JUDGMENT OF THE COURT (Second Chamber)

19 December 2013 (*)

(Reference for a preliminary ruling – Company law – Second Directive 77/91/EEC – Liability of a public limited liability company for breach of its obligations in respect of advertising – Inaccurate information in share prospectus – Extent of liability – Legislation of a Member State providing for repayment of the price paid by the purchaser for purchased shares)

In Case C?174/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Handelsgericht Wien (Austria), made by decision of 26 March 2012, received at the Court on 12 April 2012, in the proceedings

Alfred Hirmann

v

Immofinanz AG,

intervening party:

Aviso Zeta AG,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça (Rapporteur), G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 17 April 2013,

after considering the observations submitted on behalf of:

– Mr Hirmann, by S. Ganahl and J. Moyal, Rechtsanwälte,

– Immofinanz AG, by A. Zahradnik and B. Rieder, Rechtsanwälte,

– Aviso Zeta AG, by A. Jank, Rechtsanwalt,

– the Austrian Government, by A. Posch, acting as Agent,

– the Portuguese Government, by L. Inez Fernandes and D. Tavares, acting as Agents,

– the European Commission, by G. Braun and R. Vasileva, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of:

– Articles 12, 15, 16, 18, 19 and 42 of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the [second paragraph of Article 48 EC], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1), as amended by Council Directive 92/101/EEC of 23 November 1992 (OJ 1992 L 347, p. 64) ('the Second Directive'),

– Article 14 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16; 'the market abuse directive'),

– Articles 6 and 25 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; 'the prospectus directive'),

– Articles 7, 17 and 28 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ 2004 L 390, p. 38, 'the transparency directive'),

– Articles 12 and 13 of Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of [the second paragraph of Article 48 EC], with a view to making such safeguards equivalent (OJ 2009 L 258, p. 11).

2 The request has been made in proceedings between Mr Hirmann and Immofinanz AG ('Immofinanz') concerning an application for the cancellation of an acquisition of shares in the latter.

Legal context

European Union law

3 The fourth recital in the preamble to the Second Directive is worded as follows:

'… Community provisions should be adopted for maintaining the capital, which constitutes the creditors' security, in particular by prohibiting any reduction thereof by distribution to shareholders where the latter are not entitled to it and by imposing limits on the company's right to acquire its own shares'.

4 Articles 12, 15, 16, 18 to 20 and 42 of the Second Directive provide, inter alia:

'Article 12

Subject to the provisions relating to the reduction of subscribed capital, the shareholders may not be released from the obligation to pay up their contributions.

...

Article 15

1. (a) Except for cases of reductions of subscribed capital, no distribution to shareholders may be made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the law or the statutes.

…

(d) The expression "distribution" used in subparagraphs (a) and (c) includes in particular the payment of dividends and of interest relating to shares.

…

Article 16

Any distribution made contrary to Article 15 must be returned by shareholders who have received it if the company proves that these shareholders knew of the irregularity of the distributions made to them, or could not in view of the circumstances have been unaware of it.

...

Article 18

1. The shares of a company may not be subscribed for by the company itself.

…

Article 19

1. Where the laws of a Member State permit a company to acquire its own shares, either itself or through a person acting in his own name but on the company's behalf, they shall make such acquisitions subject to at least the following conditions:

(a) authorisation shall be given by the general meeting, which shall determine the terms and conditions of such acquisitions, and in particular the maximum number of shares to be acquired, the duration of the period for which the authorisation is given and which may not exceed 18 months, and, in the case of acquisition for value, the maximum and minimum consideration. …;

…

Article 20

1. Member States may decide not to apply Article 19 to:

…

(d) shares acquired by virtue of a legal obligation or resulting from a court ruling …

...

Article 42

For the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position.'

5 Article 14(1) of the market abuse directive provides:

'Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied [with]. Member States shall ensure that these measures are effective, proportionate and dissuasive.'

6 Recital 10 in the preamble to the prospectus directive states that the aim of that directive is to ensure investor protection and market efficiency.

7 Articles 6 and 25(1) of the prospectus directive are worded as follows:

'Article 6

Responsibility attaching to the prospectus

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.

