Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

20 July 2017*

(Reference for a preliminary ruling — Company law — Directive 2004/25/EC — Takeover bids — Second subparagraph of Article 5(4) — Possibility of changing the price of the offer in specific circumstances and according to clearly determined circumstances and criteria — National law providing an option for the supervisory authority to increase the price of a takeover bid in the event of collusion between the offeror or the persons acting in concert with it and one or more sellers)

In Case C-206/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 10 November 2015, received at the Court on 13 April 2016, in the proceedings

Marco Tronchetti Provera SpA,

Antares European Fund Limited,

Antares European Fund II Limited,

Antares European Fund LP,

Luca Orsini Baroni,

UniCredit SpA,

Camfin SpA

v

Commissione Nazionale per le Società e la Borsa (Consob)

intervening parties:

Camfin SpA,

Generali Assicurazioni Generali SpA,

Antares European Fund Limited,

Antares European Fund II Limited,

Antares European Fund LP,

* Language of the case: Italian.

Luca Orsini Baroni,

Marco Tronchetti Provera & C. SpA,

UniCredit SpA,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras (Rapporteur), J. Malenovský, M. Safjan and D. Šváby, Judges,

Advocate General: N. Wahl,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 1 February 2017,

after considering the observations submitted on behalf of:

— Camfin SpA, by A. Zoppini, G.M. Roberti and I. Perego, avvocati,

— la Commissione Nazionale per le Società e la Borsa (Consob), by G. Randisi, S. Lopatriello, S. Providenti and A. Atripaldi, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili and S. Fiorentino, avvocati dello Stato,

— the European Commission, by V. Di Bucci and H. Støvlbæk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 March 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 5(4) of 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).

2 The request has been made in proceedings between a number of Italian commercial companies and the Commissione Nazionale per le Società e la Borsa ('Consob') (National Commission for Companies and the Stock Exchange, Italy), concerning the legality of a decision by the latter to adjust upwards the price of a takeover bid.

Legal context

European Union law

3 According to recitals 1 to 3 and 9 of Directive 2004/25:

‘(1) In accordance with Article [50](2)(g) of the [TFEU], it is necessary to coordinate certain safeguards which, for the protection of the interests of members and others, Member States require of companies governed by the law of a Member State the securities of which are admitted to trading on a regulated market in a Member State, with a view to making such safeguards equivalent throughout the [European Union].

(2) It is necessary to protect the interests of holders of the securities of companies governed by the law of a Member State when those companies are the subject of takeover bids or of changes of control and at least some of their securities are admitted to trading on a regulated market in a Member State.

(3) It is necessary to create [EU]-wide clarity and transparency in respect of legal issues to be settled in the event of takeover bids and to prevent patterns of corporate restructuring within the European Union from being distorted by arbitrary differences in governance and management cultures.

…

(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. Member States should be free to establish further instruments for the protection of the interests of the holders of securities, such as the obligation to make a partial bid where the offeror does not acquire control of the company or the obligation to announce a bid at the same time as control of the company is acquired.’

4 Article 3 of that directive, entitled ‘General Principles’, provides:

‘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; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company’s places of business;

(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;

(e) an offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration;

(f) an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

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.'

5 Article 5 of Directive 2004/25, headed 'Protection of minority shareholders, the mandatory bid and the equitable price', provides in subparagraphs 1 to 4:

'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 as referred to in Article 1(1) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly 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.

2. Where control has been acquired following a voluntary bid made in accordance with this Directive to all the holders of securities for all their holdings, the obligation laid down in paragraph 1 to launch a bid shall no longer apply.

3. The percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.

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.'

Italian law

6 Article 106 of decreto legislativo n. 58 — Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52 (Legislative Decree No 58 consolidating all provisions in the field of financial intermediation within the meaning of Articles 8 and 21 of Law No 52 of 6 February 1996), of 24 February 1998, (Ordinary supplement to GURI No 71, of 26 March 1998), in the version applicable to the facts in the main proceedings ('TUF') entitled, 'Total takeover bids', provides:

'1. Anyone who, after making acquisitions, holds a greater than 30% share, must launch a takeover bid addressed to all the holders of securities for all their holdings admitted to trading on a regulated market.

2. For each category of shares, the bid shall be launched within 20 days at a price which is not less than the highest price paid by the offeror and persons acting in concert with him, during the 12 months preceding the communication provided for in Article 102 [first sentence], for the purposes of purchasing securities in the same category. If no purchase for consideration of securities in the same category intervened in the period indicated, the bid shall be launched for that category of shares at a price which is no less than the weighted average market rate during the previous 12 months or a reduced period that is available.

