Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 27 November 2019[1]

Case C-640/18

Wagram Invest SA
v
État belge

(Request for a preliminary ruling from the cour d'appel de Mons
(Court of Appeal, Mons, Belgium))

(Reference for a preliminary ruling – Fourth Directive 78/660/EEC – Annual accounts of certain types of companies – Principle that a true and fair view must be given – Article 2(3) to (5) – Purchase of a financial fixed asset by a public limited company – Entry as a charge in the profit and loss account of a discount relating to a non-interest-bearing debt becoming due after more than one year, and entry of the purchase price of the fixed asset as an asset in the balance sheet after deduction of the discount – Obligation to provide additional information – Departure from a provision of the directive in 'exceptional cases')

1. The present case concerns a request for a preliminary ruling from the cour d'appel de Mons (Court of Appeal, Mons, Belgium) on the interpretation of the Fourth Directive 78/660/EEC[2] ('Directive 78/660') on the annual accounts of certain types of companies.

2. This request for a preliminary ruling seeks in essence to verify the compliance of a method used to record the acquisitions of shares by Wagram Invest SA with the principle that a true and fair view must be given, enshrined in Article 2(3) to (5) of Directive 78/660,[3] read in the light of other provisions of that directive.

3. A tax dispute between Wagram Invest and the Belgian tax authorities gives rise to this case which will give the Court the opportunity to clarify once again the scope of the principle that a true and fair view of annual accounts must be given, which is the primary objective of the provisions of the European Union concerning the accounts and financial statements of undertakings.[4] The Court is also called upon to provide clarification on the relationship between the obligation to provide additional information, provided for in Article 2(4) of Directive 78/660, and the possibility, in exceptional cases, of departing from a provision of that directive, in accordance with Article 2(5) of that directive.

1 Original language: French.

2 Fourth Council Directive 78/660/EEC of 25 July 1978 based on [Article 50(2)(g) TFEU] on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11). Directive 78/660, applicable at the time of the relevant facts in the case pending before the referring court, was repealed by Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ 2013 L 182, p. 19).

3 Those provisions were included in Article 4(3) and (4) of Directive 2013/34.

4 See point 45 of this Opinion.

I. Legal framework

A. European Union law

4. Under Article 2(3) to (5) of Directive 78/660:

‘3. The annual accounts shall give a true and fair view of the company’s assets, liabilities, financial position and profit or loss.

4. Where the application of the provisions of this Directive would not be sufficient to give a true and fair view within the meaning of paragraph 3, additional information must be given.

5. Where in exceptional cases the application of a provision of this Directive is incompatible with the obligation laid down in paragraph 3, that provision must be departed from in order to give a true and fair view within the meaning of paragraph 3. Any such departure must be disclosed in the notes on the accounts together with an explanation of the reasons for it and a statement of its effect on the assets, liabilities, financial position and profit or loss. The Member States may define the exceptional cases in question and lay down the relevant special rules.’

5. Article 31(1) of Directive 78/660 provides:

‘The Member States shall ensure that the items shown in the annual accounts are valued in accordance with the following general principles:

…

(c) valuation must be made on a prudent basis …’

6. Under Article 32 of Directive 78/660:

‘The items shown in the annual accounts shall be valued in accordance with Articles 34 to 42, which are based on the principle of purchase price or production cost.’

7. Article 35 of Directive 78/660 provides:

‘1. (a) Fixed assets must be valued at purchase price or production cost, without prejudice to (b) and (c) below.

…

2. The purchase price shall be calculated by adding to the price paid the expenses incidental thereto.

…’

B. Belgian law

8. Article 24 of the Royal Decree of 30 January 2001 implementing the Companies Code[5] ('the royal decree') provides, in the first paragraph, that the annual accounts must give a true and fair view of the company's assets, liabilities, financial position and profit or loss and, in the second paragraph, that if the application of the provisions of that decree is not sufficient to satisfy that requirement, additional information must be given in the notes on the accounts.

9. The first paragraph of Article 29 of the royal decree states that, in exceptional cases where, as a result of the application of the valuation rules, it is not possible to comply with the first paragraph of Article 24, those rules must be departed from and that article must be applied.

10. Article 35 of the royal decree provides that, without prejudice to the application of Articles 29, 67 and 77, assets are to be valued at their acquisition value and entered in the balance sheet with that value, after deduction of any related depreciation and reductions in value. 'Acquisition value' means the purchase price, the production cost or the value at which the asset is transferred.[6]

11. Article 67 of the royal decree concerns the entry in the balance sheet of receivables. Under paragraph 1 thereof, '[w]ithout prejudice to the provisions of paragraph 2 of this article …, receivables are entered in the balance sheet at their nominal value'.

