Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

30 January 2020*

(Reference for a preliminary ruling — Directive 82/891/EEC — Articles 12 and 19 — Division of limited liability companies — Protection of the interests of the creditors of the company being divided — Nullity of the division — *Actio pauliana*)

In Case C-394/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte d'appello di Napoli (Court of Appeal, Naples, Italy), made by decision of 27 February 2018, received at the Court on 14 June 2018, in the proceedings

I.G.I. Srl

v

Maria Grazia Cicenia,

Mario Di Pierro,

Salvatore de Vito,

Antonio Raffaele,

intervener:

Costruzioni Ing. G. Iandolo Srl,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, P.G. Xuereb (Rapporteur), T. von Danwitz, C. Vajda and A. Kumin, Judges,

Advocate General: M. Szpunar,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 5 June 2019,

after considering the observations submitted on behalf of:

– I.G.I. Srl, by S. Ietti, avvocatessa,

* Language of the case: Italian.

– Costruzioni Ing. G. Iandolo Srl, by S. Pierro and S. Ietti, avvocatesse,

– the European Commission, by L. Malferrari, W. Mölls and H. Støvlbæk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 12 and 19 of Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ 1982 L 378, p. 47), as amended by Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 (OJ 2007 L 300, p. 47) ('the Sixth Directive').

2 The request has been made in proceedings between I.G.I. Srl, on the one hand, and Maria Grazia Cicenia, Mario Di Pierro, Salvatore de Vito and Antonio Raffaele, on the other hand, concerning the possibility for the latter, as creditors of a company being divided which had a part of its assets transferred to I.G.I., to bring an *actio pauliana* so as to have the instrument of division declared without effect vis-à-vis them, and to bring enforcement or protective actions in relation to the assets transferred to I.G.I.

Legal context

European Union law

Third Directive 78/855/EEC

3 Article 1 of Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies (OJ 1978 L 295, p. 36), as amended by Directive 2007/63 ('the Third Directive'), entitled 'Scope', provides, in paragraph 1:

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

…

– Italy:

la società per azioni,

…'

4 Article 13(3) of the Third Directive states:

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

The Sixth Directive

5 The eighth recital of the Sixth Directive states:

'… creditors, including debenture holders, and persons having other claims on the companies involved in a division, must be protected so that the division does not adversely affect their interests'.

6 The eleventh recital of that directive states:

'… to ensure certainty in the law as regards relations between the companies involved in the division, between them and third parties, and between the members, the cases in which nullity can arise must be limited by providing that defects be remedied wherever that is possible and by restricting the period within which nullification proceedings may be commenced'.

7 Article 1 of that directive provides:

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

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

…'

8 Article 2 of the Sixth Directive provides:

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

…

3. In so far as this Directive refers to [the Third Directive], the expression "merging companies" shall mean "the companies involved in a division", the expression "company being acquired" shall mean "the company being divided", the expression "acquiring company" shall mean "each of the recipient companies" and the expression "draft terms of merger" shall mean "draft terms of division".'

9 Article 12 of the Sixth Directive is worded as follows:

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

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

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

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

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

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

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

10 Article 15 of the Sixth Directive provides:

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

11 Under Article 17(1) of that directive:

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

(a) the transfer, both as between the company being divided and the recipient companies and as regards third parties, to each of the recipient companies of all the assets and liabilities of the company being divided; such transfer shall take effect with the assets and liabilities being divided in accordance with the allocation laid down in the draft terms of division or in Article 3(3);

(b) the shareholders of the company being divided become shareholders of one or more of the recipient companies in accordance with the allocation laid down in the draft terms of division;

(c) the company being divided ceases to exist.'

