



Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 11 February 2021¹

Case C-910/19

Bankia SA

v

Unión Mutua Asistencial de Seguros (UMAS)

(Request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling – Directive 2003/71/EC – Companies – Obligation to publish a prospectus when securities are offered to the public or admitted to trading – Qualified and non-qualified investors – Civil liability towards qualified investors in the event of a prospectus being inaccurate or incomplete)

I. Introduction

1. The request for a preliminary ruling concerns the interpretation of Article 3(2) and Article 6 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.²
2. This request was made in proceedings between Bankia SA and Unión Mutua Asistencial de Seguros ('UMAS'), a mutual insurance entity, the latter having acquired shares in the former where the prospectus contained serious inaccuracies.
3. This case provides the Court with an opportunity to interpret the provisions of Directive 2003/71, which introduced a prospectus that can be used as a single passport for all markets, within the European Union, on which shares are issued by an issuer. Although that directive harmonised to a great extent the content of that prospectus, it afforded discretion, first, to Member States in the choice of the system and procedures under which civil liability may be incurred by issuers or offerors, in particular, in respect of the content of the information provided in a prospectus and, secondly, to issuers, who, although in certain situations are not required to publish such a prospectus, in particular where the subscription offer is made only to qualified investors, may nonetheless do so voluntarily.
4. The questions referred by the Tribunal Supremo (Supreme Court, Spain) therefore concern, in the first place, whether an inaccurate prospectus may provide the basis for a qualified investor to bring an action for damages and, secondly, whether evidence that the qualified investor is aware of the true situation of the issuer may be adduced from the existence of commercial or legal relations between them (being a shareholder or a member of its management bodies, etc.).

¹ Original language: French.

² OJ 2003 L 345, p. 64.

5. I shall propose that the Court's answer to the first question should be that a prospectus containing inaccurate information may always provide the basis on which an action for damages may be brought by a qualified investor and, to the second question, that, in order for civil liability to be incurred in particular by the issuer or the offeror, assessment of the extent to which qualified investors are aware of the economic situation of either the issuer or the offeror is a matter for national law, on condition that the principles of effectiveness and equivalence are observed.

II. Legal framework

A. Directive 2003/71

6. Recitals 10, 16, 18, 19 and 27 of Directive 2003/71 read as follows:

(10) The aim of this Directive and its implementing measures is to ensure investor protection and market efficiency, in accordance with high regulatory standards adopted in the relevant international fora.

...

(16) One of the objectives of this Directive is to protect investors. It is therefore appropriate to take account of the different requirements for protection of the various categories of investors and their level of expertise. Disclosure provided by the prospectus is not required for offers limited to qualified investors. In contrast, any resale to the public or public trading through admission to trading on a regulated market requires the publication of a prospectus.

...

(18) The provision of full information concerning securities and issuers of those securities promotes, together with rules on the conduct of business, the protection of investors. Moreover, such information provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make this information available is to publish a prospectus.

(19) Investment in securities, like any other form of investment, involves risk. Safeguards for the protection of the interests of actual and potential investors are required in all Member States in order to enable them to make an informed assessment of such risks and thus to take investment decisions in full knowledge of the facts.

...

(27) Investors should be protected by ensuring publication of reliable information. The issuers whose securities are admitted to trading on a regulated market are subject to an ongoing disclosure obligation but are not required to publish updated information regularly. Further to this obligation, issuers should, at least annually, list all relevant information published or made available to the public over the preceding 12 months, including information provided to the various reporting requirements laid down in other [EU] legislation. This should make it possible to ensure the publication of consistent and easily understandable information on a regular basis. To avoid excessive burdens for certain issuers, issuers of non-equity securities with high minimum denomination should not be required to meet this obligation.'

7. Article 2 of Directive 2003/71 provides:

‘1. For the purposes of this Directive, the following definitions shall apply:

...

