Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 18 March 2021 [1]

Case C-605/18

Adler Real Estate AG,
Petrus Advisers LLP,
GM
joined parties:
Finanzmarktaufsichtsbehörde (FMA)

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Austria))

(Reference for a preliminary ruling – Transparency requirements in relation to securities admitted to trading on a regulated market situated or operating within a Member State – Notification of 'major holdings' by 'persons acting in concert' – Directive 2004/109/EC – 'Requirements more stringent' – 'Supervision' by an authority designated under Directive 2004/25/EC)

I. Introduction

1. The Finanzmarktaufsichtsbehörde (Financial Markets Authority, Austria) ('the Financial Markets Authority') imposed financial administrative penalties on a number of individuals for failing to notify an issuer, whose shares were admitted to trading on a regulated market situated in Austria, of their acquisition of 'major holdings' in that issuer's securities. By the present case, the Bundesverwaltungsgericht (Federal Administrative Court, Austria) essentially seeks to ascertain whether, pursuant to Directive 2004/109/EC, [2] the Financial Markets Authority was the competent authority to penalise such a notification infringement.

[1] Original language: English.

[2] Directive of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ 2004 L 390, p. 38).

II. Legal framework

A. EU law

1. The Takeover Bids Directive

2. Directive 2004/25/EC ('the Takeover Bids Directive') lays down measures to coordinate all instruments of the Member States relating to takeover bids for securities of companies listed on the regulated markets situated or operating within a Member State.[3] In accordance with its Article 4(1), Member States shall designate the authority or authorities competent to supervise bids for the purposes of the rules which they make or introduce pursuant to this Directive.

2. The Transparency Directive

3. Directive 2004/109 ('the Transparency Directive') seeks to harmonise transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market situated or operating within a Member State. In accordance with recital 2 thereof, 'shareholders, or natural persons or legal entities holding voting rights or financial instruments that result in an entitlement to acquire existing shares with voting rights', should inform issuers of the acquisition of or other changes in 'major holdings' in companies so that the latter are in a position to keep the public informed.

4. Recital 28 of that directive explains that:

'A single competent authority should be designated in each Member State to assume final responsibility for supervising compliance with the provisions adopted pursuant to this Directive, as well as for international cooperation …'

5. Following amendment by Directive 2013/50/EU ('the Amending Transparency Directive'),[4] Article 3 of the Transparency Directive currently reads as follows:

'1. The home Member State may make an issuer subject to requirements more stringent than those laid down in this Directive, except that it may not require issuers to publish periodic financial information on a more frequent basis than the annual financial reports referred to in Article 4 and the half-yearly financial reports referred to in Article 5.

[3] Article 1(1) of the Takeover Bids Directive.

[4] Directive of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC (OJ 2013 L 294, p. 13).

1a. By way of derogation from paragraph 1, the home Member States may require issuers to publish additional periodic financial information on a more frequent basis than the annual financial reports referred to in Article 4 and the half-yearly financial reports referred to in Article 5, where the following conditions are met:

– the additional periodic financial information does not constitute a disproportionate financial burden in the Member State concerned, in particular for the small and medium-sized issuers concerned, and

– the content of the additional periodic financial information required is proportionate to the factors that contribute to investment decisions by the investors in the Member State concerned.

…

The home Member State may not make a holder of shares, or a natural person or legal entity referred to in Article 10 or 13, subject to requirements more stringent than those laid down in this Directive, except when:

…

(iii) applying laws, regulations or administrative provisions adopted in relation to takeover bids, merger transactions and other transactions affecting the ownership or control of companies, supervised by the authorities appointed by Member States pursuant to Article 4 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids'.

6. Pursuant to Article 10 of the Transparency Directive:

'The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:

(a) voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question.'

7. Pursuant to Article 24 of the Transparency Directive:

'1. Each Member State shall designate the central authority referred to in Article 21(1) of Directive 2003/71/EC as the central competent administrative authority responsible for carrying out the obligations provided for in this Directive and for ensuring that the provisions adopted pursuant to this Directive are applied …

2. Member States may allow their central competent authority to delegate tasks … Any delegation of tasks shall be made in a specific manner stating the tasks to be undertaken and the conditions under which they are to be carried out.

