Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 19 June 2014[1]

Case C-441/12

Almer Beheer BV
and
Daedalus Holding BV
v
Van den Dungen Vastgoed BV
and
Oosterhout II BVBA

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(Company law — Directive 2003/71/EC — Obligation to publish a prospectus when securities are offered for sale to the public — Scope of application — Court-enforced sale and transfer of securities — Total consideration of the offer)

1. In accordance with the Prospectus Directive,[2] Member States may not allow any offer of securities to be made to the public within their territories without prior publication of a prospectus.

2. As stated in its preamble, the purpose of that directive is essentially twofold: to ensure efficiency on a single securities market and to protect investors.

3. The concept of an offer of securities to the public is defined broadly, but there are a number of exceptions both to the scope of application of the Prospectus Directive itself and to the scope of the obligation to publish a prospectus. Inter alia, exceptions apply when the total consideration for the offer is below a certain threshold.

4. The main proceedings concern a situation in which, stated schematically (the detailed facts are more complex), company A, which is in debt to company B, holds shares in company C. Those shares have been seized at the behest of company B and a court has ordered their sale by auction, by a judicial officer, in order to satisfy part of the debt. The amount to be raised is limited in the court order to a specified amount, plus the amount necessary to cover the costs of the procedure, seizure and sale.

5. In such circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands, 'the Hoge Raad') wishes to know, first, whether the definition of an offer of securities to the public in the Prospectus Directive is sufficiently broad to cover an enforced sale of the kind in issue and, second, how the total consideration of the offer is to be determined.

1 — Original language: English.

2 — 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 (OJ 2003 L 345, p. 64), as amended.

6. For reasons which I shall explain, I consider it preferable to examine the second question first, reaching the conclusion that (in all probability) the sale in issue in the main proceedings is in any event explicitly excluded from the scope of the Prospectus Directive by reason of its limited value, so that it is unnecessary to answer the first question. However, even if that should not be so, I consider that the circumstances of such a sale are such that it should not be regarded as requiring the publication of a prospectus pursuant to that directive.

Legislation

European Union (EU) law

7. Article 1 of the Prospectus Directive is entitled 'Purpose and scope'.

8. According to Article 1(1), the purpose 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'. The underlying aims and objectives are explained in the preamble as essentially seeking to ensure by harmonisation, on the one hand, an efficient single market for securities, on which issuers and offerors of securities may operate freely under cover of a 'single passport' (namely, the prospectus required and regulated by the directive)[3] and, on the other hand, adequate protection for investors, in particular through disclosure of all relevant information.[4]

9. Article 1(2), dealing with scope, lists 10 situations to which the Prospectus Directive does not apply. In all cases but one, those situations are defined by reference to the type of security involved. The exception, Article 1(2)(h), defines the situation by reference to the 'total consideration of the offer', calculated over a period of 12 months. Originally, the directive was not to apply when that total consideration was less than EUR 2 500 000. That threshold was increased to EUR 5 000 000 by Directive 2010/73/EU,[5] which entered into force on 31 December 2010 and was to be transposed by the Member States by 1 July 2012.

10. Article 2(1) defines a number of terms for the purposes of the Prospectus Directive. In particular:

— 'securities' means 'those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as … shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares …' (Article 2(1)(a), referring to (now) Article 4(1)(18) of Council Directive 2004/39/EC[6]);

— 'offer of securities to the public' 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 these securities. This definition shall also be applicable to the placing of securities through financial intermediaries' (Article 2(1)(d));

— 'issuer' means 'a legal entity which issues or proposes to issue securities' (Article 2(1)(h)); and

3 — See, in particular, recitals 1, 4, 10, 14, 17 and 45.

4 — See, in particular, recitals 10, 12, 16, 18 to 21, 27, 29 and 34.

5 — Article 1(1)(a)(i) of Directive 2010/73 of the European Parliament and of the Council of 24 November 2010 amending [Directive 2003/71/EC and Directive] 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (OJ 2010 L 327, p. 1).

