OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 12 September 2013 (1)

Case C?174/12

Alfred Hirmann

v

Immofinanz AG

(Request for a preliminary ruling from the Handelsgericht Wien (Austria))

(Company Law – Directive 77/91/EEC – Liability of a public limited liability company – Protection for investor relying on inaccurate information – Compatibility of a national rule providing for the cancellation of a share purchase transaction)

1. When an investor purchases shares in a public limited liability company on the secondary market (that is, not as part of an increase in that company's share capital) and subsequently contends that the information in the securities prospectus on which he relied in making that purchase was neither complete nor truthful, may a court order the company to cancel the contract, thus requiring it to re-acquire its own shares and refund the money to the investor, or is such a remedy precluded by EU law? And is such an investor entitled to be refunded the original purchase price, or the value of the shares at the date when he brings his claim?

2. The Handelsgericht Wien (Commercial Court, Vienna), which has made the present request for a preliminary ruling, framed its questions in terms of Directive 77/91/EEC (the 'Second Company Law Directive'). (2) However, on 25 October 2012 that directive was repealed and replaced by a new, recast text: Directive 2012/30. (3) In this Opinion, I therefore refer to the Second Company Law Directive in the past tense. However, to the extent that provisions of the repealed directive are to be found in substantially the same terms in the recast version (where this is so, the equivalent provisions are identified in the footnotes), what is said will, I hope, be helpful for the future as well as for the past.

3. The referring court points out that Article 15 (4) of the Second Company Law Directive limited the right of a public limited liability company to distribute its capital to shareholders, while Article 18 (5) prohibited a company from subscribing to its own shares. The national court wonders whether those provisions precluded the imposition of such a remedy on a public limited liability company, which has a civil liability towards an investor arising out of a breach of its obligations to provide information. Did the Second Company Law Directive preclude such a remedy where it would involve the use of subscribed capital and might result in the company becoming insolvent? Finally, did the principle of equal treatment of shareholders preclude such a remedy?

4. In its order for reference, the national court also requests guidance as to the possible relevance to the dispute before it of the Prospectus Directive; (6) the Transparency Requirements Directive; (7) the Market Abuse Directive; (8) and the Safeguards Directive. (9)

EU law

5. The directives cited by the national court fall into two broad categories: directives concerned primarily with corporate governance (the Second Company Law Directive and the Safeguards Directive) and directives concerned primarily with shareholder protection (the Prospectus Directive, the Transparency Requirements Directive and the Market Abuse Directive). (10) For ease of comprehension, I shall group them accordingly when setting out the relevant EU legislation.

Corporate Governance Directives

The Second Company Law Directive

6. The second and fourth recitals in the preamble to the Second Company Law Directive stated:

'… 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 and reduction of their capital is particularly important;

…

… 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'.

7. The Second Company Law Directive applied to the types of public limited liability company listed in Article 1(1), which included, in respect of Austria, 'die Aktiengesellschaft'. (11)

8. Article 6 (12) of the Second Company Law Directive required a public limited liability company to have a certain amount of minimum subscribed capital before it might be incorporated or obtain authorisation to commence business.

9. Article 12 (13) of the same directive provided that 'shareholders may not be released from the obligation to pay up their contributions'.

10. Article 15(1) (14) stated:

'(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.

…

(c) The amount of a distribution to shareholders may not exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in

accordance with 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.’

11. If a distribution contrary to Article 15 were made, Article 16 provided that it ‘must be returned by shareholders who [had] received it if the company [proved] 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) (15) provided that ‘[t]he shares of a company may not be subscribed for by the company itself’. (The remainder of Article 18 is not relevant to the present proceedings.)

12. Article 19 (16) permitted a company to acquire its own shares in accordance with the conditions that it laid down. Those conditions included, in particular, that authorisation must be given by the general meeting which determined the terms and conditions of such acquisitions; (17) that the acquisitions might not have the effect of reducing the net assets below the amount mentioned in Article 15(1)(a); (18) and, that only fully paid up shares might be included in the transaction. (19) Member States might subject acquisitions to the further conditions listed at Article 19(1)(i) to (v).

13. Article 20(1)(d) (20) permitted Member States not to apply the conditions laid down by Article 19 in respect of, inter alia, ‘shares acquired by virtue of a legal obligation’.

14. Finally, Article 42 provided that when implementing the Second Company Law Directive ‘Member States shall ensure equal treatment to all shareholders who are in the same position’.

The Safeguards Directive

15. The Safeguards Directive concerns, inter alia, the circumstances in which the existence of a company may be nullified, and the consequences of nullity.

16. Article 12 of the Safeguards Directive stipulates that Member States may not provide for the nullity of companies otherwise than by an order made by a court of law and only on one of the grounds listed exhaustively at subparagraph (b)(i) to (vi).

17. Article 13 specifies the consequences of nullity.

Shareholder Protection Directives

The Prospectus Directive

18. The objectives of the Prospectus Directive include harmonising requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market within a Member State.

19. Recital 10 in the preamble to the Prospectus Directive states that the aim of the directive is ‘to ensure investor protection and market efficiency’.

20. Recital 19 states that ‘[s]afeguards 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 … [risk] and thus to take investment decisions in full knowledge of the facts’.

21. Article 5 of the Prospectus Directive requires the prospectus to contain ‘all information

which … 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'.

22. Article 6 of the Prospectus Directive 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, regulation[s] and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus.

