



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 26 September 2019¹

Case C-394/18

I.G.I. Srl

v

Maria Grazia Cicenía,

Mario Di Pierro,

Salvatore de Vito,

Antonio Raffaele

intervener:

Costruzioni Ing. G. Iandolo Srl

(Request for a preliminary ruling from the Corte d'appello di Napoli (Court of Appeal, Naples, Italy))

(Reference for a preliminary ruling — Companies — Divisions — *actio pauliana* — Protection of the interests of the creditors of companies participating in a division — Legal certainty of the division operation — Sixth Directive 82/891/EEC)

I. Introduction

1. In Roman law, the protection of creditors against the fraudulent manoeuvres of their debtors was first ensured, as Advocate General Ruiz-Jarabo Colomer has explained, by means of a primitive tool that gave a creditor the right to sell a debtor who had not paid his debt as a slave, then by introducing an action that allowed a creditor to revoke the acts carried out fraudulently and to his detriment by a debtor.² Such an action was then based on three defining elements:³ first of all, effective harm existing at the time when the action is brought (*eventus damni*); next, fraudulent intent on the part of the debtor to harm the creditor's rights (*consilium fraudis*); and, last, knowledge on the part of the third party of the fraud (*scientia fraudis*).

2. Nowadays, the conditions for the implementation of the *actio pauliana*, as it exists in various Member States, still borrow from Roman law. Generally, an *actio pauliana* may be brought when an act disposing of the assets by the debtor has caused injury to the creditor. It is also necessary to demonstrate the existence of fraud on the part of the debtor and of knowledge of, or even complicity in, that fraud by the third party.

¹ Original language: French.

² See Opinion of Advocate General Ruiz-Jarabo Colomer in *Seagon* (C-339/07, EU:C:2008:575, points 23 to 26).

³ See Opinion of Advocate General Bobek in *Feniks* (C-337/17, EU:C:2018:487, point 34).

3. The *actio pauliana* thus makes it possible to protect the creditors when the debtor diminishes his or her seizable assets in order to avoid paying his or her debts.⁴ The action is brought by the creditor against the third party who has acquired the asset at issue, its objective being, in the national legal orders, to return a fraudulently alienated asset to the debtor's assets.⁵ From that aspect, the *actio pauliana* is an action that enables a creditor to obtain a declaration that a disposition of an asset by a debtor with the aim of fraudulently diminishing his or her assets cannot be relied on as against the creditor.

4. The *actio pauliana* may, in that respect, play a role in company law, in order to protect a company's creditors, in particular in the case of company restructurings. Nonetheless, its use in that particular situation does not appear to be essential, since its implementation competes with the instruments dedicated to the protection of creditors provided for by EU law, and to a certain extent seems capable of calling in question the continuing existence of a restructuring operation that is already effective. That is clear from the two questions for a preliminary ruling submitted by the referring court in the present case, in the context of a division operation, which provide the Court with the opportunity to rule for the first time on Articles 12 and 19 of Sixth Directive 82/891/EEC.⁶

II. Legal framework

A. European Union law

1. Third Directive 78/855/EEC

5. Article 1 of Third Council Directive 78/855/EEC,⁷ entitled 'Scope', provides in paragraph 1:

'The coordination measures laid down by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the following types of company:

...

– Italy:

la società per azioni,

...'

6. Article 13(3) of that directive provides:

'Such protection may be different for the creditors of the acquiring company and for those of the company being acquired.'

⁴ See Opinion of Advocate General Bobek in *Feniks* (C-337/17, EU:C:2018:487, point 35).

⁵ See Hoffman, N., 'Die Actio Pauliana im deutschen Recht: Gläubigeranfechtung nach dem Anfechtungsgesetz und der Insolvenzordnung'; Rivero, F., 'La acción pauliana en Derecho español'; and Chazal, J.P., 'L'action paulienne en droit français', in Forner Delagüa, J. (ed.), *La protección del crédito en Europa: La acción pauliana*, Bosch, Barcelona, 2000; Pyziak-Szafnicka, M., and Wilejczyk, M., 'Ochrona wierzycieli w razie niewypłacalności dłużnika', in *System Prawa Prywatnego. Prawo zobowiązań — część ogólna*, vol. 6, edited by Olejniczak, A., C.H. Beck, Warsaw, 2018, pp. 1771 and 1772.

⁶ Sixth Council Directive of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ 1982 L 378, p. 47), as amended by Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 (OJ 2007 L 300, p. 47) ('the Sixth Directive'). It should be emphasised in that regard that that directive was repealed by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ 2017 L 169, p. 46), which, however, is not applicable *ratione temporis* to the dispute in the main proceedings.

⁷ Third Council Directive of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies (OJ 1978 L 295, p. 36), as amended by Directive 2007/63 ('the Third Directive').

2. *The Sixth Directive*

7. Article 1 of the Sixth Directive provides:

‘1. Where Member States permit the companies referred to in Article 1(1) of [the Third Directive] coming under their laws to carry out division operations by acquisition as defined in Article 2 of this Directive, they shall subject those operations to the provisions of Chapter I of this Directive.

2. Where Member States permit the companies referred to in paragraph 1 to carry out division operations by the formation of new companies as defined in Article 21, they shall subject those operations to the provisions of Chapter II of this Directive.

...’

8. Article 2(1) of that directive provides:

‘For the purposes of this Directive, “division by acquisition” shall mean the operation whereby, after being wound up without going into liquidation, a company transfers to more than one company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the companies receiving contributions as a result of the division (hereinafter referred to as “recipient companies”) and possibly a cash payment not exceeding 10% of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.’