6 — 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 (OJ 2004 L 145, p. 1); the original reference was to Article 1(5) of Directive 93/22.

— ‘person making an offer’ or ‘offeror’ means ‘a legal entity or individual which offers securities to the public’ (Article 2(1)(i)).

11. The requirement to publish a prospectus is set out at Article 3 of the Prospectus Directive, which provides:

‘1. Member States shall not allow any offer of securities to be made to the public within their territories without prior publication of a prospectus.

2. 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; and/or

(b) an offer of securities addressed to fewer than 100 natural or legal persons per Member State, other than qualified investors; and/or

(c) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 50 000 per investor, for each separate offer; and/or

(d) an offer of securities whose denomination per unit amounts to at least EUR 50 000; and/or

(e) an offer of securities with a total consideration of less than EUR 100 000, which limit shall be calculated over a period of 12 months.

However, any subsequent resale of securities which were previously the subject of one or more of the types of offer mentioned in this paragraph shall be regarded as a separate offer and the definition set out in Article 2(1)(d) shall apply for the purpose of deciding whether that resale is an offer of securities to the public. The placement of securities through financial intermediaries shall be subject to publication of a prospectus if none of the conditions (a) to (e) are met for the final placement.

3. Member States shall ensure that any admission of securities to trading on a regulated market situated or operating within their territories is subject to the publication of a prospectus.’

12. Under Article 4 of the Prospectus Directive, offers to the public of 13 more classes of securities are exempt from the obligation to publish a prospectus.

13. Article 5 of the Prospectus Directive provides:

‘1. Without prejudice to Article 8(2), [[7]] the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This information shall be presented in an easily analysable and comprehensible form.

2. The prospectus shall contain information concerning the issuer and the securities to be offered to the public or to be admitted to trading on a regulated market and also include a summary. The summary shall, in a brief manner and in non-technical language, convey the essential characteristics and risks associated with the issuer, any guarantor and the securities, in the language in which the prospectus was originally drawn up. …’

7 — Article 8(2) of the Prospectus Directive permits the competent authority of the home Member State to authorise (in certain defined circumstances) the omission from the prospectus of information that would otherwise be required.

14. Pursuant to Article 6(1) of the Prospectus Directive, '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 …'. Article 6(2) requires Member States to 'ensure that their laws, regulation[s] and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus'.

15. According to Article 9(1) of the Prospectus Directive, a prospectus is to be valid for 12 months after its publication for offers to the public, provided that it is completed by any supplements required pursuant to Article 16. [8]

16. Article 13(1) of the Prospectus Directive provides: 'No prospectus shall be published until it has been approved by the competent authority of the home Member State.' That approval must be notified to the issuer or offeror within either 10 or 20 days of the submission of the draft prospectus or the full provision of the necessary documents or supplementary information, whichever is the later (Article 13(2), (3) and (4)).

17. Article 25(1) of the Prospectus Directive provides that, without prejudice to their right to impose criminal sanctions and without prejudice to their civil liability regime, Member States are to ensure that 'the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible, where the provisions adopted in the implementation of this Directive have not been complied with'.

18. Commission Regulation (EC) No 809/2004 [9] ('the Implementing Regulation') contains more detailed rules.

19. The second subparagraph of Article 22(1) of the Implementing Regulation requires a base prospectus to contain the information listed in various annexes to that regulation, depending on the type of issuer and securities involved. That information includes a complete overview of the issuer's situation including, inter alia, its legal form, investments, principal activities, principal markets, organisational structure, financial condition, capital resources, profit forecasts and management (see Annex I to the Implementing Regulation).

Netherlands law

20. The Prospectus Directive was transposed into Netherlands law by the Wet op het financieel toezicht (Law on financial supervision, 'the Wft'), Article 5(2) of which prohibits any offer of securities to be made to the public in the Netherlands unless a prospectus approved by the supervisory authority of a Member State is generally available.