…

Article 25

Sanctions

1. Without prejudice to the right of Member States to impose criminal sanctions and without prejudice to their civil liability regime, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible, where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that those measures are effective, proportionate and dissuasive.

…'

8 Articles 7, 17(1) and 28(1) of the transparency directive are worded as follows:

'Article 7

Responsibility and liability

Member States shall ensure that responsibility for the information to be drawn up and made public in accordance with Articles 4, 5, 6 and 16 lies at least with the issuer or its administrative, management or supervisory bodies and shall ensure that their laws, regulations and administrative provisions on liability apply to the issuers, the bodies referred to in this Article or the persons responsible within the issuers.

...

Article 17

Information requirements for issuers whose shares are admitted to trading on a regulated market

1.. The issuer of shares admitted to trading on a regulated market shall ensure equal treatment for all holders of shares who are in the same position.

...

Article 28

Penalties

1. Without prejudice to the right of Member States to impose criminal penalties, Member States shall ensure, in conformity with their national law, that at least the appropriate administrative measures may be taken or civil and/or administrative penalties imposed in respect of the persons responsible, where the provisions adopted in accordance with this Directive have not been complied with. Member States shall ensure that those measures are effective, proportionate and dissuasive.

...'

9 Recital 10 in the preamble to Directive 2009/101 states that it is necessary, in order to ensure legal certainty as regards relations between the company and third parties, and also between members, to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity, and to fix a short time-limit within which third parties may enter objection to any such declaration.

10 Article 12 of that directive provides:

'The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions:

(a) nullity must be ordered by decision of a court of law;

(b) nullity may be ordered only on the grounds: [points (i) to (vi)]:

…

Apart from the foregoing grounds of nullity, a company shall not be subject to any cause of non-existence, absolute nullity, relative nullity or declaration of nullity.'

11 Article 13 of the same directive provides:

‘1. The question whether a decision of nullity pronounced by a court of law may be relied on as against third parties shall be governed by Article 3. Where the national law entitles a third party to challenge the decision, he may do so only within six months of public notice of the decision of the court being given.

2. Nullity shall entail the winding-up of the company, as may dissolution.

3. Nullity shall not of itself affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company’s being wound up.

4. The laws of each Member State may make provision for the consequences of nullity as between members of the company.

5. Holders of shares in the capital shall remain obliged to pay up the capital agreed to be subscribed by them but which has not been paid up, to the extent that commitments entered into with creditors so require.’

Austrian law

12 Paragraph 5 of the Law on Securities (Kapitalmarktgesetz) of 6 December 1991 (BGBl. 625/1991) provides:

‘(1) If an offer of securities subject to the obligation to publish a prospectus is made without the publication of a prospectus or of the information provided for in Paragraph 6, investors, who are consumers within the meaning of Paragraph 1(1), point 2, of the Konsumentenschutzgesetz (Law on the Protection of Consumers), are entitled to withdraw from their bid or from the contract.

…

(4) The right of withdrawal under subparagraph 1 shall expire one week after the day on which the prospectus or the information provided for in Paragraph 6 is published.’

13 Paragraph 6(2) of that law provides:

‘Investors who have already agreed to purchase or subscribe to transferable securities or investments after the emergence of a circumstance, error or inaccuracy within the meaning of subparagraph 1, but prior to the publication of the relevant supplement, shall have the right to withdraw their agreement within a period of two working days from publication of the supplement. Paragraph 5 shall apply *mutatis mutandis*. However, if the investors are consumers within the meaning of Paragraph 1(1) point 2, of the [Law on the Protection of Consumers], the time-limit referred to in Paragraph 5(4) shall also apply.’

14 Paragraph 11, points 1 and 6, of the Law on Capital Markets is worded as follows:

‘(1) Liability to each investor for loss which the latter has suffered as a result of placing his trust in the information contained in the prospectus or in any other information required under this federal law (Paragraph 6) that is relevant to the assessment of transferable securities or investments shall be incurred by the following:

1. the issuer, for the provision, through his own fault or that of his staff, agents or other persons whose services were used to draw up the prospectus, of any incorrect or incomplete information;

...