12 Article 19 of that directive is worded as follows:

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

(a) nullity must be ordered in a court judgment;

(b) divisions which have taken effect pursuant to Article 15 may be declared void only if there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law;

(c) nullification proceedings may not be initiated more than six months after the date on which the division becomes effective as against the person alleging nullity or if the situation has been rectified;

(d) where it is possible to remedy a defect liable to render a division void, the competent court shall grant the companies involved a period of time within which to rectify the situation;

(e) a judgment declaring a division void shall be published in the manner prescribed by the laws of each Member State in accordance with Article 3 of [First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41)];

(f) where the laws of a Member State permit a third party to challenge such a judgment, he may do so only within six months of publication of the judgment in the manner prescribed by Directive 68/151/EEC;

(g) a judgment declaring a division void shall not of itself affect the validity of obligations owed by or in relation to the recipient companies which arose before the judgment was published and after the date referred to in Article 15;

(h) each of the recipient companies shall be liable for its obligations arising after the date on which the division took effect and before the date on which the decision pronouncing the nullity of the division was published. The company being divided shall also be liable for such obligations; Member States may provide that this liability be limited to the share of net assets transferred to the recipient company on whose account such obligations arose.

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

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

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

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

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

15 Article 22(1) of that directive, also in Chapter II thereof, provides:

‘Articles 3, 4, 5 and 7, 8(1) and (2) and 9 to 19 of this Directive shall apply, without prejudice to Articles 11 and 12 of Directive 68/151/EEC, to division by the formation of new companies. For this purpose, the expression “companies involved in a division” shall refer to the company being divided and the expression “recipient companies” shall refer to each of the new companies.’

16 Article 25 of the Sixth Directive, contained in Chapter IV of that directive which is entitled ‘Other operations treated as divisions’, provides:

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

Italian law

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

‘A merger may be implemented only 60 days after the last of the registrations required under Article 2502-bis, unless (i) the merger has the consent of the creditors of the companies involved in the merger who have claims existing before the registration or publication required under Article 2501-ter(3), (ii) payment is made to creditors that have not given their consent, (iii) the corresponding sums are deposited with a bank, or (iv) the report required under Article 2501-sexies, which has been drafted, for all companies involved in the merger, by a single auditing company, in accordance with its liability under the sixth paragraph of Article 2501-sexies, has certified that the assets and liabilities and financial situation of the companies involved in the merger are such that it is not necessary to provide safeguards for the protection of the aforementioned creditors.

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

18 Article 2504-quater of that code, entitled ‘Invalidity of the merger’, states that:

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

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

19 Article 2506 of that code, entitled ‘Forms of division’, provides:

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

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

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

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

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

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

21 Article 2506-quater of that code, entitled 'Effects of the division', provides, in its final paragraph:

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

22 Under Article 2901 of that code, which is contained in a section entitled 'On the action to set aside':

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

(1) the debtor is aware of the prejudice that the act has caused to the interests of the creditor or, in the case of an act antedating the existence of the credit, the act was deliberately planned to prejudice the settlement of the claim;

(2) furthermore, in relation to an act for consideration, the third party was aware of the prejudice and, in the case of an act antedating the existence of the credit, was a party to the deliberate planning of that act.

…'

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

24 Finally, it follows from Article 2903 of that code that the action to set aside is subject to a limitation period of 5 years running from completion of the act.

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

25 By notarised instrument of 16 September 2009, Costruzioni Ing. G. Iandolo Srl transferred, within the context of a division, a part of its assets to I.G.I., established for that purpose by means of the same notarised instrument.

26 Taking the view that that division had caused Costruzioni Ing. G. Iandolo to lose a large part of its assets and that the company now owned only land plots of low value, Ms Cicenia, Mr Di Pierro, Mr de Vito and Mr Raffaele brought an action against I.G.I. and Costruzioni Ing. G. Iandolo before the Tribunale di Avellino (District Court, Avellino, Italy), in which they claimed that they are creditors of Costruzioni Ing. G. Iandolo. Principally, they brought an action to set aside, a so-called *actio pauliana*, under Article 2901 of the Civil Code, requesting that the instrument of division in

question be declared without effect vis-à-vis themselves. In the alternative, they requested that Costruzioni Ing. G. Iandolo and I.G.I. be declared jointly and severally liable for the debts of Costruzioni Ing. G. Iandolo, pursuant to Article 2506-quater of the Civil Code.

27 By judgment of 11 December 2015, the Tribunale di Avellino (District Court, Avellino) allowed the principal claim of the creditors and declared the asset transfer instrument contained in the instrument of division without effect vis-à-vis them 'in relation to the assets referred to in the revoked instrument still in the possession of I.G.I.'.