… In any case, the final responsibility for supervising compliance with the provisions of this Directive and implementing measures adopted pursuant thereto shall lie with the competent authority designated in accordance with paragraph 1.'

B. Austrian law

1. The ÜbG

8. The Takeover Bids Directive was transposed into Austrian law by the Bundesgesetz betreffend Übernahmeangebote (Federal Law on takeover bids) ('the ÜbG').[5] Its Paragraph 1(6) defines the term 'legal entities acting in concert' as follows:

'Legal entities acting in concert: natural or legal persons who cooperate with the offeror on the basis of an agreement in order to acquire or exert control over the offeree company, in particular by means of coordination of the voting rights, or cooperate with the offeree company on the basis of an agreement in order to prevent the successful outcome of a takeover bid. If a legal entity holds an indirect or direct controlling interest (Paragraph 22(2) and (3)) in one or more other legal entities, there is a presumption that all those legal entities act in concert; the same applies if several legal entities have made an agreement regarding the exercise of their voting rights when electing members of the Supervisory Board.'

9. By virtue of Paragraph 22(1) of the ÜbG:

'Anyone who directly or indirectly obtains a controlling interest in an offeree company shall immediately report this fact to the Takeover Commission, and must notify a bid for all of the securities of the offeree company in accordance with the provisions of this Federal Act within 20 stock-market working days of obtaining a controlling interest.'

10. Pursuant to Point 1 of Paragraph 22a of the ÜbG, the 'obligation to make a bid pursuant to Paragraph 22(1) shall apply … when a group of parties acting in concert is created that jointly acquires a controlling interest.'

11. Paragraph 23 of the ÜbG, entitled, 'Attribution of shares and extension of the offeror's obligations', explains, in its first paragraph that 'persons acting in concert' within the meaning of Paragraph 1(6) of the ÜbG, must have their voting rights reciprocally attributed through the application of Paragraphs 22 to 22b.

2. The BörseG 1989

12. At the time relevant in the main proceedings, the Börsegesetz 1989 in the version BGBl. I 98/2015 ('the BörseG 1989') was applicable. Paragraphs 91 et seq. of the BörseG 1989 inter alia implement the obligations on notifying information about 'major holdings' arising from Section I of Chapter III, and in particular Article 9(1), of the Transparency Directive.

[5] BGBl. I No 127/1998.

13. Paragraph 92(7) of the BörseG 1989 extends the notification requirement of Paragraph 91 also to the case of 'voting rights that are attributable to the person pursuant to Paragraph 23(1) or (2) of the ÜbG'.

III. Facts, national proceedings and the questions referred

14. The Übernahmekommission (Takeover Commission, Austria) ('the Takeover Commission') is the 'supervisory authority' designated by Austria pursuant to Article 4 of the Takeover Bids Directive.

15. On 22 November 2016, the Takeover Commission issued a decision ('the Preliminary Decision') against Adler Real Estate AG ('Adler'), Mountain Peak Trading LLP ('Mountain Peak'), Westgrund AG ('Westgrund'), Petrus Advisers Ltd ('Petrus'), and GM (a natural person). That decision was handed down in the context of a fact-finding proceeding concerning the acquisition of a 'major holding' of 31.36% in Conwert Immobilien SE ('Conwert'), and the related failure to satisfy the obligation to submit a mandatory public takeover bid. It found that, upon the reciprocal attribution of voting rights pursuant to Paragraph 23(1) of the ÜbG, a controlling interest within the meaning of Paragraph 22 of the ÜbG was acquired.

