



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

17 September 2014*

(Reference for a preliminary ruling — Company law — Directive 2003/71/EC — Article 3(1) — Obligation to publish a prospectus when securities are offered for sale to the public — Enforced sale of securities)

In Case C-441/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 28 September 2012, received at the Court on 3 October 2012, in the proceedings

Almer Beheer BV,

Daedalus Holding BV

v

Van den Dungen Vastgoed BV,

Oosterhout II BVBA,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça (Rapporteur), G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 September 2013,

after considering the observations submitted on behalf of:

- the Netherlands Government, by M. de Ree and C. Wissels, acting as Agents,
- the Czech Government, by M. Smolek, acting as Agent,
- the German Government, by T. Henze, J. Möller and J. Kemper, acting as Agents,
- the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

* Language of the case: Dutch.

— the Portuguese Government, by L. Inez Fernandes, D. Tavares and A. Cunha, acting as Agents,
— the European Commission, by A. Nijenhuis and R. Vasileva, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 19 June 2014,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(h) and Article 3(1) 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 (OJ 2003 L 345, p. 64), as amended by Directive 2008/11/EC of the European Parliament and of the Council of 11 March 2008 (OJ 2008 L 76, p. 37) ('the Prospectus Directive').
- 2 The request has been made in proceedings between Almer Beheer BV and Daedalus Holding BV ('Almer and Daedalus'), on one hand, and Van den Dungen Vastgoed BV and Oosterhout II BVBA ('Van den Dungen and Oosterhout'), on the other, concerning Almer and Daedalus' action claiming that the enforced sale of securities held by them should be subject to the obligation to publish a prospectus.

Legal context

EU law

- 3 Recitals 10, 18 and 19 in the preamble to the Prospectus Directive are worded as follows:

'(10) The aim of this Directive and its implementing measures is to ensure investor protection and market efficiency, in accordance with high regulatory standards adopted in the relevant international fora.

...

(18) The provision of full information concerning securities and issuers of those securities promotes, together with rules on the conduct of business, the protection of investors. Moreover, such information provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make this information available is to publish a prospectus.

(19) Investment in securities, like any other form of investment, involves risk. Safeguards for the protection of the interests of actual and potential investors are required in all Member States in order to enable them to make an informed assessment of such risks and thus to take investment decisions in full knowledge of the facts.'
- 4 Article 1(1) and (2) of that directive 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.

2. This Directive shall not apply to:

...

(h) securities included in an offer where the total consideration of the offer is less than EUR 2 500 000, which limit shall be calculated over a period of 12 months;

...'

5 Article 2(1)(d) of the directive provides:

'For the purpose of this Directive the following definitions shall apply:

...

(d) '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 ...;

...'

6 Article 3(1) of the directive provides:

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

7 Article 5(1) of the directive provides:

'Without prejudice to Article 8(2), 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.'

8 Under Article 13(1) of the directive:

'No prospectus shall be published until it has been approved by the competent authority of the home Member State.'

9 The Prospectus Directive was amended by Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 (OJ 2010 L 327, p. 1), which came into force on 31 December 2010. Given the date of the facts of the case before the referring court, the Prospectus Directive remains applicable *ratione temporis* to those facts.

Netherlands law

10 The Prospectus Directive was transposed into Netherlands law by the Law of 28 September 2006 on financial supervision (Wet op het financieel toezicht, 'the Wft').

