



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 15 March 2017¹

Case C-206/16

Marco Tronchetti Provera SpA and Others
v
Commissione Nazionale per le Società e la Borsa (Consob)

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Company law — Directive 2004/25/EC — Protection of the interests of minority shareholders in relation to takeover bids — Article 5(4) — Concept of ‘clearly determined’ — National rules permitting the supervisory authority to adjust the price offered in the takeover bid — Collusion between the offeror or the persons acting in concert with it and one or more sellers)

1. This request for a preliminary ruling turns on the proper interpretation of Article 5(4) of Directive 2004/25/EC.² That provision allows Member States to authorise their national supervisory authority in the field of securities (‘NSA’) to adjust the price offered in a mandatory takeover bid made in accordance with that directive. However, that directive requires such measures to be taken in a manner which has been ‘clearly determined’.

2. In the main proceedings, the Consiglio di Stato (Council of State, Italy) doubts whether the prospect of applying the Italian legislation implementing that directive, which allows the Commissione Nazionale per le Società e la Borsa (National Commission for Companies and the Stock Exchange; ‘Consob’) — the Italian NSA — to increase the price offered in a mandatory takeover bid in the event of collusion, to the circumstances of those proceedings, can be said to be ‘clearly determined’ under Article 5(4) of Directive 2004/25.

3. The particular feature of the main proceedings is that the adjustment of the price offered was the result of a transaction other than the one which triggered the mandatory takeover bid. Moreover, it is not established that all of the parties involved in that other transaction intended to collude or were aware of the risk thereof. This case will therefore allow the Court to clarify the limits to the power of Member States to authorise their NSA to derogate from the ‘highest price paid rule’ (‘the HPPR’) set out in Article 5(4) of Directive 2004/25.

4. As I shall explain below, Article 5(4) of Directive 2004/25 in principle allows Member States to authorise their NSA to adjust the price offered in a mandatory takeover bid in the event of collusion of the type mentioned in the previous point. However, that provision precludes applying such a rule to a set of circumstances which, had it not been for the application of that directive, would not otherwise have been classified in national law as an instance of collusion.

¹ Original language: English.

² Directive of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ 2004 L 142, p. 12), as amended by Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part Two (OJ 2009 L 87, p. 109).

I. Legal framework

A. Directive 2004/25

5. The takeover bid procedure brought about by Directive 2004/25 applies, in accordance with Article 1 thereof ('Scope'), to 'takeover bids for the securities of companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market'. Article 2(1)(a) of the directive ('Definitions') defines a 'takeover bid' (or 'bid') as 'a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law'.

6. Article 3 of Directive 2004/25 ('General principles') states:

'1. For the purpose of implementing this Directive, Member States shall ensure that the following principles are complied with:

- (a) all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected;
- (b) the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; ...

...

- (d) false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted;

...

2. With a view to ensuring compliance with the principles laid down in paragraph 1, Member States:

- (a) shall ensure that the minimum requirements set out in this Directive are observed;
- (b) may lay down additional conditions and provisions more stringent than those of this Directive for the regulation of bids.'

7. Article 4(2) of Directive 2004/25 ('Supervisory authority and applicable law') designates the competent NSA in respect of a takeover. In particular, subparagraph (a) states that 'the authority competent to supervise a bid shall be that of the Member State in which the offeree company has its registered office if that company's securities are admitted to trading on a regulated market in that Member State'.

8. Article 4(5) of Directive 2004/25 provides:

'The supervisory authorities shall be vested with all the powers necessary for the purpose of carrying out their duties, including that of ensuring that the parties to a bid comply with the rules made or introduced pursuant to this Directive.'

Provided that the general principles laid down in Article 3(1) are respected, Member States may provide in the rules that they make or introduce pursuant to this Directive for derogations from those rules:

- (i) by including such derogations in their national rules, in order to take account of circumstances determined at national level

and/or

- (ii) by granting their supervisory authorities, where they are competent, powers to waive such national rules, to take account of the circumstances referred to in (i) or in other specific circumstances, in which case a reasoned decision must be required.’

9. Article 5 of Directive 2004/25 (‘Protection of minority shareholders, the mandatory bid and the equitable price’) provides:

‘1. Where a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, holds securities of a company ... which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price as defined in paragraph 4.

...

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid referred to in paragraph 1 shall be regarded as the equitable price. If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him/her purchases securities at a price higher than the offer price, the offeror shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired.