28 I.G.I. and Costruzioni Ing. G. Iandolo lodged an appeal against that judgment before the Corte d'Appello di Napoli (Court of Appeal, Naples, Italy), arguing that the *actio pauliana* brought by the creditors concerned is inadmissible on the ground that the objection referred to in Article 2503 of the Civil Code is the sole judicial remedy of which creditors of companies involved in a division may avail themselves, and that, where no such objection is made, the effects of the division become definitive vis-à-vis those creditors. Those companies also stated that Article 2504-quater of the Civil Code precludes situations in which an instrument of division is declared invalid after the publication formalities have been complied with.

29 The referring court states that Articles 12 and 19 of the Sixth Directive were transposed into Italian law by Articles 2503, 2504-quater, 2506-ter and 2506-quater (final paragraph) of the Civil Code.

30 In particular, the referring court states that, in order to implement Article 12 of the Sixth Directive, which relates to the protection of the interests of the creditors of the companies involved in a division whose claims antedate publication of the draft terms of division, the Italian legislature provided that creditors whose rights antedate the division can, within a short period of time, file an objection to the division. It also provided that each company is jointly and severally liable, up to the effective value of the net assets transferred to it or remaining with it, for the debts of the company being divided that are not satisfied by the company on whose account such obligations arose. Finally, it made provision, where the instrument of division can no longer be declared invalid, for a right to compensation for the prejudice that may be caused to the shareholders or to third parties harmed by the division.

31 The referring court also notes that, in order to implement Article 19 of the Sixth Directive, which lays down nullity rules for divisions, the Italian legislature provided that the instrument of division cannot be declared invalid where it has been registered with the Register of Companies.

32 The referring court also states that, as regards the question whether an *actio pauliana* brought by the creditors of a company being divided is admissible, there are two opposing lines of case-law which have been developed by the lower courts.

33 According to one line of case-law, such an action is admissible on the ground that, although both the objection provided for in Article 2503 of the Civil Code and the action to set aside provided for in Article 2901 of that code are aimed at safeguarding the creditors' security over the assets of the debtor, those actions are not comparable. Thus, they differ as to the persons who can rely on them, the time when they can be brought, the time limit in which they can be brought, the fact that the action to set aside seeks to penalise fraudulent conduct, and, finally, their effects.

34 According to the second line of case-law, an action to set aside on the part of the creditors of a company being divided must be ruled out in the light of the objective of the Sixth Directive aimed at ensuring that the effects of the division become definitive and irrevocable vis-à-vis the creditors, within a short period of time, so as to safeguard the interests of the various interested parties concerned by the division, other than the creditors of the company being divided.

35 In that regard, the referring court observes that the preservation of certainty in the law in respect of the effects of the division and the interests of the parties interested in the division, which is one of the objectives of the Sixth Directive, cannot be ensured unless a failure to bring those actions provided for in Article 12 of the Sixth Directive has the effect of precluding any possibility for the creditors to subsequently bring other actions with a view to safeguarding their security over the assets of the debtor. Thus, according to that court, the concept of 'nullity' referred to in Article 19 of the Sixth Directive should encompass all actions that result in the instrument of division being rendered without effect, whether absolute or relative, and irrespective of the validity, in this latter case, of the instrument of division.

36 The referring court nevertheless indicates that Article 12 of the Sixth Directive does not preclude the bringing of any subsequent action intended to safeguard the creditors' security over the assets of the debtor, and that there are a number of differences, under national law, between nullification proceedings and an *actio pauliana*.

37 In those circumstances, the Corte d'appello di Napoli (Court of Appeal, Naples) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can the creditors of the company being divided, whose credit interests antedate the division, who have not taken advantage of the remedy of lodging an objection under Article 2503 of the Civil Code (and therefore of the protection tool introduced in implementation of Article 12 of [the Sixth Directive]), use an action to set aside under Article 2901 of the Civil Code after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them and, therefore, to take precedence in enforcement over the creditors of the recipient company or companies and to be placed in a preferential position before the shareholders of those companies?

(2) Does the notion of nullity, provided for by Article 19 of [the Sixth Directive], refer only to actions affecting the validity of the instrument of division or also to actions which, despite not affecting its validity, result in its relative lack of effect or unenforceability?'