9. Article 12 of that directive provides:

‘1. The laws of Member States must provide for an adequate system of protection for the interests of the creditors of the companies involved in a division whose claims antedate publication of the draft terms of division and have not yet fallen due at the time of such publication.

2. To that end, the laws of Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the company being divided and that of the company to which the obligation will be transferred in accordance with the draft terms of division make such protection necessary and where those creditors do not already have such safeguards.

3. In so far as a creditor of the company to which the obligation has been transferred in accordance with the draft terms of division has not obtained satisfaction, the recipient companies shall be jointly and severally liable for that obligation. Member States may limit that liability to the net assets allocated to each of those companies other than the one to which the obligation has been transferred. However, they need not apply this paragraph where the division operation is subject to the supervision of a judicial authority in accordance with Article 23 and a majority in number representing three-fourths in value of the creditors or any class of creditors of the company being divided have agreed to forego such joint and several liability at a meeting held pursuant to Article 23(1)(c).

4. Article 13(3) of [the Third Directive] shall apply.

5. Without prejudice to the rules governing the collective exercise of their rights, paragraphs 1 to 4 shall apply to the debenture holders of the companies involved in the division except where the division has been approved by a meeting of the debenture holders, if such a meeting is provided for under national laws, or by the debenture holders individually.

6. Member States may provide that the recipient companies shall be jointly and severally liable for the obligations of the company being divided. In such case they need not apply the foregoing paragraphs.

7. Where a Member State combines the system of creditor protection set out in paragraph 1 to 5 with the joint and several liability of the recipient companies as referred to in paragraph 6, it may limit such joint and several liability to the net assets allocated to each of those companies.’

10. In the words of Article 15 of the Sixth Directive:

‘The laws of Member States shall determine the date on which a division takes effect.’

11. Article 17(1) of that directive states:

‘A division shall have the following consequences *ipso jure* and simultaneously:

- (a) the transfer, both as between the company being divided and the recipient companies and as regards third parties, to each of the recipient companies of all the assets and liabilities of the company being divided; such transfer shall take effect with the assets and liabilities being divided in accordance with the allocation laid down in the draft terms of division or in Article 3(3);
- (b) the shareholders of the company being divided become shareholders of one or more of the recipient companies in accordance with the allocation laid down in the draft terms of division;
- (c) the company being divided ceases to exist.’

12. Article 19 of that directive provides:

‘1. The laws of Member States may lay down nullity rules for divisions in accordance with the following conditions only:

- (a) nullity must be ordered in a court judgment;
- (b) divisions which have taken effect pursuant to Article 15 may be declared void only if there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law;
- (c) nullification proceedings may not be initiated more than six months after the date on which the division becomes effective as against the person alleging nullity or if the situation has been rectified;
- (d) where it is possible to remedy a defect liable to render a division void, the competent court shall grant the companies involved a period of time within which to rectify the situation;
- (e) a judgment declaring a division void shall be published in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC; [⁸]
- (f) where the laws of a Member State permit a third party to challenge such a judgment, he may do so only within six months of publication of the judgment in the manner prescribed by [the First Directive];

8 First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41) (‘the First Directive’).

- (g) a judgment declaring a division void shall not of itself affect the validity of obligations owed by or in relation to the recipient companies which arose before the judgment was published and after the date referred to in Article 15;
- (h) each of the recipient companies shall be liable for its obligations arising after the date on which the division took effect and before the date on which the decision pronouncing the nullity of the division was published. The company being divided shall also be liable for such obligations; Member States may provide that this liability be limited to the share of net assets transferred to the recipient company on whose account such obligations arose.

2. By way of derogation from paragraph 1(a), the laws of a Member State may also provide for the nullity of a division to be ordered by an administrative authority if an appeal against such a decision lies to a court. Subparagraphs (b), (d), (e), (f), (g), and (h) shall apply by analogy to the administrative authority. Such nullification proceedings may not be initiated more than six months after the date referred to in Article 15.

3. The foregoing shall not affect the laws of the Member States on the nullity of a division pronounced following any supervision of legality.'

13. Articles 2 to 19 of the Sixth Directive are in Chapter I, entitled 'Division by acquisition'.

14. In Chapter II of that directive, entitled 'Division by the formation of new companies', Article 21(1) provides:

'For the purposes of this Directive, "division by the formation of new companies" means the operation whereby, after being wound up without going into liquidation, a company transfers to more than one newly formed company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the recipient companies, and possibly a cash payment not exceeding 10% of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.'

15. Article 22 of that directive, also in Chapter II, provides in paragraph 1:

'Articles 3, 4, 5 and 7, 8(1) and (2) and 9 to 19 of this Directive shall apply, without prejudice to Articles 11 and 12 of [the First Directive], to division by the formation of new companies. For this purpose, the expression "companies involved in a division" shall refer to the company being divided and the expression "recipient companies" shall refer to each of the new companies.'

16. Chapter IV of the Sixth Directive, entitled 'Other operations treated as divisions', contains Article 25, which provides:

'Where the laws of a Member State permit one of the operations specified in Article 1 without the company being divided ceasing to exist, Chapters I, II and III shall apply, except for Article 17(1)(c).'

B. Italian law

17. Article 2503 of the Codice Civile (Civil Code), entitled 'Objection by the creditors', provides:

'A merger may be implemented only 60 days after the last of the registrations required under Article 2502-bis, unless (i) the merger has the consent of the creditors of the companies involved in the merger who have claims existing before the registration or publication required under Article 2501-ter(3), (ii) payment is made to creditors that have not given their consent, (iii) the corresponding sums are deposited with a bank, or (iv) the report required under Article 2501-sexies,

which has been drafted, for all companies involved in the merger, by a single auditing company, in accordance with its liability under the sixth paragraph of Article 2501-sexies, has certified that the assets and liabilities and financial situation of the companies involved in the merger are such that it is not necessary to provide safeguards for the protection of the aforementioned creditors.