21. Pursuant to Article 53(2) of the Vrijstellingsregeling Wft (Wft Exemption Rules) there is no obligation to publish a prospectus where the total consideration of the offer, calculated over a period of 12 months, is less than EUR 2 500 000. That threshold, which was laid down when the Prospectus Directive was first implemented, has not been increased to EUR 5 000 000 since the entry into force of Directive 2010/73.

8 — Article 16 requires the mention in a supplement to the prospectus of every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public.

9 — Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (OJ 2004 L 149, p. 1). It was adopted on the basis of, in particular, Articles 5(5), 7, 10(4), 11(3), 14(8) and 15(7) of the Prospectus Directive.

Facts, procedure, questions and submissions

22. Van den Dungen Vastgoed BV and Oosterhout II BVBA ('Van den Dungen and Oosterhout') entered into an agreement with Almer Beheer BV and Daedalus Holding BV ('Almer and Daedalus') under which, in particular: the company Global Hail Group BV ('Global Hail') was to be set up; all its shares would be held by Stichting Administratiekantoor Global Hail ('STAK'), whose directors would all be representatives of the parties to the agreement; and Van den Dungen and Oosterhout would transfer certain shares in other companies to Global Hail, against a price to be paid by Almer and Daedalus.

23. Various disputes and legal proceedings arose between the parties. On 30 October 2009, Van den Dungen and Oosterhout obtained an order from the Rechtbank Breda (District Court, Breda) for Almer and Daedalus to pay EUR 500 000 by way of advance on the price of the shares transferred to Global Hail. In order to guarantee the payment, Van den Dungen and Oosterhout effected a compulsory attachment of share certificates issued by STAK to Almer and Daedalus.

24. On 27 December 2010, the Rechtbank Breda ordered the sale and transfer of those share certificates within six months by a judicial officer (*deurwaarder*) to be designated by Van den Dungen and Oosterhout. According to that order, the sale was to be a public sale, advertised in two national newspapers; the shares were to be transferred to the highest bidder; all the shares were to be offered but only as many as would raise EUR 500 000, plus the costs of the procedure, seizure and execution were to be sold; the obligation to publish a prospectus did not apply.

25. Almer and Daedalus appealed to the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) which, on 5 April 2011, confirmed the decision of the Rechtbank Breda. In particular, it considered that there was no obligation to publish a prospectus because the value of the shares to be sold was not likely to be greater than EUR 2 500 000.

26. Almer and Daedalus appealed to the Hoge Raad, which, considering that the outcome of the appeal turns on the interpretation of Articles 1(2)(h) and 3(1) of the Prospectus Directive, has requested a preliminary ruling on the following questions:

'1. Must Article 3(1) of the Prospectus Directive be interpreted as meaning that the obligation to publish a prospectus laid down therein is also applicable in principle (that is to say, apart from the exemptions and exceptions for certain cases referred to in that directive) to an enforced sale of securities?

2. (a) If the answer to Question 1 is yes, should the concept of "the total consideration of the offer" used in Article 1(2)(h) of the Prospectus Directive then be interpreted as meaning that the sums deriving from an enforced sale of securities must be those reasonably to be expected, with due regard for the particular nature of an enforced sale, even if the sums reasonably to be expected are well below the real economic value?

(b) If the answer to Question 1 is yes, but the answer to Question 2(a) is no, how should "the total consideration of the offer" referred to in Article 1(2)(h) of the Prospectus Directive be construed, particularly in the case of an enforced sale of securities?'

27. Written observations have been submitted by the Czech, German, Netherlands, Polish and Portuguese Governments and by the European Commission. At the hearing, the German and Portuguese Governments and the Commission made oral submissions. None of the parties to the main proceedings has submitted any observations on the questions raised.

28. In their observations, the Netherlands Government addresses only Question 2, and the Commission considers that an answer to Question 1 is unnecessary if Question 2 is answered first; both appear to take the view that, in the case in the main proceedings, the total consideration of the offer falls below the threshold for the application of the Prospectus Directive.

29. By contrast, the German, Polish and Portuguese Governments address only Question 1, while the Czech Government examines primarily that question, addressing Question 2 only summarily.

