



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT

delivered on 10 September 2020¹

Case C-735/19

Euromin Holdings (Cyprus) Limited

v

Finanšu un kapitāla tirgus komisija (Financial and Capital Market Commission, Latvia)

(Request for a preliminary ruling
from the Augstākā tiesa (Senāts) (Supreme Court, Latvia))

(Reference for a preliminary ruling – Company law – Directive 2004/25/EC – Takeover bids – Protection of minority shareholders – Mandatory bid – Article 5(4) – Determination of equitable offer price – Price other than highest price paid by offeror – Approval of offer price by supervisory authority – Calculation of share price based on company value – Objective valuation criteria generally used in financial analysis – State liability due to incorrect transposition and application of EU law – Offeror's right to compensation due to inflated price – Standard limitation of compensation – Equitable compensation)

I. Introduction

1. Where an investor acquires sufficient shares in a company to obtain a controlling interest over the company, that affects both its management and its shareholders. The shareholders did not decide to invest under those conditions and may therefore wish in certain cases to sell their shares. It is for that reason that Directive 2004/25² obliges an investor who obtains control over a company ('the offeror') to make an offer to buy back the remaining minority shareholders' shares at an equitable price. According to that directive, the highest price paid for the same securities by the offeror over a particular period before the takeover of the company is to be regarded as the equitable price.

2. Against this background, first, this request for a preliminary ruling revolves around the question of whether and on what conditions the Member States can oblige the offeror to pay the remaining shareholders a price other than the highest price paid by the offeror. The Court has already addressed certain aspects of this issue in other proceedings.³

¹ Original language: German.

² Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ 2004 L 142, p. 12), as amended by Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 (OJ 2014 L 173, p. 190) ('Directive 2004/25').

³ Judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572).

3. Second, the referring court asks whether the offeror has any claims against a Member State that obliged him or her to pay an inflated price and, if so, what those claims are.

A. EU law

1. Directive 2004/25

4. Recitals 6, 8 and 9 of Directive 2004/25 read, in extract, as follows:

‘(6) In order to be effective, takeover regulation should be flexible and capable of dealing with new circumstances as they arise and should accordingly provide for the possibility of exceptions and derogations. However, in applying any rules or exceptions laid down or in granting any derogations, supervisory authorities should respect certain general principles.

...

(8) In accordance with general principles of Community law, and in particular the right to a fair hearing, decisions of a supervisory authority should in appropriate circumstances be susceptible to review by an independent court or tribunal. However, Member States should be left to determine whether rights are to be made available which may be asserted in administrative or judicial proceedings, either in proceedings against a supervisory authority or in proceedings between parties to a bid.

(9) Member States should take the necessary steps to protect the holders of securities, in particular those with minority holdings, when control of their companies has been acquired. The Member States should ensure such protection by obliging the person who has acquired control of a company to make an offer to all the holders of that company’s securities for all of their holdings at an equitable price in accordance with a common definition. ...’

5. Article 3 of Directive 2004/25 states the following:

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

- (a) all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected;
- (b) the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; ...
- (c) the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid;
- (d) false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted;

...

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

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

6. Article 4(6) of the directive is worded as follows:

'This Directive shall not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed in the course of bids or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid.'

7. Article 5 of the directive ('Protection of minority shareholders, the mandatory bid and the equitable price') provides as follows:

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

...

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

Provided that the general principles laid down in Article 3(1) are respected, Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and in accordance with criteria that are clearly determined. To that end, they may draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional

occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

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

...'

2. Regulation No 1254/2012

8. Commission Regulation (EU) No 1254/2012 of 11 December 2012 amending Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Financial Reporting Standard 10, International Financial Reporting Standard 11, International Financial Reporting Standard 12, International Accounting Standard 27 (2011), and International Accounting Standard 28 (2011)⁴ regulates the adoption of certain international accounting standards in EU law.

9. Point 22 of the annex to that regulation on International Financial Reporting Standard 10, Consolidated financial statements ('IFRS 10:22'), provides as follows under the heading 'Non-controlling interests':

'A parent shall present non-controlling interests in the consolidated statement of financial position within equity, separately from the equity of the owners of the parent.'

10. Appendix A to that annex entitled 'Defined terms' defines 'consolidated financial statements' as 'the financial statements of a *group* in which the assets, liabilities, equity, income, expenses and cash flows of the *parent* and its *subsidiaries* are presented as those of a single economic entity'.⁵

11. 'Non-controlling interest' is defined in that appendix as 'equity in a *subsidiary* not attributable, directly or indirectly, to a *parent*'.⁶

B. Latvian law

12. Article 74(1) of the Finanšu instrumentu tirgus likums (Law on the Market for Financial Instruments; 'the FITL') establishes the offer price in the case of a mandatory public bid. According to that provision, the price may be no lower than:

'(1) the price at which the offeror or persons acting in concert with the latter acquired the shares of the offeree company in the 12 months before the bid. In the event of the acquisition of shares at different prices, the buyback price is to be the highest price at which shares were purchased during the 12 months preceding the legal obligation to submit a buyback offer;

⁴ OJ 2012 L 360, p. 1.

⁵ Emphasis as in the original.

⁶ Emphasis as in the original.

- (2) the weighted average share price on the regulated market or on the multilateral trading facility via which the largest volume of the shares concerned were traded during the last 12 months. The weighted average share price is to be calculated on the basis of the 12 months preceding the legal obligation to submit a buyback offer;
- (3) the share value calculated by dividing the net assets of the offeree company by the number of shares issued. Net assets are to be calculated by deducting the offeree company's own shares and liabilities from its total assets. If the offeree company has shares with different nominal values, in order to calculate the share value, the net assets are to be divided by the percentage of each nominal share value in the share capital.'

13. If the offeree company is required to prepare consolidated financial statements, the value of the shares shall be calculated in accordance with Article 74(2) of the FITL on the basis of the data reported in those statements, using the method provided for in Article 74(1)(3) of the FITL.

14. Article 14(1) of the Konsolidēto gada pārskatu likums (Law on consolidated financial statements) defines consolidated financial statements as the financial statements obtained by combining the assets and liabilities, equity and income and expenses reported in the financial statements of the parent of a group and the financial statements of its subsidiaries. The assets and liabilities reported in the statements of financial position prepared by the consolidated companies are reported in full in the consolidated statement of financial position.

15. Article 21(1) of that law requires the share of equity of consolidated subsidiaries represented by stocks and shares held by their minority shareholders to be reported as a separate equity item under the heading 'minority interests'.

16. Article 5 of the FITL regulates the liability for compensation of the Finanšu un kapitāla tirgus komisija (Financial and Capital Market Commission) and of its servants and agents. It states that they bear no liability for compensation towards participants in the capital market or third parties or, moreover, for measures implemented by them in a lawful, proper and legitimate manner and in good faith during the regular exercise of the supervisory functions delegated to them by virtue of the law or other provisions.

17. Article 13(3) of the Valsts pārvaldes iestāžu nodarīto zaudējumu atlīdzināšanas likums (Law on compensation for damage caused by national authorities; 'the VPINZAL') regulates the right to compensation for damage caused by bodies of the State as follows:

'As a rule, compensation shall be determined based on the amount calculated in accordance with Article 12 of this law as follows:

- (1) if the amount calculated does not exceed EUR 142 288: 100% of that amount;
- (2) if the amount calculated is between EUR 142 289 and EUR 1 422 872: between 50% and 100% of that amount;
- (3) if the amount calculated exceeds EUR 1 422 872: an adequate amount, which may be below 50% of that amount;

...'