If none of those exceptions applies, the creditors referred to in the previous paragraph may file an objection within the period of 60 days indicated above. In such a case, the final paragraph of Article 2445 shall apply.'

18. Article 2504-quater of the Civil Code, entitled 'Invalidity of the merger', states that:

'Once the instrument of merger has been registered in accordance with the second paragraph of Article 2504, that instrument may not be ruled invalid.

This does not affect the right to compensation for prejudice that may be caused to shareholders or to third parties harmed by the merger.'

19. Article 2506 of the Civil Code, entitled 'Forms of division', provides:

'In a division, a company allocates all of its assets to more than one company, either pre-existing or newly formed, or a part of its assets, in that case possibly to only one company, and the corresponding shares or units to its shareholders.

A cash payment is authorised where it does not exceed 10% of the nominal value of the allocated shares or units. Further, it is permitted that, by unanimous consent, some shareholders do not receive shares or units of one of the recipient companies but shares or units of the company being divided.

By the division, the company being divided can be either wound up without going into liquidation or continue its activity.

Participating in a division is prohibited for companies in liquidation that have started to distribute their assets.'

20. Article 2506-ter of the Civil Code, entitled 'Applicable legislation', provides:

'The division is also subject to Articles 2501-septies, 2502, 2502-bis, 2503, 2503-bis, 2504, 2504-ter, 2504-quater, 2505 (first and second paragraphs), 2505-bis and 2505-ter. All references to a merger contained in those articles shall be understood as also referring to a division.'

21. The last paragraph of Article 2506-quater of the Civil Code, entitled 'Effects of the division', provides:

'Each company is jointly and severally liable, up to the effective value of the net assets transferred to it or remaining with it, for the debts of the company being divided that are not satisfied by the company on whose account such obligations arose.'

22. Article 2901 of the Civil Code, which appears in a section entitled ‘On the action to set aside’, provides:

‘Even where the credit is subject to conditions or deadlines, a creditor may request that transfers of assets through which a debtor causes a prejudice to its interests be declared without effect vis-à-vis that creditor, where the following conditions are met:

- (1) the debtor is aware of the prejudice that the act has caused to the interests of the creditor or, in the case of an act antedating the existence of the credit, the act was deliberately planned to prejudice the settlement of the claim;
- (2) furthermore, in relation to an act for consideration, the third party was aware of the prejudice and, in the case of an act antedating the existence of the credit, was a party to the deliberate planning of that act.

...’

23. It follows from the first paragraph of Article 2902 of the Civil Code that a creditor that has obtained a declaration of ineffectiveness in relation to the instrument disposing of the debtor’s assets causing prejudice to the creditor’s security over the assets of the debtor can bring enforcement or protective action against the purchaser third parties in respect of the assets forming the subject of the contested instrument.

24. Last, it follows from Article 2903 of the Civil Code that the *actio pauliana* is subject to a limitation period of 5 years running from completion of the act.

III. The facts giving rise to the dispute in the main proceedings, the questions for a preliminary ruling and the procedure before the Court

25. By a notarised document of 16 September 2009, Costruzioni Ing. G. Iandolo Srl, in the context of a division, transferred part of its assets to I.G.I. Srl, a company formed for that purpose.

26. Taking the view that that division had stripped Costruzioni Ing. G. Iandolo of the bulk of its assets and that it remained the owner of only certain plots of land of extremely modest value, Ms Maria Grazia Cicienia, Mr Mario Di Pierro, Mr Salvatore de Vito and Mr Antonio Raffaele brought an action before the Tribunale di Avellino (District Court, Avellino, Italy), in the context of which they stated that they were creditors of Costruzioni Ing. G. Iandolo. By way of primary action, the applicants brought an action to set aside, or an *actio pauliana*, pursuant to Article 2901 of the Civil Code, requesting that the instrument of division be declared null and void with regard to them. In the alternative, the applicants requested that Costruzioni Ing. G. Iandolo and I.G.I. be declared jointly and severally liable for the debts of Costruzioni Ing. G. Iandolo, pursuant to the third paragraph of Article 2506-quater of the Civil Code.

27. By judgment published on 11 December 2015, the Tribunale di Avellino (District Court, Avellino) allowed the applicants’ main claim and declared the act transferring the assets in the instrument of division ineffective with regard to them ‘as concerns the assets referred to in the revoked act still held by I.G.I.’.

28. I.G.I. and Costruzioni Ing. G. Iandolo lodged an appeal against that judgment before the Corte d’Appello di Napoli (Court of Appeal, Naples, Italy), claiming, in particular, that the creditors’ *actio pauliana* was inadmissible on the ground that the objection referred to in Article 2503 of the Civil Code was the only legal remedy that could be exercised by the creditors of the companies involved in

the division and that, since no objection had been lodged, the effects of the division became final with regard to the creditors. Those companies maintain, in addition, that Article 2504-quater of the Civil Code precludes a division being declared invalid after the instrument of division has been registered in the Companies Register.

29. The referring court emphasises in that regard that Articles 2503 and 2504-quater of the Civil Code transpose Articles 12 and 19 of the Sixth Directive into national law.