12. However, Article 67(2)(c) provides a specific accounting regime for certain types of receivables. More specifically, under that provision, where receivables are entered in the balance sheet at their nominal value, there is an accompanying entry of the discount on non-interest-bearing receivables or receivables with abnormally low interest as deferred income, and an inclusion in the profit or loss *prorata temporis* on the basis of compound interest, where those receivables: (1) are repayable by a date more than one year from the date on which they are first entered in the company's balance sheet, and (2) relate either to amounts recorded as income in the profit and loss account, or to the transfer price of fixed assets or branches of activity.

13. Article 77 of the royal decree extends the regime concerning receivables, laid down in Article 67 of the decree, to debts. Article 77 provides, inter alia, that Article 67 applies *mutatis mutandis* to debts of corresponding types and maturities.

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

14. By two agreements, one of 10 January 1997 and the other of 10 March 1999, Wagram Invest twice purchased from its managing director shares in a company. By the first agreement, Wagram Invest acquired 2 005 shares in that company for a price equivalent to EUR 594 944.45, payable in 16 semi-annual instalments, interest-free. By the second agreement, Wagram Invest acquired 1 993 shares in that company for a price equivalent to EUR 787 319.75, payable in 12 semi-annual instalments, interest-free.[7]

15. In order to record those share purchase operations in its accounts, Wagram Invest, in accordance with Article 77 of the royal decree, made the following accounting entries.

5 *Moniteur belge* of 6 February 2001, p. 3008.

6 As defined in Articles 36, 37 and 39, respectively, of that royal decree.

7 The price of the first purchase was, more specifically, BEF 24 000 000, and the price of the second purchase was BEF 31 760 400. It is apparent from the file that the price on which both agreements transferring the shares was based corresponds to the price that the shareholders of that company had paid when they had subscribed to a capital increase a short time earlier.

16. First, it entered the debts vis-à-vis the managing director as debts becoming due after more than one year in its balance sheet liabilities at their nominal value, that is to say, a value equivalent to EUR 594 944.45 for the 1997 purchase and a value equivalent to EUR 787 319.75 for the 1999 purchase. [8]

17. Secondly, it entered as an asset the 2 005 shares purchased in 1997 at their present value equivalent to EUR 452 004.76 and the 1 993 shares purchased in 1999 at their present value equivalent to EUR 641 332.82. [9]

18. The discount rate used to determine the amounts was the market rate applicable to debts of that kind at the time when they are first entered in the balance sheet, that is to say, 8 %.

19. Thirdly, it posted the discount consisting of the difference between the nominal value of the debt and the present value of the fixed asset, that is to say, a value equivalent to EUR 142 939.69 for the 1997 purchase and a value equivalent to EUR 145 986.93 for the 1999 purchase. [10]

20. Fourthly, at the end of each tax year, it recorded as a financial charge a percentage of deferred charges corresponding to the discount on the debt.

21. Accordingly, at the end of the 2000 tax year, Wagram Invest posted the equivalent to EUR 48 843.41 as a percentage of charges, that is to say, an amount equivalent to EUR 24 801.9 for the shares purchased in 1997 and EUR 24 041.5 for those purchased in 1999. [11]

22. At the end of the 2001 tax year, Wagram Invest posted an amount equivalent to EUR 66 344.17 as a percentage of charges, that is to say, equivalent to EUR 20 899.7 for the shares purchased in 1997 and to EUR 45 444.5 for those purchased in 1999. [12]

23. Following an inspection, the Belgian tax authorities considered it necessary to reject the discount charges recorded and deducted for the 2000 and 2001 tax years and, in spite of Wagram Invest's disagreement, issued it with a tax assessment on 28 October 2002.

24. The Belgian tax authorities considered in particular that recording a fictitious discount by reducing the purchase price of the fixed asset had the effect of expressing a decrease in value of securities which was not economically justified and which it was not permissible to account for in stages over time for tax purposes. [13]

25. On that basis, the Belgian tax authorities assessed Wagram Invest for two additional corporation tax contributions for the 2000 and 2001 tax years, on 20 November 2002 and 18 November 2002, respectively.

26. Having filed an objection which did not receive a decision within the applicable time limit, on 10 March 2005 Wagram Invest brought an action for annulment of the decision of the Belgian tax authorities before the tribunal de première instance de Namur (Court of First Instance, Namur, Belgium). By judgment of 20 December 2007, that court dismissed that action and confirmed that the contributions at issue for the 2000 and 2001 tax years should be paid.

8 More specifically, a nominal value of BEF 24 000 000 for the first purchase and BEF 31 760 400 for the second purchase, respectively.