- (d) “offer of securities to the public” means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. This definition shall also be applicable to the placing of securities through financial intermediaries;
- (e) “qualified investors” means:
 - (i) legal entities which are authorised or regulated to operate in the financial markets, including: credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and their management companies, pension funds and their management companies, commodity dealers, as well as entities not so authorised or regulated whose corporate purpose is solely to invest in securities;
 - (ii) national and regional governments, central banks, international and supranational institutions such as the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations;
 - (iii) other legal entities which do not meet two of the three criteria set out in paragraph (f);
 - (iv) certain natural persons: subject to mutual recognition, a Member State may choose to authorise natural persons who are resident in the Member State and who expressly ask to be considered as qualified investors if these persons meet at least two of the criteria set out in paragraph 2;
 - (v) certain SMEs: subject to mutual recognition, a Member State may choose to authorise SMEs which have their registered office in that Member State and who expressly ask to be considered as qualified investors;
- (f) “small and medium-sized enterprises” means companies, which, according to their last annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 000 000 and an annual net turnover not exceeding EUR 50 000 000;
- (g) “credit institution” means an undertaking as defined by Article 1(1)(a) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions [³];
- (h) “issuer” means a legal entity which issues or proposes to issue securities;
- (i) “person making an offer” (or “offeror”) means a legal entity or individual which offers securities to the public;

...

³ OJ 2000 L 126, p. 1.

2. For the purposes of paragraph 1(e)(iv) the criteria are as follows:

- (a) the investor has carried out transactions of a significant size on securities markets at an average frequency of, at least, 10 per quarter over the previous four quarters;
- (b) the size of the investor's securities portfolio exceeds EUR 0,5 million;
- (c) the investor works or has worked for at least one year in the financial sector in a professional position which requires knowledge of securities investment.

...'

8. Article 3 of Directive 2003/71 provides:

'1. Member States shall not allow any offer of securities to be made to the public within their territories without prior publication of a prospectus.

2. The obligation to publish a prospectus shall not apply to the following types of offer:

- (a) an offer of securities addressed solely to qualified investors; ...

...

3. Member States shall ensure that any admission of securities to trading on a regulated market situated or operating within their territories is subject to the publication of a prospectus.'

9. Article 4 of that directive provides for exemptions from the obligation to publish a prospectus for certain categories of securities.

10. Article 5 of that directive provides:

'1. Without prejudice to Article 8(2), the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This information shall be presented in an easily analysable and comprehensible form.

2. The prospectus shall contain information concerning the issuer and the securities to be offered to the public or to be admitted to trading on a regulated market. It shall also include a summary. The summary shall, in a brief manner and in non-technical language, convey the essential characteristics and risks associated with the issuer, any guarantor and the securities, in the language in which the prospectus was originally drawn up. The summary shall also contain a warning that:

- (a) it should be read as an introduction to the prospectus
- (b) any decision to invest in the securities should be based on consideration of the prospectus as a whole by the investor
- (c) where a claim relating to the information contained in a prospectus is brought before a court, the plaintiff investor might, under the national legislation of the Member States, have to bear the costs of translating the prospectus before the legal proceedings are initiated; and

- (d) civil liability attaches to those persons who have tabled the summary including any translation thereof, and applied for its notification, but only if the summary is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

...'

11. Article 6 of Directive 2003/71 provides:

'1. Member States shall ensure that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

2. Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus.

...'

B. Spanish law

12. Article 28 of Ley 24/1988, del Mercado de Valores (Law 24/1988 on the Securities Market) of 28 July 1988,⁴ in the version applicable in the main proceedings, provides:

'1. Responsibility for the information given in a prospectus attaches at least to the issuer, the offeror or the person asking for the admission to trading on an official secondary market and the directors of those persons, in accordance with the provisions laid down by regulation.

The responsibility referred to in the preceding subparagraph shall likewise attach to the guarantor of the securities in respect of the information it is required to provide.

The lead entity shall also be held responsible in respect of the monitoring work it carries out, in accordance with the provisions laid down by regulation.

Responsibility shall also attach, in accordance with the provisions laid down by regulation, to any other persons agreeing to assume responsibility for the prospectus, provided that fact is stated in that document, and to any other persons not referred to above who have authorised the contents of the prospectus.

2. The persons responsible for the information in the prospectus shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices. They must also declare that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

3. In accordance with the provisions laid down by regulation, all the persons referred to in the preceding paragraphs shall, where appropriate, be liable for any damage caused to the holders of securities acquired as a result of incorrect information or the omission of relevant data from the prospectus or from the document to be prepared, where appropriate, by the guarantor.