16. The Takeover Commission had reached that threshold finding based on the aggregation criteria for 'legal entities acting in concert' laid down in Paragraph 1(6) of the ÜbG. Pursuant to Paragraph 23(1) of the ÜbG, those voting rights in Conwert should therefore have been reciprocally attributable to Adler, Mountain Peak, Westgrund, Petrus, and GM for the first time on 29 September 2015. In principle, pursuant to Point 1 of Paragraph 22a of the ÜbG, that acquisition of a 'major holding' should have led to a mandatory takeover bid for Conwert within a period of 20 stock-market working days.

17. By judgment of 1 March 2017, the Oberster Gerichtshof (Supreme Court, Austria) dismissed a challenge against the Preliminary Decision. The Preliminary Decision became definitive.

18. On 29 June 2018, the Financial Markets Authority, the 'central competent administrative authority' within the meaning of Article 24 of the Transparency Directive, imposed financial administrative penalties on Adler, Petrus, and GM for infringing the notification obligation laid down in Article 92(7) of the BörseG 1989. That obligation is incumbent on natural or legal persons which, individually or collectively, acquire a holding threshold of 30% in an 'offeree company'. According to the Financial Markets Authority, in the present case, Adler, Petrus and GM had 'acted in concert' within the meaning of Article 1(6) of the ÜbG when purchasing shares in Conwert. The voting rights in their holdings in Conwert should therefore be reciprocally attributable to those parties for the first time on 29 September 2015.

19. For the purposes of classifying Adler, Petrus and GM as 'persons acting in concert', the Financial Markets Authority considered itself bound by the definitive nature of the factual and legal classification of the Preliminary Decision. Accordingly, it did not itself assess whether Adler, Petrus, and GM ought to be classified as 'persons acting in concert', within the meaning of Paragraph 1(6) of the ÜbG, nor whether the voting rights in their holdings should be reciprocally attributable to them. The Financial Markets Authority decided that only the existence of the subjective element of the offense – the '*mens rea*' of Adler, Petrus, and GM – could be investigated in the financial administrative penalties procedure.

20. The referring court observes that the BörseG 1989, which transposes the Transparency Directive into Austrian law, imposes notification obligations on persons with 'major holdings' (defined as being 30%) held in an 'issuer'. Those obligations go beyond those provided for by the Transparency Directive. That court considers, therefore, that the notification obligation imposed on 'legal entities acting in concert' under Paragraph 92(7) of the BörseG 1989 must be regarded as falling within the concept of 'requirements more stringent than those laid down in' the Transparency Directive.

21. However, the referring court doubts whether those 'more stringent' requirements comply with the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive. That provision states that any 'more stringent' requirements be 'supervised by the authorities appointed by Member States pursuant to Article 4 of the [Takeover Bids Directive].'

22. The referring court also raises questions concerning the compatibility of the Austrian procedural rules on the binding effects of administrative decisions which have become definitive with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), in a situation in which a prior decision of the Takeover Commission, which has become definitive, is deemed to subsequently bind the Financial Markets Authority.

23. It is within this context that the Bundesverwaltungsgericht (Federal Administrative Court, Austria) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 3(1a), fourth subparagraph, (iii), of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, as last amended by Directive 2013/50/EU of the European Parliament and of the Council, to be interpreted as meaning that it is a requirement for the permissibility of the imposition of "more stringent requirements" on the "holder of shares, or a natural person or legal entity" that the "laws, regulations or administrative provisions" providing for more stringent requirements for holdings publicity are "supervised" by an authority designated by the Member State pursuant to Article 4 of Directive 2004/25/EC … concerning takeover bids and that such supervision encompasses compliance with the more stringent requirements regarding holdings publicity within the meaning of Directive 2004/109/EC?

(2) Does Article 47 of the Charter of Fundamental Rights of the European Union preclude a national practice according to which a decision having the force of *res judicata* taken by the supervisory authority pursuant to Article 4 of Directive 2004/25/EC by means of which a natural person's breach of national provisions adopted in implementation of Directive 2004/25/EC was established is also given binding effect in the context of criminal proceedings conducted against that same natural person owing to a breach of national standards connected with such proceedings in implementation of Directive 2004/109/EC (Transparency Directive), with the result that that natural person is prevented from challenging, in law and fact, the breach of law already established with the force of *res judicata*?'

