do not provide for how to delimit and calculate the value corresponding to controlling or non-controlling interests in the net assets [own funds]. Since the Commission acted in accordance with Latvian law, it is not appropriate to compensate the damage.
- 8 In its judgement, the Administratīvā apgabaltiesa (Regional Administrative Court) partially upheld the application, declared the dispute decision unlawful and ordered the Commission to compensate the applicant at first instance for 50% of the damage caused. The judgment was based on the following considerations.
- 9 Article 74(1)(3) of the FITL, which specifies the methods for determining the share price, uses the concepts of 'total asset value' and 'net assets', which, however, are not defined in the provisions of the FITL.

proprios' (net assets/own funds) and '*pasivos*' (liabilities). The use of this terminology can lead to confusion, but it is the usual terminology. Apparently, in FR '*passif*' and '*passifs*' are also used.

- 10 After examining the origin of Article 74(1)(3) of the FITL, doubts arise as to whether the wording of that provision is in compliance with its objective. In implementing the amendments aimed at fixing the share price using information relating directly to the annual consolidated financial statements, the influence of that regulation on the provisions of Article 74(1)(3) was not discussed. It cannot be confirmed that the legislator deliberately established that, in calculating the share price, net assets must also include non-controlling (minority) interests.
- 11 In the light of the provisions of Directive 2004/25/EC, it should be concluded that Member States may authorise the competent authority to increase or reduce the price fixed under clearly defined circumstances and criteria. Under Directive 2004/25, the share buyback price should normally be determined in accordance with Article 74(1)(1) of the FITL. The methods referred to in points 2 and 3 should only be used in exceptional circumstances. It should be noted that Article 74(1) of the FITL is not worded as meaning that the methods referred to in points 2 and 3 are to be used only in the event of exceptional circumstances. However, the fact that the volume of share transactions in Latvia is very small and that there may be situations where there are no sales of shares in the company in question within 12 months may be considered exceptional circumstances.
- 12 Although Directive 2004/25 aims to protect the interests of minority shareholders, this does not necessarily mean that the share price should be the highest. To calculate the price of a share, objective valuation criteria must be used and the price must not be artificially increased.
- 13 It should be noted that the wording of Article 74(1)(3) of the FITL is too vague and is not in accordance with the objective of the rule contained in that article: the provision to include non-controlling interests in net assets is contrary to the objective behind the provision. It is therefore necessary to carry out a teleological reduction and correct the wording of the rule, concluding that net assets do not include non-controlling (minority) interests.
- 14 With regard to the examination of the claim of the applicant at first instance for compensation for the material damage it has suffered, under Article 13(3) of the Law on Compensation for Damage Caused by Public Authorities, it must be held that there are circumstances that justify a reduction in the calculated amount of the damage, but that there are no circumstances in which it would be equitable to reduce that amount by more than 50%. The Commission is therefore obliged to compensate the applicant at first instance for 50% of the amount of said damage.

Essential arguments of the parties to the main proceedings

- 15 The **Commission** claims that the judgment is unfounded and appeals against it in its entirety. In its opinion, the lack of debate in the Saeima (Parliament) does not by itself permit conclusions to be drawn on the scope of the content of a provision, in particular on whether or not it is contrary to the wording of Article 74 of the FITL. It does not consider that, in the present case, it can be held that a case-law

development, namely a teleological reduction of Article 74(1)(3) and Article 74(2), is justified given that it is possible to clarify the content of that particular paragraph by interpreting this rule in such a way that the rules are consistent with each other and in conformity with the legislator's intention.