9 More specifically, a present value of BEF 18 233.827 and BEF 25 871 302, respectively.

10 More specifically, a discount of BEF 5 766 173 and BEF 5 889 098 respectively.

11 More specifically, a percentage of BEF 1 970 339 corresponding to BEF 1 000 506 for the first purchase and BEF 969 833 for the second purchase, respectively.

12 More specifically, a percentage of BEF 2 676 318 corresponding to BEF 843 090 for the first purchase and BEF 1 833 228 for the second purchase, respectively.

13 It is apparent from the order for reference that the relevant tax provision in this case, on which the tax dispute between Wagram Invest and the Belgian tax authorities is based, is Article 198(7) of the code des impôts sur les revenus 1992 (1992 Income Tax Code).

27. Wagram Invest then appealed against that judgment before the cour d'appel de Liège (Court of Appeal, Liège, Belgium), which, by judgment of 14 October 2011, upheld the judgment at first instance.

28. Wagram Invest then lodged an appeal on a point of law on 2 July 2014. By judgment of 11 March 2016, the Cour de cassation (Court of Cassation, Belgium) set aside the judgment of the cour d'appel de Liège (Court of Appeal, Liège) and referred the case back to the referring court.

29. The referring court finds that the accounting method used by Wagram Invest complies with the provisions of Belgian accounting law, and more particularly with Article 77 of the royal decree. However, that court is uncertain whether such a method complies with the provisions of Directive 78/660.

30. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the notion of a true and fair view under Article 2(3) of [Directive 78/660], where a public limited company purchases a financial fixed asset, authorise a discount relating to a non-interest-bearing debt becoming due after one year to be entered as a charge in the profit and loss account, and the acquisition price of the fixed asset to be entered as an asset in the balance sheet after deduction of that discount, in the light of the valuation principles set out in Article 32 of that directive?

(2) Must the expression "in exceptional cases" that is a proviso for application of Article 2(5) of [Directive 78/660] and that allows application of a (different) provision of that directive to be excluded be interpreted as meaning that the provision in question can apply only on condition that it is found that compliance with the provisions of the directive, together with, where applicable, additional disclosure in the notes on the accounts in accordance with Article 2(4) of that directive, cannot adversely affect compliance with the principle that a true and fair view must be given?

(3) Must Article 2(4) of [Directive 78/660] be applied as a priority with the effect that the possibility, under Article 2(5) of that directive, of excluding application of a provision of the directive can be utilised only if additional disclosure cannot ensure effective implementation of the principle that a true and fair view must be given enshrined in Article 2(3) of that directive and, even then, only in exceptional cases?'

III. Assessment

A. Preliminary observations

31. Before analysing the substance of the questions raised by the referring court, it is appropriate to address two preliminary issues.

32. At the outset, it should be pointed out that the referring court is asking the Court of Justice about the compliance of the method used by Wagram Invest to account for the debts relating to the two share purchases at issue with the principle that a true and fair view must be given, as provided for in Article 2(3) to (5) of Directive 78/660. Thus, the questions referred for a preliminary ruling by the referring court concern the interpretation of Directive 78/660, which relates to the annual accounts of certain types of companies.

33. Even though the order for reference focuses only on the accounting aspect of the case, it is nevertheless quite clear from that order that the dispute in the main proceedings pending before the referring court is, in fact, of a tax nature.

34. It is also apparent from the order for reference that the interpretation of the relevant provisions of Directive 78/660 is capable of having tax consequences, since including, for accounting purposes, the discount consisting of the difference between the nominal value of the debt for the two share purchases at issue and the present value of those shares, and recording it in stages over time, has an impact on Wagram Invest's corporation tax burden for the tax years 2000 and 2001.

35. In those circumstances, as regards, in the first place, the interdependence between the accounting and tax aspects of the case, it should be pointed out that the Court has already had occasion to state that Directive 78/660 is not designed to lay down the conditions in which the annual accounts of companies may or must serve as a basis for the determination by the tax authorities of the Member States of the basis for assessment and the amount of taxes, such as the corporate tax at issue in the main proceedings. [14]

36. However, the Court has also held that the annual accounts can be used by Member States as a reference base for tax purposes and that no provision of Directive 78/660 precludes Member States from correcting, for tax purposes, the effects of the accounting rules in that directive, in order to determine a taxable profit closer to the economic reality. [15]

37. Like the European Commission, I consider that it follows from that case-law that, although the accounting rules deriving from Directive 78/660 are not intended to govern the tax systems of the Member States, so that the interpretation of the provisions of that directive does not necessarily have to lead to consequences for tax purposes, the Member States nevertheless remain free to choose, in the exercise of their competence to define in particular the method of taxation of non-interest-bearing long-term receivables, whether or not it is appropriate to rely on those accounting rules in order to define the tax regime applicable to those receivables.