30. More specifically, first, in order to implement Article 12 of that directive, which requires that Member States provide for an adequate system of protection for the interests of the companies involved in a division whose claims antedate publication of the draft terms of division and have not yet fallen due at the time of such publication, the Italian legislature provided that creditors whose rights antedate the division are to be entitled to object to the division within 60 days from the last registration of the division decision in the Companies Register. From that aspect, the Italian legislature also provided that each company involved in the division is to be held jointly and severally liable, within the limits of the net assets allocated to it or which it has retained, for the debts of the company being divided which the company to which the obligation was transferred has not satisfied.

31. Second, in order to comply with Article 19 of the Sixth Directive, which lays down the nullity rules for division, the Italian legislature provided that the instrument of division cannot be rendered invalid after it has been registered on the Companies Register.

32. The referring court observes that it follows from the eleventh recital of the Sixth Directive that one of the objectives of that directive is to ensure certainty in the law as regards relations both between the companies involved in the division and between them and third parties, and also between the members. In the light of that objective, the referring court is of the view that Article 12 of that directive, in that it provides for a mechanism for the protection of the creditors' interests, may be interpreted as making it impossible to exercise a different remedy having the same objective where those creditors have not made use of the protection tool provided for in that article. In addition, the referring court also observes that the limitation of the nullity rules for divisions provided for in Article 19 of the Sixth Directive might imply that an *actio pauliana* can no longer be brought by the creditors of a company involved in the division where the division has taken effect if that action must be regarded as the result of a nullity within the meaning of that directive.

33. Nonetheless, the referring court notes the absence in Article 12 of the Sixth Directive of a provision precluding the exercise of any subsequent action designed to protect the creditors' guarantee over the debtor's assets. It also emphasises the differences between nullity proceedings and the *actio pauliana* in domestic law.

34. It was in that context that the Corte d'Appello di Napoli (Court of Appeal, Naples) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Can the creditors of the company being divided, whose credit interests antedate the division, who have not taken advantage of the remedy of lodging an objection under Article 2503 of the Civil Code (and therefore of the protection tool introduced in implementation of Article 12 of [the Sixth Directive]), use an action to set aside under Article 2901 of the Civil Code after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them and, therefore, to take precedence in enforcement over the creditors of the recipient company or companies and to be placed in a preferential position before the shareholders of those companies?
- (2) Does the notion of nullity, provided for by Article 19 of [the Sixth Directive], refer only to actions affecting the validity of the instrument of division or also to actions which, despite not affecting its validity, result in its relative lack of effect or unenforceability?

35. Written observations were lodged by I.G.I. and Costruzioni Ing. G. Iandolo, and also by the European Commission.

36. Oral observations were presented on behalf of those parties at the hearing on 5 June 2019.

IV. Analysis

A. The admissibility of the questions

1. The existence of the claims

37. I.G.I. and Costruzioni Ing. G. Iandolo maintain in their written observations⁹ that the request for a preliminary ruling is inadmissible on the ground that the questions referred are irrelevant. In their contention, the *actio pauliana* brought by the plaintiffs in the main proceedings is devoid of purpose because their claims have been extinguished.

38. To my mind, such an argument cannot succeed. It is clear from the Court's case-law that the Court is empowered only to rule on the interpretation of a provision of EU law on the basis of the facts presented by the national court.¹⁰ In other words, the Court is bound by the facts as set out by the referring court.

39. It is not apparent from the order for reference that the *actio pauliana* at issue in the main proceedings is devoid of purpose because the claims of the plaintiffs in the main proceedings have been extinguished.

40. Furthermore, in the context of the close cooperation between the national courts and the Court established in Article 267 TFEU, based on the allocation of functions between them, it is for the national court alone, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.¹¹

41. I must point out, in that regard, that the questions for a preliminary ruling on EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred to it by a national court only where it is quite obvious that the interpretation or the assessment of the validity of an EU rule sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.¹²

42. None of those circumstances holds true in the present case. The referring court stated in its order that the provisions application of which is requested by the parties to the main proceedings are the provisions that transpose the Sixth Directive into national law and clearly demonstrated the reasons why the answers to the questions referred seem relevant and necessary for the resolution of the dispute in the main proceedings.

⁹ The Commission raised the same argument in its observations at the hearing.

¹⁰ See, to that effect, judgment of 22 May 2014, *Érsekcsanádi Mezőgazdasági* (C-56/13, EU:C:2014:352, paragraph 53).

¹¹ See, in particular, judgments of 21 April 1988, *Pardini* (338/85, EU:C:1988:194, paragraph 8); of 26 October 2017, *Argenta Spaarbank* (C-39/16, EU:C:2017:813, paragraph 37); and, more recently, of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 42). Likewise, it is for the national court alone to withdraw its request for a preliminary ruling if it deems that such a ruling is no longer necessary to enable it to decide the action before it (see judgment of 17 May 2001, *TNT Traco* (C-340/99, EU:C:2001:281, paragraph 34)).

¹² See, for the most recent authorities, judgments of 16 May 2019, *Plessers* (C-509/17, EU:C:2019:424, paragraph 27); of 23 May 2019, *Fülla* (C-52/18, EU:C:2019:447, paragraph 25); and of 5 June 2019, *GT* (C-38/17, EU:C:2019:461, paragraph 23).

2. *The scope of the Sixth Directive*

43. I would observe at the outset that it is apparent from its title that the Sixth Directive relates to the division of public limited liability companies. Likewise, Article 1 of that directive, read with Article 1(1) of the Third Directive, provides that the Sixth Directive is to apply, in the case of Italy, to public limited liability companies ('società per azioni'). However, Costruzioni Ing. G. Iandolo is not a public limited liability company but a limited liability company ('società a responsabilità limitata'). It might be inferred at first sight that the Sixth Directive is not applicable to the dispute in the main proceedings and that there is thus no need to answer the questions for a preliminary ruling.