Consideration of the questions referred

The applicable directive

38 In the request for a preliminary ruling, the referring court refers both to the Sixth Directive and Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ 2017 L 169, p. 46), which repealed the Sixth Directive with effect from its entry into force on 20 July 2017. Given that all the facts of the main proceedings predate the date of entry into force of Directive 2017/1132, the Sixth Directive applies.

The jurisdiction of the Court

39 The Commission has expressed doubts as to the Court's jurisdiction to hear and determine the present request for a preliminary ruling on the ground that the dispute in the main proceedings does not fall within the scope of the Sixth Directive, since only a part of the assets of Costruzioni Ing. G. Iandolo was transferred to I.G.I.

40 According to the Commission, it is apparent from Article 21(1) of the Sixth Directive, read in conjunction with Article 2(1) thereof, that that directive does not apply to divisions by the formation of new companies unless all assets and liabilities of the company being divided are transferred.

41 As the Advocate General noted in point 43 of his Opinion, it is apparent from the title of the Sixth Directive that that directive concerns divisions of public limited liability companies. It is also apparent from Article 1 of that directive, read in conjunction with Article 1(1) of the Third Directive, that the Sixth Directive applies, in respect of the Italian Republic, to 'società per azioni' (public limited liability companies). However, Costruzioni Ing. G. Iandolo and I.G.I. are not public limited liability companies but limited liability companies.

42 Moreover, under Article 21 of the Sixth Directive, division by the formation of new companies means the operation whereby, after being wound up without going into liquidation, a company transfers to more than one newly formed company all its assets. However, Costruzioni Ing. G. Iandolo did not transfer all its assets to more than one company but only a part of its assets to one company, I.G.I.

43 Consequently, the division operation at issue in the main proceedings does not directly fall within the scope of the Sixth Directive.

44 In accordance with Article 267 TFEU, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and acts of the EU institutions. In the context of cooperation between the Court and the national courts, established by Article 267 TFEU, it is for the national courts alone to assess, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling (judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 29 and the case-law cited).

45 Applying that case-law, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning EU provisions in situations where the facts of the cases being considered by the national courts were outside the scope of EU law but where those provisions had been rendered applicable by domestic law due to a reference made by that law to the content of those provisions. In that case, even though the facts of the main proceedings were outside the direct scope of EU law, the provisions of EU law had been made applicable by national legislation, which, in dealing with purely internal situations, follows the same approach as that provided for by EU law (see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraph 37; of 17 July 1997, *Leur-Bloem*, C-28/95, EU:C:1997:369, paragraphs 27 and 32; and of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 53).

46 When, in regulating purely internal situations, domestic legislation seeks to adopt the same solutions as those adopted in EU law in order, for example, to avoid discrimination against foreign nationals or any distortion of competition or to provide for a single procedure in comparable situations, it is clearly in the interest of the Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply. Thus, an interpretation by the Court of provisions of EU law in purely internal situations is warranted on the ground that they have been made applicable by national law directly and unconditionally, in order to ensure that internal situations and situations governed by EU law are treated in the same way (judgments of 21 December 2011, *Cicala*, C-482/10, EU:C:2011:868, paragraphs 18 and 19, and of 21 November 2019, *Deutsche Post and Others*, C-203/18 and C-374/18, EU:C:2019:999, paragraph 37).

47 Where a national court refers a question to the Court in connection with a situation that is outside the direct scope of EU law, the Court cannot, where the referring court does not indicate something other than that the national legislation in question applies without distinction to situations governed by the provisions of EU law in question and to purely internal situations, consider that the request for a preliminary ruling on the interpretation of the provisions of that law is necessary to enable that court to give judgment in the case pending before it (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 54).

48 The specific factors that allow it to be established that the provisions of EU law have been made applicable by national law directly and unconditionally, in order to ensure that internal situations and situations governed by EU law are treated in the same way, must be apparent from the order for reference (judgment of 20 September 2018, *Fremoluc*, C-343/17, EU:C:2018:754, paragraph 21).

49 To that end, the referring court must indicate, in accordance with Article 94 of the Rules of Procedure of the Court, in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law that makes the preliminary ruling on interpretation necessary for it to give judgment in that dispute. Those requirements also appear in the recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2019 C 380, p. 1).