II. Facts and main proceedings

18. The applicant in the main proceedings, Euromin Holdings (Cyprus) Limited ('Euromin') acquired shares in the listed public limited company Ventspils nafta ('the offeree company') and now holds 93.24% of all voting shares in that company. That acquisition triggered an obligation to make a mandatory buyback bid to all the other shareholders of the offeree company, for which purpose Euromin submitted a prospectus for a mandatory bid with an offer price of EUR 3.12 per share for approval by the Finanšu un kapitāla tirgus komisija (Financial and Capital Market Commission; 'the FCMC').

19. By decision of 15 October 2015 ('the contested decision'), the FCMC rejected that prospectus. It took the view that Euromin should make a mandatory bid with an offer price of EUR 4.56 per share to the minority shareholders of the offeree company. Euromin then made a bid to that effect and subsequently acquired the minority shareholders' shares for the price of EUR 4.56 per share.

20. In the opinion of the FCMC, if the calculation method provided for in Article 74(1)(3) of the FITL is applied correctly, that gives a price of EUR 4.56 per share. That provision states that the offer price must be based on the value obtained by dividing the net assets of the offeree company by the number of shares issued. Net assets are therein defined as the total assets of the offeree company, less its own shares and liabilities, whereby, in the case of a group, Article 74(2) of the FITL requires the data used to be taken from the consolidated financial statements. In the FCMC's view, which Euromin contests, so-called non-controlling interests held by third parties in subsidiaries of the offeree company reported in the consolidated financial statements should be included in the net assets of the offeree company. This is, according to the FCMC, because those shares are in fact reported in the consolidated financial statements of the offeree company under a separate equity item, rather than as liabilities, and could not therefore be deducted in accordance with Article 74(1)(3) of the FITL.

21. Euromin contested that decision before the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) and requested payment of EUR 7 236 243.36 in compensation for additional expenditure incurred in the amount of the difference between the original and the inflated offer price.

22. By judgment of 10 March 2017, the Administratīvā apgabaltiesa (Regional Administrative Court) admitted the application in part, found the contested decision to be unlawful, and ordered the FCMC to pay compensation equal to 50% of the difference. The limitation of compensation was based on the rule enacted in Article 13(3) of the VPINZAL.

23. Euromin and the FCMC lodged appeals in cassation against that judgment in the Augstākā tiesa (Senāts) (Supreme Court, Latvia).

24. First, that court has doubts as to whether the application of Article 74(1)(3) of the FITL in the main proceedings is compatible with the requirements of Article 5(4) of Directive 2004/25. Second, it questions whether the case-law of the Court on the liability of the Member States for the incorrect transposition and application of EU law precludes the application of Article 13(3)(3) of the VPINZAL.

III. Questions referred and procedure before the Court

25. In those circumstances, the Augstākā tiesa (Senāts) (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU:

- (1) Is national legislation which provides that the share price for a mandatory bid is to be calculated by dividing the net assets of the offeree company (including non-controlling (minor) interests) by the number of shares issued contrary to the correct application of Article 5 of Directive 2004/25?
- (2) If the first question is answered in the negative, that is to say, to the effect that the net assets of the offeree company do not have to include non-controlling or minority interests, may a method of determining the share price be regarded as clearly determined, within the meaning of the second subparagraph of Article 5(4) of Directive 2004/25, if it is necessary to apply a method of legal interpretation – teleological reduction – in order to understand it?
- (3) Is legislation providing that the highest price out of the following three variants must be used compatible with Article 5(4) of Directive 2004/25?
 - The price at which the offeror or persons acting in concert with the latter acquired the shares of the offeree company in the 12 months before the bid. In the event of the acquisition of shares at different prices, the buyback price is to be the highest price at which shares were purchased during the 12 months preceding the legal obligation to submit a buyback offer.
 - The weighted average share price on the regulated market or on the multilateral trading facility via which the largest volume of the shares were traded during the last 12 months. The weighted average share price is to be calculated on the basis of the 12 months preceding the legal obligation to submit a buyback offer.
 - The share value calculated by dividing the net assets of the offeree company by the number of shares issued. Net assets are to be calculated by deducting the offeree company's own shares and liabilities from its total assets. If the offeree company has shares with different nominal values, in order to calculate the share value, the net assets are to be divided by the percentage of each nominal share value in the share capital.
- (4) If the method of calculation laid down by national law, using the discretion granted to Member States by the second subparagraph of Article 5(4) of Directive 2004/25 results in a higher price than that resulting from the application of the first subparagraph of Article 5(4) of that Directive, is it consistent with the objective of the Directive to always choose the higher price?
- (5) If damage is caused to an individual as a result of the incorrect application of EU law, may national law provide for the limitation of compensation for such damage if that limitation applies equally to damage suffered as a result of the incorrect application of national law and to damage suffered as a result of the incorrect application of EU law?
- (6) Do the provisions of Directive 2004/25 that are applicable to the present case confer rights on individuals, that is to say, is the requirement for State liability met?

26. Euromin, the Republic of Latvia, the Republic of Poland, the Federal Republic of Germany and the European Commission submitted written observations on the questions referred.

27. Euromin, the Republic of Latvia and the Commission attended the hearing on 9 July 2020.

IV. Legal assessment

28. The questions referred by the Augstākā tiesa (Senāts) (Supreme Court) concern two separate issues. First, the referring court seeks to know the correct interpretation of Article 5 of Directive 2004/25 setting out the rules governing the mandatory bid which an offeror must make to the minority shareholders on acquiring a holding in a company that gives control. Second, it raises the question as to the consequences of any incorrect transposition of that provision into Latvian law. In particular, it has to decide whether and to what extent the offeror in the main proceedings has a claim to compensation against the Latvian authorities on the grounds of payment of an inflated offer price.

29. The first four questions concern how the ‘equitable price’ for a mandatory bid within the meaning of Article 5(4) of Directive 2004/25 is determined. The Latvian supervisory authority considers in the case at hand that the offer price should not be based on the highest price paid for the same securities by the offeror over the statutory period before the bid, as provided for in the first subparagraph of Article 5(4) (‘the highest price paid by the offeror’). Rather, it should be based on the share value obtained by dividing the net assets of the offeree company, as defined in national law, by the number of shares issued, as that value was higher than the highest price paid by the offeror.

30. Against this background, first, it is necessary to clarify in connection with the third and fourth questions referred whether it is even compatible with Directive 2004/25 to base the offer on a value other than the highest price paid by the offeror, where that value exceeds the latter price (A.). Only then can the first and second questions be considered, which concern the correct way to calculate the net assets of the offeree company with a view to determining an alternative equitable offer price. That will involve investigating the potential requirements imposed by the directive concerning the calculation of any such alternative value (B.).

31. Then it will be necessary to investigate the consequences that any incorrect transposition of the directive might have in the main proceedings, as the sixth question referred revolves around the question of whether the provisions of the directive are intended to confer rights on the offeror in the main proceedings, thereby paving the way for a compensation claim on the grounds of infringement of EU law (C.).