44. In addition, the Commission maintains that the Sixth Directive, pursuant to Article 21(1) read with Article 2(1), applies only in the event of the transfer of 'all the assets and liabilities' of the company being divided to the new company when the division takes place, whereas it is apparent from the order for reference that only a part of Costruzioni Ing. G. Iandolo's assets was transferred to I.G.I.

45. Likewise, as regards this time the number of recipient companies, Article 2(1) and Article 21(1) of the Sixth Directive define a division as an operation whereby a company that is being divided transfers its assets to more than one company. As the referring court makes clear, in the present case the assets of the company being divided were transferred to only one company.

46. It follows — according to the Commission — that there is no need to answer the present questions for a preliminary ruling on the interpretation of the Sixth Directive, as that directive is not applicable to the dispute in the main proceedings.

47. However, it follows from the Court's case-law that the Court has jurisdiction under Article 267 TFEU to interpret EU law where the situation in question is not governed directly by EU law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation to EU law.¹³ Where national legislation follows, for the solutions which it adopts in situations which do not fall within the scope of EU law, those provided for by EU law, there is a definite Union interest, in order to preclude the risks of future discrepancies in interpretation, in the provisions or concepts taken from EU law being given a uniform interpretation, irrespective of the conditions in which they are to be applied.¹⁴

48. It is apparent from the order for reference that Articles 2503 and 2504-quater, the final paragraph of Article 2506-ter and the final paragraph of Article 2506-quater of the Italian Civil Code transpose the Sixth Directive into national law, according to the provisions of decreto legislativo n. 22 — Attuazione delle direttive n. 78/855/CEE e n. 82/891/CEE in materia di fusioni e scissioni societarie, ai sensi dell'art. 2, comma 1, della legge 26 marzo 1990, n. 69 (Legislative Decree No 22 implementing Directives 78/855/EEC and 82/891/EEC on mergers and divisions, in accordance with Article 2(1) of Law No 69 of 26 March 1990) of 16 January 1991,¹⁵ as, moreover, the Commission observes. The Commission further emphasises that that legislative decree expressly provides that the regime of the Sixth Directive is to be extended not only to public limited liability companies but to all types of companies.

¹³ See judgment of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraph 34).

¹⁴ See, to that effect, judgments of 21 December 2011, *Cicala* (C-482/10, EU:C:2011:868); of 18 October 2012, *Nolan* (C-583/10, EU:C:2012:638, paragraph 45); and of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 53).

¹⁵ GURI No 19 of 23 January 1991.

49. In addition, the referring court states that, according to Article 2506 of the Civil Code, a division may be total where the company being divided allocates its entire assets to more than one company, or partial, where the company being divided transfers only a part of its assets to a newly formed company. Articles 2503 and 2504-quater, the final paragraph of Article 2506-ter and the final paragraph of Article 2506-quater of the Civil Code, which constitute the provisions that transpose the Sixth Directive, are therefore also applied, in Italian law, in the case of divisions whereby only a part of the assets of the company being divided is transferred to a single company.

50. Furthermore, that solution seems logical to me, since it allows the rules on divisions within a Member State to be made uniform for all types of companies and for divisions of any type.¹⁶

51. It follows, to my mind, that the Italian legislature intended to align the domestic legislation on the divisions of companies other than public limited liability companies with the rules laid down in the Sixth Directive, whether the divisions in question are total or partial, and the Court therefore has jurisdiction to answer the questions referred to it.

52. That conclusion is not called in question by the interpretation of Article 25 of the Sixth Directive proposed by the Commission in its written observations. That provision allows Member States to provide that that directive is to apply where the company being divided does not disappear following the division, but continues to exist in law. In the Commission's submission, that does not mean that the Member State may disregard the condition relating to the transfer of all the assets. The opportunity offered to Member States to widen the scope of the Sixth Directive is thus limited: a division may take place without the company being divided disappearing, provided that the company being divided transfers the whole of its assets to the recipient companies. Member States cannot apply the rules laid down in that directive to divisions that do not entail the transfer of all of the assets and liabilities of the company being divided.

53. Such reasoning fails to convince me. First, Article 25 of the Sixth Directive must in my view be interpreted literally. According to that article, where the national legislature chooses to extend the concept of division to situations in which the company being divided continues to exist, those operations must be subject to the provisions of that directive. Article 25 of the Sixth Directive does not mean, however, that the national legislature cannot refer to those provisions in order to regulate situations outside the scope of that directive.

54. Second, and even more importantly, the alignment, *in national law*, of the division operations that do not entail the transfer of all of the assets and liabilities of the company being divided to the rules laid down in the Sixth Directive falls within the exclusive competence of the national legislature. The Member States are free to comply, as regards the areas falling outside the scope of EU law, with the solutions adopted by EU law. That freedom to refer to the solutions provided for by EU law for situations that fall outside its scope cannot be limited, provided that such a reference to such solutions cannot hinder the attainment of the objectives pursued by the Sixth Directive.