(6) Provided that the wrongful conduct was not intentional, the extent of the liability towards each individual investor shall be limited to the purchase price paid by him, plus fees and interest as from the date of payment of the purchase price. …'

15 Paragraph 52 of the Law on Limited Liability Companies (Aktiengesetz) of 6 September 1965 (BGBl. I, 98/1965, p. 1089), as amended by the Law of 22 September 2005 (BGBl. I, 2005 p. 2802) provides:

'Investments shall not be repaid to shareholders; for the lifetime of the company, they shall be entitled only to the profit as set out in the annual balance sheet in so far as that right is not excluded by law or by statute. Payment of the purchase price in the context of the lawful acquisition by a company of its own shares shall not constitute the repayment of investments (Paragraphs 65 and 66).'

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

16 On 7 January 2005 Mr Hirmann purchased shares in Immofinanz to a value of EUR 10 013.75. That purchase, which was carried out through Aviso Zeta AG ('Aviso Zeta'), which is a financial company, was made on the secondary market and not as part of an increase in capital. The sale price was paid by the purchaser to Aviso Zeta and the shares at issue were registered in a custody-account in that company in Mr Hirmann's name.

17 In the main proceedings, Mr Hirmann complains that Immofinanz adopted unlawful measures to support the Immofinanz share price. He claims that its shares were purchased through subsidiaries in the group led by Aviso Zeta, which also controlled Immofinanz, in order to manipulate the market.

18 Further, Mr Hirmann asserts that he purchased the shares on the basis of Immofinanz's prospectus relating to the stock market at the time. He claims that in that prospectus Immofinanz explained that the purchase of its shares represented a safe and risk-free investment. However, that prospectus contained information which was incomplete, false or misleading. Consequently, criminal charges have been brought against former members of the Immofinanz Executive Board and proceedings relating to those charges are currently pending.

19 In those circumstances, Mr Hirmann claimed that the referring court should cancel the contract for the purchase of the shares and award damages. To that end, he claimed, in particular, that Immofinanz should be ordered to pay a sum equivalent to the initial purchase price of the shares, together with interest, in exchange for the restoration of those shares to Immofinanz.

20 According to Immofinanz, that claim is contrary to overriding principles of national and European Union law governing limited liability companies, in particular to the requirement that those companies should maintain their capital. If that company were held liable to Mr Hirmann that would amount to protecting one shareholder at the expense of all other shareholders and also of its creditors.

21 The Handelsgericht Wien considered that the resolution of the dispute required an interpretation of European Union law and therefore decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is a national rule which provides for the liability of a public limited liability company, as issuer, towards a purchaser of shares for infringement of obligations relating to the provision of

information laid down in the law governing capital markets, in particular in the following provisions:

– Articles 6 and 25 of [the prospectus directive];

– Articles 7, 17 and 28 of [the transparency directive];

– Article 14 of [the market abuse directive],

compatible with Articles 12, 15, 16, 19 and 42 of [the Second Directive]?

2. Are the provisions of Articles 12, 15, 16 and in particular 18, 19 and 42 of [the Second Directive] to be interpreted as precluding national legislation which states that, as part of the liability referred to [in Question 1], a public limited liability company must refund the purchase price to the purchaser and redeem the shares purchased?

3. Are the provisions of Articles 12, 15, 16, 18, 19 and 42 of [the Second Directive] to be interpreted as meaning that the liability of a public limited liability company as referred to [in Question 1]

– may also include the company's net assets (subscribed capital plus reserves within the meaning of Article 15(1)(a) of the aforementioned directive), and

– may arise even if it is capable of rendering the company insolvent?

4. Are the provisions of Articles 12 and 13 of Directive 2009/101 … to be interpreted as precluding national legislation which provides for the retroactive cancellation of a share acquisition in the sense that cancellation of the share purchase contract is to be regarded as producing *ex nunc* effects (see Case C?215/08 *E. Friz* [2010] ECR I?2947)?

5. Are the provisions of Articles 12, 15, 16, 18, 19 and 42 of [the Second Directive] and Articles 12 and 13 of Directive 2009/101 … to be interpreted as meaning that liability is limited to the value of the shares – thus, in the case of a listed company, the price of those shares on the stock exchange – at the time when the claim is brought, with the result that the refund which the shareholder receives may be less than the price he originally paid for his shares?'