32. Finally, if the answer to that question is in the affirmative, it will also be necessary to consider in connection with the fifth question referred whether the principles of equivalence and effectiveness preclude a standard limitation of that claim in the main proceedings (D.).

A. The third and fourth questions

33. By its third and fourth questions, the referring court wishes to know whether Directive 2004/25 precludes national legislation whereby the offer price is always the highest of three prices determined using different calculation methods or criteria, where only one of those

criteria is the highest price paid for the same securities by the offeror over a period before the bid determined by the Member State concerned, as referred to in the first subparagraph of Article 5(4).

34. Essentially, it is necessary with both of these questions to clarify whether or on what conditions a Member State can allow other values or calculation methods to be used to determine by law the 'equitable price' for a mandatory bid in lieu of the price referred to in the first subparagraph of Article 5(4) of Directive 2004/25. Therefore, the rule provided for in the first subparagraph of Article 5(4) must first be examined (1.) before investigating the possibility of derogating from it (2.). Finally, the impact of this on the provision to be applied in the main proceedings will be examined (3.).

1. Protection of minority shareholders through submission of a mandatory bid at the highest price paid by the offeror

35. Directive 2004/25 enacts comprehensive information requirements to ensure that the shareholders of the offeree company in general are protected in the event of a takeover. That information is intended to enable the shareholders to assess the impact of a takeover on the company or the rights of its shareholders, so that they can take independent decisions on their own responsibility.⁷ In addition, the obligation of the offeror to make a mandatory bid affords the remaining minority shareholders special protection.⁸ It gives the minority shareholders the opportunity to sell their securities on fair terms, including at an equitable price,⁹ thereby taking account of the changed conditions brought about by the change of control and ensuring that minority shareholders do not bear the risk of collapse of the share price following the takeover.

36. According to the first subparagraph of Article 5(4) of Directive 2004/25, the highest price paid for the same securities by the offeror on a regulated market over a period before the bid determined by the Member State concerned, as referred to in paragraph 1 of that provision, is to be regarded as an equitable price for the purpose of that mandatory bid. That price represents the lower limit of the minimum mandatory bid which the offeror is required to make.

37. In my view, that rule is based on the premiss that a properly functioning capital market establishes a share price that neither under- nor over-values the undertaking and thus reflects the true value of a share in the undertaking concerned, the European legislature having been guided here by the model of an efficient, transparent and liquid market.¹⁰

⁷ See, in particular, Articles 6 and 8 of Directive 2004/25 and the principles referred to in Article 3(1)(b) and (c) of that directive.

⁸ Judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraph 28).

⁹ See the Report of the High Level Group of Company Law Experts on issues related to takeover bids, Brussels, 10 January 2002 ('the Winter report'), p. 53.

¹⁰ See, for example, recital 2 and Article 13(2)(a) and (c) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/123/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1) or recital 10 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ 2003 L 345, p. 64).

38. Moreover, where the offer is based on the highest price paid by the offeror, the minority shareholder may¹¹ receive a so-called control premium,¹² while the offeror is given the certainty that he or she will not have to pay more in the mandatory bid than he or she was willing to pay in the preceding period.¹³

39. The Court has already ruled with regard to the first subparagraph of Article 5(4) of Directive 2004/25 that that provision is mandatory for the Member States; it is not a rule which they may choose to apply.¹⁴ That means that the Member States cannot a priori allow bids to be based on a price (be it an equitable price) other than the highest price paid by the offeror.

2. Possibility of derogating from the rule of the highest price

(a) Exemption to ensure a higher level of protection?

40. However, the question arises as to whether the Member States can provide for the minimum price of a mandatory bid to be higher than the price referred to in the first subparagraph of Article 5(4) of Directive 2004/25 in order to ensure a higher level of protection for minority shareholders.

41. It has to be recalled in this regard that, as is apparent from recital 25 thereof, Directive 2004/25 is intended to establish minimum guidelines to ensure an adequate level of protection for holders of securities. Consequently, Article 3(2)(b) of Directive 2004/25 allows the Member States to lay down ‘additional conditions and provisions more stringent’ for bids.

42. However, the question arises as to whether Article 3(2) of Directive 2004/25 also applies when determining the equitable offer price for a mandatory bid. More stringent provisions and additional conditions are conceivable primarily with regard to the documents and information to be provided to shareholders on the takeover bid. If the price of the mandatory bid referred to in the first subparagraph of Article 5(4) is not equitable, though, the second subparagraph of Article 5(4) provides for the supervisory authorities to adjust that price not only upwards, but also downwards.¹⁵ That suggests that the highest price paid by the offeror is not a minimum requirement.

43. But above all, it would conflict with the overall scheme of the Directive 2004/25¹⁶ to qualify the rule of the highest price paid as a minimum requirement within the meaning of Article 3(2)(a), since that directive aims to achieve freedom of establishment by creating greater transparency and legal certainty in the case of cross-border takeovers.¹⁷ Achieving freedom of establishment presupposes in this context a high level of predictability for investors, as

¹¹ Where the takeover is framed so that one individual shareholder acquires sufficient shares to obtain a controlling majority. However, a controlling majority can also be achieved by acquiring fewer shares and then merging with another shareholder.

¹² This is the ‘premium’ which an offeror must pay on a functioning market for a share package that gives a controlling majority, in return for the ability, acquired along with ownership of the shares, to influence the business of the company.

¹³ See, in that regard, the Winter report, p. 58.

¹⁴ Judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraphs 28 and 30).

¹⁵ See, in greater detail, my reasoning in point 47 of this Opinion.

¹⁶ See, with regard to the general objectives of the directive to be taken into account when answering the question of whether the Member States may derogate from its provisions, the judgments of 23 May 1990, *Van den Burg* (C-169/89, EU:C:1990:227, paragraph 10), and of 30 April 1998, *Bellone* (C-215/97, EU:C:1998:189, paragraph 17).

¹⁷ See, in particular, recitals 3 and 25 of Directive 2004/25 and the proposal for a Directive of the European Parliament and of the Council on takeover bids, COM(2002) 534 final (OJ 2003 C 45 E, p. 1) (‘the proposal for a directive’), p. 2.

uncertainty as to the costs of a takeover may curb cross-border investments.¹⁸ In that sense, the relevant legal basis of Article 50(2)(g) TFEU considers it necessary to coordinate the safeguards for shareholders in order to facilitate cross-border takeovers by having equivalent safeguards. Therefore, shareholder protection functions to achieve rather than to restrict freedom of establishment.¹⁹ It is for precisely that reason that recital 9 of Directive 2004/25 provides for the equitable price to be defined commonly in the European Union.²⁰

44. Consequently, the rule of the highest price paid, as established in the first subparagraph of Article 5(4) of Directive 2004/25, is a principle by which all the Member States must abide in order to enhance legal certainty in connection with cross-border takeovers in the interests of all stakeholders and, at the same time, to ensure that minority shareholders are protected.²¹

(b) Possibility of derogating if the highest price paid by the offeror is not equitable or cannot be determined

45. However, the Court has ruled that the highest price paid by the offeror is *primarily*,²² that is, only normally, regarded as equitable within the meaning of the first subparagraph of Article 5(4) of Directive 2004/25.²³

46. The second subparagraph of Article 5(4) of Directive 2004/25 states that Member States may authorise their supervisory authorities to adjust that price upwards or downwards in certain circumstances in accordance with criteria that are clearly determined. To that effect, it lists as examples of circumstances in which such adjustment may be indicated, agreement between the purchaser and a seller, exceptional occurrences or manipulation of the price of the securities at issue.²⁴ What all those circumstances have in common is that the highest price paid by the offeror in these cases is not the price that would have transpired on a properly functioning capital market. Article 3(1)(d) of Directive 2004/25 states that such outcomes are to be avoided.