Provided that the general principles laid down in Article 3(1) are respected, Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and in accordance with criteria that are clearly determined. To that end, they may draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

...’

B. Italian law

10. The decreto legislativo 24 febbraio 1998, n. 58. Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52 (Legislative Decree No 58 of 24 February 1998 consolidating all provisions in the field of financial intermediation within the meaning of Articles 8 and 21 of Law No 52 of 6 February 1996),³ as amended ('Legislative Decree No 58/1998'), contains provisions which implement Directive 2004/25. Article 106 thereof ('Total takeover bid') provides:

'3. Consob shall regulate by order cases where:

(d) the bid, subject to a reasoned Consob decision, is made at a price greater than the highest paid, provided that it is necessary to protect investors and at least one of the following circumstances are present:

...

(2) there has been collusion between the offeror or the persons acting in concert with it and one or more sellers.'

11. By Decision of 14 May 1999, Consob adopted the Regolamento di attuazione del decreto legislativo 24 febbraio 1998, n. 58, concernente la disciplina degli emittenti (Order Implementing Legislative Decree No 58 of 24 February 1998 laying down rules applicable to offerees),⁴ as amended ('the Implementing Order'). Article 47 *octies* thereof ('Increase in price in case of collusion') provides:

'1. The bid price shall be adjusted upwards by Consob, pursuant to Article 106(3)(d)(2) of [Legislative Decree No 58/1998], where the collusion established between the offeror and the persons acting in concert with it and one or more sellers gives rise to payment of an amount greater than that declared by the offeror. In that case the price of the bid shall be equal to that which is established.'

II. Facts, procedure and the question referred

12. On 17 May 2013, Marco Tronchetti Provera SpA ('MTP'), a company of which the main shareholder is Mr Marco Tronchetti Provera, set up, through companies controlled by MTP and together with others, a company named Lauro Sessantuno SpA ('Lauro 61').

13. On 5 June 2013, Lauro 61 communicated to the market a takeover bid for all the shares in Camfin SpA at a unit price of EUR 0.80 per share, set on the basis of the market prices of that share over the previous 12 months.

14. At the time of the mandatory takeover bid, Camfin held, directly and indirectly, 26.19% of the shares in Pirelli & C. SpA ('Pirelli'). Certain shareholders of Pirelli consisting, among others, of Malacalza Investimenti srl ('MCI'), MTP, Camfin, Allianz SpA and Fondiaria SAI SpA ('FonSai'), had previously concluded a so-called lock-up agreement ('the Pirelli agreement').

15. MCI, a shareholder in Camfin as well, subscribed to Lauro 61's bid, transferring to Lauro 61 12.37% of the capital in Camfin at the price stated above.

³ GURI General Series No 71 of 26 March 1998 — Ordinary Supplement No 52.

⁴ GURI General Series No 123 of 28 May 1999 — Ordinary Supplement No 100.

16. On 5 June 2013 also, the market was informed that (i) Lauro 61 had dissolved the existing agreements between MTP and MCI concerning Camfin; (ii) MCI had sold its shares in Camfin; (iii) MCI had acquired a holding amounting to 6.98% of Pirelli's capital from Allianz and FonSai at the price of EUR 7.80 per share; and (iv) the parties to the Pirelli agreement — of which the president was Mr Tronchetti Provera — had authorised Allianz and FonSai to release from that agreement all or some of the shares held by them covered by that agreement ('the Pirelli shares').

17. The takeover was concluded on 11 October 2013 after Lauro 61 had first acquired 95.95% of Camfin's capital and then exercised its right to acquire the remaining shares, thus becoming the sole owner of the capital of Camfin whose shares were therefore delisted.

18. In response to a complaint made by some of the minority shareholders of Camfin, on 12 September 2013 Consob initiated a procedure to increase the price of the takeover bid at issue.

19. On concluding that those exchanges had allowed MCI to obtain a total payment from the sale of shares in Camfin greater than EUR 0.80 per share, Consob took the view that collusion had occurred and, by Decision No 18662 of 25 September 2013 ('the contested decision'), increased by EUR 0.03 the unit price per share to EUR 0.83.⁵ The lawfulness of the contested decision was subsequently confirmed by four judgments of 19 March 2014 of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio).