30. With regard to Question 1, the Czech Government and the Commission consider that an enforced sale of shares of the kind in issue falls within the concept of an offer of securities to the public for the purposes of the Prospectus Directive, while the German and Polish Governments take the opposite view; the Portuguese Government considers that, in the context of such a sale, the creditor's right to an effective remedy within a reasonable time precludes the imposition of any obligation to publish a prospectus, which would entail unacceptable delay.

Assessment

31. It has not been suggested that the shares in issue in the main proceedings are anything other than securities within the meaning of the Prospectus Directive,[10] nor does there appear to be the slightest reason to entertain any doubt in that regard.

32. What is in doubt is whether the particular manner in which those shares are to be sold is an offer requiring publication of a prospectus pursuant to the same directive.

33. However, regardless of whether such a sale is or is not such an offer, the Prospectus Directive cannot apply to it if the total consideration is lower than the threshold laid down in Article 1(2)(h) thereof.

34. It therefore seems to me preferable to examine first whether the sale is covered by that clear and explicit exclusion from the scope of the directive before considering whether it falls within the concept of an offer of securities to the public requiring the publication of a prospectus, which is broadly, though not precisely, defined and is subject to a considerable number of exceptions.

35. I shall therefore address the questions raised by the Hoge Raad in that order, beginning with Question 2.

Question 2

36. The Hoge Raad's second question asks, essentially, how the 'total consideration of the offer' should be determined when assessing whether, in the light of the threshold laid down in Article 1(2)(h) thereof, the Prospectus Directive applies to a particular sale of shares. Before addressing that issue, however, I consider it useful to examine the level of the applicable threshold itself, with particular regard to the circumstances of the sale in issue in the main proceedings.

37. When, on 27 December 2010, the Rechtbank Breda made the order which is in dispute in those proceedings, the threshold was set at EUR 2 500 000 both in the Prospectus Directive and in the Netherlands legislation. Four days later, Directive 2010/73 came into force, raising the threshold to EUR 5 000 000 in the Prospectus Directive, a change which was to be brought into force by the Member States by 1 July 2012.[11] However, it appears that, although most of the amendments

10 — See point 10 above, first indent.

11 — See point 9 and footnote 5 above.

introduced by Directive 2010/73 have been transposed into Netherlands law,[12] the raising of that threshold has not. There is therefore a discrepancy between the Prospectus Directive and the Netherlands legislation, which may still be present when the sale in issue in the main proceedings finally takes place.

38. The Netherlands Government and the Commission have both mentioned the discrepancy, but neither has drawn any consequences from it. Although not entirely clear from its written observations, the Commission's view appears to be that a Member State is entitled to apply requirements of national law equivalent to those of the Prospectus Directive where an offer falls below the current threshold of EUR 5 000 000 in Article 1(2)(h) but not to require publication of a prospectus where the offer falls below the threshold of EUR 100 000 in Article 3(2)(e).

39. If that is indeed the Commission's view, it seems to me to be mistaken. The Prospectus Directive is a harmonising measure, one of whose fundamental aims is to provide a 'single passport' enabling issuers to raise capital in all the Member States. That aim would be set at naught if the threshold for the application of the requirements of the Prospectus Directive — of which the most central, on which all the others are based, is the obligation to publish a prospectus — differed between Member States.

40. As regards the threshold of EUR 100 000 in Article 3(2)(e) of the Prospectus Directive, I confess to being puzzled by its presence. Where the 'total consideration in the Union [is] less than EUR 100 000 … calculated over a period of 12 months', it is unnecessary to specify that 'the obligation to publish a prospectus shall not apply' because such situations are already excluded from the application of the directive as a whole by the much higher threshold in Article 1(2)(h). Moreover, it seems anomalous for a provision in a directive to legislate with regard to a category of transaction which has earlier been explicitly excluded from its scope.