38. As regards, in the second place, the admissibility of the questions referred for a preliminary ruling, first, Wagram Invest, in its observations, contests their relevance, since the regularity of its accounting entries was confirmed by the judgment of the cour d'appel de Liège (Court of Appeal, Liège, Belgium), referred to in point 27 of this Opinion, which has become final. Secondly, the admissibility of the questions referred was discussed at the hearing as to their possible hypothetical nature. Indeed, it was pointed out that, since the compliance of the accounting entries of Wagram Invest with Belgian law is not disputed, the dispute in the main proceedings concerns only the application of the Belgian tax provisions, which have no connection with Directive 78/660, so that the interpretation of that directive can have no effect on the dispute in the main proceedings.

39. In that regard, I would like to recall that, according to settled case-law, it is solely for the national court 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. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling. [16]

14 Judgment of 15 June 2017, *Immo Chiaradia and Docteur De Bruyne* (C-444/16 and C-445/16, EU:C:2017:465, paragraph 31 and the case-law cited).

15 Judgments of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 28), and of 15 June 2017, *Immo Chiaradia and Docteur De Bruyne* (C-444/16 and C-445/16, EU:C:2017:465, paragraph 33).

16 Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 24), and of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 26 and the case-law cited).

40. It follows, according to the case-law, that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is 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. [17]

41. In my view, however, none of those three situations applies in the present case. First, as is apparent from point 34 of this Opinion, the interpretation of the relevant provisions of Directive 78/660 is capable of having tax consequences, so that it is indisputable that the interpretation of those provisions sought by the referring court relates to the actual facts of the main action or its purpose or the subject matter of the dispute in the main proceedings and that therefore the problem which the questions referred raise is not hypothetical. Secondly, in the present case, the Court has before it the factual and legal material necessary to give a useful answer to the request for a preliminary ruling submitted to it by the referring court.

42. In the light of the foregoing, I consider that the request for a preliminary ruling is admissible.

B. The first question referred

43. By its first question, the referring court asks whether, in view of the valuation rules set out in Article 32 of Directive 78/660, Article 2(3) of that directive, which lays down the principle that a true and fair view must be given, must be interpreted as permitting, when a financial fixed asset is purchased by a company, the discount relating to a non-interest-bearing debt becoming due after more than one year to be entered as a charge in the profit and loss account, and the purchase price of the fixed asset to be entered as an asset in the balance sheet after deduction of that discount.

44. In that regard, it should be pointed out, at the outset, that Directive 78/660 is designed to coordinate national provisions concerning the presentation and content of annual accounts and annual reports and the valuation methods in order to protect members and third parties. To that end, according to the third recital thereof, it is designed only to establish minimum requirements as to the extent of the financial information to be made available to the public. [18]

45. As is apparent from the Court's case-law, compliance with the principle that a true and fair view must be given is the primary objective of Directive 78/660. According to that principle, contained in Article 2(3) to (5) of that directive, annual accounts must give a true and fair view of the assets and liabilities, financial position and the profit and loss of the company. [19]

46. The principle that a true and fair view must be given requires, first, that the accounts reflect the activities and transactions which they are supposed to describe and, second, that the accounting information be given in the form judged to be the soundest and most appropriate for satisfying third parties' needs for information, without harming the interests of the company. [20]

17 Judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25), and of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 26 and the case-law cited).

18 Judgments of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 29 and the case-law cited), and of 15 June 2017, *Immo Chiaradia and Docteur De Bruyne* (C-444/16 and C-445/16, EU:C:2017:465, paragraph 39).

19 Judgments of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 30 and the case-law cited), and of 15 June 2017, *Immo Chiaradia and Docteur De Bruyne* (C-444/16 and C-445/16, EU:C:2017:465, paragraph 40).

20 Judgments of 7 January 2003, *BIAO* (C-306/99, EU:C:2003:3, paragraph 72 and the case-law cited), and of 15 June 2017, *Immo Chiaradia and Docteur De Bruyne* (C-444/16 and C-445/16, EU:C:2017:465, paragraph 41).