47. In fact, the assumption that the highest price paid by the offeror is an equitable price is only justified where there is a properly functioning market,²⁵ whereas the second subparagraph of Article 5(4) of Directive 2004/25 illustrates that, in the opinion of the European legislature, that price is perhaps not to be regarded as equitable in the circumstances referred to therein.²⁶ It follows from the fact that the price may be adjusted upwards or downwards that both an over- and an under-valued share price may be inequitable. It has to be emphasised here that the

¹⁸ See Winter report, p. 57.

¹⁹ See also, to that effect, *Dougan*, Minimum Harmonization and the Internal Market, (2000) 37 CLMR 853 (876).

²⁰ Determining the highest price paid by the offeror is, moreover, relatively straightforward and clearly possible and it therefore ensures a high level of legal certainty (see opinion of Advocate General Wahl in *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:212, point 31).

²¹ See, in that regard, the proposal for a directive, p. 2.

²² See judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraph 30).

²³ See also the recommendation in the Winter report, p. 58 and 59. With regard to the definition of the equitable price in Article 5 of Directive 2004/25, the Commission's proposal for a directive expressly follows those recommendations, see the proposal for a directive, p. 2.

²⁴ See judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraph 38).

²⁵ See, in that regard, point 37 of this Opinion.

²⁶ See, to that effect, Opinion of Advocate General Wahl in *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:212, point 33), and judgment of the EFTA Court of 10 December 2010, *Periscopos v Oslo Børs and Erik Must* (E-1/10, EFTA Court Report 2009-10, p. 200, paragraph 47).

decision as to when the highest price paid by the offeror is not equitable in a particular case rests with the Member States. That is because the directive does not contain a closed list of the circumstances in which adjustment by the supervisory authority may be indicated.²⁷

48. The powers of the supervisory authorities to adjust a particular bid provided for in the second subparagraph of Article 5(4) of Directive 2004/25 is purely optional,²⁸ that is, the Member States need not confer that power on their supervisory authorities. However, only the instrument is optional; the obligation to guarantee an equitable offer price is not. Therefore, a Member State must be able to provide for other mechanisms or procedures to ensure an equitable price in circumstances such as those referred to in the second subparagraph of Article 5(4) of the directive.²⁹ In particular, a Member State may also provide for a derogation from the price referred to in the first subparagraph of Article 5(4) of Directive 2004/25, in the event that it is inequitable, *ipso jure*. Moreover, the Member States must be able to provide for a mechanism for determining the equitable offer price where the price referred to in the first subparagraph of Article 5(4) of Directive 2004/25 cannot be determined.³⁰

49. This is corroborated also by the rule in the second subparagraph of Article 5(4) of Directive 2004/25 and by recital 6 thereof.³¹ Moreover, otherwise, a situation caused by distortion of the market or of the normal functioning of the market would be perpetuated, contrary to the principle enacted in Article 3(1)(d) of Directive 2004/25.

50. Having said that, in order to ensure its transparency and predictability³² and comply with the requirements governing adjustment of the offer price by the supervisory authorities laid down in the second subparagraph of Article 5(4) of Directive 2004/25, such a statutory rule may only provide for a different calculation method under certain circumstances and in accordance with criteria that are clearly determined. This is because it must make no difference whether a national supervisory authority is authorised to adjust a particular offer price in accordance with the second subparagraph of that rule or whether it is tasked with the implementation of more general and abstract rules within the meaning of the first subparagraph of Article 5(4) of the directive.

51. Consequently, on the one hand, the circumstances in which the minimum price for a mandatory bid must be based on a price other than the highest price paid by the offeror must follow precisely from the statutory rule and, moreover, must essentially be comparable to the circumstances listed in the second subparagraph of Article 5(4) of Directive 2004/25.³³ On the other hand, the rule must clearly establish how the other price is to be determined in such circumstances.

²⁷ See, to that effect, judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraph 37).

²⁸ Judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraphs 28 and 31).

²⁹ According to the Winter report (pp. 59 and 61), this should apply in particular if the price determined thus is plainly unfair.

³⁰ In the opinion of the Federal Republic of Germany, that may be the case where a controlling majority is obtained simply as a result of the merger of several minority shareholders, known as ‘acting in concert’.

³¹ See, with regard to that aspect, judgment of the EFTA Court of 10 December 2010, *Periscopus v Oslo Børs and Erik Must* (E-1/10, EFTA Court Report 2009-10, p. 200, paragraph 46).

³² See points 43 and 44 of this Opinion.

³³ See, to that effect, judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraph 38), and point 46 of this Opinion.

52. The Court has already found in that regard that the application of abstract legal concepts does not preclude this, provided that the interpretation of the concept in question can be deduced from the rule in a sufficiently clear, precise and foreseeable manner with the help of interpretation methods recognised under domestic law.³⁴

3. Consequences for the provision applicable in the main proceedings

53. The provision of Article 74(1) of the FITL to be applied in the main proceedings does not appear at first glance to give precedence as a matter of course to the criterion listed in point 1 (the highest price paid by the offeror). Nor does it appear to lay down any particular requirements or circumstances that would result in the application of any one calculation method. On the contrary, the obligation to select the highest of the individual prices obtained suggests that all three calculation methods are applied in parallel for each mandatory bid. Based on the considerations above, a rule understood thus would be precluded by the first subparagraph of Article 5(4) of Directive 2004/25.

54. However, it transpires from the order for reference that the Administratīvā apgabaltiesa (Regional Administrative Court) held at first instance that Article 74(1) of the FITL could and should be interpreted as meaning that its point 1 takes precedence as a rule and that the calculation methods provided for in points 2 and 3 only apply by way of exception under exceptional circumstances. That court appears to have deduced that requirement from Article 74(8) of the FITL regulating the power of the supervisory authority to adjust the offer price in exceptional circumstances and to rely in that case on the calculation method provided for under Article 74(1)(3) of the FITL.

55. The Regional Administrative Court then held that the lack of liquidity of the securities of the offeree company constituted an exceptional circumstance. The Latvian Government confirmed in that regard that, in enacting Article 74(1)(2) and (3) of the FITL, the Latvian legislature had taken account of the specific situation on the Latvian stock market, which was extremely illiquid and persistently inactive.

56. The referring court is required to rule on whether Article 74(1) of the FITL can be interpreted in that sense. It has to be recalled in that regard that the referring court is required to start from the premiss that the legislature intended to comply with the directive, even if the provision concerned was not enacted for the specific purpose of transposing the directive, or was adopted before it entered into force.³⁵

57. Should the referring court find that Article 74(1) of the FITL can be interpreted in that sense, it will still have to consider whether the requirements listed in points 51 and 52 of this Opinion are fulfilled. In particular, the requirements for the application of the calculation methods provided for in Article 74(1)(2) and (3) of the FITL must be sufficiently clear, precise and foreseeable, that is it must be apparent when exceptional circumstances are to be assumed.