50 In the present case, the referring court, which has exclusive jurisdiction to interpret national law under the system of judicial cooperation established in Article 267 TFEU, stated that Articles 2503, 2504-quater, 2506-ter and the final paragraph of Article 2506-quater of the Civil Code, the application of which is sought by the parties to the main proceedings in the present case, transpose Articles 12 and 19 of the Sixth Directive into national law. That is apparent, as noted by the Commission, from decreto legislativo n. 22 — Attuazione delle direttive n. 78/855/CEE e n. 82/891/CEE in materia di fusioni e scissioni societarie, ai sensi dell'art. 2, comma 1, della legge 26 marzo 1990, n. 69 (Legislative Decree No 22 implementing Directives 78/855/EEC and 82/891/EC on mergers and divisions, in accordance with Article 2(1) of Law No 69 of 26 March 1990) of 16 January 1991 (GURI No 19 of 23 January 1991).

51 It is also apparent from the order for reference that those articles of the Civil Code which transpose Articles 12 and 19 of the Sixth Directive into national law apply, pursuant to Article 2506 of the Civil Code, to both division operations by which a company transfers only a part of its assets to one or more companies and division operations by which a company transfers all its assets to one or more companies; that is the case as regards both public limited liability companies and limited liability companies.

52 In transposing the Sixth Directive in that manner, the Italian legislature therefore decided to apply Articles 12 and 19 of the Sixth Directive directly and unconditionally also to division operations involving limited liability companies by which a company transfers only a part of its assets to another company.

53 It must be further noted that Article 25 of the Sixth Directive, invoked by the Commission in its written observations, does not prohibit national legislatures from applying the rules on divisions laid down in the Sixth Directive to division operations involving limited liability companies by which a company transfers only a part of its assets to another company, as the Commission acknowledged at the hearing.

54 In those circumstances, it must be held that, contrary to the submissions of the Commission, the Court has jurisdiction to answer the questions submitted by the referring court.

Admissibility of the request for a preliminary ruling

55 I.G.I. submits that the request for a preliminary ruling is inadmissible on the ground that it does not contain a description of the factual and legal context of the questions submitted to the Court, contrary to what is required by Article 94 of the Rules of Procedure of the Court. Furthermore, I.G.I. and Costruzioni Ing. G. Iandolo maintain that the questions referred are irrelevant given that the claims that the respondents in the main proceedings sought to protect by bringing an *actio pauliana*

have all been extinguished. At the hearing, the Commission also stated that if the claims have in fact been extinguished, the request for a preliminary ruling is devoid of purpose and must be declared inadmissible.

56 In that regard, it should be noted that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, 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 (judgment of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung*, C-26/18, EU:C:2019:579, paragraph 32 and the case-law cited).

57 According also to settled case-law, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for the national court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 19 December 2018, *Stanley International Betting and Stanleybet Malta*, C-375/17, EU:C:2018:1026, paragraph 29 and the case-law cited).

58 In the request for a preliminary ruling, the referring court sufficiently describes the legal and factual context of the main proceedings and makes clear that the questions referred to the Court are necessary to enable it to decide whether the *actio pauliana* brought before it is consistent with EU law.

59 Furthermore, as regards the information provided by the referring court, which has exclusive jurisdiction to interpret national law under the system of judicial cooperation established in Article 267 TFEU, it cannot be held that the questions submitted to the Court bear no relation to the actual facts of the main action or its purpose or concern a hypothetical problem.

60 The request for a preliminary ruling is therefore admissible.

The first question

61 By its first question, the referring court asks, in essence, whether Article 12 of the Sixth Directive must be interpreted as precluding the creditors of the company being divided whose credit interests antedate that division, who did not take advantage of the creditor protection tools provided for in the national legislation implementing that article, from bringing an *actio pauliana* after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them and to bring enforcement or protective action in relation to the assets transferred to the recipient company.

62 As a preliminary point, it must be noted that, under Article 22(1) of the Sixth Directive, Articles 12 and 19 of that directive are to apply to divisions by the formation of new companies within the meaning of Article 21(1) of the Sixth Directive. It is apparent from Article 22(1) that, for this purpose, the expression ‘companies involved in a division’ is to refer to the company being divided and the expression ‘recipient companies’ is to refer to each of the new companies.