24. Written observations have been submitted by Alder, Petrus, GM, the Financial Markets Authority, as well as the European Commission. With the exception of the Commission, those parties also replied to the written questions put to them by the Court.

IV. Analysis

25. This Opinion is structured as follows. I shall begin with the first question raised by the referring court and the interpretation of the word 'supervised' in view of the context of the provision in which it is stated. Thereafter, I shall turn to the context of the present case. In the light of those considerations, I shall propose to the Court that only the first question raised requires a reply (A). However, given the close link between the present case and another request for a preliminary ruling made by the same national court in a parallel case, Case C-546/18, *Adler Real Estate*,[6] the answer to the second question in the present proceedings has in fact already been provided there (B).

A. The first question

26. By its first question, the referring court requests clarification on whether the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive, as amended by the Amending Transparency Directive, should be interpreted to mean that a notification 'requirement more stringent' than that contained in the Transparency Directive must be supervised by the authority designated by the Member States pursuant to Article 4 of the Takeover Bids Directive. If the answer to that question is in the affirmative, the sub-question arises as to whether such 'supervision' can be split from the task of 'ensuring compliance' with those 'more stringent' notification requirements.

27. That question requires a lot of 'unpacking'. In doing so, I shall first set the scene on the changes brought about by the Amending Transparency Directive and the need for the insertion of the fourth subparagraph of Article 3(1a) into the Transparency Directive (1). I shall then interpret that provision in the context in which it occurs and in the light of the conditions of application it presupposes (2). Thereafter, I will turn to the interpretation of the word 'supervise', as it appears in the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive, to determine which authority should hold regulatory oversight over those 'more stringent' reporting requirements (3). Only then will I be able to provide a reply to the referring court's question.

1. The Transparency Directive and its Amendment

28. As part of the broader objective of completing the single market for financial services and converging financial reporting standards throughout the Union, the Transparency Directive sought to contribute to the establishment of 'efficient, transparent and integrated securities markets'.[7] It brought about *minimum harmonisation* of notification requirements for physical or legal persons acquiring or otherwise handling securities in issuers that are active on a regulated market of a Member State.[8] That left Member States the discretion, when transposing those requirements, to go above the harmonised base level by putting in place notification requirements 'more stringent' than those laid down in the Transparency Directive.[9]

6 See my Opinion in *Adler Real Estate and Others* (C-546/18).

7 The Transparency Directive, recitals 1 and 9.

8 Contrast for example the complete harmonisation of disclosure requirements under the 'Prospectus Regulation' (Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ 2017 L 168, p. 12)).

9 The Transparency Directive, Article 3(1).

29. As a Commission Staff Working Document on the operation of the Transparency Directive explains, the effect of those 'more stringent' requirements was an 'uneven level of harmonisation'. That made it difficult for persons or entities to simultaneously conform to the laws of several Member States. [10]

30. The Amending Transparency Directive sought to tackle that problem. It generally removed the discretion of the Member States to make holders of shares subject to 'more stringent' notification requirements than those provided for in the Transparency Directive. [11] At the same time, however, the Amending Transparency Directive needed to maintain the possibility for Member States to impose such requirements if they related to *another aspect* of the regulation of the national securities markets.

31. One of those aspects is the regulation of takeover bids, merger transactions and other transactions affecting ownership or control of companies. Their regulation is generally covered by the Takeover Bids Directive. [12] Pursuant to the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive, the home Member State may make a holder of securities subject to notification requirements that are 'more stringent' than those laid down in the Transparency Directive, if those requirements fall within the scope of the Takeover Bids Directive. However, those 'more stringent' requirements must be '*supervised* by the authorities appointed by Member States pursuant to' Article 4 thereof. [13]

32. It is the interpretation of the word 'supervised' in that provision which is the source of disagreement in the present case, a point to which I shall now turn.