…

3. Consob shall regulate by order cases where:

(a) the share referred to [in the first paragraph] is acquired by the purchase of shares in companies whose capital is mainly constituted by securities issued by another company, in accordance with Article 105(1);

(b) the obligation to bid arises when purchases of greater than 5% are made by those who already hold the share referred to in paragraph 1, without holding majority voting rights in ordinary shareholders meetings;

(c) the bid, after a reasoned decision is adopted by Consob, is made at a price lower than the highest price already paid, by fixing criteria to determine that price and on condition that one of the following circumstances are present:
   (1) the market prices were influenced by extraordinary events, or where there are good reason to believe that they had been the object of manipulations;
   (2) the highest price paid by the offeror or by the persons acting in concert with him during the period referred to in paragraph 2 corresponds to the price of purchase/sale transactions of securities which are the object of the bid, carried out under market conditions and in the context of the management of its characteristic business or correspond to the price of purchase/sale transaction which [would have] benefited from one of the exemptions referred to in paragraph 5;

(d) the bid, after a reasoned decision adopted by Consob, is made at a higher price than the highest paid, provided that it is necessary to protect investors and at least one of the following circumstances are present:
   (1) the offeror or the persons acting in concert with it fixed a price for the acquisition of shares at an amount higher than that paid to acquire in the same category;
   (2) there has been collusion between the offeror or the persons acting in concert with it and one or more sellers.
   (3) …
   (4) there is reason to suspect that the market prices have been the object of manipulation.

3-*a* Consob, having regard to the characteristics of the financial instruments issued, may establish, by regulation, the cases in which the obligation to bid results from acquisitions that lead to the joint holding of securities and other financial instruments that confer voting rights on the themes referred to in Article 105 to an extent capable of conferring total voting rights equivalent to that of whoever holds the share indicated in paragraph 1.

3-*b* The measures provided for in subparagraphs (c) and (d) of paragraph 3 shall be published in accordance with the detailed arrangements set out in the regulation referred to in Article 103(4)(f).

…'

7 By Decision No 11971 of 14 May 1999, Consob adopted the Regolamento di attuazione del decreto legislativo 24 febbraio 1998, n. 58, concernente la disciplina degli emittenti (Order Implementing Legislative Decree No 58 of 24 February 1998 laying down rules applicable to offerees), which has been amended a number of times ('the order concerning offerees'). Article 47 octies of that order, entitled, 'Increase in price in case of collusion', provides in paragraph 1:

'The bid price is adjusted upwards by Consob, pursuant to Article 106(3)(d)(2) of [the TUF], where the collusion established between the offeror or the persons acting in concert with it and one or more sellers gives rise to payment of an amount greater than that declared by the offeror. In that case the price of the bid shall be equal to the price which is established.'

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

8 Marco Tronchetti Provera & C. SpA ('MTP') set up, through other companies, Lauro Sessantuno SpA ('Lauro 61') with the aim of acquiring a majority of the shares in Comfin SpA, a holding company that did not directly carry on any industrial activity but produced its results from the companies whose capital it held. Amongst those companies was Pirelli & C. SpA ('Pirelli'), of which Camfin held 26.19% of the voting rights.

9 On 5 June 2013, Lauro 61 informed the market of a takeover bid for all the shares in Camfin SpA at a unit price of EUR 0.80 per share, that being the highest price paid over the previous 12 months in accordance with Article 106(2) of the TUF. The takeover bid had become mandatory because Lauro 61 held a 60.99% share of the Camfin's share capital following the acquisition of many direct holdings from other shareholders in Camfin, including Malacalza Investimenti Srl ('MCI').

10 In parallel with the takeover bid, Lauro 61 informed the market of the dissolution of the existing agreements between MTP and MCI concerning, in particular, Camfin. For its part, MCI informed the market that it had sold its shares in that company and had carried out a separate transaction, namely the acquisition of a holding of 6.98% of the share capital in Pirelli from the two companies, who, together with Camfin and the other main shareholders thereof, were signatories to a lock-up agreement ('the Pirelli agreement'), and were authorised by that agreement to release all or some of their locked-up shares.

11 On 11 October 2013, the takeover was successfully concluded and Lauro 61 became the proprietor of Camfin's total share capital.

12 In the meantime, on 12 September 2013, the Consob, seised by the minority shareholders in Camfin, had initiated a procedure to increase the price pursuant, in particular, to Article 106(3)(d)(2) of the TUF and Article 47 octies of the order concerning offerees.