20. Those four judgments are currently the subject of appeals pending before the referring court. In that connection, the referring court states that the concept of 'collusion' appears in various parts of Italian legislation. Although the precise meaning of that concept is not static, it does require a clandestine and fraudulent agreement to the detriment of third parties which eludes mandatory statutory provisions, which presupposes the existence of an element of intent on the part of all the participants to the agreement. In that regard, that court considers that Allianz and FonSai were not privy to such an agreement. Accordingly, if that interpretation of the concept of 'collusion' is applied, the appeals brought, inter alia, by MTP and Lauro 61 ought to be allowed.

21. However, the referring court goes on to state that the concept of 'collusion' might require a different interpretation on account, inter alia, of the specific nature of the area of law at issue and the nature of the regulatory powers conferred on Consob. Nevertheless, such an interpretation might raise issues of legal certainty, as it might make it impossible for economic operators to foresee how to proceed before issuing a takeover bid. Accordingly, entertaining doubts on the proper interpretation of Articles 3(1) and 5(4) of Directive 2004/25, the referring court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the proper application of the second [sub]paragraph of Article 5(4) of [Directive 2004/25], in the light of the general principles laid down in Article 3(1) thereof, and the proper application of the general principles of EU law relating to legal certainty, protection of legitimate expectations, proportionality, reasonableness, transparency and non-discrimination, prevented by a provision of national law such as Article 106(3)(d)(2) of [Legislative Decree No 58/1998], as subsequently amended, and Article 47 *octies* of [the Implementing Order], as subsequently amended, in so far as those provisions authorise Consob to increase the takeover bid as referred to in Article 106 where the condition that "there has been collusion between the offeror or the persons acting in concert with it and one or more sellers" is fulfilled, without identifying the specific actions which constitute such a situation, and thus without determining clearly the conditions and criteria under which Consob is authorised to adjust upwards the price of the takeover bid?'

⁵ That higher price was obtained by a calculation whereby the amount of EUR 6.6 million — which, according to Consob, constituted the advantage afforded to MCI in terms of the lower price paid for the Pirelli shares — was divided by the shares in Camfin acquired by Lauro 61. The new price, set thus, meant for Lauro 61 an increased overall disbursement of around EUR 8.5 million.

III. Analysis

A. Introductory remarks

22. This is the first time that the Court has been asked to interpret Article 5(4) of Directive 2004/25. It is, in fact, only the second time that the Court will give guidance on the rules contained in that piece of legislation.⁶ Moreover, following the decision of the Consiglio di Stato (Council of State) to refer this case to the Court, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio) has also decided to refer five questions on the interpretation of Article 5(4) of Directive 2004/25 for a preliminary ruling.⁷

23. Essentially, the referring court asks whether upholding an interpretation of the concept of ‘collusion’, as used in Article 106(3)(d)(2) of Legislative Decree No 58/1998 and Article 47 *octies* of the Implementing Order (taken together: ‘the Italian rules at issue’), as not requiring the specific actions which constitute such a situation to be identified, is permissible under Article 5(4) of Directive 2004/25, read in the light of Article 3(1) thereof and of certain general principles, most notably the principle of legal certainty.

24. It emerges from the order for reference that the referring court envisages two possible interpretations of the concept of ‘collusion’: on the one hand, a narrow reading, which requires a clandestine and fraudulent agreement to the detriment of third parties that eludes mandatory statutory provisions, and presupposes the existence of an element of intent on the part of all the participants to the agreement (‘the narrow reading’ or ‘the narrow sense’); and, on the other hand, a broad reading of the concept of ‘collusion’, according to which the agreement may consist of elements beyond the actual transaction triggering the mandatory takeover bid, and which does not necessarily require the existence of an element of intent on the part of all the participants to that agreement (‘the broad reading’ or ‘the broad sense’).

25. The referring court indicates that since Allianz and Fonsai did not intend to participate in any fraudulent and clandestine agreement, a narrow reading of the concept of ‘collusion’ would not permit adjusting the price as done by Consob. In the referring court’s view, the answer to the question referred will therefore be decisive for the price that Lauro 61 was obliged to offer, under Article 5 of Directive 2004/25, for the shares in Camfin when taking over that latter company.

26. At this preliminary juncture, I wish to make emphatically clear a point of central importance to the present case.

27. In brief: it is not for the Court to say how the concept of ‘collusion’ used in the Italian rules at issue ought to be interpreted. In particular, it is not for the Court to choose which one of the two interpretations it prefers. Jurisdiction to do so properly rests with the referring court.⁸ It is for the referring court to decide which reading of that concept — the narrow or the broad reading — is valid.