63 Under Article 12(1) of the Sixth Directive, the Member States must provide for an adequate system of protection for the interests of the creditors of the companies involved in a division whose claims antedate publication of the draft terms of division and have not yet fallen due at the time of such publication.

64 Article 12(2) of the Sixth Directive provides that, for the purpose of paragraph 1, the Member States are to at least provide that such creditors are to be entitled to obtain adequate safeguards where the financial situation of the company being divided and that of the company to which the obligation will be transferred in accordance with the draft terms of division make such protection necessary and where those creditors do not already have such safeguards.

65 Furthermore, it follows from Article 12(3) and (6) of the Sixth Directive, read in conjunction with Article 22(1) of that directive, that the Member States may provide that the newly formed companies are to be jointly and severally liable for the obligations of the company being divided.

66 It is true that the *actio pauliana* is not listed amongst the tools for protecting the creditors of a company being divided set out in Article 12 of the Sixth Directive.

67 However, as the Advocate General noted in points 59 and 60 of his Opinion, the use of the expression 'at least' in Article 12(2) of the Sixth Directive indicates that that article provides for a minimum system of protection for the interests of the creditors of the companies involved in a division whose claims antedate publication of the draft terms of division and have not yet fallen due at the time of such publication. Therefore, that paragraph does not prevent the Member States from providing for tools for protecting the interests of those additional creditors in relation to those claims.

68 Furthermore, it is not apparent from Article 12 of the Sixth Directive that a failure to avail oneself of one of the tools for protecting the creditors of the company being divided, provided for in the national legislation implementing that article, prevents those creditors from making use of protection tools other than the ones set out in that article.

69 In those circumstances, it must be held, in the light of the objective set out in the eighth recital of that directive consisting in protecting creditors, including debenture holders, and persons having other claims on the companies involved in a division, from any prejudice that may result from the division, that Article 12 of the Sixth Directive does not exclude the possibility, for the creditors of a company being divided, to bring an *actio pauliana*, such as the one at issue in the main proceedings, where the financial situation of the company being divided and that of the company to which the obligation will be transferred in accordance with the draft terms of division make such protection necessary. However, the effects of such an action must not run counter to the purpose of that provision.

70 In that context, it must be noted that it is apparent from the very wording of the first question that an *actio pauliana*, such as that provided for in in Article 2901 of the Civil Code, brought by the creditors of a company being divided, can allow them to take precedence in enforcement over the creditors of the recipient company or companies and to be placed in a preferential position before the shareholders of those companies. Given that the division operation at issue in the main proceedings is a division operation by the formation of a new company, the expression 'the recipient company or companies' employed by the referring court must be understood as designating the newly formed company or companies.

71 Nevertheless, the minimum system of protection for the interests of the creditors, provided for in Article 12(1) of the Sixth Directive, read in conjunction with Article 22(1) of that directive, concerns creditors of a company being divided and not creditors of newly formed companies or the shareholders of those companies, as those companies do not exist prior to a division.

72 Furthermore, it follows from Article 12(4) of the Sixth Directive, read in conjunction with Article 2(3) of that directive and Article 13(3) of the Third Directive, that protection 'may be different' for the creditors of newly formed companies and the creditors of a company being divided.

73 Therefore, Article 12 of the Sixth Directive does not require the protection for the creditors of newly formed companies provided for by the Member States to be equivalent to that provided for the creditors of a company being divided.

74 It therefore follows from all those provisions that the minimum harmonisation, under the Sixth Directive, of the protection of the interests of the creditors of companies involved in a division does not preclude, within the context of a division by the formation of a new company, as is the case in the main proceedings, priority being given to the protection of the interests of the creditors of the company being divided.

75 In the light of all of the foregoing considerations, the answer to the first question is that Article 12 of the Sixth Directive, read in conjunction with Articles 21 and 22 of that directive, must be interpreted as not precluding the creditors of the company being divided whose credit interests antedate that division, who did not take advantage of the creditor protection tools provided for in the national legislation implementing that Article 12, from bringing an *actio pauliana* after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them and to bring enforcement or protective action in relation to the assets transferred to the newly formed company.