2. 'Supervised'

33. The referring court enquires whether the word 'supervised' in the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive should be understood to relate only to the 'supervision' of the 'more stringent' requirements imposed by national law, or whether it should relate also to ensuring their 'compliance'.

34. GM, Adler and the Commission adopt a literal interpretation of that indent. They submit that the indent clearly refers to the authorities appointed by the Member States pursuant to Article 4 of the Takeover Bids Directive as the ones needing to 'supervise' the 'more stringent' requirements.

35. The Financial Markets Authority, for its part, submits that it would be contrary to the spirit and purpose of the Transparency Directive if an authority other than itself were granted the competence to guarantee compliance with that directive. It notes that it alone is the 'central competent administrative authority' within the meaning of Article 24(1) of the Transparency Directive. As such, an interpretation of the third indent of the fourth subparagraph of

[10] Commission Staff Working Document – The review of the operation of Directive 2004/109/EC: emerging issues Accompanying document to the Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Operation of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, COM(2010)243 (SEC(2009)611 final), point 6. See also, on the problem of 'gold plating', Commission Staff Working Document – Report on more stringent national measures concerning Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (SEC(2008)3033 final), point 6.

[11] The Amending Transparency Directive, recital 12. See also the prohibition on requirements for holders of securities contained in the fourth subparagraph of Article 3(1) of the Transparency Directive.

[12] See, for instance, Moloney, N., *EU Securities and Financial Markets Regulation*, Oxford University Press, 2014, p. 140.

[13] My emphasis.

Article 3(1a) of the Transparency Directive which would assign the supervision of the 'more stringent' requirements to the Takeover Commission would not be supported by the wording of Article 24(1) of the Transparency Directive. Moreover, the concept of 'authority designated in accordance with Article 4' of the Takeover Bids Directive must cover any authority materially competent to achieve the objectives of the Takeover Bids Directive. Otherwise, parties could avoid the requirements on notification arising from the Transparency Directive by 'acting in concert' over the purchase of 'major holdings'.

36. I am not convinced by the arguments put forward by the Financial Markets Authority.

37. The purpose of the Transparency Directive is to establish legislative harmonisation. The Member States are to put in charge an administrative authority to supervise that objective.[14] However, such harmonisation can naturally only occur within the scope of application of the Transparency Directive. That purpose does not affect competences falling outside thereof, including where they relate to the regulation of other aspects of the national securities markets.[15] That said, a reasonable reading of the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive confirms that that exception concerns itself precisely with such 'outside' competences: takeover bids, merger transactions and other transactions. For those fields, the Transparency Directive never sought to establish harmonised rules on notification requirements.

38. The same conclusion is also confirmed by recital 12 of the Amending Transparency Directive. There, the EU legislature recalls that the objective of harmonising the regime for notification of holdings of securities with voting rights should not affect the parallel obligations of (and transparency initiative pursued by) the Takeover Bids Directive. That is, in particular, because the two directives follow different 'speeds' of legislative overhaul: the Takeover Bids Directive operates under the principle of 'coordination',[16] seeking merely to establish 'certain common principles and a limited number of general requirements which Member States are to implement through more detailed rules in accordance with their national systems and their cultural contexts'.[17] By contrast, the Transparency Directive pushes a broader policy initiative, intending to harmonise provisions of national law.[18]

39. The reference in Article 3(1a) of the Transparency Directive to 'requirements more stringent' is thus to be understood as more of a 'competence policing' provision, aiming to protect against 'supervisory overreach' of the authority appointed pursuant to Article 24 of the Transparency Directive. In such a way, the EU legislature sought to ensure that the 'Article 24 authority' does not indirectly extend the requirement of 'harmonisation' to notification requirements otherwise falling within the scope of supervision of the 'Article 4 authority'.