Consideration of the questions referred for a preliminary ruling

The first and second questions

22 By its first and second questions, which may be examined together, the referring court seeks to ascertain whether Articles 12, 15, 16, 18, 19 and 42 of the Second Directive must be interpreted as precluding national legislation which, in the context of transposition of the prospectus, transparency and market abuse directives, first, provides for the liability of a public limited liability company, as the issuer, to the purchaser of that company's shares, on the basis of a breach of the information requirements laid down in those directives, and, secondly, imposes, as a result of that liability, on the company concerned the obligation to repay to the purchaser a sum equivalent to the purchase price of the shares and to redeem those shares.

23 The objective of the provisions of the Second Directive referred to in the two abovementioned questions is, in essence, to ensure that the share capital of public limited liability companies is maintained and that there is equal treatment of shareholders.

24 As regards the objective of maintenance of capital, the second recital in the preamble to the Second Directive states that, in order to ensure minimum equivalent protection for both

shareholders and creditors of public limited liability companies, the coordination of national provisions relating to their formation and to the maintenance, increase or reduction of their capital is particularly important. In turn, the fourth recital in the preamble to the Second Directive indicates that the aim of that directive is to maintain the capital, which constitutes the creditors' security, in particular by prohibiting any reduction by distribution to shareholders where the latter are not entitled to it and by imposing limits on a company's right to acquire its own shares. The latter constraint is due, in particular, to the need to ensure the protection of shareholders and creditors against market behaviour which might reduce a company's capital and cause the prices of its shares artificially to rise.

25 To that end, the Second Directive lays down, in essence, an obligation on shareholders to pay up their contributions (Article 12), a prohibition on the company repaying those contributions (Article 15), the obligation on the shareholders to return distributions made contrary to Article 15 of that directive (Article 16), the prohibition on the company owning its own shares (Article 18), and the conditions under which a derogation from the latter prohibition may be allowed (Article 19).

26 As regards, further, the objective of equal treatment of shareholders, Article 42 of the Second Directive provides that, for the implementation of that directive, the laws of the Member States are to ensure equal treatment to all shareholders who are in the same position.

27 It follows both from the wording and the objective of the provisions referred to in the two preceding paragraphs that their purpose is to regulate only the legal relationships established between the company and its shareholders which derive exclusively from the memorandum and articles of association and that they are directed solely to internal relations within the company concerned.

28 It follows that, as submitted by Mr Hirmann, the Austrian and Portuguese Governments and the European Commission, the provisions at issue of the Second Directive are not such as to preclude national legislation which establishes the principle that a company issuing shares incurs liability by reason of the dissemination of inaccurate information contrary to the law governing capital markets and which provides that, under that liability, that company is obliged to repay to the purchaser a sum equivalent to the purchase price of the shares and to redeem those shares.

29 In such circumstances, the liability of the company concerned to investors, who are also its shareholders, by reason of irregular conduct on the part of that company prior to or at the time of the purchase of its shares, does not derive from the memorandum and articles of association and is not directed solely at the internal relations of that company. The source of the liability at issue in such a case is the share purchase contract.

30 Further, as regards the principle, stated in Article 42 of the Second Directive, that shareholders must be treated equally, it must be observed that the shareholders who have suffered loss as a result of a company's wrongful conduct occurring prior to or at the time of purchase of that company's shares are not in a situation which is identical to that of shareholders in the same company whose legal situation has not been affected by that wrongful conduct.

31 That is precisely why Article 20(1)(d) of the Second Directive allows a company to acquire its own shares, in particular, where it is under a legal obligation to do so. Such an acquisition cannot be regarded as designed to effect a reduction in the company's capital or an artificial rise in the prices of its shares.

32 In those circumstances, a payment made by a company to a shareholder because of irregular conduct on the part of that company prior to or at the time of the purchase of its shares does not constitute a distribution of capital within the meaning of Article 15 of the Second Directive

and, consequently, such a payment ought not to be subject to the conditions stated in that article.