³⁴ See, *mutatis mutandis*, judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraph 46), and order of 11 January 2018, *Amber Capital Italia and Others* (C-654/16, C-657/16 and C-658/16, not published, EU:C:2018:7, paragraph 36).

³⁵ See, to that effect, judgments of 13 November 1990, *Marleasing* (C-106/89, EU:C:1990:395, paragraphs 8 and 9); of 16 December 1993, *Wagner Miret* (C-334/92, EU:C:1993:945, paragraphs 20 and 21); and of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 43).

58. In that regard, first, it has to be noted that the discretion granted to the Member States under Directive 2004/25 is certainly intended to ensure that sufficient account can be taken of the specific characteristics of the various capital markets and the particular circumstances prevailing in the Member States.³⁶ An illiquid and inactive capital market is undoubtedly not in keeping with the model which the European legislature had in mind in enacting the rule in the first subparagraph of Article 5(4) of Directive 2004/25.³⁷ A price formed under those circumstances might therefore not be equitable. However, it is for the referring court to make that assessment in each individual case.

59. Second, the reference to the ‘illiquidity’ or ‘inactivity’ of the capital market does not of itself clearly define exceptional circumstances. That is because, from an economic perspective, those concepts do not describe an established scenario. In order to be ‘clearly determined’ within the meaning of the case-law cited in point 52 of this Opinion, Latvian law should, at the very least, stipulate certain trading volumes or frequencies below which a security qualifies as illiquid. Again, it is for the referring court to decide if that is the case.

60. Furthermore, the question arises as to whether the rule that, of the applicable calculation methods, the method that gives the highest price must always be chosen in exceptional circumstances is sufficiently clear, precise and foreseeable. I am of the view that it is, since, if two fixed values are compared, the higher of the two can clearly be determined. The question as to whether the alternative calculation methods are themselves in turn clearly defined in the above sense, such that those values can be unambiguously established and compared, is the subject matter of the first and second questions referred, which must now be considered.

4. Conclusion

61. It follows from the above considerations that Article 5(4) of Directive 2004/25 is to be interpreted as meaning that the Member States must, as a rule, provide for the price referred to in the first subparagraph of that provision to be the minimum price for mandatory bids. That does not apply in circumstances such as those referred to in the second subparagraph of that provision, in which the highest price paid by the offeror in the period before the bid determined by the Member State concerned cannot be regarded as equitable. The latter is for the referring court to decide. Consequently, the first subparagraph of Article 5(4) of the directive does not preclude national legislation which takes as a basis in such circumstances a price other than that referred to in that provision, provided that, first, the conditions on which that price is assumed to be inequitable and, second, the criteria by which the alternative value is determined can be deduced in a sufficiently clear, precise and foreseeable manner with the help of interpretation methods recognised under domestic law.

The ‘illiquidity’ of the securities of the offeree company cannot be regarded as a sufficiently clear, precise and foreseeable condition for the existence of particular circumstances that may justify a derogation from the rule enacted in the first subparagraph of Article 5(4) of Directive 2004/25, unless the law clearly stipulates the trading volumes or frequencies below which a security qualifies as illiquid.

³⁶ See point 48 of this Opinion and the considerations in the Winter report, p. 57.

³⁷ See, in that regard, point 37 of this Opinion.

B. The first and second questions

62. Should the referring court find that it is possible to interpret Article 74(1)(3) of the FITL as meaning that it only applies by way of exception and that the *conditions* for it are clearly stipulated, the first and second questions referred then concern the requirements imposed by Article 5(4) of Directive 2004/25 in terms of the *criteria* by which a price other than that referred to in the first subparagraph of that provision is calculated.³⁸

63. Article 74(1)(3) of the FITL provides that the offer price for the mandatory bid is calculated by dividing the net assets of the offeree company by the number of shares issued and that the net assets (net worth) of the offeree company are in turn calculated in accordance with that provision by deducting its own shares and liabilities from its total assets. That is because from a financial point of view, the assets of the offeree company are not attributed to it in the amount of its liabilities.³⁹ If the offeree company is the parent of a group, Article 74(2) of the FITL requires the calculation to be based on data from the most recent consolidated financial statements showing the total assets and liabilities reported by the offeree company and the value of all the subsidiaries controlled by it, as shown on their statements of financial position.⁴⁰

64. In the case at hand, the offeree company does not own 100% of the shares in any of its subsidiaries. However, it does have several majority interests and therefore prepares consolidated financial statements in accordance with IFRS. The offeree company reports the shares of the minority shareholders of its subsidiaries (non-controlling interests) under a separate equity item, rather than as part of its debt capital, on the liability side of its consolidated financial statements in accordance with IFRS 10:22. For that reason, the FCMC is of the opinion that these shares form part of the net assets of the offeree company. That is because, in its view, it follows from Article 74(1)(3), of the FITL that, for the purpose of calculating net assets, only liabilities and own shares, and no kind of equity, can be deducted.

65. In light of that, the referring court asks by its first question whether Article 5(4) of Directive 2004/25 precludes legislation whereby assets attributed to the minority shareholders of a subsidiary are included in the net assets of the offeree company in their entirety, even where it does not own 100% of the shares in that subsidiary, in order to determine the equitable offer price. If that is not admissible, it asks by the second question referred whether teleological reduction of Article 74(1)(3) of the FITL is permissible under EU law. The referring court is of the opinion that, if teleological reduction is necessary, it might mean that the provision can no longer be regarded as being sufficiently clear, precise and foreseeable within the meaning of the case-law cited in point 52 of this Opinion.

66. Again, two aspects must be taken as the starting point here. First, the Member States must ensure that, if, by way of exception, they take a price other than that referred to in the first subparagraph of Article 5(4) as the offer price of a mandatory bid, that price is equitable (1.). Second, the criteria for calculating that price must be clearly established, that is, it must be possible to deduce them from the rule in a sufficiently clear, precise and foreseeable manner with the help of interpretation methods recognised under domestic law (2.).

³⁸ See points 50 and 51 of this Opinion.

³⁹ Although own shares are not attributed to any other holder on the statement of financial position, they are worthless if the company is wound up. Therefore, they are not included in net assets.

⁴⁰ See Article 14(1) of the Latvian Law on consolidated financial statements.

1. *Equitableness of the price*

67. The second subparagraph of Article 5(4) of Directive 2004/25 lists examples of criteria which a national supervisory authority can be authorised to apply when determining a price that derogates from the first subparagraph of Article 5(4) of that Directive. They include, for example, the break-up value of the offeree company or other objective valuation criteria generally used in financial analysis on which, as explained previously,⁴¹ any statutory rule for determining a different equitable price must also be predicated. These examples illustrate that, where recourse to listed share prices is impossible, a different share price must be derived from the company value of the offeree company which in turn must be determined by a different method.