40. However, the desire for delimitation of the 'Article 24 authority's competences' really only gains in importance in cases where the Member State in question has decided to split the supervisory competences of the Transparency Directive and Takeover Bids Directive between two

[14] Of course, as the Financial Markets Authority correctly points out, Member States may also designate a competent authority other than the 'central competent authority' referred to in Article 24(1) of the Transparency Directive for the purposes of Article 24(4)(h) thereof, and may also delegate that other authority certain powers. However, as the Financial Markets Authority confirmed in its submissions, those aspects are not at issue in the present case.

[15] As explained in point 30 of this Opinion.

[16] Recital 1 of the Takeover Bids Directive.

[17] Recital 26 of the Takeover Bids Directive.

[18] Recital 5 of the Transparency Directive.

(or more) authorities.[19] To cater for such scenarios, the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive designates a 'lead' authority for the purposes of the Transparency Directive, as well as the regulatory limits of that authority. It therefore complements, from a different side, the cooperation and information-sharing obligation inherent in Article 4(4) of the Takeover Bids Directive.

41. Consequently, in my view, there is nothing to indicate that the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive seeks to undermine (or diminish) the task of the 'central competent administrative authority' of Article 24 of the Transparency Directive. Nor do I see why the approach suggested by GM, Adler and the Commission would open up the possibility to 'circumvent' the requirements on notification arising from the Transparency Directive. Indeed, where 'more stringent' notification requirements compatible with the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive are at issue, they fall within the scope (and the regulatory supervision) of the 'Article 4 authorities' appointed for that purpose. So long as that obligation is correctly implemented into national law, there is no danger of 'more stringent' notification requirements for the purposes of takeover bids, merger transactions and other transactions affecting the ownership or control of companies becoming the regulatory equivalent of 'international waters'.

42. All that eventually leads to the sub-question of whether such 'supervision' also entails 'ensuring compliance' with the 'more stringent' notification requirements.

43. To me, in view of all that has been stated above, the answer ought to be yes.

44. First, at a mere linguistic and logical level, I find it rather difficult to distinguish between 'supervision' and 'ensuring compliance'. Assuming that administrative authorities are not given the powers to 'supervise' for their own amusement, 'supervision' is bound to largely overlap with 'ensuring compliance'.

45. Second, a reasonable reading of the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive leads to no other conclusion. There is no indication in the text, or the preparatory documents to that directive, that there should be a distinction between 'supervision' of, and 'ensuring compliance' with, the conditions of the Transparency Directive.

46. Third, as I explain above in points 37 and 38 of this Opinion, it is clear that the third indent to the fourth subparagraph of Article 3(1a) of the Transparency Directive concerns regulatory aspects not falling within the scope of that directive. It would thus be wholly illogical if the 'Article 24 authority' were asked to police compliance with requirements *not falling within its competence*.

47. Therefore, the only reasonable way to read the word 'supervise' in the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive is to also include 'ensuring compliance' with the requirements flowing from the Takeover Bids Directive.

[19] It would appear that a number of Member States have appointed the same authority for the purposes of Article 4 of the Takeover Bids Directive and Article 24 of the Transparency Directive. See European Securities and Markets Authority, 'Practical Guide: National rules on notifications of major holdings under the Transparency Directive', 31 July 2019 (ESMA31-67-535) and 'List of competent authorities designated for the purposes of Directive 2004/25/EC on takeover bids (Takeover bids Directive)', 8 June 2020.

3. The present case: more stringent requirements?

48. Thus, any reporting 'requirements more stringent' than those contained in the Transparency Directive, falling within the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive, must be supervised by the competent authorities appointed by the Member States pursuant to Article 4 of the Takeover Bids Directive.

49. Turning to the legislative context in the present case, the parties explain that the ÜbG transposes the Takeover Bids Directive into Austrian law. Thereunder, the Takeover Commission was designated as the competent authority within the meaning of Article 4 of that directive. Subject to confirmation by the referring court, it thus appears that the Takeover Commission is the sole authority exercising that competence.

50. In their replies to a written question put by the Court, GM, Adler and the Financial Markets Authority explain that the Financial Markets Authority is the sole authority appointed pursuant to Article 24(1) of the Transparency Directive, and that that authority did not transfer any powers of supervision or compliance to the Takeover Commission.