¹⁶ For certain authors, that solution makes it possible to avoid 'two-speed company law'; see Guyon, Y., 'La coordination communautaire du droit français des sociétés', *RTD Eur*, 1990, p. 241. I must emphasise in that regard that such a choice was made by other Member States when they transposed the Sixth Directive. See, by way of illustration, for France, loi n° 88/17, du 5 janvier 1988, relative aux fusions et aux scissions de sociétés commerciales et modifiant la loi n° 66/537, du 24 juillet 1966, sur les sociétés commerciales (Law No 88/17 of 5 January 1988 on mergers and divisions of commercial companies and amending Law No 66/537 of 24 July 1966 on commercial companies) (JORF of 6 January 1988, p. 227); for Germany, Gesetz über die Spaltung der von der Treuhandanstalt verwalteten Unternehmen (SpTrVG) (Law on the division of companies administered by the Treuhandanstalt) of 5 April 1991 (BGBl. 1991 I, p. 854); for Spain, Ley 19/89 de reforma parcial y adaptación de la legislación mercantil a las Directivas de la Comunidad Económica Europea (CEE) en materia de Sociedades (Law 19/89 on the partial reform and adaptation of the commercial legislation to the Directives of the European Economic Community (EEC) in the realm of companies) of 25 July 1989 (BOE No 178 of 27 July 1989, p. 24085); and, for Poland, kodeks spółek handlowych (Commercial Companies Code), of 15 September 2000 (Dz. U. of 2000, No 94, position 1037), in particular Article 529 of that Code.

55. It does not seem to me that the adoption, in national law, of the solutions laid down by the Sixth Directive in situations that do not fall within its scope is capable of hindering the attainment of the objectives pursued by the EU legislature by means of that directive.

56. I am therefore of the view that the questions must be considered admissible.

B. The questions for a preliminary ruling

1. The first question

57. By its first question, the referring court seeks to ascertain whether Article 12 of the Sixth Directive must be interpreted as precluding creditors of a company which has been divided whose rights antedate the division from bringing an *actio pauliana* such as that at issue in the main proceedings, after the division has been implemented and even though those creditors did not use the protection tool provided for in national law in application of that provision.

58. Under Article 12(1) of the Sixth Directive, Member States are required to provide for an adequate system of protection for the interests of the creditors of the companies involved in a division whose claims antedate publication of the draft terms of division and have not yet fallen due at the time of such publication. To that end, Member States must *at least* provide that such creditors are to be entitled to obtain adequate safeguards where that is necessary owing to the financial situation of the company being divided and of the recipient companies. In the alternative, Member States may choose to establish a system of joint and several liability between the recipient companies for the obligations of the company being divided. Article 12(7) of the Sixth Directive provides that Member States nonetheless have the option of combining the adequate system of protection for creditors referred to in paragraph 1 with the system of joint and several liability between recipient companies. In that case, the joint and several liability of the recipient companies is to be limited to the net assets allocated to each of those companies.

59. Those provisions call for three observations on my part. First of all, the requirement laid down in Article 12 of the Sixth Directive to provide for a system for the protection of the interests of creditors is a minimum requirement. The phrase ‘at least’ means that the Member States must observe a certain threshold of protection for the interests of creditors by providing them with guarantees in a specific situation, but without being limited to that protective measure. Article 12 of the Sixth Directive does not establish an exhaustive list of instruments that may be put in place with the aim of protecting the interests of creditors.¹⁷

60. Next, the Sixth Directive requires that Member States put such a system of adequate protection of creditors in place only for claims that antedate publication of the draft terms of division and have not yet fallen due at the time of such publication. On the other hand, as regards claims that antedate publication of the draft terms of division and have already fallen due at the time of such publication, that directive does not provide any specific instruments for the protection of creditors’ interests. There again, it follows that if the Member States are required to put protective instruments in place in the case of a certain type of claims, the national legislatures may provide, in national law, for protective measures in the case of other types of claims that do not fall within the scope of the provisions of the Sixth Directive.

¹⁷ Although it does not leave Member States entirely free when introducing instruments for the same purpose, as I shall explain in points 67 to 69 of this Opinion.

61. Last, it follows expressly from Article 12 of the Sixth Directive that the implementation of a system of joint and several liability of the recipient companies does not preclude other measures for the protection of creditors. The cumulation of the different protection tools makes it possible only to limit joint and several liability between the recipient companies to their net assets. The implementation of the system of joint and several liability between recipient companies cannot preclude the introduction of other measures for the protection of creditors.

62. It follows that, contrary to I.G.I.'s and Costruzioni Ing. G. Iandolo's contention, Article 12 of the Sixth Directive does not provide for a 'closed protective system' beyond which Member States can no longer put in place additional measures for the protection of creditors' interests. That provision does not in principle prevent Member States from maintaining or adopting measures also intended to protect the creditors of the companies involved in the division.

63. Likewise, contrary to the referring court's suggestion, no provision of Article 12 of the Sixth Directive makes those additional measures for the protection of creditors' interests conditional on prior recourse to the instruments provided for in that directive. I am therefore of the view that the Member States remain free to introduce mechanisms to protect the creditors' interests in addition to the measures expressly provided for by the Sixth Directive.

64. The *actio pauliana* such as that at issue in the main proceedings may be distinguished from the instruments provided for by the Sixth Directive. It is not a transposition measure and is likely to be brought in only a limited number of situations.¹⁸ The fact nonetheless remains that the *actio pauliana*, such as that provided for in the Italian Civil Code, is a measure designed to protect creditors' rights when an act by a debtor is capable of adversely affecting their interests. It therefore allows wider protection of the rights of the creditors of the company being divided. To my mind, the *actio pauliana* such as that at issue in the main proceedings is an additional measure for the protection of the creditors' interests, which Article 12 of Sixth Directive does not preclude.¹⁹

65. I am therefore of the view that Article 12 of the Sixth Directive does not preclude, in principle, the creditors of a company that is being divided, whose claims antedate the division, from bringing an *actio pauliana* such as that at issue in the main proceedings, once the division has been implemented and even though those creditors have not made use of the protective instrument provided for in national law in application of that provision.²⁰

66. However, I must, at this point, clarify my interpretation of Article 12 of the Sixth Directive.

67. I am of the view that although the Member States may adopt or maintain measures for the protection of creditors other than those provided for by the Sixth Directive, those measures must not undermine the results prescribed by that directive and thus jeopardise its effectiveness.