68. There are numerous different criteria and methods by which the value of a company can be determined. It follows from the wording of the second subparagraph of Article 5(4) of the directive in that regard that the European legislature wished to give the Member States broad discretion to choose an appropriate method,⁴² provided they choose one or more criteria generally used in financial analysis.

69. However, the discretion which the Member States have in establishing the criteria is limited by the purpose and objectives of the provision, which are to determine an equitable share price for a mandatory bid to the minority shareholders of the offeree company of a takeover.

70. It has to be recalled in that regard that it does not follow from the requirement that the price must be equitable within the meaning of Article 5(4) of the directive that it must necessarily be based on the highest possible share price.⁴³ On the contrary, an equitable share price within the meaning of Article 5(4) of Directive 2004/25 must reflect the true economic value of a share in the offeree company. That is because, on the one hand, takeovers should facilitate freedom of establishment and, on the other hand, they should not disadvantage or infringe the fundamental property rights of minority shareholders. This is illustrated, moreover, by the basic legislative decision that, as a rule, the highest price paid by the offeror should be regarded as an equitable price since an undertaking is neither under- nor over-valued on a model, properly functioning, market.⁴⁴

71. Consequently, the Member States can lay down any valuation criteria used in financial analysis which establish the true economic value of an interest in the offeree company for the purpose of determining a share price which, by way of exception, derogates from that referred to in the first subparagraph of Article 5(4) of Directive 2004/25.

72. That being so, it is for the referring court to examine, first, whether the valuation of an undertaking based on its net assets calculated using data from consolidated financial statements in accordance with International Financial Reporting Standard 10 (IFRS 10) is a method recognised by financial analysts and, second, whether the calculation methods provided for under national law for that purpose are capable of establishing the true economic value of an interest in the undertaking concerned.

⁴¹ See points 48 to 50 of this Opinion.

⁴² See also Opinion of Advocate General Wahl in *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:212, point 38).

⁴³ See, in that regard, points 42 to 44 of this Opinion.

⁴⁴ See point 37 of this Opinion.

73. On the first aspect, the Commission has noted in proceedings before the Court that, depending on the type of undertaking, a valuation method based on the statement of financial position might inadequately capture its true value.⁴⁵

74. However, as the Latvian Government rightly noted, a rule whereby the offer price is determined by dividing the net assets of the offeree company by the number of its shares issued is, to all intents and purposes, comparable to a rule based on the break-up value of the company concerned. That criterion is expressly mentioned in the directive and, in my opinion, given the broad discretion which the directive confers on the Member States, cannot in theory be called into question.

75. Moreover, there is, in my opinion, no reason to question whether values reported in consolidated financial statements prepared to IFRS 10 are, in principle, valuation criteria generally used in financial analysis. That is because those international reporting standards were adopted into EU law by Regulation No 1254/2012 and, according to recital 9 of Regulation No 1606/2002,⁴⁶ they should provide a true and fair view of the financial position and performance of an enterprise.

76. With regard to the second aspect, the peculiarity of the main proceedings is that the most recent consolidated financial statements of the group prepared in accordance with IFRS 10 are to be used to determine the takeover value of the group's parent company. However, consolidated financial statements include on the asset side the total assets of the parent and of all its subsidiaries, irrespective of the parent's share of the subsidiaries, and report the non-controlling interests of third parties in the parent's subsidiaries as a separate equity item on the liability side.⁴⁷

77. The reason for that is that the primary purpose of IFRS 10 is to give creditors as true a picture as possible of the financial position of a *group*. Therefore, as stated in Appendix A to IFRS 10, the assets, liabilities, equity, income, expenses and cash flows of the parent and its subsidiaries are presented *as those of a single economic entity*.⁴⁸ Consolidating the parent and subsidiaries is therefore justified in light of the particular objective of IFRS 10. The reason for reporting non-controlling interests as a separate item of 'equity' is to make it clear to creditors that the subsidiary concerned is not owned 100% by the parent and is not therefore equivalent to 'normal' equity.

78. That being so, it is for the referring court to examine whether consolidation of the total assets of the parent and subsidiaries, without any possibility for correction in the form of the pro rata deduction of non-controlling interests, is an appropriate method for determining the economic value of a share in the parent. In doing so, it must pay particular attention to the fact that, according to Appendix A to IFRS 10,⁴⁹ non-controlling interests held by third parties are defined as the equity of a subsidiary that is not attributable directly or indirectly to the parent and is

⁴⁵ That may be the case, for example, where intangible assets make up most of the value of the undertaking. One need only think of web-based undertakings with digital business models, such as Facebook or Google.

⁴⁶ Regulation (EC) of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ 2002 L 243, p. 1), as amended by Regulation (EC) No 297/2008 of the European Parliament and of the Council of 11 March 2008 (OJ 2008 L 97, p. 62).

⁴⁷ See IFRS 10:22.

⁴⁸ This is not mandatory, but is rooted in the fact that IFRS 10 is based on the entity theory of M&A reporting. If the opposite (parent company) concept is taken as a basis, non-controlling shareholders would be reported as outside creditors. See also *Pellens/Amshoff/Sellhorn*, Einheitstheorie in der M&A-Bilanzierung [Entity theory in M&A reporting], *Betriebsberater* (BB) 2008, p. 602 et seq.

⁴⁹ See point 11 of this Opinion.

therefore reported separately in the consolidated financial statements. This might suggest that these third-party shares should be treated as borrowed capital when calculating the takeover value of a parent.

79. It follows from the above considerations that any objective valuation criterion generally used in financial analysis to determine the true economic value of a share in the offeree company of a takeover can be applied to determine by law an equitable price that derogates from the price in the first subparagraph of Article 5(4) of Directive 2004/25. It is for the referring court to judge whether the price determined in application of the national rule reflects that value.

2. Unambiguous calculation criteria

80. Moreover, it must be possible to deduce from the national rule in a sufficiently clear, precise and foreseeable manner, with the help of interpretation methods recognised under domestic law, the calculation method which, in the opinion of the referring court, reflects the true economic value of a share in the offeree company.⁵⁰

81. The referring court appears to assume that it necessarily follows from the obligation to use the data reported in the consolidated financial statements that only the items reported as ‘liabilities’ in the consolidated financial statements may be deducted for the purpose of the calculation required under Article 74(1)(3) of the FITL. However, if that does not enable the true economic value of a share in the offeree company to be established, it considers that it is bound to engage in teleological reduction of Article 74(1)(3) of the FITL. In light of that, it questions whether the calculation method provided for under that provision is unambiguous.

82. It has to be recalled in that regard that the principle of interpretation in conformity with EU law requires the referring court to take account of all national rules of law and all interpretation methods recognised in national law, so as to interpret it, as far as possible, in light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU.⁵¹

83. Thus, it is for the referring court to consider, first and foremost, whether Article 74(1)(3) of the FITL can be interpreted as meaning that, to determine the net assets of the offeree company, an amount has to be deducted from the total assets referred to therein which corresponds to the value of the subsidiaries reported on the statement of financial position which is not attributed to the offeree company (that is, the non-controlling interests). This appears at first glance to be possible, given that the national law does not, as far as I can see, expressly refer to liabilities within the meaning of IFRS 10.