33 The argument relied on by Immofinanz at the hearing, that Article 15 of the Second Directive precludes a civil liability claim being brought by an investor against a company which has deceived him by reason of the dissemination of misleading information, can therefore not be accepted.

34 Likewise, the fact that a company redeems the shares of an investor who had bought them on the basis of incorrect information, the dissemination of which that company is responsible for, cannot fall within the scope of Article 18 of the Second Directive. Such an acquisition by the company of its own shares is a consequence of the legal obligation under which that company is bound to compensate the investor who has suffered loss, that obligation being wholly unrelated to the *ratio legis* of that article.

35 Further, it is clear from the order for reference and, more particularly, from the wording of the questions referred for a preliminary ruling, that the purpose of the national legislation at issue in the main proceedings is to transpose into the national legal order, inter alia, Articles 6 and 25 of the prospectus directive, Articles 7, 17 and 28 of the transparency directive and Article 14 of the market abuse directive.

36 Article 6(1) of the prospectus directive provides, in particular, that the Member States are to ensure that responsibility for information provided in a prospectus attaches at least to the issuer.

37 Further, Article 7 of the transparency directive provides that Member States are to ensure that responsibility for information to be drawn up and made public in accordance with that directive lies at least with the issuer. Under Article 17(1) of that directive, that issuer is to ensure equal treatment for all holders of shares who are in the same position.

38 It is clear that national legislation which provides for the liability of a public limited liability company, as an issuer of securities, to an investor where information obligations binding on that company have not been met satisfies the requirements laid down in Article 6(1) of the prospectus directive and Article 7 of the transparency directive, and does not undermine the principle of equal treatment established in Article 17(1) of the latter directive.

39 Further, Article 25(1) of the prospectus directive, Article 28(1) of the transparency directive and Article 14(1) of the market abuse directive, which are similarly worded, provide, inter alia, that, without prejudice to the right of Member States to apply criminal penalties, Member States are to ensure that, in conformity with their national law, the appropriate administrative measures or penalties may be taken or imposed in respect of the persons responsible, where the provisions adopted in accordance with those directives have not been complied with, and such measures must be effective, proportionate and dissuasive.

40 While it is true that, unlike Article 25(1) of the prospectus directive, Article 28(1) of the transparency directive and Article 14(1) of the market abuse directive do not expressly refer to the civil liability regimes in the Member States, the fact remains that the Court has previously ruled that, in respect of the award of damages and the possibility of an award of punitive damages, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed (see, by analogy, Joined Cases C?295/04 to C?298/04 *Manfredi and Others* [2006] ECR I?6619, paragraph 92, and the judgment of 6 June 2013 in Case C?536/11 *Donau Chemie and Others* [2013] ECR, paragraphs 25 to 27).

41 It follows from the foregoing that the Member States have a wide discretion in the choice of penalties to be applied in cases of breach by issuing companies of their obligations under those

directives, provided that the Member States act in accordance with European Union law.

42 It also follows that, where an issuer of shares incurs liability, it is for the Member States to choose a civil measure to provide compensation.

43 In this case, the civil liability regime provided for in the national legislation at issue in the main proceedings constitutes an appropriate remedy for the harm suffered by the investor and for the failure of the issuing company to comply with the information requirements. Further, it is capable of deterring issuers from misleading investors.

44 The establishment of such a liability regime is therefore within the discretion conferred on the Member States and is not contrary to European Union law.

45 The answer to the first and second questions is therefore that Articles 12, 15, 16, 18, 19 and 42 of the Second Directive must be interpreted as not precluding national legislation which, in the context of transposition of the prospectus, transparency and market abuse directives, first, provides that a public limited liability company, as an issuer, may have a liability to a purchaser of shares in that company based on a breach of the information requirements laid down in those directives, and, secondly, imposes, under that liability, an obligation on the company concerned to repay to the purchaser a sum equivalent to the purchase price of the shares and to redeem those shares.

The third question

46 By its third question, the referring court seeks to ascertain whether Articles 12, 15, 16, 18, 19 and 42 of the Second Directive must be interpreted as precluding a provision in national legislation to the effect that the obligation on the issuing company to repay to the purchaser a sum equivalent to the purchase price of the shares and to redeem them may extend to the company’s net assets (subscribed capital plus reserves) and lead to the company becoming insolvent.

