

Case C-627/23**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

13 October 2023

Referring court:

Cour de cassation (Belgium)

Date of the decision to refer:

29 September 2023

Appellants on a point of law:

Commune de Schaerbeek

Commune de Linkebeek

Defendant on a point of law:

Holding Communal SA

1. Subject matter and circumstances of the dispute:

- 1 The shareholders of the public limited company Holding communal (formerly Crédit communal de Belgique; ‘Holding communal’) are the provinces and municipalities financed by it. That company has a substantial holding in the public limited companies Dexia and Dexia Bank (now Belfius Bank).
- 2 In order to deal with the 2008 banking crisis, it participated in an increase of capital in Dexia of EUR 500 million. In order to be able to meet that commitment, the board of directors of Holding communal decided to appeal to the shareholders, proposing capital increases, in particular by contributions in cash, which were approved at the general meeting of shareholders on 30 September 2009.
- 3 All the shareholders agreed to subscribe to the increases in capital.
- 4 On 7 December 2011, the extraordinary general meeting of Holding communal decided that the company should be dissolved and liquidated. Since no liquidating

dividends could be distributed, the shareholders lost the whole of their subscriptions.

- 5 The municipalities of Schaerbeek and Linkebeek applied for the annulment of their subscriptions to the capital increases on the ground that a prospectus was not published before the shareholders were invited to subscribe to those increases.
- 6 By judgment of 12 April 2022, the cour d'appel de Bruxelles (Court of Appeal, Brussels) upheld the judgment dismissing their action. Like the court of first instance, the Court of Appeal held that, since they were not negotiable, the securities issued when the capital was increased were not transferable securities and that, therefore, the law requiring the publication of a 'prospectus' was not applicable.
- 7 Upon appeal, the Cour de cassation (Court of Cassation) is examining the concept of transferable security contained in the directive transposed by the Belgian law.

2. Provisions in question:

A. *EU law*

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

- 8 Article 1, entitled 'Purpose and scope', provides:

'1. The purpose of this Directive is to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State'.

- 9 Article 2, entitled 'Definitions, provides:

'1. For the purposes of this Directive, the following definitions shall apply:

(a) "securities" means transferable securities as defined by Article 1(4) of Directive 93/22/EEC with the exception of money market instruments as defined by Article 1(5) of Directive 93/22/EEC, having a maturity of less than 12 months. For these instruments national legislation may be applicable ...'

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

10 Article 4, entitled 'Definitions', provides:

'1. For the purposes of this Directive, the following definitions shall apply:

...

18) "Transferable securities" means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

...'

11 Article 69 provides:

'Repeal of Directive 93/22/EEC

Directive 93/22/EEC shall be repealed with effect from 1 November 2007. References to Directive 93/22/EEC shall be construed as references to this Directive. References to terms defined in, or Articles of, Directive 93/22/EEC shall be construed as references to the equivalent term defined in, or Article of, this Directive'.

B. Belgian law

12 The loi du 16 juin 2006, relative aux offres publiques d'instruments de placement et aux admissions d'instruments de placement à la négociation sur des marchés réglementés (Law of 16 June 2006 on offers of investment instruments to the public and admissions of investment instruments to trading on regulated markets, 'the Law of 16 June 2006') transposed into Belgian law Directive 2003/71.

3. Positions of the parties:

A. The municipalities of Schaerbeek and Lindebeek

13 The loi du 16 juin 2006, also known as the 'Prospectus Law', provides that all offers of investment instruments to the public made on Belgian territory and all admissions of investment instruments to trading on a Belgian regulated market require the prior publication of a prospectus by the issuer, the offeror or the person asking for admission to trading on a regulated market, as the case may be.

- 14 In the absence of the prior publication of a prospectus, the subscriptions to the capital increases at issue are vitiated by absolute nullity.
- 15 The court of first instance wrongly held that the ‘Prospectus Law’ was not applicable in this case on the ground that the increases in capital did not give rise to the issue of ‘transferable securities’ within the meaning of the ‘Prospectus Law’, since the shares issued were not negotiable on the capital market because they could be held only by municipal and provincial entities and their transfer was subject to approval by the board of directors.
- 16 It follows from the wording of the law that the securities offered to persons which must give rise to the prior publication of a prospectus cover without restriction, ‘shares in companies’. The persons notified of the offer are not defined in the law. It is not stated in the law that those persons cannot be municipal in nature, or that they cannot already be shareholders. The application of those legal provisions does not require the transfer of those shares to be free of any condition.
- 17 Accordingly, whether their transfer is subject to restrictions, such as the need for approval by the board of directors, or whether the ‘persons’ concerned belong to a specific category, such as municipal and provincial entities, is of no consequence for the application of the Law of 16 June 2006.
- 18 The existence of such characteristics does not remove the possibility of the company shares being traded on capital markets or, therefore, permit their exclusion, on that basis alone, from the scope of the Law of 16 June 2006.
- 19 Moreover, the court of first instance was wrong to state that ‘if the legislature had intended to include all shares, including non-negotiable shares, in the investment instruments, it would not have provided in Article 5 of the Law of 16 June 2006 [derived from point 18 of Article 4(1) of Directive 2004/39] that only negotiable shares are transferable securities and therefore investment instruments within the meaning of the Law [of 16 June 2006]’.
- 20 Company shares, irrespective of the conditions and any procedures that must be complied with when they are transferred, are still negotiable on the capital market, even if such negotiation must entail a transaction concluded with municipal and provincial entities and even if it is subject to approval by the board of directors.

B. *Holding communal*

- 21 Holding communal challenges the application of the Law of 16 June 2006 and supports the assessments of the court of first instance.

4. Assessment of the Court of Cassation:

- 22 Pursuant to the Law of 16 June 2006, transferable securities are to be understood as meaning all classes of investment instruments which are negotiable on the capital market, such as, inter alia, company shares.
- 23 The contested judgment of the court of appeal states that ‘the court of first instance decided that the Law [of 16 June 2006] was not applicable to the present dispute on the ground that the capital increases at issue did not give rise to the issue of ‘transferable securities’ within the meaning of the law, since the shares issued ‘were not negotiable on the capital market’, and confirms that those shares ‘were not transferable shares within the meaning of the Law [of 16 June 2006]’, since such shares ‘could be held only by municipal and provincial entities and their transfer was subject to approval by the board of directors’.
- 24 The Law of 16 June 2006 transposes Directive 2003/71/EC into Belgian law.
- 25 Since examination of the plea requires interpretation of Article 2(1)(a) of Directive 2003/71/EC, itself referring to point 18 of Article 4(1) of Directive 2004/39/EC, it is necessary to refer to the Court of Justice of the European Union the question for a preliminary ruling set out below.

5. Question for a preliminary ruling:

- 26 The Court of Cassation stays the proceedings pending the reply by the Court of Justice of the European Union to the following question:

‘Must Article 2(1)(a) 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 2001/34/EC, itself referring to point 18 of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, be interpreted as meaning that the concept of transferable security negotiable on the capital market covers the shares of a holding company which can be held only by provinces and municipalities and whose transfer is subject to the approval of the board of directors?’