⁶ See judgment of 15 October 2009, *Audiolux and Others*, C-101/08, EU:C:2009:626, in particular paragraphs 47 to 51.

⁷ Cases *Amber Capital Italia and Amber Capital Uk*, C-654/16; *Hitachi Rail Italy Investments*, C-655/16; *Finmeccanica*, C-656/16; *Bluebell Partners*, C-657/16; and *Elliot International and Others*, C-658/16, all pending before the Court.

⁸ Similarly, a question by which a national court asks the Court whether it may or ought to interpret national law in a manner which best complies with EU law remains a question on the interpretation of national law which is, consequently, inadmissible: see judgment of 27 February 2014, *Pohotovost*, C-470/12, EU:C:2014:101, paragraphs 58 to 61.

28. That said, for its part, what the Court can and must do in order to assist the referring court to resolve the dispute before it is to interpret EU law, which in this case consists essentially of Article 5(4) of Directive 2004/25 and, in particular, what ‘clearly determined’ properly means. Although those latter terms are used in respect of measures taken by the Member States, Article 5(4) of that directive does not leave it to national law to define that concept. Hence, as an autonomous concept of EU law, it must be interpreted in a uniform fashion.

29. However, in order to go about interpreting Article 5(4) of Directive 2004/25 in a manner which may be of use to the referring court, it is worth calling to mind that that court has already excluded the idea that the narrow reading of the concept of ‘collusion’ can justify upholding the judgments under appeal and, by way of consequence, the contested decision. What therefore remains for the Court to consider is whether the broad reading of the concept of ‘collusion’ can be said to be ‘clearly determined’ under Article 5(4) of Directive 2004/25, and that is as such the interpretation which the Court must focus its answer on.

B. Assessment of the question referred

1. Article 5(4) of Directive 2004/25: preliminary comments

30. While Article 5(1) of Directive 2004/25 sets the conditions which trigger the duty for a natural or legal person, upon reaching the threshold specified in national law, to make a mandatory bid for the remainder of the securities in the target company, Article 5(4) governs the price to be offered when doing so.

31. The first subparagraph of Article 5(4) of Directive 2004/25 makes this price, as a general rule, painstakingly clear. It is quite simply the highest price paid by the offeror (or persons acting in concert with him) over a specified period: no less than six months, and no more than one year, as determined by the Member States (the HPPR). Moreover, that price is, according to the directive, the equitable price. The reason therefor seems self-evident, as the HPPR fixes, in straightforward terms, the price to be offered in a manner both transparent and predictable.

32. However, under the second subparagraph of Article 5(4) of Directive 2004/25, Member States may authorise their NSA to adjust the price under certain conditions. The wording of that provision refers to (i) the *circumstances* surrounding the takeover bid and (ii) the *criteria* to be employed when adjusting the price. Moreover, when doing so, Member States must observe the general principles laid down in Article 3(1), and those circumstances and criteria are to be ‘clearly determined’.

33. In my view, it seems fairly clear from the above that the second subparagraph of Article 5(4) of Directive 2004/25 governs *when, why and how* a Member State may authorise its authorities to intervene in respect of a takeover bid where the HPPR does not truly reflect the equitable price.⁹ As I shall explain below, only those circumstances which present *a clear and direct link* to the transaction triggering the mandatory takeover bid may be taken into account when doing so.

34. I shall now analyse in further detail the second subparagraph of Article 5(4) of Directive 2004/25, at issue in the main proceedings. What does it require and what, in fact, is meant by ‘clearly determined’?

⁹ See, to that effect, the *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids*, Brussels, 10 January 2002, p. 50.

2. *The paradigm: Member State discretion*

35. What is immediately apparent is that the second subparagraph of Article 5(4) of Directive 2004/25 contains a list of what I can only imagine to be non-exhaustive examples from which Member States may draw inspiration, should they wish to authorise their NSA to adjust the price.

36. Another point which seems clear is that the ‘circumstances’ referred to in Article 5(4) of Directive 2004/25 which may trigger a price adjustment lie, analytically speaking, upstream of the ‘criteria’ to be employed when performing that adjustment.