41. If the intention of the legislature had been to require Member States to impose an obligation to publish a prospectus where the total consideration exceeded EUR 2 500 000 (or, subsequently, EUR 5 000 000), to preclude them from imposing that obligation where the consideration was under EUR 100 000 and to allow them the option of imposing it or not where the consideration lay between those two amounts, it seems to me that the intention would have had to be made considerably clearer. As the matter stands, I can find nothing in the language of the preamble or of the enacting terms from which such an intention could be inferred.

42. Consequently, I consider that an issuer or offeror would be entitled to rely on the Prospectus Directive as amended if the Netherlands authorities were to require publication of a prospectus where the total consideration for an offer on or after 1 July 2012 was between EUR 2 500 000 and EUR 5 000 000, and that national courts would be obliged to disapply any domestic rule requiring such publication.

43. Turning to the method of determination of the total consideration for that purpose, I can understand the difficulty which might arise in many circumstances. Any sale by auction is uncertain and, although shares may have an objective (and at least approximately ascertainable) economic value, there can be no guarantee whatever that they will be sold at that price.

12 — Wet van 10 mei 2012 tot wijziging van de Wet op het financieel toezicht en de Wet toezicht financiële verslaggeving in verband met de herziene richtlijn prospectus (Law of 10 May 2012 amending the Law on financial supervision and the Law on the supervision of financial information in connection with the amended Prospectus Directive).

44. In the circumstances of the main proceedings, however, that difficulty does not appear to arise. The Rechtbank Breda was careful to specify that only as many shares as were necessary to cover the required payment of EUR 500 000, together with all the procedural costs, should be sold. The procedural costs being, in principle, ascertainable with a reasonable degree of accuracy, the total amount to be raised by the sale should be known within narrow limits before the bidding takes place. That amount must, in my view, be taken as the 'total consideration' for the purposes of applying the threshold in Article 1(2)(h) of the Prospectus Directive.

45. It would therefore be only if that total consideration were to exceed EUR 5 000 000 that the Prospectus Directive, with its obligation to publish a prospectus, could possibly apply.

46. It seems highly improbable that the procedural costs on a seizure and sale by auction of shares intended to raise the principal sum of EUR 500 000 should amount to anything approaching EUR 4 500 000. If that were so, it would be a matter of the very gravest concern for the administration of justice in the Netherlands.

47. On that basis, the sale in issue in the main proceedings would appear to be expressly excluded from the scope of application of the Prospectus Directive, with the result that no obligation to publish a prospectus can be imposed. It should therefore be entirely unnecessary for the competent national court to consider the — in that case purely hypothetical — question whether a comparable sale for a greater sum would require the publication of a prospectus.

48. However, it must not be forgotten that the threshold value in Article 1(2)(h) of the Prospectus Directive is to be calculated over a period of 12 months. Since the amount concerned by the contested order of the Rechtbank Breda is stated to represent only an advance on the payment of the debt owed by Almer and Daedalus to Van den Dungen and Oosterhout, and since the Hoge Raad has not indicated the total amount of that debt in its request for a preliminary ruling, there remains a possibility that further sales may be ordered, perhaps bringing the total consideration over a period of 12 months above the threshold of EUR 5 000 000. In such circumstances, the question referred to in the previous paragraph — the Hoge Raad's first question — would no longer be hypothetical.

49. I turn therefore to the question whether an enforced sale of shares, of the kind in issue in the main proceedings, is to be regarded as an offer of securities to the public in respect of which Article 3(1) of the Prospectus Directive imposes the obligation to publish a prospectus.

Question 1

50. First, it seems clear that a public sale by auction advertised in two national newspapers must be covered by the definition of an 'offer of securities to the public' as 'a communication to persons in any form and by any means' in Article 2(1)(d) of the Prospectus Directive.

51. Here, I would point out that the remainder of the definition in that provision ('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 these securities') seems circular at best. If the offer were already to provide such 'sufficient information', the additional publication of a prospectus — which is designed to provide that information [13] — would not appear necessary; and one can hardly imagine that an offer could escape the obligation to publish a prospectus on the ground that it did not contain sufficient information to enable an investor to decide. I shall therefore treat that part of the definition as meaning that the offer must identify the securities in question and provide such information as to enable an investor to acquire them if he decides to do so, but not that it must contain all the necessary information to enable him to take an informed decision.