84. If, in the opinion of the referring court, that result cannot be achieved based on classic interpretation, it must also consider teleological reduction, provided that the Latvian system of law recognises that legal instrument. In order to achieve a result consistent with EU law, it may also need to disapply (in part) any conflicting national provisions.⁵²

⁵⁰ See, in that regard, point 52 of this Opinion.

⁵¹ Judgments of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 113 and 114); of 19 January 2010, *Küçükdeveci* (C-555/07, EU:C:2010:21, paragraph 48); and of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 31).

⁵² See, with regard to that obligation, judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 37).

85. However, if such teleological reduction of the provision or its disapplication (in part) is necessary, the calculation method cannot, in my opinion, be regarded as being sufficiently clear, precise and foreseeable within the meaning of the case-law cited in point 52 of this Opinion. That is because that requirement is intended to afford the offeror legal certainty as to the offer price which must be paid.

86. To conclude, a criterion to determine by law an equitable price which differs from that referred to in the first subparagraph of Article 5(4) of Directive 2004/25 may be regarded as insufficiently clear, precise and foreseeable where a provision requires teleological reduction in order to apply or must be disapplied because it is inconsistent with EU law.

C. The sixth question

87. By its sixth question, the referring court wishes to know whether the provisions of Directive 2004/25, in particular Article 5(4) of the directive, are intended to confer rights on the offeror within the framework of a takeover.

88. The background to this question is that it is settled case-law that the liability of a Member State for damage caused to an individual as a result of infringement of EU law by that Member State depends on three conditions: the EU rule of law infringed must be intended to confer rights on individuals; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the damage sustained.⁵³

89. The peculiarity of this case is that Article 4(6) of Directive 2004/25 requires the Member States to regulate whether and on what conditions the parties to a bid are entitled to bring administrative or judicial proceedings. In particular, they may decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. Furthermore, the directive does not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities.

90. This restriction on the rights of the parties to a bid is justified by the concern that takeovers should not be hampered by protracted disputes, for example over the equitableness of the offer price.⁵⁴ However, the directive is not intended to interfere in the right of an injured party to take recourse to the courts, at the very least to seek compensation.⁵⁵

91. If, therefore, in light of this, the Member States are able to enact detailed rules governing the exercise of their rights by the parties to the bid and restricting the takeover under certain circumstances at particular stages of the procedure, it cannot, in my opinion, be deduced from Article 4(6) of Directive 2004/25 that the Member States can simply exclude subjective rights, even though the directive so provides.

⁵³ Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51); of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 51); and of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602, paragraph 22).

⁵⁴ See, in that regard, the Winter report, p. 57.

⁵⁵ See, in that regard, the proposal for a directive, p. 4 (explanation of Article 4). Article 4(6) was adopted unchanged from the proposal for a directive.

92. Whether a provision is intended to confer rights on individuals must, in fact, always be investigated in the light of the specific provision. The Court has ruled in that sense that it is not possible to give a blanket answer to this question by reference to the objectives of the directive which includes the provision.⁵⁶ Furthermore, the fact that a provision also serves other interests does not preclude it from also having the aim of protecting individuals.⁵⁷

93. For the main proceedings, this means that the stated objective of Directive 2004/25, to protect the minority shareholders of the offeree company,⁵⁸ does not preclude the provision of Article 5(4) of the directive from being intended to protect the offeror also. In that regard, it has already been stated that the rule of the highest price paid enacted in the first subparagraph of Article 5(4) of the directive is intended to afford the offeror legal certainty.⁵⁹ Moreover, although the criterion of an equitable offer price is intended to ensure that the minority shareholder is compensated for the true economic value of its interest in the offeree company,⁶⁰ the possibility of adjusting the highest price paid by the offeror *downwards* provided for in the second subparagraph of Article 5(4) of the directive illustrates that the offeror should, at the same time, be protected against having to pay more than the equitable price.

94. However, the deciding factor in my opinion is that Article 5(4) of Directive 2004/25 allows direct interference in the legal situation of offerors, in particular in their property rights, by obliging them to pay the equitable offer price. In that sense, the Court has based its answer to the question of whether a provision is intended to protect the individual on whether the application of the provision directly affects the legal situation of the individual.⁶¹

95. The Latvian Government objected in the proceedings before the Court that a particular offer price cannot be deduced from Article 5(4) of Directive 2004/25 and that the Member States have discretion within the limits of ‘equitableness’. However, it has confused the question of the character of a rule as protecting the individual with the question of its direct applicability. It is only for the purpose of its direct applicability that the rule in question must be unconditional and sufficiently precise.⁶² Although, with regard to State liability, the level of clarity and precision of the rule breached and the scope of the discretion which it confers on the national authorities are factors to be taken into consideration when deciding if a sufficiently serious breach exists,⁶³ fulfilment of that requirement is not the subject matter of the sixth question referred and must be judged by the referring court.

96. However, the assumption that a rule is also intended to protect the individual does not depend on the fact that it is directly applicable.⁶⁴ On the contrary, the individual should be able to bring an action for damages against the State precisely where he or she cannot rely directly on EU law.⁶⁵

⁵⁶ See, to that effect, judgment of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606, paragraph 40).

⁵⁷ Judgment of 8 October 1996, *Dillenkofer and Others* (C-178/94, C-179/94 and C-188/94 to C-190/94, EU:C:1996:375, paragraph 39).

⁵⁸ See, for example, recital 2 and Article 3(1)(a) of Directive 2004/25, and judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraph 24).

⁵⁹ See points 38 and 43 of this Opinion.

⁶⁰ See, in that regard, points 37 and 70 of this Opinion.

⁶¹ See judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 103).

⁶² Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraphs 11 and 12).

⁶³ Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 56); of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602, paragraph 25); and of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe* (C-620/17, EU:C:2019:630, paragraph 42).

⁶⁴ Judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 97).

⁶⁵ Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 21).

97. The Member States regulate exactly how the protection which Article 5(4) is intended to afford the offeror in the bid procedure is ensured according to their national administrative, civil and procedural law in the exercise of the powers conferred on them by Article 4(6) of Directive 2004/25. As far as the main proceedings are concerned, it suffices to find that Latvian law appears to allow the offeror to take recourse against the decision by the supervisory authority.

98. Therefore, the answer to the sixth question referred should be that Article 5(4) of Directive 2004/25 is to be interpreted as meaning that that provision is intended to protect the offeror in a bid procedure against having to pay more than the equitable offer price for a mandatory bid.

D. The fifth question

99. Lastly, by its fifth question referred, the Augstākā tiesa (Senāts) (Supreme Court) wishes to know whether EU law precludes a national rule of law providing for a standard limitation capping compensation on the grounds of infringement of EU law above a specific amount.

100. It is settled case-law that, in the absence of relevant EU provisions, it is for each Member State to make good damage caused by breach of EU law under its national liability laws, whereby it must simply ensure, first, that the conditions for reparation under national legislation are not less favourable than those applying to similar claims based on national law only (principle of equivalence) and, second, that they are not framed as to make it practically impossible or excessively difficult to obtain reparation (principle of effectiveness).⁶⁶ This also applies in principle when determining the extent of the compensation claim.⁶⁷

101. With regard to the principle of equivalence, it follows from the fifth question referred that the standard limitation of compensation provided for under Article 13(3)(3) of the VPINZAL applies equally to infringements of national and EU law.