⁴ BOE No 181 of 29 July 1988, p. 23405.

The liability claim shall become time-barred three years from the time when the claimant could have become aware of the inaccurate information in, or the omissions from, the prospectus.

4. No liability shall attach to the persons referred to in the preceding paragraphs on the basis of the summary, or of its translation, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus, or does not provide, when read together with the other parts of the prospectus, key information that will assist investors when deciding whether or not to invest in the securities.'

III. The facts in the main proceedings and the questions referred for a preliminary ruling

13. In 2011, Bankia issued an offer of shares to the public, for the purpose of becoming listed on the stock exchange, comprising two tranches: one tranche for retail investors, employees and directors, and a second tranche, the 'institutional tranche', for qualified investors.

14. From 29 June 2011, the date on which the prospectus was registered with the Comisión Nacional del Mercado de Valores (Securities Market Commission, Spain), both tranches were offered to investors. The 'book-building period', in which potential qualified investors could submit subscription bids, ran from that date until 18 July 2011.

15. On 18 July 2011, the share price was set at EUR 3.75 for both tranches of the public offer.

16. In the context of the subscription offer, Bankia contacted UMAS, which is a mutual insurance entity and is consequently considered to be a qualified investor. On 5 July 2011, UMAS signed a EUR 600 000 purchase order for 160 000 shares at EUR 3.75 each.

17. Following a revision of Bankia's annual financial statements, the shares lost almost all their value on the secondary market and were suspended from trading.

18. In previous proceedings, brought by retail investors, the Tribunal Supremo (Supreme Court) found that the prospectus issued by Bankia contained serious inaccuracies regarding the issuer's true financial situation.

19. UMAS brought proceedings against Bankia seeking, primarily, annulment of the share purchase order, on the grounds that the consent was vitiated by error, and, in the alternative, a declaration that Bankia was liable on the grounds that the prospectus was misleading. The first instance court annulled the share purchase order on the grounds of an error vitiating consent and ordered repayment of the consideration given.

20. Bankia appealed against that judgment before the Audiencia Provincial (Provincial Court, Spain). The latter dismissed the action for annulment but upheld the action for damages brought against Bankia on grounds that the prospectus was inaccurate.

21. Bankia lodged an appeal on a point of law against that judgment before the referring court. The latter held that neither Directive 2003/71 nor Spanish law expressly provides that it is possible for qualified investors to hold the issuer liable for an inaccurate prospectus where the offer made to the public to subscribe for securities is combined, that is to say, is addressed to both retail and qualified investors. The referring court points out, in that regard, that Article 3(2) of that directive does not require a prospectus to be issued where an offer is addressed solely to qualified investors, since the latter have the capability and means of information enabling them to take an informed decision. On the other hand, according to recital 27 of that directive, the protection of investors should be ensured by the publication of reliable information, with no distinction being drawn between the various types of investor.

22. In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and refer the following questions to the Court concerning the interpretation of Article 3(2) and Article 6 of Directive 2003/71:

- (1) When an offer of shares to the public for subscription is directed at both retail and qualified investors, and a prospectus is issued for the retail investors, is an action for damages arising from the prospectus available to both kinds of investor or only to retail investors?
- (2) In the event that the answer to the [first question] is that it is also available to qualified investors, is it possible to assess the extent to which they were aware of the economic situation of the issuer of the offer of shares to the public for subscription otherwise than through the prospectus, on the basis of their legal and commercial relations with that issuer (for example, being shareholders of the issuer or members of its management bodies, etc.)?

23. Bankia, UMAS, the Spanish and Czech Governments and the European Commission submitted written observations.

IV. Analysis

24. By its first question, the referring court asks, in essence whether Article 6 of Directive 2003/71, in the light of Article 3(2)(a) of that directive, should be interpreted as meaning that, where an offer of shares to the public for subscription is directed at both retail and qualified investors, and a prospectus is issued, an action for damages arising from the prospectus may be brought by qualified investors, although it is not necessary to publish such a document where the offer concerns exclusively such investors. By its second question, that court asks whether, in the event of the first question being answered in the affirmative, Article 6 of that directive should be interpreted as meaning that, for the purpose of determining whether the issuer is liable, in the case of a qualified investor bringing an action, account can be taken of the fact that that investor was able to access information, other than the information contained in the prospectus, concerning the economic situation of the company issuing the public offer.