37. Other than that, the second subparagraph of Article 5(4) of Directive 2004/25 does not, in itself, say a great deal.

38. And yet one thing that does appear to be fairly certain is that the second subparagraph of Article 5(4) of Directive 2004/25 confers discretion on Member States to authorise their NSAs to adjust the price.¹⁰ The drafting history of that provision lends support to that view,¹¹ as does the context in which it appears. As stated in Article 3(2) thereof, that directive sets only minimum requirements¹² — which means that Member States may adopt additional more stringent conditions and provisions for the regulation of bids. Similarly, Article 4(5) of the directive appears to give Member States broad powers to derogate generally from the directive.

39. Indeed, it is worth calling to mind that Directive 2004/25 was very much the result of a compromise reached between the European Parliament and the Council.¹³ Upon reaching that compromise, the Commission, which since 1985 had already hinted at the idea of common procedural rules governing changes to share ownership¹⁴ and had, to that end — unsuccessfully — submitted several legislative proposals to the EU legislature on that topic,¹⁵ issued a statement to be added to the Council minutes expressing its regret that the text finally adopted was not, in its view, sufficiently ambitious, and that crucial parts had become optional.¹⁶ That legislative history obviously colours the interpretation of Directive 2004/25.

40. Even so, the discretion conferred by Article 5(4) of Directive 2004/25 on Member States is not limitless.¹⁷

10 Concurring, see Enriques, L., ‘The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation?’, *European Company and Financial Law Review*, Issue 4, 2004, p. 440, at p. 446, who states that ‘with specific regard to the equitable price, Member States and their supervisory authorities will have wide discretion in determining the circumstances and the criteria justifying a discount’.

11 Unlike the Commission Proposal for a Directive of the European Parliament and of the Council on takeover bids, COM(2002) 534 final (OJ 2003 C 45 E, p. 1), the second subparagraph of Article 5(4) of Directive 2004/25 does not say that Member States ‘shall’ but rather that they ‘may’ draw up a list of circumstances in which the highest price may be adjusted.

12 According to recital 25 of Directive 2004/25, the directive aims ‘to establish minimum guidelines for the conduct of takeover bids and ensure an adequate level of protection for holders of securities throughout the [Union]’.

13 See, inter alia, the Report of 8 December 2003 on the Proposal for a European Parliament and Council directive on takeover bids, European Parliament Committee on Legal Affairs and the Internal Market, A5-0469/2003 final, p. 18, cf. p. 6, and Council document No 16116/03 of 16 December 2003 relating to the Proposal for a Directive of the European Parliament and of the Council on takeover bids, point II (Interinstitutional File No 2002/0240 (COD)).

14 White Paper of 14 June 1985 from the Commission to the European Council: Completing the Internal Market (COM(85) 310 final), paragraph 139 et seq.

15 See Commission Proposal of 19 January 1989 for a Thirteenth Council Directive on Company Law concerning takeover and other general bids (COM(88) 823 final; OJ 1989 C 64, p. 8), and Commission Proposal of 7 February 1996 for a 13th European Parliament and Council Directive on company law concerning takeover bids (COM(95) 655 final; OJ 1996 C 162, p. 5).

16 See Statement by the Commission in Council document No 7088/04 of 12 March 2004 relating to the adoption of a Directive of the European Parliament and the Council on takeover bids, point 2 (Interinstitutional File No 2002/0240 (COD)).

17 Recital 6 of Directive 2004/25 states that ‘in order to be effective, takeover regulation should be flexible and capable of dealing with new circumstances as they arise and should accordingly provide for the possibility of exceptions and derogations. *However, in applying any rules or exceptions laid down or in granting any derogations, [NSAs] should respect certain general principles*’ (emphasis added).

3. *Limits to Member State discretion*

a) *Basic principles*

41. In the first place, the HPPR still remains the basic rule. And there is logic to that rule: an efficient functioning of the capital markets in the Union requires a sufficient degree of predictability as to the consideration to be offered in a mandatory bid. In that connection, the HPPR offers the dual benefit of allowing the minority shareholders to share in full the premium paid by the acquirer at any time in the period under consideration, while at the same time giving the offeror the certainty that he will not have to pay more in the mandatory bid than he has been willing to pay in the preceding period and, as a result, permitting him to determine himself at which maximum price he is prepared to acquire all securities of the company.¹⁸ Consequently, from a structural point of view, it ought to be interpreted broadly. Conversely, the possibility for Member States to derogate therefrom ought to be restricted to what is essential.¹⁹ Moreover, any attempt to disapply the HPPR, and the dual guarantee it offers, must be based on sound reasoning and must also be substantiated accordingly under the third subparagraph of Article 5(4) of the directive.

