

Case C-910/19

Request for a preliminary ruling

Date lodged:

12 December 2019

Referring court:

Tribunal Supremo, Sala de lo Civil (Supreme Court, Civil Division, Spain)

Date of the decision to refer:

10 December 2019

Applicant:

Bankia, S. A.

Defendant:

Unión Mutua Asistencial de Seguros (UMAS)

... [Proceedings number and Rapporteur]

TRIBUNAL SUPREMO (SUPREME COURT)

Civil Division

IN FULL SESSION

Proceedings ...

... [Composition of the court]

Madrid, 10 December 2019.

... [Rapporteur]

DESCRIPTION OF THE FACTS

ONE. The Civil Division of the Tribunal Supremo (Supreme Court) is hearing an appeal on a point of law against the judgment delivered by the Audiencia [OR. 2] Provincial de Madrid (Provincial Court, Madrid, Spain) (Section 14) on

21 December 2016, in appeal No 657/2016, concerning the liability of a public limited company for the contents of an issue prospectus offering shares to the public for subscription.

TWO. Whilst the appeal was being deliberated, voted upon and decided, the referring court found that a question could appropriately be referred to the Court of Justice of the European Union for a preliminary ruling. ... [Hearing of the parties]

THREE. The claimant and respondent on appeal, Unión Mutua Asistencial de Seguros (UMAS), ... claimed, in summary, that it was not appropriate to refer the question for a preliminary ruling, because liability for a prospectus is not covered by Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC. It also claimed that, in Spanish law, if a prospectus is issued, liability arises in any event.

FOUR. Bankia S.A., the defendant and appellant on appeal, ... claimed, in summary, that the question that had arisen was not resolved by the EU case-law and should therefore be referred.

LEGAL BASIS

ONE. *Subject matter of the dispute*

1. In 2011, Bankia S. A. issued an offer of shares to the public (oferta pública de suscripción de acciones, 'the OPS') for the purpose of becoming listed on the stock exchange. [OR. 3]

2. The offer was divided into two tranches: one tranche for retail investors, employees and directors (60% of the shares offered) and a second tranche (the remaining 40%) for qualified investors, the 'institutional tranche'.

In the first tranche, the maximum sums that could be invested were EUR 10 000 (employees and directors sub-tranche) and EUR 250 000 (retail sub-tranche).

For the second tranche, with minimum investment of EUR 60 000, the prospectus established two bands:

(a) 50% of the shares had to be offered to the professional investors defined in paragraphs (a) to (d) of Article 78 bis (3) of the Ley del Mercado de Valores (Law on the Securities Market, LMV) of 1988, that is to say, entities subject to public authorisation or regulation, such as credit institutions, investment services undertakings, insurance companies, collective investment undertakings and pension funds and so on, public bodies and large businesses;

(b) the other 50% could be offered to the professional customers under paragraph (e) of Article 78 bis (3) ('other customers who previously so request and who expressly decline to be treated as retail customers').

3. For the institutional tranche, as for the retail tranche, the offer timetable began to run from the time the CNMV (Comisión Nacional del Mercado de Valores, Spanish Securities Market Commission) registered the prospectus (29 June 2011).

The 'book-building period', in which potential qualified investors could submit subscription bids, ran from that date until 18 July 2011.

In that period, the placement agent (Bankia Bolsa) would carry on 'activities to disseminate and promote the offer with the aim of obtaining an indication from potential investors of the number of shares to which they were prepared to subscribe and at what price'.

On the last day of that period the price for that tranche would be set and those subscription offers would be selected that, once confirmed, would become irrevocable and give rise to the corresponding shares [OR. 4] being allotted to investors (on 19 July 2011) and officially listed the following day.

4. The share price was set at EUR 3.75, for both the retail and institutional tranches.

5. In the context of the offer, Bankia contacted Unión Mutua Asistencial de Seguros (UMAS), a mutual insurance entity, to invite it to subscribe to shares in the entity.

6. On 5 July 2011, UMAS signed a buy order for 160 000 Bankia shares at EUR 3.75 each, involving a total disbursement of EUR 600 000.