25. In order to give an answer to the referring court, it is necessary, in the event of an inaccurate prospectus being issued in the context of a combined offer, that is to say, an offer comprising two tranches, one addressed to qualified investors and the other addressed to retail investors, to consider in the first place whether there exists a principle of civil liability towards qualified investors and, if so, in the second place, what the procedure is for enforcement of that liability.

26. As a preliminary matter, it should be pointed out however that UMAS's plea that the request for a preliminary ruling is inadmissible must be rejected in accordance with the settled case-law of the Court.⁵

27. In the present case, the referring court has adequately explained the link between the subject matter of the dispute and the interpretation of EU law sought, the fact that the issue to be resolved exists and what factual and legal material is needed to enable it to give a useful answer to the questions referred.

⁵ See, inter alia, judgment of 24 November 2020, *Openbaar Ministerie (Faux en écritures)* (C-510/19, EU:C:2020:953, paragraphs 25 to 27 and the case-law cited).

A. Can an inaccurate prospectus serve as the basis for an action for damages brought by a qualified investor against the issuer of the shares?

28. That question arises in the situation that exists in the case in the main proceedings, namely, a combined offer that may occur in the context of an offer to the public (Article 3(1) of Directive 2003/71) or in the event of an issue of shares for trading on a regulated market, since in that event the publication of a prospectus is mandatory and both qualified investors and retail investors are likely to acquire such shares (Article 3(3) of that directive).

29. Article 6 of that directive establishes a principle of liability in the event that an inaccurate or incomplete prospectus is issued, which includes the obligation on Member States to ensure, first, that the persons responsible for the content of the prospectus are identified and listed (paragraph 1) and, second, that a system of civil liability applies to them (paragraph 2).

30. Nonetheless, Article 6 of Directive 2003/71 does not provide for an exception to that principle of liability based on the nature of the combined offer, whether it is offered solely to the public or is intended for trading on a regulated market, whereas other provisions of that directive do provide for exemptions from the obligation to publish a prospectus, based either on the persons to whom the offer is addressed, the number of shares or total offer issued (Article 3(2)), or on the nature of the shares issued (Article 4). However, those exemptions from the publication obligation do not prohibit voluntary publication of a prospectus by an issuer who will then benefit from the ‘single passport’ if the shares are issued on a regulated market.⁶

31. The referring court questions, because of the exemption from the obligation to publish a prospectus which is provided for in Article 3(2)(a) of Directive 2003/71, where the offer is limited to qualified investors, whether it is possible for the latter to bring an action for damages based on the inaccuracy of the prospectus. In so doing, the referring court appears to start from the premiss that, since the prospectus is intended solely to protect and inform non-qualified investors, qualified investors cannot rely on the inaccuracy of the prospectus in order to bring an action for damages.

32. Nevertheless, in reality, taken together, the abovementioned exemptions create situations in which either non-qualified investors do not receive a prospectus,⁷ or qualified investors receive a prospectus, although if the offer had been directed solely at them, outside a regulated market, they would not have received one. Except for a combined offer, outside the market regulated by Article 3(1) of Directive 2003/71, qualified investors would receive a prospectus in the event of an offer intended for admission to a regulated market under paragraph 3 of that article, apart from exceptions based on the nature of the securities issued, as provided for in Article 4(2) of that directive, exceptions applying also to non-qualified investors. Similarly, qualified investors may receive a prospectus published voluntarily by the issuer.

33. Thus, both the literal and the systematic interpretation of Directive 2003/71 tend to cast doubt on the idea that a prospectus is produced merely in order to protect non-qualified investors.

34. Furthermore, a teleological interpretation of that directive points in the same direction. The primary objective of the directive is to ensure the completion of a single securities market (recital 45) through the development of access to financial markets (recital 18), for SMEs in particular (recital 4):

- first, by simplifying administrative tasks for the issuers by introducing a single passport (recital 1) and by reducing costs through the opportunity to incorporate information into the prospectus merely by reference to information already in existence and validated (recital 29), and,

⁶ See recital 17 of Directive 2003/71.