42. In the second place, when exercising their discretion, Member States must observe the principles laid down in Article 3(1) of the directive. Those principles are guiding principles for their implementation of that directive.²⁰

43. However, in so far as is relevant to the main proceedings, no threat to those principles arises. In particular, I detect no breach of the procedural rights or equal treatment of Camfin's shareholders: the Italian rules at issue can, in fact, justify only an *upwards* adjustment in the event of collusion.²¹

44. What is more, none of those general principles expressly refers to the aim of ensuring foreseeability for the offeror or the public at large — that, however, is instead apparent from the recitals of Directive 2004/25, which I shall revert to below at point 59.

45. Rather, Article 3(1)(d) of Directive 2004/25 refers to the general principle that false markets must not be created in the securities of the offeree company, the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities concerned becomes artificial and the normal functioning of the market is distorted. That general principle therefore clearly lends support to the view that a Member State may authorise a NSA to adjust the price offered in a takeover bid in the event of collusion in the narrow sense. That is confirmed by the wording of Article 5(4) of Directive 2004/25, which specifically envisages circumstances 'where the highest price was set by agreement between the purchaser and a seller', or 'where the market prices of the securities in question have been manipulated'.

46. Now, when it comes to the broad reading of the concept of 'collusion' mentioned by the referring court, the general principles are not quite as conclusive. Yet I cannot read them as prohibiting such a reading.

¹⁸ See the *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids*, Brussels, 10 January 2002, pp. 49 and 50.

¹⁹ For a restrictive view on the discretion of NSAs to depart from the HPPR, see Papadopoulos, T., 'The European Union Directive on Takeover Bids: Directive 2004/25/EC', *International and Comparative Law Journal*, Volume 6, Issue 3, p. 13, at pp. 30 and 31, who argues that a wide discretion to adjust the price in the takeover bid would be incompatible with the general principle stated in Article 3(1)(a) of Directive 2004/25 (a downwards adjustment of the price without adequate justification might breach the principle of equal treatment of shareholders) as well as Article 49 TFEU (an upwards adjustment of the price without adequate justification might discourage bidders).

²⁰ See judgment of 15 October 2009, *Audiolux and Others*, C-101/08, EU:C:2009:626, paragraph 51.

²¹ That said, the Court has held that the general principle of equal treatment of shareholders listed in Article 3(1)(a) of Directive 2004/25 does not require interpreting national rules in a manner which is always the most favourable towards the minority shareholders of a company: see, to that effect, judgment of 15 October 2009, *Audiolux and Others*, C-101/08, EU:C:2009:626, paragraphs 47 to 52.

47. On the contrary, the High Level Group of Company Law Experts on Issues Related to Takeover Bids referred, in its recommendations which form part of the legislative history of Article 5(4) of Directive 2004/25, to the concept of ‘collusion’ as ‘an agreement with the vendor aimed at evading the highest price paid rule’.²² That definition, which unilaterally focuses on the seller, seems wide enough to cover ‘collusion’ both in the narrow and in the broad sense. Besides, the wording of Article 5(4) of the directive does not mention, whether directly or impliedly, a requirement of awareness or intent.

48. In the third place, the discretion of Member States to authorise their NSA to adjust the price of a takeover bid is limited for more general reasons: apart from the fact that a NSA must act within its jurisdiction as defined in Article 4 of Directive 2004/25 when deciding to adjust the price of a bid, case-law shows that the directive does not apply to situations that lie outwith its scope.²³ In other words, the directive applies, *ratione materiae*, to takeover bids, that is to say the relationship between the offeror and the holders of securities in the target company. It therefore cannot presumptively apply to transactions which have nothing to do with the triggering of a mandatory takeover bid — the contrary would make as much sense as government cheese.

49. Therefore, the ‘circumstances’ referred to in the second subparagraph of Article 5(4) of Directive 2004/25 only include those legal or factual circumstances *which present a clear and direct link to a given mandatory takeover bid*. As the Italian Government also suggested at the hearing, a transaction which, on its face, is distinct from the one giving rise to the mandatory takeover bid must, in reality, be indispensable to the takeover operation (*sine qua non*) if it is to be taken into account when carrying out a price adjustment of that bid.