11 Article 5:2 of the Wft provides:

‘Securities may not be offered to the public in the Netherlands or be admitted to trading on a regulated market situated or operating in the Netherlands unless a prospectus is generally available in respect of the offer or admission which has been approved by the Authority for the Financial Markets or by a supervisory authority of another Member State.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 12 On 16 July 2003, Almer and Daedalus entered into an agreement with Van den Dungen and Oosterhout under which Van den Dungen and Oosterhout would transfer — for a price — certain shares in other companies to Global Hail Group BV (‘the Hail Group’).
- 13 Pursuant to that agreement, the company Stichting Administratiekantoor Global Hail (‘STAK’) was set up and all the shares of the Hail Group were transferred to it.
- 14 Almer and Daedalus hold share certificates of the Hail Group issued by STAK.
- 15 Following disputes between the parties in relation to the performance of that agreement, the Gerechtshof ’s-Hertogenbosch (court of appeal, ’s-Hertogenbosch), by judgment of 30 November 2010, ordered Almer and Daedalus to pay EUR 500 000 to Van den Dungen and Oosterhout. That payment constituted an advance on the price of the shares of four companies transferred to the Hail Group.
- 16 In order to ensure that payment, on 11 December 2009 Van den Dungen and Oosterhout effected a compulsory attachment of share certificates held by Almer and Daedalus and, subsequently, requested the Rechtbank Breda (District Court, Breda) to order the sale and transfer of those share certificates and to specify within what period, in what manner and under what conditions that sale should take place.
- 17 On 27 December 2010, the Rechtbank Breda ordered the sale and transfer of those share certificates within six months by a judicial officer, to be designated by Van den Dungen and Oosterhout, in a public sale, advertised in two national newspapers. The shares were to be transferred to the highest bidder, and the judicial officer was to ensure, at the time of the sale, that only as many share certificates were sold as would raise EUR 500 000, plus the costs of the proceedings, seizure and enforcement.
- 18 The Rechtbank Breda also held that the obligation to publish a prospectus laid down in Article 5:2 of the Wft was not applicable to the sale of those share certificates, on the ground that the aim of the Wft was not to protect purchasers who deliberately assume a risk in an enforced sale with a view to making a profit but only to protect investors and savers against dishonest offers, inadequate information and incompetence.
- 19 Almer and Daedalus appealed against that decision to the Gerechtshof ’s Hertogenbosch, which, by judgment of 5 April 2011, upheld the decision of the Rechtbank Breda.
- 20 Almer and Daedalus brought an appeal in cassation against that decision before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
- 21 The referring court notes, at the outset, that the central issue is to determine whether the obligation to publish a prospectus is also applicable to the enforced sale of share certificates at issue in the proceedings before it.

- 22 In that respect, that court observes that, when the directive was being drawn up, no attention was given to the particular situation of an enforced sale of securities. Such a sale is characterised by the fact that it is not a normal market situation. The goods being disposed of are sold, not by the owner or person entitled to them, but by the enforcement creditor, often through the mediation of a bailiff. According to that court, in such a situation, the seller is not liable, as a rule, for any risks or defects in the goods sold of which he is unaware, and the buyer accepts that the goods may be encumbered with such risks and defects, which usually results in the goods yielding far less than in a normal sale. In addition, to accept the existence of an obligation to publish a prospectus in the case of an enforced sale of securities could give rise to serious practical complications as regards, inter alia, the preparation and cost of the prospectus.
- 23 In those circumstances the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘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?’

Consideration of the questions referred

The first question

- 24 By its first question, the referring court asks, in essence, whether Article 3(1) of the Prospectus Directive must be interpreted as meaning that the obligation to publish a prospectus prior to any offer of securities to the public is also applicable to an enforced sale of securities.
- 25 Under Article 3(1) of the Prospectus Directive, Member States are not to allow any offer of securities to be made to the public within their territories without prior publication of a prospectus.
- 26 An offer of securities to the public, according to Article 2(1)(d) of that directive, 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 these securities.
- 27 In the present case, it is clear from the order for reference that the enforced sale at issue in the main proceedings, under the conditions specified by the Rechtbank Breda, is a public sale by a judicial officer following the publication of an advertisement in two national newspapers, in which the bids are made in writing and the securities are sold to the highest bidder.

- 28 Given the broad definition of an ‘offer of securities to the public’ set out in Article 2(1)(d) of the Prospectus Directive, it cannot be ruled out from the outset that an enforced sale, such as that at issue in the main proceedings, might be covered by that definition.
- 29 However, it must be pointed out there is no mention of enforced sales in the ‘Prospectus Directive’, including in the provisions excluding certain situations from its scope, such as Article 1(2), and in the provisions laying down exemptions from the obligation to publish a prospectus, such as Article 3(2) and Article 4(1) and (2).
- 30 In those circumstances, it must be examined whether, in view of the objectives pursued by the Prospectus Directive, enforced sales of securities must also be subject to the rules contained in that directive.
- 31 It can be seen from recitals 10, 18 and 19 of that directive that its aim is ‘to ensure investor protection and market efficiency’, that the provision of full information concerning securities ‘provides an effective means of increasing confidence in [those] securities and thus of contributing to the proper functioning and development of securities markets’ and that ‘[s]afeguards for the protection of the interests of actual and potential investors are required in all Member States in order to enable them to make an informed assessment of [the] risks [involved in investment in securities] and thus to take investment decisions in full knowledge of the facts.’
- 32 Furthermore, Article 1(1) of the Prospectus Directive provides that its 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.
- 33 It follows that the protection of investors and the proper functioning and development of markets form the fundamental core of the objectives pursued by the Prospectus Directive. In view of those objectives, the publication of a prospectus is intended, first, to enable investors to assess the risks linked to the offer of securities to the public or the admission of those securities to trading, so as to enable them to make an informed decision, and, secondly, to ensure that the proper functioning of the markets concerned is not hindered by irregularities.
- 34 The nature of the transactions that underlie the decision to carry out a sale of securities in the context of enforcement proceedings is significantly different from the nature of those referred to in the Prospectus Directive.
- 35 As the Advocate General pointed out in paragraph 61 of her Opinion, enforced sales of securities are very far from any normal situation of trading in securities, whether on a regulated market or in some other circumstances. Those securities are not, in the context of enforced sales, 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 Member State concerned, solely in order to satisfy a debt.
- 36 Accordingly, enforced sales are not intended to participate in economic activity on the securities market, but rather are intended only to satisfy the rights of the attaching creditor.
- 37 Furthermore, the particular nature of an enforced sale — in comparison with that of a normal sale of securities, the aim of which is to raise capital in order to enable future investments by the company issuing those securities — is also reflected in the level of protection of investors.
- 38 The publication of a prospectus prior to an offer of securities to the public plays a crucial role in the protection of investors, since that document provides investors with full and precise information on the issuer, enabling them, in principle, to evaluate the risks of the transaction.