- 16 The Commission also submits that the Administratīvā apgabaltiesa (Regional Administrative Court) interpreted Article 74(1)(3) of the FITL in a manner contrary to the objective of Directive 2004/25. The principal objective of this Directive is to protect the interests of minority shareholders in the process of fixing the individual price of shares to be repurchased and, in line with the objective of this Directive, Article 74(1)(3) of the FITL requires that the individual price of shares to be repurchased be calculated in such a way that minority interests form part of the net assets. In the present case, as a result of the teleological reduction, Article 74(1)(3) of the FITL has been interpreted in a way that contradicts the objective of Directive 2004/25.
- 17 The Commission rejects the criticism that the individual price of the shares to be repurchased was 'artificially increased', in so far as the Commission, by including Ventspils Nafta's minority interests in subsidiaries in the calculation of the share price, achieved the objective of Directive 2004/25 and calculated the share price on the basis of 'objective valuation criteria generally used in financial analysis' (Article 5(4), second subparagraph, *in fine*, of the Directive). The balance of interests proposed by the Administratīvā apgabaltiesa (Regional Administrative Court) is not valid in all cases, particularly when the subsidiaries of the offeree company operate at a loss without making a profit. The share price calculated by the Commission is objective, equitable and valid in all cases.
- 18 The **applicant at first instance** appeals against the part of the judgment that dismisses its claim for compensation for damage suffered. The applicant at first instance submits that it follows from Article 13(3)(3) of the Law on Compensation for Damage Caused by Public Authorities that compensation may be granted for the full amount of the damage and that the reduction in compensation is only an option for the court, not an obligation. It argues that, if it is accepted that, where such a high amount of damage occurs, in situations where there are no particular objective circumstances, the courts automatically reduce the amount of compensation to 50% of the value of the damage suffered, this may lead to the failure of the national regulatory authorities to deal in a sufficiently serious manner with questions of normative interpretation that do not have an unambiguous solution.

Brief description of the grounds for the request for a preliminary ruling

- 19 In the present case, it needs to be determined whether the Commission applied Article 74(1)(3) of the FITL correctly when, in calculating the share price, it included non-controlling (minority) interests in the net assets. The question is

therefore related to the interpretation of the provisions of Directive 2004/25, about which the Senāts has doubts for the following reasons.

- 20 According to the consistent case-law of the Court of Justice of the European Union, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, to comply with the third paragraph of Article 288 of the Treaty on the Functioning of the European Union (see, for example, *CCOO* judgment C-55/18, paragraph 69 and the case-law cited). Consequently, for the correct interpretation of Article 74(1)(3) of the FITL, it is necessary to clarify whether the method for calculating the share price established in this provision should be considered a method of fixing equitable prices within the meaning of Directive 2004/25.
- 21 As is apparent from recital 9 of Directive 2004/25, the purpose of this Directive is to protect the interests of minority shareholders of companies in the event of the acquisition of control of such companies (judgment in *Marco Tronchetti Provera and Others*, C-206/16, paragraph 24). Although the inclusion of minority (non-controlling) interests in the net assets is undoubtedly in the interest of the minority shareholders, it is doubtful whether fixing such a high price actually constitutes an ‘equitable price’ within the meaning of Directive 2004/25 and is compliant, therefore, with the purpose of this Directive.
- 22 The Court of Justice of the European Union has stated that the second subparagraph of Article 5(4) of Directive 2004/25 confers on Member States a degree of discretion in defining the circumstances in which their supervisory authorities may adjust the equitable price, on condition, however, that those circumstances are clearly determined (judgment in *Marco Tronchetti Provera and Others*, paragraph 37).
- 23 It is therefore necessary to clarify whether the method for the calculation of net assets described in Article 74(1)(3) of the FITL is clearly determined, taking into account that the concepts of total asset value and net assets used in this point are not defined either in that point or in the other provisions of the FITL.
- 24 The Commission has linked the concept of ‘net assets’ to the annual consolidated financial statements, namely by reference to Commission Regulation No 1254/2012.
- 25 On the other hand, the Administratīvā apgabaltiesa (Regional Administrative Court), examining the origin of the rule in question, concludes that, initially, non-controlling (minority) interests were not included in the own funds section of the annual consolidated financial statements and that the legislator, despite having changed the wording of the provision, cannot be considered to have analysed what would result from applying the standard in cases where data from annual

consolidated financial statements are used and to have deliberately established that, in the calculation of the share price, the net assets also include non-controlling (minority) interests. It concludes that the above enables us to question whether the wording of the rule complies with its objective and whether, therefore, the definition of the term 'net assets' requires a case-law development of the Law by means of a teleological reduction. This is, in the case of teleological reduction, whoever has to apply a rule limits the scope of its application (including to the greatest extent possible) without complying with the literal meaning of the terms used in the rule and creating a restrictive provision. In the present case, the Administratīvā apgabaltiesa (Regional Administrative Court) states that it was not appropriate to take non-controlling (minority) interests into account and that such a conclusion could be reached by means of a teleological reduction.