50. The fact that, according to Article 3(2) of Directive 2004/25, the directive only partially harmonises the rules relating to takeover bids does not alter this. A Member State cannot authorise its NSA to derogate from Article 5(4) of Directive 2004/25 by adjusting the price in the mandatory takeover bid in a manner which, although enhancing the protection of minority shareholders, would have the consequence of depriving the HPPR of its effectiveness by allowing the NSA to take into consideration transactions which fall outside that NSA’s jurisdiction and/or the scope of the directive.²⁴

b) *The meaning and effect of the terms ‘clearly determined’*

51. Now, as for the specific meaning of the terms ‘clearly determined’, both sides in the main action rely on the judgment in *Periscopus*²⁵ for their own purposes. In that judgment, the EFTA Court held it to be incompatible with the second subparagraph of Article 5(4) of Directive 2004/25 to authorise a NSA to deviate from the HPPR where it is clear that this price does not reflect the market price without providing further clarification of the concept of ‘market price’. However, that judgment does not settle the present matter. Firstly, because the issue in the main proceedings is not that the price offered was clearly lower than the market price, but rather that it was the result of collusion, which arguably constitutes a different circumstance. Secondly, because the Italian rules at issue in the present case are not as laconic as the Norwegian rules at issue in that judgment. Lastly, because that judgment does not bind this Court.

²² Report the High Level Group of Company Law Experts on Issues Related to Takeover Bids, Brussels, 10 January 2002, p. 50.

²³ See, to that effect, judgment of 15 October 2009, *Audiolux and Others*, C-101/08, EU:C:2009:626, paragraph 49.

²⁴ See, by analogy, judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraphs 36 and 37.

²⁵ Judgment of the EFTA Court of 10 December 2010, *Periscopus v Oslo Børs and Erik Must*, E-1/10, EFTA Court Report 2009-10, p. 200.

52. In my view, the terms ‘clearly determined’ require the authorisation given to NSAs to adjust the price to take the form of a set of written rules published in advance and readily accessible to the public at large (‘national corrective rules’). Whether such rules are adopted by a government department or the NSA does not matter, just as it does not matter either whether those rules come in the form of primary or secondary legislation, so long as they are binding.

53. However, I do not think it possible to extract from the expression ‘clearly determined’ a requirement that national corrective rules must describe, exhaustively and in detail, each and every specific situation in advance.²⁶ On that point, I agree with the Italian Government that, rather than listing individually and exhaustively the specific situations in which a NSA is entitled to proceed to adjust the price of a mandatory takeover bid, the EU legislature chose instead to use the more generic term ‘circumstances’. Likewise, I would tend to agree with the Commission that Article 5(4) of Directive 2004/24 does not preclude Member States from having recourse to abstract legal concepts.

54. On the basis of those considerations, I do not have difficulty in accepting that the expression ‘clearly determined’ allows a Member State to adopt national corrective rules which enable its NSA to adjust the price of a mandatory takeover bid in the event of collusion *in both the narrow and the broad sense*.

55. Be that as it may, the referring court — a national supreme court — considers that a narrow reading of the concept of ‘collusion’ is the one which generally applies in Italian law. As stated, it is not for the Court to take a position on which of the two interpretations of the Italian rules at issue is the right one. The only issue for the Court to answer is whether the expression ‘clearly determined’, as used in Article 5(4) of Directive 2004/25, changes this — or, to state more truthfully the reality of what the Court is being asked to rule on, *requires* such a broad reading.

56. I do not think so.

57. First, to do so would be tantamount to interpreting the second subparagraph of Article 5(4) of Directive 2004/25 broadly, contrary to its nature as a derogation from the HPPR.

58. Second, Member States may choose whether to exercise the discretion conferred on them by the second subparagraph of Article 5(4) of Directive 2004/25 and, should they do so, to set out the national corrective rules therefor, in accordance with the principle of procedural autonomy. In the main proceedings, a choice has been made, when setting the Italian rules at issue, to have recourse to a concept which — I gather — is not new in Italian law, namely that of ‘collusion’. In that regard, adopting the broad reading of the concept of ‘collusion’ simply because of the link to the directive, when that is not the case for matters which exclusively involve national law, seems far-fetched. The principle of equivalence merely requires claims based on EU law to be treated in the same manner as claims based on national law, not to be given preferential treatment.

59. Third, as concerns specifically the general principle of legal certainty, which the referring court mentions in the wording of its question for a preliminary ruling, one of the overarching aims of Directive 2004/25 is ‘to create Union-wide clarity and transparency in respect of legal issues to be settled in the event of takeover bids’.²⁷ Moreover, both that principle and the need, under Article 288 TFEU, to secure the full implementation of directives in law and not only in fact require

²⁶ See, to that effect, judgment of the EFTA Court of 10 December 2010, *Periscopos v Oslo Børs and Erik Must*, E-1/10, EFTA Court Report 2009-10, p. 200, paragraph 47.