⁷ See Article 3(2)(b) to (e) of Directive 2003/71.

– second, by facilitating cross-border offers, in particular by avoiding extra charges involved in translating them into all the official languages (recital 35).

35. One of the other objectives of Directive 2003/71, stated in recital 16, is to ‘protect investors’ whilst taking account of ‘the different requirements for protection of the various categories of investors and their level of expertise’. That protection is provided through the publication of full information (recitals 18 and 20), that is reliable (recital 27) and accessible (recital 21) and designed to enable investors ‘to make an informed assessment of such risks and thus to take investment decisions in full knowledge of the facts’, according to recital 19 of that directive.

36. Thus, that directive combines those two objectives. The Court has already had the opportunity to assess that combination, ruling that a prospectus was not necessary in the event of a sale of securities in the context of enforcement proceedings.⁸

37. Consequently, Article 6 of Directive 2003/71, in conjunction with Article 3(3(a) of that directive, must be interpreted with due regard to the appropriate balance between the two objectives mentioned above.

38. It seems clear to me, therefore, that the fact that Articles 3 and 4 of that directive provide in detail for numerous exemptions from the obligation to publish a prospectus, whilst Article 6 of that directive lays down, without exception, a principle of liability in the event of an inaccurate prospectus, must lead to an interpretation that, where a prospectus exists, it must be possible to bring an action for damages on the basis of the inaccuracy of that prospectus, irrespective of the type of investor who considers he has been injured.

39. Moreover, if it were accepted that each Member State could determine itself whether or not qualified investors may bring an action for damages in the event of an inaccurate prospectus, that would lead to possible distortions occurring among Member States, distortions that would undermine, disproportionately, the objective of completing the single securities market. That objective requires a uniform interpretation of the scope of Article 6 of Directive 2003/71 as regards persons who may bring proceedings against the issuer of the offer.

40. Similarly, in the event of voluntary publication of an inaccurate prospectus, where an offer is restricted to qualified investors, such an investor should be able to bring an action for damages against the issuer on the basis of Article 6 of that directive.

41. It follows from all those considerations that Article 6 of Directive 2003/71, in the light of Article 3(2)(a) of that directive, must be interpreted as meaning that, where an offer of shares to the public for subscription is directed at both retail and qualified investors, and a prospectus is issued, an action for damages arising from the prospectus may be brought by qualified investors, although it is not necessary to publish such a document where the offer concerns exclusively such investors.

B. May evidence that a qualified investor is aware of the true situation of the issuer be adduced from the existence of commercial or legal relations between them (being a shareholder or a member of its management bodies, etc.)?

42. By its second question, the referring court asks the Court specifically about the discretion afforded to Member States in Article 6 of Directive 2003/71.

⁸ See judgment of 17 September 2014, *Almer Beheer and Daedalus Holding* (C-441/12, EU:C:2014:2226, paragraphs 31 to 33 and operative part).

43. Article 6 lays down two principles:

- first, Member States must ensure that there is at least one person responsible for the information given in the prospectus, who is identified in it and who declares that ‘the information contained in the prospectus is in accordance with the facts and ... the prospectus makes no omission likely to affect its import.’ (paragraph 1);
- second, Member States must ensure that their provisions on civil liability apply to the persons responsible for the information given in a prospectus (first subparagraph of paragraph 2).

44. As Article 6 of Directive 2003/71 does not contain any rule for bringing an action for damages, it is for Member States to lay down such rules according to their national laws.

45. As in any situation where Member States are afforded discretion, their choices must observe the principles of effectiveness and equivalence in order to ensure the effectiveness of the provisions of the directive in question. The Court reiterated recently that the detailed rules provided for must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).⁹

46. The Court also stated those principles, in respect of the discretion afforded to Member States in Article 6 of Directive 2003/71, in the judgment of 19 December 2013, *Hirrmann*.¹⁰

47. Thus, in accordance with those principles, Member States may choose a basis in tort or delict, or a contractual or quasi-contractual basis for the action for damages.