The second question

76 By its second question, the referring court asks, in essence, whether Article 19 of the Sixth Directive, which lays down nullity rules for divisions, must be interpreted as precluding the creditors of the company being divided from bringing, after the division has been implemented, an *actio pauliana* which does not affect the validity of that division but merely allows for that division to be rendered unenforceable against those creditors.

77 Article 19 of the Sixth Directive lays down nullity rules for divisions. In particular, that article limits the cases in which nullity can arise, restricts the period within which nullification proceedings may be commenced and provides that, where it is possible to remedy a defect liable to render a division void, a period of time is to be granted to the companies involved to rectify the situation.

78 The concept of 'nullity' is not defined in the Sixth Directive.

79 Since that concept is not defined, its meaning and scope must, as the Court has consistently held, be determined by considering its usual meaning, while also taking into account the context in which it occurs and the purposes of the rules of which it is part (judgment of 26 July 2017, *Jafari*, C-646/16, EU:C:2017:586, paragraph 73 and the case-law cited).

80 The concept of 'nullity', in its usual meaning, refers to actions seeking the annulment of an act, that result in its elimination and that have an effect *erga omnes*.

81 That meaning of the concept of 'nullity' is confirmed by the context surrounding that concept and by the objectives pursued by the Sixth Directive, as noted by the Advocate General in points 73 to 75 of his Opinion.

82 As regards the context of that concept, it must be noted that Article 19(1)(b) of the Sixth Directive states that divisions which have taken effect may be declared void in three cases only, namely if there has been no judicial or administrative preventive supervision of their legality, if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting which approved the draft terms of division is void or voidable under national law.

83 Those three cases in which nullity can arise concern the coming into being of the division and affect its very existence. Therefore, these are cases which result in the elimination of the division.

84 As regards the objectives pursued by the Sixth Directive, it is apparent from the eleventh recital of the Sixth Directive that the EU legislature considered it necessary to limit the cases in which nullity can arise, to provide that defects are to be remedied wherever that is possible, and to restrict the period within which nullification proceedings may be commenced in order to ensure certainty in the law as regards relations between the companies involved in the division, between them and third parties, and between the members. That objective of the Sixth Directive, which was given effect in Article 19 thereof, confirms that the nullity of a division has an effect *erga omnes*.

85 However, as noted by the Advocate General in point 79 of his Opinion, while nullification proceedings seek to penalise failure to comply with the requirements for the coming into being of the instrument of division, an *actio pauliana* such as that at issue in the main proceedings has the sole aim of protecting creditors to whose rights the division has caused harm.

86 It follows from the order for reference that the *actio pauliana* brought by the respondents in the main proceedings under Article 2901 of the Civil Code only allows for the division in question, in particular the transfer of certain assets referred to in the instrument of division, to be declared unenforceable against those respondents. That action does not affect the validity of that division, does not result in its elimination and does not have an effect *erga omnes*.

87 Therefore, that action is not covered by the concept of 'nullity' referred to in Article 19 of the Sixth Directive.

88 In the light of all of the foregoing considerations, the answer to the second question is that Article 19 of the Sixth Directive, read in conjunction with Articles 21 and 22 of that directive, which lays down nullity rules for divisions, must be interpreted as not precluding the creditors of the company being divided from bringing, after the division has been implemented, an *actio pauliana* which does not affect the validity of that division but merely allows for that division to be rendered unenforceable against those creditors.

Costs

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

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

1. **Article 12 of Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies, as amended by Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007, read in conjunction with Articles 21 and 22 of Directive 82/891, must be interpreted as not precluding the creditors of the company being divided whose credit interests antedate that division, who did not take advantage of the creditor protection tools provided for in the national legislation implementing that article, from bringing an *actio***

pauliana **after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them and to bring enforcement or protective action in relation to the assets transferred to the newly formed company.**

2. **Article 19 of Directive 82/891, as amended by Directive 2007/63, read in conjunction with Articles 21 and 22 of Directive 82/891, which lays down nullity rules for divisions, must be interpreted as not precluding the creditors of the company being divided from bringing, after the division has been implemented, an *actio pauliana* which does not affect the validity of that division but merely allows for that division to be rendered unenforceable against those creditors.**

[Signatures]