- 26 The need to carry out a case-law development of the Law and to use a teleological reduction to clarify the true content of a provision means that, for the correct interpretation of the rule, complex legal assessments need to be performed that require in-depth legal knowledge. Under these circumstances, the Senāts has doubts over whether Article 74(1)(3) and Article 74(2) of the FITL, which establish that the net assets are calculated by deducting the offeree company's own shares and liabilities from the total value of its assets without clearly indicating whether, when calculating the price of the share, the net assets have to include non-controlling (minority) interests, is contrary to the second subparagraph of Article 5(4) of Directive 2004/25, which allows the price to be adjusted in clearly determined circumstances.
- 27 It should be noted that, under the second subparagraph of Article 5(4) of Directive 2004/25, [']provided that the general principles laid down in Article 3(1) are respected, Member States may draw up a list of circumstances in which the price may be adjusted either upwards or downwards, [...] where [...] the market prices in general or [...] certain market prices in particular have been affected by exceptional circumstances[?].
- 28 The judgment of the Administratīvā apgabaltiesa (Regional Administrative Court) states that, under Directive 2004/25, Article 74(1)(1) of the FITL must be regarded as the principal method for determining the share price and that the methods described in Article 74(1)(2) and (3) of the FITL should only be used in cases where exceptional circumstances are observed. In its review of Article 74(1) of the FITL, the Administratīvā apgabaltiesa (Regional Administrative Court) comes to the conclusion that this paragraph is not worded such that it can be interpreted as meaning that the methods referred to in paragraphs 2 and 3 can be used only in exceptional circumstances; however, it states that the Latvian stock market is very small and that this small volume of transactions can be regarded as exceptional circumstances.
- 29 The Senāts has doubts as to whether the share calculation method provided for in Article 74(1)(3) of the FITL is only applicable in 'exceptional circumstances',

within the meaning of the second subparagraph of Article 5(4) of Directive 2004/25. Likewise, the Senāts has doubts as to whether the low volume of transactions on the Latvian stock market may be regarded as ‘exceptional circumstances’ within the meaning of Directive 2004/25.

- 30 The Senāts raises the question of whether the provisions of Article 13(3)(3) of the Law on Compensation for Damage Caused by Public Authorities (according to which, if the amount of damage exceeds EUR 1 422 872, the corresponding compensation may be less than 50% of said amount) is compatible with the fundamental rules and principles of EU law, as well as with the judgments of the Court of Justice of the European Union concerning the liability of the Member States (see, for example, judgments *Francovich and Others*, C-6/90 and C-9/20, and *Köbler*, C-224/01). Although the reduction provided for by that provision also covers damage relating to both EU law and national law (see, for example, the judgment in *Tomášová*, C-168/15, paragraphs 38 and 39), the fact that the compensation, in view of the possible impact of compensation for damage on the State’s budget, may be reduced by 50% raises doubts as to compliance with the principle of effectiveness in the present case (see, for example, the judgment in *Kantarev*, C-571/16, paragraph 125), particularly since there is no limit established for calculating the reduction in the amount of compensation where the amount of damage exceeds EUR 1 422 872 [as regards the reduction of compensation for damage, see also the judgment in *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, in which it was held that it is not possible to obtain compensation for damage if the costs incurred by one party as a result of a decision are generally excluded (see paragraph 47 of the above-mentioned judgment)].
- 31 In view of the factual circumstances of the present case, the Senāts also raises the question as to whether all the requirements established by the case-law of the Court of Justice of the European Union to give rise to State liability are met (see, for example, the judgment in *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, paragraph 35). In other words, it asks whether, in the present case, the applicable rules of Directive 2004/25 confer rights on individuals. It also has doubts as to whether, in this case, the absence of any finding of gross negligence or wilful misconduct on the part of the Commission constitutes a relevant circumstance excluding State liability in any case (see paragraph 42 of said judgment).
- 32 In summary, the Senāts has doubts as to the interpretation of Article 5(4) of Directive 2004/25 (in relation to the general principles of Article 3(1) of that Directive), as well as doubts as to the limitation of the obligation to compensate for damage and the actual compensation.