48. Although the Court held, in the judgment of 19 December 2013, *Hirrmann*,¹¹ that the source of the liability of an issuer for irregularities in the prospectus was the share purchase contract,¹² that was a case in which the obligations arising from the memorandum and articles of association were relied on in order to preclude liability being incurred on the basis of the share purchase contract. Thus, the Court found that ‘the source of the liability’ was that contract and not the memorandum and articles of association, although that does not, in my view, mean that Member States must choose a contractual basis as regards liability based on the inaccuracy of the prospectus.

49. Similarly, as regards the extent of the liability itself, the choice whether or not to take into account the fault of the victim and the way in which the causal link is perceived¹³ are matters for the Member States, subject to compliance with the EU law principles of effectiveness and equivalence.

50. Although the Court accepted that a Member State may limit the civil liability of the issuer, in the case giving rise to the judgment of 19 December 2013, *Hirrmann*,¹⁴ by limiting the amount of compensation by reference to the date on which the share price is determined for the compensation, the Member State must nonetheless observe the principles of equivalence and effectiveness.

51. Therefore, reasoning by analogy, it is possible to accept that a Member State may provide in its legislation that awareness by a qualified investor of the true situation of the issuer should be taken into account, on condition that the principles of effectiveness and equivalence are observed.

⁹ Judgment of 26 June 2019, *Craeynest and Others* (C-723/17, EU:C:2019:533, paragraph 54 and the case-law cited).

¹⁰ C-174/12, EU:C:2013:856, paragraph 40 and the case-law cited.

¹¹ C-174/12, EU:C:2013:856.

¹² Judgment of 19 December 2013, *Hirrmann* (C-174/12, EU:C:2013:856, paragraph 29).

¹³ Legal doctrine has developed three theories with regard to causality: the *causa proxima* theory, the conditional equivalence theory and the adequate causality theory.

¹⁴ C-174/12, EU:C:2013:856.

52. Consequently, Member States may lay down regulations providing that, in the event of an action for damages being brought by a qualified investor on grounds of an inaccurate prospectus, the qualified investor's awareness of the true situation of the issuer should be taken into consideration besides the inaccurate or incomplete terms of the prospectus, since such awareness may also be taken into account in similar actions for damages and taking it into account does not in practice have the effect of making it impossible or excessively difficult to bring that action.

53. However, review of compliance with the principles of effectiveness and equivalence can take place only where the investor's awareness is taken into consideration specifically in a given situation. Thus, it is for a referring court, which seeks to draw the legal conclusions from awareness of the economic situation of an issuer by a qualified investor bringing an action for damages against the latter on grounds of an inaccurate prospectus, to comply with those principles when assessing the evidence of such awareness and of the extent to which that awareness has been taken into consideration.

54. It follows from all the above considerations that Article 6(2) of Directive 2003/71 must be interpreted as not precluding, in the event of an action for damages being brought by a qualified investor on grounds of an inaccurate prospectus, that investor's awareness of the true situation of the issuer being taken into consideration besides the inaccurate or incomplete terms of the prospectus, since such awareness may also be taken into account in similar actions for damages and taking it into account does not in practice have the effect of making it impossible or excessively difficult to bring that action, which is a matter for the referring court to determine.

V. Conclusion

55. In the light of the preceding considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Tribunal Supremo (Supreme Court, Spain) as follows:

- (1) Article 6 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, in the light of Article 3(2)(a) of that directive, must be interpreted as meaning that, where an offer of shares to the public for subscription is directed at both retail and qualified investors, and a prospectus is issued, an action for damages arising from the prospectus may be brought by qualified investors, although it is not necessary to publish such a document where the offer concerns exclusively such investors.
- (2) Article 6(2) of Directive 2003/71 must be interpreted as not precluding, in the event of an action for damages being brought by a qualified investor on grounds of an inaccurate prospectus, that investor's awareness of the true situation of the issuer being taken into consideration besides the inaccurate or incomplete terms of the prospectus, since such awareness may also be taken into account in similar actions for damages and taking it into account does not in practice have the effect of making it impossible or excessively difficult to bring that action, which is a matter for the referring court to determine.