²⁷ See recital 3 of Directive 2004/25.

that all Member States reproduce the rules of the directive concerned within a clear, precise and transparent framework providing for mandatory legal provisions.²⁸ That obligation must apply all the more to national corrective rules which Member States have adopted or maintained in accordance with Article 5(4) of the directive.

60. The principle of legal certainty requires, in particular, examining whether the legal measure at issue displays such ambiguity as to make it difficult for those concerned to resolve with sufficient certainty any doubts as to the scope or meaning thereof.²⁹ Conversely, even though Directive 2004/25 is undoubtedly not a legal instrument of criminal law which in itself requires the application of conventional concepts of criminal law and procedure, the mere fact that a trader cannot know in advance precisely what level or type of sanction might be imposed in each individual case for a given line of conduct does not amount to a breach of the principle that penalties must have a proper legal basis.³⁰

61. However, while the line of case-law mentioned in the previous point typically concerns the objection, by a private individual, that the law was not sufficiently clear for the legal consequences of a given behaviour to be foreseeable — which is normally no excuse (*ignorantia iuris non excusat*) — it does not resolve the matter satisfactorily where it is a national court which is uncertain as to how to interpret its own rules (*iura non novit curia*). Had the broad reading of the concept of ‘collusion’ in Italian law generally prevailed, then the circumstances for adjusting the price would be ‘clearly determined’. Yet the order for reference indicates that this is not the case.

62. That is where the expression ‘clearly determined’ under Article 5(4) of Directive 2004/25, which is but an emanation of the principle of legal certainty, reveals its true colours. National corrective rules may of course have recourse to indeterminate concepts, which may gradually evolve over time through interpretation by the courts of the Member States. However, such concepts cannot drastically change content at a whim, purely because a NSA wishes to apply them to a new set of circumstances not covered by the previous reading thereof while claiming, at the same time, to be ‘clearly determined’. Allowing such arbitrariness to occur would jeopardise the directive’s aim of ensuring clarity and transparency across the Union, not least for traders.³¹

63. Illustrative in that regard is the fact that the referring court indicates that it would have allowed MTP’s and Lauro 61’s appeals had it not been for Directive 2004/25. In fact, the referring court’s doubts as to the correct interpretation of its own rules alone suffice to show that the Italian rules at issue are not ‘clearly determined’ under Article 5(4) of the directive so as to allow a broad reading of the concept of ‘collusion’ in order to derogate from the HPPR.

64. In light of the foregoing, I consider that Article 5(4) of Directive 2004/25 precludes applying a rule of national law, which authorises a NSA to increase the price offered in a takeover bid in the event of collusion, to a set of circumstances which, had it not been for the application of that directive, would not otherwise have been classified in national law as an instance of collusion.

65. Hence, I find it unnecessary to take a stance on whether the sale of the Pirelli shares — and, in particular, the effect of the shareholder’s agreement — presents a clear and direct link to the transaction triggering Lauro 61’s obligation to issue a takeover bid. In any event, that task, which requires gathering the facts and the evidence, would, in the final analysis, fall to the referring court to carry out.

²⁸ See, by way of examples, judgments of 15 March 1990, *Commission v Netherlands*, C-339/87, EU:C:1990:119, paragraphs 6, 22 and 25, and of 14 January 2010, *Commission v Czech Republic*, C-343/08, EU:C:2010:14, paragraph 40.

²⁹ See, to that effect, judgment of 14 April 2005, *Belgium v Commission*, C-110/03, EU:C:2005:223, paragraph 31.

³⁰ See, to that effect, judgment of 18 July 2013, *Schindler Holding and Others v Commission*, C-501/11 P, EU:C:2013:522, paragraph 58 and the case-law cited.

³¹ See, to that effect, judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 217 and 218.

IV. Conclusion In the light of the foregoing considerations, I propose that the Court should answer the question referred by the Consiglio di Stato (Council of State, Italy) to the effect that, on a proper construction of Article 5(4) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, as amended by Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part Two, that provision precludes the application of a rule of national law which authorises a national supervisory authority to adjust the price offered in a takeover bid in the event of collusion which, had it not been for the application of that directive, would not otherwise have been classified in national law as an instance of collusion.