13 By Decision No 18662 of 25 September 2013, the Consob found that there was between, on the one hand, Lauro 61 and the other persons acting in concert with it, and, on the other hand, MCI, a collusion by which MCI had sold to Lauro 61 shares in Camfin at a price of EUR 0.80 per share and, by way of consideration, had acquired shares in Pirelli from the signatories to the Pirelli pact at a price of EUR 7.80 per share, which was a lower price than the market value of EUR 8 per share. In view of the advantage thus received by MCI, the Consob found that the price of a share in Camfin should be raised to EUR 0.83 ('Decision No 18662').

14 A number of actions seeking the annulment of Decision 18662 were brought before the Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court). In some of the actions, it was submitted that Article 106(3)(d)(2) of the TUF and Article 47 octies of the order concerning offerees were not applicable on the ground that they were contrary to Article 5(4) of Directive 2004/25.

15 The Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court) dismissed those actions. According to it, the finding that there was a collusive agreement was only the factual precondition for Consob to exercise its power to adjust the price, the objective of which was merely to re-establish an equitable situation in order to protect Camfin's minority shareholders by enabling them to obtain the same advantage as that obtained by the owner of a holding conferring substantial control. It also held that the conditions for referring a question to the Court of Justice for a preliminary ruling were not met, since the EU law did not give rise to any doubt as to the reply to be given.

16 As regards the merits of Decision No 18662, that court held that it was not necessary for Consob to prove that the conduct of the parties was intended to circumvent the law on takeover bids but merely that it was objectively apt to lead to that result due to the attribution to MCI of consideration greater than that declared for the purposes of the takeover bid, namely the acquisition of Pirelli shares at a reduced price. In its global analysis of the interests of the various operators involved, it held that the agreement with MCI was an objective pursued by all the signatories to the Pirelli agreement who brought about the transaction to acquire Camfin, but also for all the other signatories to the agreement, who were persons objectively interested in the conclusion of a global agreement between MTP and MCI.

17 The companies that were unsuccessful at first instance appealed the judgments relating to them before the Consiglio di Stato (Council of State, Italy).

18 The referring court recalls, first of all, the objectives of the provisions on the determination of the mandatory takeover bid price and sets out the principal findings in the first instance judgments. Next, it sets out the essential arguments made by the appellants in the main proceedings, that the lack of obligation of finding that there was an element of intention on the part of all those participating in the collusion conferred on the supervisory authority an unlimited degree of discretion in assessing the conduct of the offeror, the seller and third party operators on the market. According to them, that degree of discretion is incompatible with the requirement that there is certainty in the *ex ante* identification of the conduct relevant for the purposes of increasing the price of the takeover bid.

19 The referring court notes that there are, in various fields of Italian law, provisions that classify certain acts of collusion in which that notion has the meaning of a 'clandestine and fraudulent agreement to the detriment of third parties that circumvents mandatory statutory provisions', which presupposes

that there was an element of intent on the part of all of the participants to the agreement. If that notion were applied, such as it is, to the field of law at issue in the main proceedings, the grounds of appeal would have to be upheld, since the companies which transferred their holdings in Pirelli to MCI were not parties to any clandestine or fraudulent agreement.

20 However, the referring court observes that, within the specific field of law at issue in the main proceedings, Consob's power to make adjustments is regulatory in nature rather than penal, which precludes the simple transposition, into that field of law, of the definition of the notion of 'collusion' such as it exists in other fields of Italian law. It emphasises moreover that, in competition law and regulation of the markets, the notion of a 'prohibited agreement' may also be deduced from apparently independent actions by operators in cases where those actions objectively produce an effect prohibited by the law. It follows from the foregoing that, as the Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court) held, for the purposes of establishing collusion, it is not necessary that the authority proves that the action of the parties was intended to circumvent the law relating to takeover bids.

21 In the same way as the parties to the main proceedings, the referring court nevertheless entertains doubts as to whether, on account of its vagueness, the notion of 'collusion', as used in the TUF and the order concerning offerees, is incompatible with the principle of certainty of conditions for the power of national authorities to adjust the price of a takeover bid, laid down in the second subparagraph of Article 5(4) of Directive 2004/25. It notes that the operators on the market of a listed company could not carry out a prior evaluation of the actions to take before a takeover bid, which would have the consequence that neutral and lawful actions on the basis of an ex ante evaluation could be regarded, ex post, on the basis of a reclassification that turned exclusively on the objective effects of a more complex situation, unknown to the operators and persons involved, of collusive conduct justifying the increase of a takeover bid price.