13 — See point 13 above.

52. Viewed in that light, advertisement of the sale by auction in two national newspapers, as ordered by the Rechtbank Breda, must meet the second part of the definition also. On a literal reading, however, since the advertisement is unlikely to contain all the information which would enable an investor to take an informed decision, it might well fall outside that part of the definition, and thus outside the definition in its entirety.

53. I shall none the less assume, on the basis of my reading of Article 2(1)(d) of the Prospectus Directive, that the sale in question is covered by the broad definition in that provision. It should therefore, in principle, be subject to the obligation to publish a prospectus laid down in Article 3(1).[14]

54. However, both the definition and the obligation are set about by numerous exceptions (in the context of the present proceedings, no great purpose can be served by distinguishing between exclusion from the scope of the Prospectus Directive as a whole and exclusion from the obligation to publish a prospectus, which is the central provision of the directive and that on which most of the others are conditional, since what is at issue is the applicability of that obligation).

55. As I have said, the exclusion from the scope of the directive in Article 1(2)(h) appears likely to apply to the sale in issue. The remaining nine exclusions in Article 1(2) concern particular types of security, and there is no indication that the shares to be sold in the main proceedings fall within any of those categories.

56. Article 3(2) lists five exceptions from the obligation to publish a prospectus. Article 3(2)(e), which I have discussed above, seems unlikely in any event to apply to the sale in issue, the consideration for which is expected to exceed the threshold of EUR 100 000. The remaining four (offers addressed solely to qualified — that is to say, essentially, professional — investors, those addressed to fewer than 150 persons per Member State, and those where the value of each unit or each purchase exceeds EUR 100 000) have not been suggested as relevant in the main proceedings.

57. Article 4(1) and (2) then lists a further 13 types of offer, which may be very broadly categorised as offers of securities in substitution or exchange for, or in addition to, securities which have already been issued or traded. Again, those offers are excluded from the obligation to publish a prospectus and, again, it would seem that the offer in issue in the main proceedings does not fall within any of the categories listed.

58. On the face of it, then, it would appear that, if an enforced sale of securities of the kind in issue in the main proceedings does not by its nature (as opposed to its value) fall within any of the explicitly excluded categories, it must fall within the broad residuary category of 'a communication to persons in any form and by any means' which provides potential investors with sufficient information to enable them to identify the securities offered and to acquire them if they decide to do so.

59. However, it seems to me clear from the stated aims and objectives of the Prospectus Directive, from its wording, structure and scheme as a whole and in particular from the terms of the long list of explicit exceptions from its scope or from the obligation to publish a prospectus, that the intention was to cover all types of situation in which securities are *normally* issued or traded, in particular — if not exclusively — on regulated markets.

14 — I would add, for the sake of good order, that, although the Prospectus Directive may seem designed primarily to apply to initial sales of securities, in particular on a regulated market, it is clear from the second subparagraph of Article 3(2) that it applies also to subsequent resales in certain circumstances (see point 11 above).

60. It also seems likely — and this appeared to be delicately acquiesced in by the Commission at the hearing when it agreed that it was regrettable that the Prospectus Directive made no mention anywhere of enforced sales of securities — that the legislature simply did not consider it necessary to deal with enforced sales. I have found no mention of such sales anywhere in the drafting history of the directive, and no such mention has been brought to the Court's notice. That might suggest that such sales were tacitly assumed not to fall within the scope of the Prospectus Directive, if their very specific features were not thought worthy of any explicit mention.