- 39 In an enforced sale, however, the potential purchasers are aware that the sole purpose of the sale is to pay a debt of the holder of the securities in question and that it is carried out in the context of legal proceedings. That implies that the person who carries out the transactions linked to the sale of those securities is not their holder.
- 40 In addition, the obligation to publish a prospectus prior to an enforced sale of securities is liable to impede the achievement of the objectives of the enforcement proceedings, including that of swiftly and effectively satisfying the debt owed to the creditor.
- 41 Fulfilling such an obligation would not only delay the enforced sale and, consequently, the payment of the creditor, it would also give rise to expenses linked to drawing up the prospectus that would have to be deducted from the proceeds of that sale, which could reduce the creditor's chances of being reimbursed.
- 42 Lastly, the obligation to publish a prospectus could lead to significant practical difficulties.
- 43 Since the person effecting the sale of securities in an enforced sale is not the holder of those securities, the obligation to publish a prospectus would give rise to the questions, first, of who is responsible for drawing up the prospectus, and secondly, of who is responsible, under Article 6(1) of the Prospectus Directive, for the information given in that prospectus.
- 44 In any event, given the nature of the information that must be contained in a prospectus — which, in accordance with Article 5(1) of the Prospectus Directive, must enable investors to make an informed assessment of the assets and liabilities, financial position and profit and losses of the issuing company — the preparation of such a document would require the collaboration of the management bodies of that company. Failure by the issuing company to collaborate constructively in an enforced sale of securities would be liable to raise difficulties in carrying out that sale.
- 45 It follows that a sale of securities in the context of enforcement proceedings does not form part of the objectives of the Prospectus Directive and, accordingly, does not fall within the scope of that directive.
- 46 That conclusion cannot be called into question by the European Commission's argument that the systematic exclusion of enforced sales of securities from the scope of the Prospectus Directive would lead to discrimination as regards voluntary sales of those securities, since the respective investors would not enjoy the same level of protection.
- 47 It must be noted that the Court has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (see, to that effect, judgment in *Glatzel*, C-356/12, EU:C:2014:350, paragraph 43).
- 48 As can be seen from paragraphs 33 to 36 of the present judgment, the objective pursued by the sale of securities in the context of enforcement proceedings is entirely different from those covered by the Prospectus Directive.
- 49 Accordingly, since the situation of investors who purchase securities in an enforced sale is not comparable to that of investors who acquire such securities in a normal offer to the public, within the meaning of Article 2(1)(d) of the Prospectus Directive, there cannot be any discriminatory treatment of one set of investors in comparison with the other.
- 50 In the light of all of the foregoing considerations, the answer to the first question referred is that Article 3(1) of the Prospectus Directive must be interpreted as meaning that the obligation to publish a prospectus prior to any offer of securities to the public is not applicable to an enforced sale of securities, such as that at issue in the main proceedings.

The second question

- 51 The second question was asked by the referring court only in the event of the first question being answered in the affirmative.
- 52 In view of the answer to the first question, there is no need to answer the second question.

Costs

- 53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 3(1) 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, as amended by Directive 2008/11/EC of the European Parliament and of the Council of 11 March 2008, must be interpreted as meaning that the obligation to publish a prospectus prior to any offer of securities to the public is not applicable to an enforced sale of securities, such as that at issue in the main proceedings.

[Signatures]