22 In those circumstances, the referring court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the second subparagraph of Article 5(4) of [Directive 2004/25], in the light of the general principles laid down in Article 3(1) thereof, and the proper application of the general principles of EU law relating to legal certainty, protection of legitimate expectations, proportionality, reasonableness, transparency and non-discrimination, preclude a provision of national law such as Article 106(3)(d)(2) of the TUF, as subsequently amended, and Article 47 octies of order concerning offerees, in so far as those provisions authorise Consob to increase the takeover bid price as referred to in Article 106 where the condition that "there has been collusion between the offeror or the persons acting in concert with it and one or more sellers" is fulfilled, without identifying the specific conduct which constitutes such a situation, and thus without determining clearly the conditions and criteria under which Consob is authorised to adjust upwards the price of the takeover bid?'

Consideration of the question referred

23 By its question, the referring court asks, in essence, whether the second subparagraph of Article 5(4) of Directive 2004/25, must be interpreted as precluding a national law, such as that at issue in the main proceedings, which allows a national supervisory authority to adjust upwards the price of a takeover bid in the event of collusion, without specifying the precise conduct that characterises that notion.

24 As is clear from recitals 1, 2, 3 and 9 to Directive 2004/25, its objective is to protect the interests of holders of the securities of companies the control of which is acquired by a natural or legal person and it seeks, in that perspective, to guarantee clarity and transparency of the rules in respect of takeover bids.

25 To that end, in accordance with Article 1(1), the directive lays down measures for the coordination of the laws of Member States relating to takeover bids for the securities of companies governed by the laws of those States, where all or some of those securities are admitted to trading on a regulated market.

26 Article 3(1) of that directive lays down the guiding principles, naming them 'general principles', that must be complied with in the implementation of the directive (see, to that effect, the judgment of 15 October 2009, *Audiolux and Others*, C-101/08, EU:C:2009:626, paragraph 51). Included amongst those principles is the principle that if a person acquires control of a company, the other holders of securities must be protected.

27 With a view to ensuring compliance with those principles, Article 3(2)(a) and (b) of Directive 2004/25 provides that Member States, first, must ensure that the minimal requirements laid down by that directive are observed and, second, may lay down additional conditions and provisions more stringent than those laid down by the directive for the regulation of bids.

28 Under the heading 'Protection of minority shareholders, the mandatory bid and the equitable price', Article 5 of that directive lays down, with a view to protecting the interests of company shareholders, essentially two rules that are mandatory for Member States and another that they may choose to apply.

29 First of all, Article 5(1) of Directive 2004/25 lays down the principle of the mandatory bid for the acquisition of the holdings of securities in a given company. It also provides that 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 falling within the scope of application of the directive which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States must ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company, and that bid is to be addressed to all the holders of those securities for all their holdings at the equitable price as defined in Article 5(4) of the directive.

30 Next, also in order to ensure the protection of minority shareholders in the company subject to the takeover bid, in accordance with the first subparagraph of Article 5(4) of Directive 2004/25 the equitable price is regarded as, primarily, the highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, during a period determined by the Member States of no less than six months and no more than 12 months before the bid referred to in Article 5(1) of that directive.

31 Finally, the second sentence of Article 5(4) of Directive 2004/25 provides that, subject to compliance with the principles set out in Article 3(1), the Member States may authorise their supervisory authorities, referred to in Article 4 of the directive, to adjust the equitable price in certain circumstances and according to specified criteria. To that end, Member States may, first, draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, and, second, determine the criteria to be applied in such cases, it being specified that those circumstances and criteria must be clearly determined. Examples of such circumstances and such criteria are mentioned in the second subparagraph of Article 5(4) of the directive.

32 It is clear from those provisions that, where a Member State decides to authorise the supervisory authority to adjust the equitable price, defined in the first subparagraph of Article 5(4) of Directive 2004/25, in order to set the price at which a takeover bid must take place, that power of adjustment must be exercised in compliance with the guiding principles referred to in Article 3(1) of that directive.

33 In that regard, when it fixes, in accordance with the second subparagraph of Article 5(4) of the directive, the determined circumstances in which the said power of adjustment may be exercised, the Member State must take account in particular of the principle of protection of the interests of holders of the securities of the company of which control was taken by a natural or legal person, laid down in Article 3(1).

34 It is in the light of those considerations that the questions referred should be answered.

35 It is apparent from the order for reference that there are two parts to the question. First, the referring court asks whether an abstract legal concept that does not refer to precisely identified conduct may constitute a clearly determined circumstance within the meaning of the second paragraph of Article 5(4) of Directive 2004/25. Second, it asks whether the fact that the same concept has a different meaning in other areas of national law than the law at issue in the main proceedings has an impact on the reply that should be given to the first question.

36 In the present case, it is clear from the order for reference that the law at issue in the main proceedings regards the 'collusions between the offeror and persons acting in concert with it and one or more sellers' as being one of the determined circumstances in which the supervisory authority may adjust upwards the equitable price of a takeover bid.