51. In other words, it appears that, under Austrian law, there exists a neat separation of competences between the authority in charge of the Transparency Directive (the Financial Markets Authority) and the authority in charge of the Takeover Bids Directive (the Takeover Commission). That would mean that only the Takeover Commission could have been permitted to supervise (and ensure compliance with) the reporting 'requirements more stringent' than those contained in the Transparency Directive and falling within the third indent of the fourth subparagraph of Article 3(1a) of the Transparency Directive.

52. Those considerations are a matter for the referring court, since it concerns the interpretation of national law. It also falls to the referring court to determine whether the extension of the notification obligation laid down in Paragraph 92(7) of the BörseG 1989 to major holdings attributable pursuant to Paragraph 23(1) ÜbG concerns a 'requirement more stringent' than that contained in the Transparency Directive.

53. However, in order to fully assist the referring court and in reaction to the views already expressed by that court in the order for reference, I would tentatively agree with the referring court that, in the present case, on the basis of the information provided by it and reflected in the case file, such a requirement indeed appears to be present.

54. The concept of 'persons acting in concert' does not appear in the Transparency Directive per se. However, Article 10(a) thereof covers the situation where a natural person or legal entity acquires, disposes of, or exercises, voting rights 'held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question'.

55. The Financial Markets Authority argues that that provision 'qualitatively' overlaps with the notification obligation contained in Paragraph 92(7) of the BörseG 1989 for 'persons acting in concert'.

56. Adler, Petrus, and GM take the opposing view. In essence, they submit that the scope of national law exceeds that of Article 10(a) of the Transparency Directive because neither Paragraph 92(7) of the BörseG, nor the provisions that it directly or indirectly links to, require a 'lasting common policy towards the management of the issuer in question'.

57. Article 10(a) of the Transparency Directive contains a number of cumulative conditions. First, it requires an 'agreement'. The lack of further qualifying explanation as to its substance or form implies that all that is required is a 'meeting of the minds' in this respect. Indeed, it would be of little use to only subject written (or tangible) agreements to the notification obligation if the overall purpose of Articles 9 and 10 of the Transparency Directive is the disclosure of *all* 'major holdings' of listed securities. Second, that provision requires an 'obligation to adopt' a certain position on the basis of existing shareholding, *because* of that agreement.[20] Third, the agreement and the 'position' adopted therein must require a 'concerted exercise', meaning action in a coordinated way. Finally, that exercise must result in a '*lasting common policy* towards the management of the issuer in question'.[21] In other words, the provision requires a high degree of commitment over a certain period of time, which cannot be fleeting or intermittent, and which must be uniform and addressed to the management of the company concerned.

58. Without needing to assess whether all of the above requirements have been fulfilled, and subject to confirmation by the referring court, it suffices to note that none of the provisions of national law, which have been put before the Court, indeed appear to require a similar kind of 'lasting common policy' as that required by Article 10(a) of the Transparency Directive.

59. I therefore tentatively agree with the referring court that the notification obligation contained in Paragraph 92(7) of the BörseG 1989 for 'persons acting in concert' appears to contain a 'requirement more stringent' than that contained in the Transparency Directive, which should have been 'supervised' by the authority appointed by Austria pursuant to Article 4 of the Takeover Bids Directive. That authority seems to be, under Austrian law, the Takeover Commission.

B. The second question

60. By its second question, the referring court requests guidance on whether Article 47 of the Charter must be read as precluding national procedural rules which attach binding force to final administrative decisions of a supervisory authority, designated under Article 4 of Directive 2004/25, formulated in response to a preliminary proceeding and establishing objectively certain factual circumstances, if that decision removes from another supervisory authority, designated under Article 24 of Directive 2004/109, the ability to conduct its own fact-finding investigation or legal assessment in relation to the same subject matter and the same persons.