¹⁸ In so far as it assumes, in particular, that the act of division has been carried out fraudulently by the debtor and has caused injury to the creditor.

¹⁹ In that regard, it is immaterial that the *actio pauliana* relates to claims that antedate the division and have already fallen due or have not yet fallen due. In both cases, in my view, Article 12 of the Sixth Directive allows measures to be introduced to protect the creditors' interests.

²⁰ In addition, I must further emphasise that the initiation of an *actio pauliana* by the creditors of the company being divided seems to me, in the circumstances of the present case, necessary in order to protect the creditors. As I stated in point 51 of this Opinion, the Italian legislature intended that partial divisions entailing the transfer of a part of the assets of the company being divided to a single company would be subject to the rules of the Sixth Directive. The system of joint and several liability provided for in that directive for the protection of creditors' interests is a system of joint and several liability *between the recipient companies*, while under the provisions of that directive there is no obligation for Member States to implement joint and several liability between, on the one hand, the company being divided and, on the other hand, the recipient company. In other words, where the partial division has been implemented in favour of a single recipient company, as is the case in the main proceedings, one of the tools for the protection of the creditors' interests prescribed in the Sixth Directive is rendered ineffective. To my mind, the *actio pauliana* may, in that specific situation, be regarded as a means of compensating for the ineffectiveness of the regime of joint and several liability between the recipient companies provided for in the Sixth Directive. See, as regards a similar situation in French law, Lecourt, B., 'De l'utilité de l'action paulienne en droit des sociétés', *Aspects actuels du droit des affaires. Mélanges en l'honneur de Yves Guyon*, Dalloz, Paris, 2003. I would make clear in that regard that it is apparent from the order for reference that the Italian courts seem to accept the extension, in Italian law, of the rules on joint and several liability between the company being divided and the recipient company.

68. In that regard, I recall that, as the Commission correctly submitted at the hearing, according to Article 12 of the Sixth Directive, read in the light of the eighth recital of that directive, one of the objectives of that directive is to ensure that all the creditors of the companies involved in a division are protected so that the division will not adversely affect them. Article 12 of the Sixth Directive, which is intended to protect the creditors of the companies involved in a division, thus seems to me to be underpinned by a principle of equality between the creditors concerned. In addition, it follows from the eleventh recital of that directive that the directive is also intended to ensure certainty in the law with regard to the division of companies.

69. As the referring court suggests, it cannot be precluded that the initiation of an *actio pauliana* by certain creditors of the company that is being divided against the recipient company may adversely affect the protection of the interests of other creditors, who are nonetheless covered by the protection provided for in Article 12 of the Sixth Directive and who trusted in the effects of the division. Nor can it be precluded that the initiation of an *actio pauliana* may affect the certainty in law of relations between third parties and the companies involved in the division. Should that be the case, which it is for the referring court to ascertain, the initiation of the *actio pauliana* would be capable of jeopardising the attainment of the objectives of the Sixth Directive.

70. Thus, I am of the view that Article 12 of the Sixth Directive does not preclude, in principle, the creditors of a company that is being divided, whose rights antedate the division, from bringing an *actio pauliana* such as that at issue in the main proceedings, once the division has been implemented and even though those creditors have not made use of the protection tool provided for in national law in application of that provision, provided that such an action does not adversely affect the protection of the other creditors referred to in that provision, which it is for the referring court to ascertain.

2. The second question

71. By its second question, the referring court wonders whether the notion of ‘nullity’, within the meaning of Article 19 of the Sixth Directive, must be understood as also covering an *actio pauliana* such as that at issue in the main proceedings.

72. It must be emphasised at the outset that no definition of the notion of ‘nullity’ is given in the Sixth Directive. According to the Court’s consistent case-law, the meaning and scope of terms for which EU law provides no definition must be determined in accordance with their usual meaning in everyday language, while the context in which they are used and the purposes of the rules of which they form part must also be taken into account.²¹

73. The notion of ‘nullity’, in its usual meaning, refers to the sanction applied to an act that does not satisfy the necessary conditions for its creation, which entails the disappearance of that act and produces effects *erga omnes*. That definition is confirmed in the light of the context in which the notion of ‘nullity’ is used and of the objectives pursued by the Sixth Directive in general, and by Article 19 in particular.

74. First of all, Article 19 of the Sixth Directive sets out the restrictive conditions to be satisfied by the nullity rules for divisions. In particular, in addition to a shorter time limit for initiating the nullity proceedings, Article 19(1)(b) of that directive provides that divisions which have taken effect may be declared void only on certain grounds, which are set out in a restrictive fashion. Those grounds relate exclusively to non-compliance with the conditions necessary for creating the act of division, such as the existence of judicial or administrative preventive supervision of their legality, or if they have not

²¹ See, in particular, judgments of 12 October 2017, *X* (C-661/15, EU:C:2017:753, paragraph 27), and of 20 September 2018, *2M-Locatel* (C-555/17, EU:C:2018:746, paragraph 36).

been drawn up and certified in due legal form, or the validity of the decision of the general meeting relating to the proposed division. The nullity of the division within the meaning of Article 19 of the Sixth Directive is therefore indeed the sanction for breach of the conditions relating to the drafting of the instrument of division.

75. Next, Article 19 of the Sixth Directive, which restricts the conditions in which proceedings for a declaration of nullity of the division may be brought, is intended to ensure certainty in law in relations both between the companies involved in the division and between them and third parties, and also between shareholders, as is clear from the eleventh recital of that directive. It may be inferred that the nullity of a division within the meaning of Article 19 of the Sixth Directive has effects *erga omnes*.