37 In the first place, it must be observed that the second subparagraph of Article 5(4) of Directive 2004/25 confers on Member States a degree of discretion in defining the circumstances in which their supervisory authorities may adjust the equitable price, on condition, however, that those circumstances are clearly determined.

38 That provision indicates that Member States may draw up a list of such circumstances and mentions, for that purpose, a number of examples that refer to general formulations to illustrate the circumstances likely to justify an upwards or downwards adjustment to the equitable price, such as an agreement between the purchaser and the seller, exceptional events or a manipulation of the price of the securities at issue.

39 In such a context, as the Advocate General observed, in essence, in points 52 and 53 of his opinion, the second subparagraph of Article 5(4) of Directive 2004/25 cannot be interpreted as precluding a Member State from having recourse, in the legislation that it adopts in order to transpose that provision, to an abstract legal notion, such as, in the present case, that of 'collusion', as a clearly determined circumstance within the meaning of that provision.

40 Moreover, in itself, recourse to an abstract legal notion only means that the national norm in which it was included would suffer from an ambiguity that it made it difficult for the Member State that had adopted it to resolve with sufficient certainty any doubts as to the scope or meaning of that norm (see, to that effect, the judgment of 14 April 2005, *Belgium* v *Commission*, C-110/03, EU:C:2005:223, paragraph 31).

41 It is true that, both the principle of legal certainty and the need to secure the full implementation of directives in law and not only in fact require that all Member States reproduce the rules of the directive concerned within a clear, precise and transparent framework providing for mandatory legal provisions (judgments of 16 November 2000, *Commission* v *Greece*, C-214/98, EU:C:2000:624, paragraph 23, and of 14 January 2010, *Commission* v *Czech Republic*, C-343/08, EU:C:2010:14, paragraph 40).

42 Nevertheless, those requirements cannot be regarded as requiring a norm that uses an abstract legal notion to refer to the various specific hypotheses in which it applies, given that all those hypotheses could not be determined in advance by the legislature.

43 Therefore, the second subparagraph of Article 5(4) of Directive 2004/25 cannot be interpreted as requiring a Member State, which, in the legislation that it adopts in order to transpose that provision, provides, as in the case in the main proceedings, the 'collusion between an offeror or persons acting in concert with it and one or more sellers' as being one of the clearly determined circumstances within the meaning of that provision, which sets out the specific conduct that characterises such a collusion.

44 In the second place, the referring court asks whether the second subparagraph of Article 5(4) of that directive precludes a Member State from referring, in order to define one of the circumstances in which the equitable price may be adjusted, to the notion of 'collusion', which has, in the context the law at issue in the main proceedings, a different meaning from that which it is given in other areas of national law.

45 To the extent that that provision pursues the aim of protecting holders of securities in the company that is the object of a takeover bid, and in particular minority shareholders, enshrined in Directive 2004/25 and recalled in paragraphs 24 to 33 of this judgment, where a Member State has recourse to a notion such as that of 'collusion' in order to define one of the circumstances in which the equitable price may be adjusted, the fact that that notion has a different meaning in other fields of national law does not preclude that, used in the context of the national law on takeover bids, it may be regarded as satisfying the requirements of the second subparagraph of Article 5(4) of that directive.

46 Nevertheless, in order to satisfy the requirement for legal certainty, Member States must ensure that the interpretation that must be given to such a notion in the field of takeover bids can be deduced in a sufficiently clear, precise and foreseeable manner from the national law at issue using methods of interpretation recognised by the national law.

47 It is for the national court to ascertain whether that is the case as regards the notion of 'collusion' in the context of the law at issue in the main proceedings.

48 It follows from the foregoing considerations that the second subparagraph of Article 5(4) of Directive 2004/25 must be interpreted as not precluding a national law, such as that at issue in the main proceedings, which enables a national supervisory authority to adjust upwards the price of a takeover bid in the event of 'collusion' without setting out the specific conduct that characterises that notion, provided that the interpretation of that notion can be deduced in a sufficiently clear, precise and foreseeable manner from that law, using methods of interpretation recognised by the national law.

Costs

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

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

The second subparagraph of Article 5(4) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids must be interpreted as not precluding a national law, such as that at issue in the main proceedings, which enables a national supervisory authority to adjust upwards the price of a takeover bid in the event of collusion without setting out the specific conduct that characterises that notion, provided that the interpretation of that notion can be deduced in a sufficiently clear, precise and foreseeable manner from that law, using methods of interpretation recognised by the national law.

[Signatures]