47. The Court has previously had occasion to rule that the application of the principle that a true and fair view must be given must, as far as possible, be guided by the general principles contained in Article 31 of Directive 78/660, within which the principle of making valuations on a prudent basis set out in Article 31(1)(c) is of particular importance. [21]

48. In accordance with the provisions of Article 31(1)(c) of Directive 78/660, which states the principle of making valuations on a prudent basis, taking account of all elements – profits made, charges, income, liabilities and losses – which actually relate to the financial year in question ensures observance of the requirement of a true and fair view. [22]

49. It is also apparent from the case-law that the principle that a true and fair view must be given must also be understood in the light of the principle contained in Article 32 of Directive 78/660, pursuant to which the items shown in the annual accounts are to be valued based on the purchase price or production cost. [23]

50. The Court has stated that, under that provision, the true and fair view which the annual accounts of the company must give is based on a valuation of the assets not on the basis of their real value, but on the basis of their historical cost. [24]

51. Under Article 2(5) of Directive 78/660, it is only in exceptional cases, where the application of a provision of that directive is incompatible with the principle that a true and fair view must be given, laid down in Article 2(3), that the provision of Article 32 must be departed from in order to give a true and fair view within the meaning of paragraph 3. [25]

52. It is in the light of the principles of case-law set out in the preceding points that it is necessary to assess the compliance with the principle that a true and fair view must be given of an accounting method which permits, when a company purchases a financial fixed asset, such as shares, a discount linked to the non-interest-bearing debt of more than one year relating to that purchase to be entered in the profit and loss account, and the purchase price of the fixed asset to be entered as an asset after deduction of that discount.

53. Of the parties which submitted observations to the Court, Wagram Invest, the Belgian Government, the Austrian Government and the European Commission consider, in essence, that such a method is compatible with the principle that a true and fair view must be given. Only the German Government adopts a contrary position.

54. In that regard, I note that it is apparent from Article 32 of Directive 78/660, in the light of which, as I stated in point 49 of this Opinion, the principle that a true and fair view must be given must be understood, that the items shown in the annual accounts are valued in accordance with Articles 34 to 42, based on the principle of the purchase price or production cost.

55. Article 35(1)(a) of Directive 78/660 specifies that fixed assets must be valued at purchase price or production cost. [26]

21 Judgments of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 32 and the case-law cited), and of 15 June 2017, *Immo Chiaradia and Docteur De Bruyne* (C-444/16 and C-445/16, EU:C:2017:465, paragraph 42).

22 Judgments of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 33 and the case-law cited), and of 15 June 2017, *Immo Chiaradia and Docteur De Bruyne* (C-444/16 and C-445/16, EU:C:2017:465, paragraph 43).

23 Judgment of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 34).

24 Judgment of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 35).

25 See, to that effect, judgment of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 36). On the scope of Article 2(5) of Directive 78/660, see points 76 et seq. of this Opinion.

26 Article 35(1) of Directive 78/660 applies without prejudice to (b) and (c) of the same paragraph, which prescribe, in accordance with the principle of prudence, the circumstances in which value adjustments of financial fixed assets may or must be made.

56. However, Directive 78/660 does not contain a definition of the concept of purchase price.[27] The Court has nevertheless stated, as is apparent from point 50 of this Opinion, that the valuation of assets is based not on their real value, but on their historical cost.

57. It may be considered that, as a general rule, the historical cost of a financial fixed asset corresponds to the nominal value of the purchase price, that is to say, the price which the company which acquired the fixed asset paid for the acquisition. The entry of that nominal value as an asset therefore normally enables a true and fair view of the impact of that item on the company's accounts to be given.

58. However, where the purchase agreement for the asset provides for payment of the price to be made in stages over time without interest, it is possible that the transaction to acquire the asset, although formally a single transaction, must in reality be regarded as a complex transaction made up of two elements: the actual acquisition of the financial fixed asset and an implied loan transaction.[28]

59. If that is the case, it may be considered that the nominal value of the price paid to acquire the fixed asset consists, in fact, of two elements, namely: on the one hand, the actual purchase price of the fixed asset, corresponding to the present value of that price – that is, the purchase price less the implicit interest on the loan – and, on the other hand, an amount corresponding to that implicit interest.

60. In such a situation, I consider, like Wagram Invest, the Belgian Government, the Austrian Government and the Commission, that an accounting method which provides, on the one hand, for inclusion as an asset of the present value of the price paid for the financial fixed asset (namely, the nominal value less the implicit interest) and, on the other hand, the posting of a discount representing the implicit interest (of an amount corresponding to the difference between the nominal value of the debt for the purchase of the fixed asset and the present value of that debt) makes it possible to give a fair representation of the economic reality of the complex transaction at issue and therefore complies with the requirements connected with observance of the principle that a true and fair view must be given, provided for in Directive 78/660.