47 As stated by the Advocate General in point 84 of her Opinion, that is purely hypothetical, since, in its request for a preliminary ruling, the referring court has not explained why an answer to that question might be useful for the outcome of the dispute in the main proceedings and did no more than refer, in general terms, to the risk that the issuing company might become insolvent.

48 That being the case, there is no need to reply to the third question.

The fourth question

49 By its fourth question, the referring court seeks to ascertain, in essence, whether Articles 12 and 13 of Directive 2009/101 must be interpreted as precluding national legislation which, in circumstances such as those in the main proceedings, provides for the retroactive cancellation of the contract for the purchase of shares.

50 In points (a) and (b) of the first paragraph of Article 12 of Directive 2009/101, there is an exhaustive list of the conditions under which the nullity of companies may be ordered by a court of law. The second paragraph of that article provides that, apart from the grounds of nullity laid down in the first paragraph, a company is not to be subject to any cause of non?existence, absolute nullity, relative nullity or declaration of nullity.

51 Article 13 of that directive determines, inter alia, the consequences of a decision of nullity ordered by a court of law.

52 It must be borne in mind that the national legislation at issue in the main proceedings

establishes the principle that an issuing company incurs liability where it disseminates inaccurate information in breach of the law governing capital markets and provides that, under that liability, that company is obliged to repay to the purchaser a sum equivalent to the purchase of the shares and to redeem the shares.

53 The aim of such legislation is, inter alia, to ensure that the injured party is put back in the position he was in before the occurrence of the act which has caused him harm, by requiring, first, repayment to the purchaser of a sum equivalent to the price which he paid for the purchase of the shares, together with interest, and, secondly, the maintenance of those shares in the share capital of the company concerned in the same way as other shares.

54 It follows that a liability regime applicable to companies where there is a breach of certain provisions of the law governing capital markets is wholly unrelated to company nullity procedures, as they are to be found in Articles 12 and 13 of Directive 2009/101.

55 Consequently, since the retroactive cancellation of the contract for the purchase of shares at issue in the main proceedings is not liable to entail the nullity of the company, Articles 12 and 13 of Directive 2009/101 are irrelevant to the fourth question submitted by the referring court.

56 The referring court has particular doubts concerning the possible applicability, in this case, of the line of case-law following the *E. Friz* judgment.

57 In that judgment, the Court was called upon to rule on the compatibility with Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31) of national legislation which attached only *ex nunc* effects to a consumer’s renunciation of entry into a real property fund established in the form of a partnership.

58 After recalling, in paragraph 44 of *E. Friz*, that the consumer protection guaranteed by Directive 85/577 was not absolute, the Court held, in paragraph 50 of that judgment, that that directive did not preclude the termination of the contract being ordered to have *ex nunc* effects.

59 In that regard, it must be observed that the facts giving rise to the proceedings which led to the *E. Friz* judgment were not comparable to those of the case in the main proceedings.

60 In the case which gave rise to the *E. Friz* judgment, the consumer’s renunciation of the contract he had signed for entry into a real property fund was based not on the wrongful conduct of the other contracting party, but solely on the exercise of a right, conferred on all consumers by Article 5(1) of Directive 85/577, enabling them to renounce contracts entered into during a visit by a trader at their home.

61 In those circumstances, the Court could hold, in paragraphs 46 to 48 of *E. Friz*, that Directive 85/577 did not preclude the national rule at issue in those proceedings since that rule, in accordance with the general principles of civil law, was intended to ensure a satisfactory balance and a fair division of the risks among the various interested parties. Further, the Court had previously ruled that both the general structure of that directive and the wording of several of its provisions indicated that consumer protection was subject to certain limits (see Case C?412/06 *Hamilton* [2008] ECR I?2383, paragraphs 39 and 40).

62 By contrast, in the case in the main proceedings, it is common ground that the cancellation of the contract for the purchase of shares is based solely on the irregular conduct of the issuing company which was the cause of harm to the purchaser. In such a case, there is no justification for having recourse to the test of a satisfactory balance and a fair division of the risks among the

various interested parties, as referred to in *E. Friz*, as an aid to the assessment of the compatibility of a rule of national law with European Union law.