76. Last, Article 19(1)(d) of the Sixth Directive also provides that, provided that it is possible, a remedy must be found for a defect liable to render a division void. It thus follows both from the objective pursued by Article 19 of that directive and from the system established by that article that that provision is aimed primarily at avoiding the disappearance of an instrument of division that has taken effect.

77. I shall add that that interpretation of the notion of ‘nullity’, within the meaning of Article 19 of the Sixth Directive, as a sanction for an act where the conditions for its creation were not complied with, entailing its disappearance and producing effects *erga omnes*, is supported by a reading of other instruments of EU law that use the notion of ‘nullity’, and more particularly of the First Directive, which concerns the nullity of companies. The second paragraph of Article 11 of the First Directive thus provides that, ‘apart from the ... grounds of nullity [listed], a company shall not be subject to any cause of non-existence, nullity absolute, nullity relative or declaration of nullity’. The notion of ‘nullity’ within the meaning of the second paragraph of Article 11 of the First Directive therefore extends to non-existence, nullity absolute, nullity relative or declaration of nullity, all of which refer to actions that entail the disappearance of the instrument, that is to say, to its annulment.

78. To my mind, nullity proceedings, within the meaning of Article 19 of the Sixth Directive, as defined, and the *actio pauliana*, such as that at issue in the main proceedings, do not have the same object, or the same effects.

79. First, the referring court makes clear, in its order for reference, that Article 2901 of the Civil Code provides that a creditor may ask that transfers of assets through which a debtor causes *prejudice* to its interests be declared without effect in relation to that creditor. Thus, while nullity proceedings are intended to penalise failure to comply with the conditions for the creation of the instrument of division, the sole purpose of an *actio pauliana* such as that at issue in the main proceedings is to protect the creditors whose rights have been adversely affected by the division. Second, while nullity proceedings entail the disappearance of the division and have effects *erga omnes*, the sole effect of an *actio pauliana* such as that at issue in the main proceedings is that the instrument of division cannot be relied on as against the creditor, since it is declared to be without effect *in relation to the creditor* who brought the proceedings.

80. I am therefore of the view that nullity proceedings within the meaning of Article 19 of the Sixth Directive and an *actio pauliana*, such as that at issue in the main proceedings, are not to be confused with each other.

81. I would add in that regard that Article 7(2)(m) of Regulation (EU) 2015/848²² provides that the law of the State in which the proceedings are opened is to determine, in particular, the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors. In that case, the voidness and the unenforceability of an act are assimilated. I infer that, where the EU legislature intends that the voidness and the unenforceability of a legal act are to be subject to the same rules, it expressly so states. That is not the position in the case of Article 19 of the Sixth Directive.

82. I would further observe that the assimilation of an *actio pauliana* with nullity proceedings within the meaning of Article 19 of the Sixth Directive would have the effect of rendering the initiation of an *actio pauliana* ineffective. In so far as an *actio pauliana* is not intended to penalise non-compliance with the conditions for creating the instrument of division, it could never come within the cases of nullity set out in Article 19(1)(b) of the Sixth Directive. It would follow that, in the words of Article 19(1)(b) of that directive, an *actio pauliana*, assimilated to nullity proceedings, could no longer be brought once the division has taken effect. Yet an *actio pauliana*, which assumes an act disposing of the assets, is necessarily brought after the division has taken effect. That instrument would therefore be neutralised.²³

83. In addition, as the *actio pauliana* assumes, in order to be initiated, a valid act disposing of the assets, it would be paradoxical to regard the *actio pauliana* as equivalent to nullity proceedings, which are specifically intended to penalise the invalidity of such an act.

84. Thus, an *actio pauliana* such as that at issue in the main proceedings cannot be assimilated to nullity proceedings within the meaning of Article 19 of the Sixth Directive.

85. Accordingly, I am of the view that Article 19 of the Sixth Directive must be interpreted as not precluding an *actio pauliana*, such as that at issue in the main proceedings, being brought, when the division has been implemented, by the creditors of a company that is being divided whose rights antedate the division of that company, as the *actio pauliana* cannot be assimilated to nullity proceedings within the meaning of that directive.

V. Conclusion

86. In the light of the foregoing considerations, I propose that the Court answer the questions submitted by the Corte d'Appello di Napoli (Court of Appeal, Naples, Italy) as follows:

- (1) Article 12 of Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies, as amended by Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007, read in conjunction with Articles 21 and 22 of that directive, must be interpreted as meaning that it does not preclude the creditors of a company that is being divided whose rights antedate the division of that company from bringing an *actio pauliana*, such as that at issue in the main proceedings, when the division has been implemented without those creditors having used the protection tool provided for in national law as a result of the transposition of Sixth Directive 82/891, as amended by Directive 2007/63, in order to have the division declared unenforceable with regard to them, provided that such an action does not adversely affect the protection of the other creditors referred to in that provision.

²² Regulation of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19).

²³ Such a solution cannot be accepted, in particular since an *actio pauliana* may play a palliative role when certain tools for the protection of creditors provided for in EU law, such as the mechanism for joint and several liability of the recipient companies of the division, are no longer effective.

- (2) Article 19 of Sixth Directive 82/891, as amended by Directive 2007/63, read in conjunction with Articles 21 and 22 of that directive, must be interpreted as meaning that it does not preclude an *actio pauliana*, such as that at issue in the main proceedings, being brought, when the division has been implemented, by creditors of a company that is being divided whose rights antedate the division of that company, as the *actio pauliana* cannot be assimilated to nullity proceedings within the meaning of that directive.