61. It is furthermore clear that enforced sales of securities such as that in issue in the main proceedings are very far indeed from any normal situation of issuing or trading in securities, whether on a regulated market or in some other circumstances. They have nothing whatever to do with the issuing of securities and bear only the faintest of resemblances to trading in securities. The securities are not sold by the issuer or holder but have been confiscated and are being sold at the behest of a third party and by order of the judicial authority of the State, solely in order to satisfy a debt. In short, such sales do not belong to the sphere which the Prospectus Directive was intended to regulate but to the sphere of civil justice and debt enforcement — and there is no indication whatever that the directive was intended to affect that sphere in any way.

62. In an enforced sale, it matters little to the creditor what is sold in order to satisfy his debt — it may be securities, or stock in trade, plant and machinery, land and buildings, vehicles or any other asset. However, in some cases, only securities may be available. Where that is so, I do not think that the Prospectus Directive can be interpreted as having intended to place an obligation — and possibly a quite onerous obligation — on the creditor (or on the judicial official effecting the sale) that would not have been present if other assets had been available.

63. In other words, it is no part of the express or implied legislative intention of the Prospectus Directive that there should be any repercussions on Member States' various means of enforcing debts through the civil courts when that can be done only through an enforced sale of securities.

64. It should be remembered, moreover, that — possibly here more than in any other circumstances — a potential bidder in an enforced sale of assets, be they material or immaterial and of whatever nature, must have in the forefront of his mind the maxim 'caveat emptor'. In such sales, the buyer must always assume the risk that his purchase may turn out not to be quite what it seems on the surface. He cannot, and does not, expect the same kind of full information and warranty as that to which he would be entitled if buying goods from a manufacturer or securities from an issuer or offeror in the normal course of trading. That is, indeed, the very reason which prompted the Hoge Raad to wonder about the method of determining the total consideration of an offer, when the natural caution of bidders may well mean that the price obtained is significantly less than the true value of the securities.

65. To those considerations may be added, though perhaps of secondary importance, a number of points raised at various stages of the procedure before the Court, relating to the practical difficulties of publishing a prospectus in the case of an enforced sale of securities.

66. It is of course possible that, when securities are sold in that way, a valid prospectus will be available.[15] If that had been the case in the main proceedings, it may be presumed that the present request for a preliminary ruling would not have been made.

15 — See point 15 above.

67. It may also be the case (and may be the case in the main proceedings) that the holder of the securities has access to sufficient information to be able to produce a prospectus or assist in its production. Yet, even in such an event, obtaining, organising and formulating the necessary information [16] is an onerous task likely to encumber and delay the debt enforcement process. [17]

68. However, it is perhaps more likely that no currently valid prospectus will be available and/or that the securities to be sold will have been issued by an entity with which the holder has no other dealings and which has no interest in publishing a prospectus for the sole purposes of an enforced sale with which it has no connection. The issuer might not even be based in Europe; it is quite conceivable that an enforced sale will involve securities issued by a company present only in Africa, Asia, Australia or the Americas, on which no responsibility can be imposed by the law of the European Union or of the Member State in which the enforced sale is ordered. On whom, then, should responsibility attach pursuant to Article 6(1) of the Prospectus Directive? [18] The only possibility is the offeror — who must presumably be taken to be the judicial officer effecting the sale, since the securities are likely to have been already seized from the debtor.

69. Consequently, obtaining the detailed information necessary to draw up a prospectus could prove an almost insurmountable problem, and would in that case significantly impede the proper exercise of civil remedies under national law.

70. I find myself thereby confirmed in my view that enforced sales of securities, of the kind in issue in the main proceedings, do not fall within the scope of the Prospectus Directive.

Conclusion

71. For all the above reasons, I am of the opinion that the Court should rule to the following effect in answer to the questions raised by the Hoge Raad der Nederlanden:

(1) 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 does not apply to a situation in which securities are to be sold by auction in order to raise a sum which is known in advance to be below the threshold of EUR 5 000 000 laid down in Article 1(2)(h) of that directive, as amended.

(2) Directive 2003/71 does not apply to an enforced sale of securities which have been ordered by a court to be seized from their holder and sold in order to satisfy a debt.

16 — See points 13 and 19 above.

17 — See also point 16 above.

18 — See points 14 and 17 above.