63 The answer therefore to the fourth question is that Articles 12 and 13 of Directive 2009/101 must be interpreted as not precluding national legislation which, in circumstances such as those in the main proceedings, provides for the retroactive cancellation of a share purchase contract.

The fifth question

64 By its fifth question, the referring court seeks to ascertain whether Articles 12, 15, 16, 18, 19 and 42 of the Second Directive and Articles 12 and 13 of Directive 2009/101 must be interpreted as meaning that the liability established by the national legislation at issue in the main proceedings is restricted to the value of the shares, calculated according to the prices of those shares if the company is publicly listed, at the time when the claim is brought.

65 As regards, first, Articles 12 and 13 of Directive 2009/101, suffice it to state that, in paragraph 54 of this judgment, the Court has held that a liability regime applicable to companies where there is a breach of certain provisions of the law governing capital markets is wholly unrelated to company nullity procedures.

66 It follows that those articles, which concern only the nullity of the memorandum and articles of association, have no relevance to the assessment of the question of the extent of the liability of such companies. Interpretation of those articles cannot in any case support the argument of Immofinanz that, in the main proceedings, the company's liability should necessarily be restricted to the value of its shares, calculated according to the prices of those shares if the company is publicly listed, at the time when the claim is brought.

67 As regards, secondly, Articles 12, 15, 16, 18, 19 and 42 of the Second Directive, it must be observed that the interpretation of those articles undertaken by the Court in relation to the first two questions referred made possible the finding, in paragraph 28 of this judgment, that those articles are not such as to preclude national legislation which establishes the principle that an issuing company incurs liability by reason of the dissemination of inaccurate information contrary to the law governing capital markets and which provides that, under that liability, that company is obliged to repay to the purchaser a sum equivalent to the purchase price of the shares and to redeem those shares.

68 Further, the Court concluded, in paragraph 44 of this judgment, that the establishment of such a civil liability regime falls within the discretion conferred on the Member States by the prospectus, transparency and market abuse directives and is not contrary to European Union law.

69 In those circumstances, it is clear that the choice between a civil liability regime which provides for restitution to the purchaser of a sum equivalent to the share purchase price, together with interest, and a regime which restricts that liability to payment of the share price at the time when the application for compensation is brought is a matter which falls within the competence of the Member States.

70 In the light of the foregoing, the answer to the fifth question is that Articles 12, 15, 16, 18, 19 and 42 of the Second Directive and Articles 12 and 13 of Directive 2009/101 must be interpreted as meaning that the liability established by the national legislation at issue in the main proceedings is not necessarily restricted to the value of its shares, calculated according to the price of those shares if the company is publicly listed, at the time when the claim is brought.

Costs

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

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

1. **Articles 12, 15, 16, 18, 19 and 42 of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the [second paragraph of Article 48 EC], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, as amended by Council Directive 92/101/EEC of 23 November 1992, must be interpreted as not precluding national legislation which, in the context of the transposition 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,**

– **Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC,**

– **and Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse),**

first, provides that a public limited liability company, as an issuer of shares, may have a liability to a purchaser of shares in that company based on a breach of the information requirements laid down in those directives, and, secondly, imposes, under that liability, an obligation on the company concerned to repay to the purchaser a sum equivalent to the purchase price of the shares and to redeem those shares.

2. **Articles 12 and 13 of Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of [the second paragraph of Article 48 EC], with a view to making such safeguards equivalent, must be interpreted as not precluding national legislation which, in circumstances such as those of the main proceedings, provides for the retroactive cancellation of a share purchase contract.**

3. **Articles 12, 15, 16, 18, 19 and 42 of the Second Directive 77/91, as amended by Directive 92/101, and Articles 12 and 13 of Directive 2009/101 must be interpreted as meaning that the liability established by the national legislation at issue in the main proceedings is not necessarily restricted to the value of shares, calculated according to the price of those shares if the company is publicly listed, at the time when the claim is brought.**

[Signatures]

* Language of the case: German.