7. As a result of the issuer, Bankia, revising its annual financial statements, the shares lost almost all their value on the secondary market and were suspended from trading.

In previous proceedings, brought by retail investors, the Tribunal Supremo (Supreme Court) has held in several judgments that the issue prospectus contained serious inaccuracies about the issuer's true financial situation.

8. UMAS brought proceedings against Bankia seeking primarily that the share purchase be annulled on the grounds that its consent was vitiated by error.

In the alternative, it sought a declaration that Bankia was liable on the grounds that the issue prospectus was untrue.

9. The judgment at first instance upheld the principal claim in the application, annulled the share purchase on the grounds of an error vitiating consent and ordered restoration of the consideration given.

10. Bankia appealed against that judgment, and the Audiencia Provincial (Provincial Court) upheld that appeal in part, dismissing the action for annulment and upholding the claim in liability attaching to the prospectus. The decision was based on the considerations summarised below: (i) UMAS is a qualified investor, but there is no evidence that it was involved in the OPS in any special way, other than generically in its capacity as an investor in the institutional tranche; (ii) because retail and qualified investors participated in the public offer, Bankia's disclosure [**OR. 5**] in the prospectus was also binding on it in respect of the qualified investors; (iii) the financial statements were revised because the initial statements and the information in the prospectus were not in keeping with the principles of showing a true and fair view and of prudent valuation; (iii) the inaccuracy of the prospectus gives rise to the liability under Article 28(3) LMV, and the action in the alternative should therefore be upheld; (iv) the compensation is calculated using the difference between the purchase value — EUR 600 000 — and the value of the shares at the time the proceedings were brought — 22 May 2015 —, and the claimant is obliged to return the shares and any dividends (plus statutory interest thereon from the date on which they were received); (v) the sum payable by Bankia bears statutory interest from the date on which the proceedings were brought.

11. Bankia brought an appeal on a point of law before the Tribunal Supremo (Supreme Court). In the deliberations with a view to determining that appeal, that court decided to make this request for a preliminary ruling.

TWO. *Question at issue in the main proceedings*

A material question at issue in the proceedings is whether, when an offer of shares to the public for subscription is aimed at both retail and qualified investors, and a prospectus is issued for the retail investors, an action for damages arising from the prospectus is available to both kinds of investor or only to retail investors. That is to say, whether an institutional creditor can claim under the liability for the prospectus, even though, when an offer is directed exclusively at qualified investors, there is no requirement to publish that document.

Also at issue is whether, for the purpose of determining whether the issuer is liable, in the case of a qualified investor, account can be taken of the fact that such an investor was able to access other sources of information, different from the information contained in the prospectus, about the economic situation of the company issuing the public offer.

THREE. *EU provisions* [**OR. 6**]

1. Article 3(2) of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities

are offered to the public or admitted to trading and amending Directive 2001/34/EC provides that:

‘The obligation to publish a prospectus shall not apply to the following types of offer:

(a) an offer of securities addressed solely to qualified investors.’

2. Article 6 of that directive, entitled ‘Responsibility attaching to the prospectus’, provides:

‘1. Member States shall ensure that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

2. Member States shall ensure that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus. However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.’

FOUR. — *National law*

1. Article 30 bis (1) of Ley 24/1988, de 28 de julio, del Mercado de Valores (Law 24/1988 of 28 July 1988 on the Securities Market) (Offer of securities for sale or subscription to the public), in the wording applicable *ratione temporis* to the case, provides:

‘1. An offer of securities to the public for sale or subscription means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to those securities.

The obligation to publish a prospectus shall not apply to the following types of offer which, as a result of the effects of this law, will not be deemed to be public offers:

(a) an offer of securities addressed solely to qualified investors’. [OR. 7]

2. Article 28 of that Law (Responsibility attaching to prospectuses) provides:

‘1. Responsibility for the information given in the prospectus must attach at least to the issuer, the offeror or the person asking for the admission to trading on an official secondary market and the directors of those persons, in accordance with any conditions laid down by regulation.

The responsibility referred to in the preceding paragraph will likewise attach to the guarantor of the securities in respect of the information it has to prepare.