61. In such a case, it is the present value of the price agreed for the purchase of the fixed asset and not its nominal value which corresponds to the actual value of that purchase, whereas the interest, even if implicit, corresponding to the amount of the discount, constitutes an interest expense. In such a situation, the entry as an asset of the nominal value of the price agreed for the acquisition of the fixed asset has the effect of distorting the result of the transaction at issue and therefore the overall result stated.[29]

62. The accounting method indicated in point 60 of this Opinion is, moreover, in accordance with the principle of prudence stated in Article 31(1)(c) of Directive 78/660 and referred to in points 47 and 48 of this Opinion. By giving substance priority over form,[30] the method gives rise to an undervaluation of the asset at issue,[31] on the basis of a valuation which takes into account, as required by that principle,[32]

27 Directive 78/660 mentions, in Article 35(2), that the purchase price is calculated by adding to the price paid the expenses incidental thereto.

28 The Austrian Government uses the expression 'hidden loan'.

29 See, to that effect, also the report to the King of the Royal Decree of 6 November 1987 amending the Royal Decree of 8 October on the annual accounts of undertakings (*Moniteur belge* of 24 November 1987, p. 17309) concerning Article 27a of the Royal Decree of 8 October 1976, a provision which corresponds to Article 67 of the Royal Decree (of 30 January 2001). Both the Belgian Government and Wagram Invest referred to that report in their observations.

30 In its observations, the Commission referred to the principle of substance which was introduced into Directive 78/660 by Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings (OJ L 178, p. 16) which is not applicable *ratione temporis* since it was adopted after the facts of the dispute in the main proceedings. That principle is nevertheless relevant to the analysis.

31 See, by analogy, judgment of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 40, first sentence).

32 See point 48 of this Opinion and the case-law cited.

all the relevant factors, in this case in particular the financial charges, even if such charges, being implicit, do not formally arise from the nominal value of the purchase price of that asset. That accounting method thus enables the company's creditors to have a true and not overly optimistic view of the assets of the company concerned.

63. The conclusion that the use of that accounting method is consistent with the principle that a true and fair view must be given is, in my view, by no means contradicted by the judgment of 3 October 2013, *GIMLE*, C-322/12, EU:C:2013:632. In that judgment, which provides guidelines for important principles, the question concerned the compatibility with the principle that a true and fair view must be given of a possible inclusion as an asset of a financial fixed asset at a value *higher* than its purchase price, whereas, in the present case the question concerns an entry as an asset at a value *lower* than the total nominal value of the price agreed for the purchase of the financial fixed asset.

64. The foregoing considerations and the conclusion that the use of the accounting method indicated in point 60 of this Opinion is in accordance with the principle that a true and a fair view must be given are, however, in my view, only relevant if the transaction to purchase the financial fixed asset, for which payment of the price is made in stages over time and without interest, must actually be considered, from an economic point of view, as a complex transaction constituted, on the one hand, by the actual acquisition of the financial fixed asset and, on the other hand, by a loan transaction, which may be implicit.

65. It is for the national court to ascertain whether that is actually the case, by assessing on a case-by-case basis the circumstances, both of fact and of law,[33] specific to the case before it.

66. In that assessment, that court could, inter alia, be called upon to evaluate whether the transaction in question took place under normal market conditions. If the price agreed for the purchase of the fixed asset was clearly lower or higher than the market price, the configuration of the purchase transaction as a complex transaction, as envisaged in point 58 of this Opinion, could be excluded. As the Commission has pointed out, that circumstance could be particularly relevant in the case of a transaction taking place between related parties, such as that at issue in the main proceedings.[34]

67. In the context of that assessment, the referring court could also be called upon to ascertain whether the implicit loan transaction arising from the plan to pay the price in stages over time and without interest is not, in reality, a transaction for consideration whose agreed remuneration is a benefit in kind to be received during subsequent financial years.[35]

68. In the light of the foregoing, in my view, the answer to the first question referred for a preliminary ruling by the national court should be as follows: In the case of an acquisition by a public limited company of a financial fixed asset, for which payment of the price is planned in stages over time and without interest, the principle that a true and fair view must be given, laid down in Article 2(3) to (5) of Directive 78/660, in the light of the principles contained in Article 31(1)(c) and Article 32 of that directive, does not preclude the use of an accounting method which provides for the entry as a charge in the profit and loss account of a discount linked to the non-interest-bearing debt becoming due after more than one year, relating to that acquisition, and the entry of the purchase price of the fixed asset as an asset in the balance sheet after deduction of that discount, where that purchase transaction is to be regarded as, in fact, a complex transaction constituted, on the one hand, by the actual acquisition of the financial fixed asset and, on the other hand, by a loan transaction, even if it is implicit. It is for the national court to ascertain whether that is actually the case, by assessing on a case-by-case basis the circumstances, both of fact and of law, specific to the case before it.

33 In that analysis, it may be necessary to consider the scope of relevant national provisions or of the case-law of the national courts.

34 As is apparent from point 14 of this Opinion, Wagram Invest purchased the shares in question from its managing director.