102. Thus, all that remains is to consider whether the limitation of compensation compromises the effectiveness of the compensation claim under EU law.

103. It follows from the case-law of the Court in that regard that reparation for damage caused to individuals as a result of breaches of EU law must be commensurate with the damage sustained so as to ensure the effective protection of their rights.⁶⁸ The Latvian Government deduces from this that damage need not necessarily be compensated in full, provided that the compensation can be regarded as commensurate.

104. There is no need in this case to clarify whether the Court has been satisfied with adequate *rather than* full compensation in certain cases in the past,⁶⁹ as it suffices for the purposes of the main proceedings that compensation for less than the full damage cannot be regarded as

⁶⁶ Judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraphs 46 and 58); of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 31); and of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 122).

⁶⁷ See judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 83), and of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602, paragraph 39).

⁶⁸ Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 82); of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 92); and of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe* (C-620/17, EU:C:2019:630, paragraph 46).

⁶⁹ Opinion of Advocate General Wahl in Joined Cases *Sole-Mizo and Dalmandi Mezőgazdasági* (C-13/18 and C-126/18, EU:C:2019:708, point 43 et seq.).

adequate in the case of a clearly quantifiable monetary loss.⁷⁰ The Court has also ruled in that regard that the total exclusion of certain heads of damage for which reparation may be awarded does not constitute adequate compensation.⁷¹

105. The Latvian Government's argument at the hearing on this point, that limitation of the compensation can take account of the relative imprecision of the provision of Article 5(4) of Directive 2004/25 and the broad discretion of the Member States, is unconvincing. Suffice it to say that those factors have to be considered at most when deciding whether a sufficiently serious breach exists.⁷²

106. The Latvian Government also stated, first, that the reason for limiting the amount in compensation is to prevent a disproportionate burden on the State budget from liability claims and, second, that the offeror can seek reimbursement of any overpayment from the minority shareholders under the rules on unjust enrichment.

107. The first point to be made in response to those objections is that the Court has considered limitation of the Member State's obligation to restore compliance with EU law at most in very exceptional circumstances and that the judgment of the Court on that point is reserved in every case.⁷³ Article 13 of the VPINZAL, on the other hand, provides for limitation of compensation as the rule. Nor does the limitation in the main proceedings appear to be based on any imminent risk to the stability of public finances.⁷⁴ Consequently, these purely fiscal considerations cannot justify limitation of the offeror's compensation.

108. Second, the offeror cannot be directed to initiate action against the minority shareholders on the grounds of unjust enrichment. Although the Member States can determine the legal situation regarding the liability of supervisory authorities or litigation between the parties to the bid in accordance with Article 4(6) of Directive 2004/25, as we have already seen, those provisions must themselves satisfy the principle of effectiveness. Thus, the national law should provide a reasonable mechanism to reclaim overpayments from minority shareholders. However, the offeror cannot be expected to initiate a host of actions to sue each individual minority shareholder. Otherwise, the offeror would bear the full risk of the counterparty's impoverishment and insolvency. Thus, compensation would be precluded in certain cases, or, in any case, made excessively difficult. This is the reason why EU law does not require injured parties in this context to have recourse systematically to all the legal remedies available to them if that would give rise to excessive difficulties or could not reasonably be required of them.⁷⁵ Naturally, that does not preclude declining a compensation claim where the overpayment has in fact already been reimbursed by the other side.⁷⁶

⁷⁰ Judgment of 2 August 1993, *Marshall* (C-271/91, EU:C:1993:335, paragraph 30). See also, to that effect, judgment of 17 December 2015, *Arjona Camacho* (C-407/14, EU:C:2015:831, paragraph 33).

⁷¹ Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 87); of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe* (C-620/17, EU:C:2019:630, paragraph 47); and of 23 April 2020, *Sole-Mizo and Dalmandi Mezőgazdasági* (C-13/18 and C-126/18, EU:C:2020:292, paragraph 49).

⁷² See, in that regard, point 95 of this Opinion.

⁷³ See, to that effect, judgments of 15 March 2005, *Bidat* (C-209/03, EU:C:2005:169, paragraphs 67 to 69); of 29 July 2010, *Brouwer* (C-577/08, EU:C:2010:449, paragraphs 33 and 34); and of 29 September 2015, *Gmina Wrocław* (C-276/14, EU:C:2015:635, paragraph 45).

⁷⁴ See, in that regard, Opinion of Advocate General Wahl in Joined Cases *Sole-Mizo and Dalmandi Mezőgazdasági* (C-13/18 and C-126/18, EU:C:2019:708, point 41).

⁷⁵ Judgments of 24 March 2009, *Danske Slagterier* (C-445/06, EU:C:2009:178, paragraph 62); of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 77); and of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 142).

⁷⁶ See, to that effect, judgment of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 94).

109. In the light of this, the answer to the fifth question of the referring court is that EU law precludes the application of a national rule which applies a standard limitation of 50% over and above a certain amount in compensation in the case of a clearly quantifiable monetary loss sustained by an individual as the direct result of a serious breach by the Member State concerned of a provision of EU law that affords protection to that individual.

V. Conclusion

110. In light of the above considerations, I propose that the Court answer the questions referred by the Augstākā tiesa (Senāts) (Supreme Court, Latvia) as follows:

- (1) Article 5(4) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids is to be interpreted as meaning that the Member States must, as a rule, provide for the price referred to in the first subparagraph of that provision to be the minimum price for mandatory bids. That does not apply in circumstances such as those referred to in the second subparagraph of that provision, in which the highest price paid by the offeror in the period before the bid determined by the Member State concerned cannot be regarded as equitable. That is for the national court to decide. Consequently, the first subparagraph of Article 5(4) of the directive does not preclude national legislation which takes as a basis in such circumstances a price other than that referred to in that provision, provided that, first, the conditions on which that price is assumed to be inequitable and, second, the criteria by which the alternative value is determined can be deduced in a sufficiently clear, precise and foreseeable manner with the help of interpretation methods recognised under domestic law.
 - (a) The ‘illiquidity’ of the securities of the offeree company cannot be regarded as a sufficiently clear, precise and foreseeable condition for the purpose of particular circumstances that may justify a derogation from the rule enacted in the first subparagraph of Article 5(4) of Directive 2004/25, unless the law clearly stipulates the trading volumes or frequencies below which a security qualifies as illiquid.
 - (b) Any objective valuation criterion generally used in financial analysis to determine by law the true economic value of a share in the offeree company of a takeover can be applied to determine by law an equitable price that derogates from the price in the first subparagraph of Article 5(4) of Directive 2004/25. It is for the national court to judge whether the price determined in application of the national rule reflects that value.
 - (c) However, a valuation criterion may be regarded as insufficiently clear, precise and foreseeable where a provision requires teleological reduction in order to apply or must be disapplied because it is inconsistent with EU law.
- (2) Article 5(4) of Directive 2004/25 is to be interpreted as meaning that that provision is intended to protect the offeror in a bid procedure against having to pay more than the equitable offer price for a mandatory bid.
- (3) EU law precludes the application of a national rule which applies a standard limitation of 50% over and above a certain amount in compensation in the case of a clearly quantifiable monetary loss sustained by an individual as the direct result of a serious breach by the Member State concerned of a provision of EU law that affords protection to that individual.