The lead entity will also be liable for any verification work it carries out in accordance with regulations.

Any other persons that take responsibility for the prospectus, provided that fact is indicated in the prospectus, and any other persons not referred to above that have authorised the contents of the prospectus, will also be responsible, on the terms laid down by regulation.

2. The persons responsible for the information in the prospectus will be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices. They must also declare that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

3. In accordance with any conditions laid down by regulation, all the persons referred to in the preceding paragraphs, as the case may be, will be responsible for any damage caused to the holders of the securities acquired as a result of false information or the omission of material data from the prospectus or from the document to be prepared by the guarantor where applicable.

The action in liability will become time barred three years from the time at which the claimant could have become aware of the falsehood in or the omissions from the contents of the prospectus.

4. No responsibility shall attach to the persons referred to in the preceding paragraphs on the basis of the summary or of its translation, unless it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in the securities.’

FIVE. *The need to request a preliminary ruling*

1. Neither Directive 2003/71/EC nor the Spanish legislation expressly regulates whether, where a mixed offer to subscribe for securities is made to the public, that is to say, one that is addressed both to retail and **[OR. 8]** qualified investors, qualified investors can also bring an action for damages arising from the prospectus, bearing in mind that when the issue is directed solely at that type of investor there is no requirement to publish a prospectus.

The directive does not provide a clear answer to the issue raised since, although, on the one hand, it does not require a prospectus to be issued in offers addressed exclusively to qualified investors (Article 3(2)), on the other hand, in recital 27, it states that investors should be protected by ensuring publication of reliable information, making no distinction according to the various types of investor.

2. If the offer to the public to subscribe to shares (OPS) had been directed solely at qualified investors, the prospectus would not have been necessary. However, because there was also a retail tranche, a prospectus had to be published, which raises the issue as to (i) how effective it was vis-à-vis certain qualified investors that, whilst not its intended addressees, could have been adversely affected by what the application refers to as serious inaccuracies in the economic information disclosed in that document, when (ii) it appears that, in such cases, both the EU legislation and the national legislation assume that qualified investors have their own capability and means of information enabling them to decide whether to invest.

Nor does the directive provide a clear solution to the issue of whether, even where it is found that qualified investors can bring an action for damages arising from a prospectus, account can be taken of other sources of information to which they had access, on the basis of their previous legal and economic relations with the issuer of the OPS, such as, for example, being a shareholder of the issuer undertaking, or on its management bodies, in order to exclude the responsibility of the issuer.

3. In the present case, since no ordinary appeal lies against decisions of this appeal court and since there are questions of interpretation that go beyond the sphere of a single State and involve provisions of EU law, it is appropriate to request a preliminary ruling, so that the Court of Justice of the European Union can rule on whether an action for damages arising from a prospectus is available only to [OR. 9] retail investors and not qualified investors, including where an offer was addressed to both types of investor and a prospectus was published, and, where applicable, on whether it is possible to assess the extent to which the qualified investors were aware of the economic situation of the issuer of the OPS otherwise than through the prospectus, on the basis of their legal and commercial relations with that issuer (for example, being shareholders of the issuer or members of its management bodies, etc.).

Since the answer to that request is decisive in determining the question at issue in the proceedings,

Having regard for the foregoing,

OPERATIVE PART

THE COURT HEREBY:

Under Article 267 TFEU, requests a preliminary ruling from the Court of Justice of the European Union on the interpretation of Article 3(2) and Article 6 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC:

‘1. When an offer of shares to the public for subscription is directed at both retail and qualified investors, and a prospectus is issued for the retail investors, is an action for damages arising from the prospectus available to both kinds of investor or only to retail investors?

2. In the event that the answer to the first question is that it is also available to qualified investors, is it possible to assess the extent to which they were aware of the economic situation of the issuer of the OPS otherwise than through the prospectus, on the basis of their legal and commercial relations with that issuer (for example, being shareholders of the issuer or members of its management bodies, etc.)?

... [OR. 10] ... [References to service of the decision, decision not subject to appeal and signatures] [OR. 11]