35 In its observations submitted to the Court, the Belgian Government put forward different examples of situations of this kind, in particular a loan to a client in exchange for an undertaking to purchase goods produced by the lender.

C. The second and third questions

69. By its second and third questions, which should, in my view, be addressed together, the referring court seeks clarification regarding the relationship between the provisions contained in Article 2(4) and (5) of Directive 78/660.[36]

70. More particularly, the referring court wishes to know, in essence, whether the application of the provision of Article 2(5) of Directive 78/660 presupposes that a potential supply of additional information, pursuant to Article 2(4) of that directive, does not ensure observance of the principle that a true and fair view must be given.

71. In order to answer that question, it is necessary to interpret the two provisions at issue in order to ascertain whether there is a relationship of cross-compliance between them, in the sense that application of the former should take priority over application of the latter.

72. In that regard, it should be pointed out that, in accordance with the Court's settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules.[37]

73. Article 2(4) of Directive 78/660 provides that, where the application of that directive is not sufficient to give the true and fair view within the meaning of paragraph 3 of that article, additional information must be given.

74. It is apparent from the wording of that provision, and from its position immediately after Article 2(3), enshrining the principle that a true and fair view must be given, that it fulfils a complementary function in relation to that provision of Article 2(3),[38] by imposing an obligation on the company concerned to provide additional information in so far as that is necessary in order to give a true and fair view of its accounts.

75. Thus, according to the Court, for example, a company which is certain to make a large profit due to commitments entered into regarding the future resale of an asset must, under Article 2(4) of Directive 78/660, give additional information in that regard.[39]

76. As regards, on the other hand, Article 2(5) of Directive 78/660, that provision states that where in exceptional cases the application of a provision of that directive is incompatible with the obligation to give a true and fair view of the company's assets, financial position and profit or loss, laid down in paragraph 3 of that article, that provision must be departed from in order to give a true and fair view. Any such departure must, however, be disclosed in the notes on the accounts together with an explanation of the reasons for it and a statement of its effect on the assets, liabilities, financial position and profit or loss.

77. The third sentence of Article 2(5) states that it is for the Member States – and not therefore for the companies – to define the exceptional cases and to lay down the relevant special rules. That provision is designed to reduce the margin of discretion of the companies to determine the existence of such exceptional cases themselves.

36 In the dispute in the main proceedings, the reply to those questions seems to be relevant only if the referring court were to find, following the case-by-case analysis mentioned in the reply to the first question, that the accounting method used does not comply with the principle that a true and fair view must be given. It is only in those circumstances that any departure from the provisions of Directive 78/660 would come into play. However, the order for reference does not specify which provision could be departed from.

37 See, inter alia, judgment of 7 November 2019, *Kanyeba and Others* (C-349/18 to C-351/18, EU:C:2019:936, paragraph 35).

38 That interpretation is confirmed by the fact that in the new Directive 2013/34, the provisions corresponding to Article 2(3) and (4) of Directive 78/660 are now contained in the same paragraph, namely Article 4(3).

39 Judgment of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 41).

78. It is thus apparent from the wording of paragraph 5 that it covers '*exceptional cases*' in which the application of a provision of Directive 78/660 by the company in question would lead to a result that is '*incompatible*' with the principle that a true and fair view must be given, so that it is necessary to depart from such a provision, and it is for the Member States to determine those exceptional cases and the rules applicable to them.

79. The Court has previously had occasion to observe that, since Directive 78/660 does not define what is meant by 'exceptional cases', that expression must be interpreted in the light of the directive's aim, which is that the annual accounts of the companies concerned must give a true and fair view of their assets, of their financial position and of their profit or loss. [40]

80. Accordingly, the Court stated that those 'exceptional cases' are those in which the application of the provisions of Directive 78/660 would not give the truest and fairest possible view of the actual financial position of the company concerned. [41]

81. Those exceptional cases should, however, be understood to be only very unusual transactions and unusual situations and should, for instance, not be related to entire specific sectors. [42]

82. In that regard, the Court has stated that the undervaluation of assets in company accounts cannot, in itself, be considered to be an 'exceptional case' within the meaning of Article 2(5) of Directive 78/660. [43]

83. In my view, it is apparent from the analysis of the two provisions at issue carried out above that there is nothing to indicate that the implementation of Article 2(5) of Directive 78/660 is conditional on the prior application of the provision set out in paragraph 4 of that article.

84. Although the provisions are both designed to ensure that the annual accounts actually give a true and fair view of the company's assets, liabilities, financial position and profit or loss, they cover different and non-interdependent situations. They are not, therefore, in a relationship of subordination.