61. In the light of the proposed answer to the first question, there is no need to answer the second question.

[20] Although it ought to be noted that while the English ('to adopt'), French ('à adopter'), Spanish ('a adoptar'), Italian ('ad adottare') language versions appear to merely require the need to 'endorse' a certain position, other language versions, notably the German ('zu verfolgen'), Dutch ('te voeren'), or the Czech version ('provádět'), yield more towards the parties actually 'going through' with that position. That is to say, arguably, more than simply agreeing in principle on it.

[21] My emphasis.

62. However, in the interest of completeness and in view of the possibility that the Court might be of a different view as regards the first question, I would refer to the analysis I have already carried out with regard to the similar issues raised by the same referring court in a parallel case, Case C-546/18, *Adler Real Estate*. [22]

63. The present proceedings differ from Case C-546/18, *Adler Real Estate* in one element: the issues raised by the referring court concern the 'cross-institutional' effects of a previous finding by an administrative authority, as opposed to mere 'intra-institutional' effects across individual proceedings, as was at issue in Case C-546/18, *Adler Real Estate*.

64. That element nonetheless makes no difference. Or rather, the issue identified in that case is logically the same in the present proceedings, since both cases have at their root the same problem: the absence of effective judicial protection compliant with the first paragraph of Article 47 of the Charter *in the first round* of preliminary proceedings before the Takeover Commission, which is *the same in both* cases.

65. As a matter of principle, whether, and how, the national legal order wishes to create binding effects of final decisions by administrative authorities is left to the national procedural autonomy of the Member States. That arrangement is subject only to the principles of equivalence and effectiveness. [23] Where (genuine) identity of parties, cause and object is present, nothing speaks, in principle, against conferring binding effects on a final decision by one administrative authority (here, the Takeover Commission) in such a way as to bind another administrative authority in its proceeding (here, the Financial Markets Authority, provided that the answer to the first question is different). [24]

66. However, in order to comply with the first paragraph of Article 47 of the Charter, where the authority, whose administrative decisions are deemed to have become definitive, does not itself satisfy the criteria of a 'tribunal', within the meaning of the first paragraph of Article 47 of the Charter, the review of those findings must be available to a court having 'full jurisdiction', which is able to examine both law and fact. [25]

67. In the present case, the parties have explained that the Financial Markets Authority deemed itself bound by a decision arising from a prior proceeding of the Takeover Commission. However, the Takeover Commission itself does not satisfy the qualities of a 'tribunal', within the meaning of the first paragraph of Article 47 of the Charter. The jurisdiction of the Supreme Court in these cases is partial, limited to points of law only.

68. In summary, the institutional and procedural design of the rules applicable to the present case suffer from the same shortcomings of the same regime in Case C-546/18, *Adler Real Estate*: there appears to be, again subject to a definitive confirmation by the referring court, no effective judicial protection required under the first paragraph of Article 47(1) of the Charter 'in the first round'. That defect apparently cannot be remedied in 'the second round' because, by then, both the subsequently deciding administrative authority, as well as the court potentially reviewing the 'second' administrative decision, are effectively bound by the findings of the 'first' administrative decision.

22 See my Opinion in *Adler Real Estate and Others* (C-546/18).

23 See, to that effect, judgment of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 40 and the case-law cited).

24 See my Opinion in *Adler Real Estate and Others* (C-546/18, point 80).

25 Ibid., point 48.

V. Conclusion

69. I propose that the Court answer the first question referred for a preliminary ruling by the Bundesverwaltungsgericht (Federal Administrative Court, Austria) as follows:

The third indent of the fourth subparagraph of Article 3(1a) of Directive 2004/109/EC, as last amended by Directive 2013/50/EU, is to be interpreted as meaning that the authority in charge of 'supervising' the imposition of 'more stringent requirements' within the meaning of that provision is the authority designated by the Member State pursuant to Article 4 of Directive 2004/25/EC. Such supervision encompasses ensuring compliance with those 'more stringent' requirements.

It falls to the national court to verify whether the notification requirements in the main proceedings constitute 'requirements more stringent' than those contained in Directive 2003/109/EC.