85. Article 2(4) of Directive 78/660 supplements and specifies the content of paragraph 3 of that article by giving the company in question the possibility of providing additional information where that proves necessary for complying with the principle that a true and fair view must be given.

86. Article 2(5) of Directive 78/660 provides, on the other hand, for the possibility of departing from the application of the rules laid down in Directive 78/660. Moreover, that provision makes no mention of the provision in paragraph 4 of that article.

87. The finding that the two provisions at issue are autonomous is reinforced, in my view, by the fact, correctly highlighted by the Commission, that it is by no means inconceivable that, in certain situations, the two provisions may be applied simultaneously. It is quite possible that, where a company is required to provide additional information under Article 2(4) of Directive 78/660, in order to give a true and fair view of its accounts, to attain that objective it is necessary to depart from a provision of that directive under Article 2(5) of that article, irrespective of the additional information provided.

40 See judgment of 14 September 1999, *DE + ES Bauunternehmung* (C-275/97, EU:C:1999:406, paragraph 31).

41 See, to that effect, and by analogy, judgment of 14 September 1999, *DE + ES Bauunternehmung* (C-275/97, EU:C:1999:406, paragraph 32), regarding the concept of 'exceptional cases' referred to in Article 31(2) of Directive 78/660.

42 See recital 9 of Directive 2013/34, which, as I have already noted, is not applicable *ratione temporis* to the facts in the main proceedings, but can nevertheless provide guidance as to the interpretation of the provisions of Directive 78/660 corresponding to those of Directive 2013/34.

43 Judgment of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 38).

88. In that regard, it should be pointed out, as the Commission has done, that, as a departure from the principle that all the provisions of the Directive 78/660 are to be applied, the provision of Article 2(5) of that directive must be applied on a case-by-case basis and in a strict and restrictive manner. That means, therefore, that the departure must include an explanation of the reasons, as stated in the second sentence of the paragraph, by indicating why such a departure is necessary to ensure observance of the principle that the company's accounts must give a true and fair view.

89. In that context, although, in certain cases, the provision of additional information under Article 2(4) of Directive 78/660 makes it possible to give a true and fair view without the need to depart from a rule of that directive under Article 2(5) thereof, that fact does not in any way mean that, in every case, application of the latter provision is subject to the application of the former.

90. Finally, it should also be pointed out that there is no indication that, in the present case, the Kingdom of Belgium availed itself of the possibility provided by the third sentence of paragraph 5 of defining the exceptional cases and laying down the relevant special rules.[44]

91. In the light of the foregoing, in my view, the second and third questions referred should be answered as follows: Article 2(4) and (5) of Directive 78/660 must be interpreted as meaning that there is no relationship of conditionality between paragraphs 4 and 5 in the sense that the provision in paragraph 4 should necessarily be applied prior to that provided for in paragraph 5. It is, in any event, for the Member States, and therefore not for the companies, to define the 'exceptional cases' in which, under paragraph 5, a departure from a provision of Directive 78/660 is possible, and to lay down the relevant special rules.

IV. Conclusion

92. In the light of all the foregoing considerations, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the cour d'appel de Mons (Court of Appeal, Mons, Belgium):

(1) In the case of an acquisition by a public limited company of a financial fixed asset, for which payment of the price is planned in stages over time and without interest, the principle that a true and fair view must be given, laid down in Article 2(3) to (5) of the Fourth Council Directive 78/660/EEC of 25 July 1978 based on [Article 50(2)(g) TFEU] on the annual accounts of certain types of companies, in the light of the principles contained in Article 31(1)(c) and Article 32, does not preclude the use of an accounting method which provides for the entry as a charge in the profit and loss account of a discount linked to the non-interest-bearing debt becoming due after more than one year, relating to that acquisition, and the entry of the purchase price of the fixed asset as an asset in the balance sheet after deduction of that discount, where that purchase transaction is to be regarded as, in fact, a complex transaction constituted, on the one hand, by the actual acquisition of the financial fixed asset and, on the other hand, by a loan transaction, even if it is implicit. It is for the national court to ascertain whether that is actually the case, by assessing on a case-by-case basis the circumstances, both of fact and of law, specific to the case before it.

44 In that regard, see also judgment of 3 October 2013, *GIMLE* (C-322/12, EU:C:2013:632, paragraph 41).

(2) Article 2(4) and (5) of the Fourth Directive 78/660 must be interpreted as meaning that there is no relationship of conditionality between paragraphs 4 and 5 in the sense that the provision in paragraph 4 should necessarily be applied prior to that in paragraph 5. It is, in any event, for the Member States, and therefore not for the companies, to define the 'exceptional cases' in which, under paragraph 5, a departure from a provision of Directive 78/660 is possible, and to lay down the relevant special rules.