…'

23. Article 25(1) of the Prospectus Directive provides:

'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 these measures are effective, proportionate and dissuasive.'

The Transparency Requirements Directive

24. The Transparency Requirements Directive aims to enhance, inter alia, investor protection and market efficiency by requiring security issuers to ensure appropriate transparency through a regular flow of information. (21)

25. Article 7 of the Transparency Requirements Directive provides:

'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.'

26. Articles 4, 5, 6 and 16 of the Transparency Requirements Directive respectively require an issuer to make public: an annual financial report; a half-yearly financial report; a statement by its management; and any change in the rights attaching to various classes or shares or securities.

27. Article 17 of the Transparency Requirements Directive, entitled 'Information requirements for issuers whose shares are admitted to trading on a regulated market', provides:

'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.

…’

28. Article 28(1) of the Transparency Requirements Directive provides:

‘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.’

The Market Abuse Directive

29. The Market Abuse Directive seeks, inter alia, to promote market integrity by harmonising the laws of Member States prohibiting insider dealing and market manipulation.

30. 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.’

Austrian law

31. The Kapitalmarktgesetz (Law on securities) provides at Paragraph 5 (regarding consumer transactions):

‘(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) (22) 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. …

(5) Any agreements contrary to the provisions of subparagraphs (1) to (4) which operate to the disadvantage of the consumer shall be invalid.

6. All further rights of investors arising from other statutory provisions shall remain unaffected.’

32. Paragraph 6 of the Kapitalmarktgesetz, entitled ‘Supplement to the Prospectus’, provides:

‘(1) Every significant new circumstance, material error or inaccuracy relating to the information contained in the prospectus which is capable of affecting the assessment of the securities and investments in question and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public, or, if earlier, the time when trading on a regulated market begins, shall be mentioned in a supplement (amending or supplementary information) to the prospectus. Such a supplement (amending or supplementary information) shall be published and deposited by the applicant (Paragraph 8a(1)) without delay in accordance with at

least the same rules as were applied when the original prospectus was published and deposited.
…

(2) Investors who have already agreed to purchase or subscribe to the 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 acceptances within a period of two working days from the publication of the supplement. Paragraph 5 shall apply mutatis mutandis. If, however, the investors are consumers within the meaning of Paragraph 1(1), point (2), of the Konsumentenschutzgesetz, the time limit referred to in Paragraph 5(4) shall also apply.'

33. Paragraph 11 of the Kapitalmarktgesetz, entitled 'Liability attaching to the prospectus', provides:

'(1) Liability towards 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 securities or investments shall be incurred by the following:

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

…

(6) Provided that the conduct giving rise to the loss was not pursued intentionally, the amount of the liability towards each individual investor shall be limited to the purchase price paid by him, plus fees and interest as of the date of payment of the purchase price.

(7) Claims pursued by investors under this federal law must be brought before a court within ten years of the termination of the offer subject to the obligation to publish a prospectus; they shall otherwise be excluded.

(8) Claims for damages arising from infringements of other statutory provisions or breaches of contract shall remain unaffected by these provisions.'

34. The Aktiengesetz (Law on limited liability companies) provides at Paragraph 52 ('No repayment of investments'):

'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 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).'

Facts, procedure and questions referred

35. On 7 January 2005, Mr Alfred Hirmann purchased, through a broker, 1 375.02406 (23) shares from Immofinanz AG ('Immofinanz'), a public limited liability company ('Aktiengesellschaft'), for the sum of EUR 10 013.75. The purchase was made on the secondary market and not as part of an increase in the capital of Immofinanz. Mr Hirmann paid the purchase price to Aviso Zeta AG ('Aviso Zeta') and in return the shares were deposited in a custody account held by Aviso Zeta in Mr Hirmann's name.

36. On 15 August 2011, Mr Hirmann brought an action against Immofinanz relying on

Paragraph 6(2) in conjunction with Paragraph 5(4) of the Kapitalmarktgesetz, Paragraph 11 of the Kapitalmarkgesetz, the right to challenge a contract on grounds of error and the right to damages. He seeks to have the share purchase transaction cancelled. That would involve the reimbursement of the original purchase price in exchange for the return of the shares to Immofinanz.

37. Mr Hirmann accuses Immofinanz of embezzlement and fraud, in particular, price manipulation and illegal price support measures. He contends that the securities prospectus available at the time, upon which he based his decision to purchase the shares, was misleading. Contrary to the statements made in the securities prospectus, proceeds from an equity issue were used to buy shares in Immofinanz for the purposes of price manipulation and price speculation. That misapplication of funds resulted in a risk greater than was indicated in the prospectus. Overall, the information in the securities prospectus was neither complete nor truthful. It was also not comprehensible or easy to analyse.

38. Immofinanz disputes the allegations of fact. It further contends that EU law precludes capital investments by shareholders from being repaid during the lifetime of the company. To hold a public limited liability company liable in that way towards its members – on whatever legal ground – is contrary to the prohibition in EU law on the repayment of investments.

39. Against that background, and before deciding the facts of the case, the Handelsgericht Wien stayed the proceedings and referred the following questions:

‘(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 legislation governing securities, in particular the following:

– Articles 6 and 25 of [the Prospectus Directive];

– Articles 7, 17 and 28 of [the Transparency Requirements Directive]; and

– Article 14 of [the Market Abuse Directive],

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

(2) Are Articles 12, 15, 16 and, in particular, 18, 19 and 42 of [the Second Company Law Directive], as amended, 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 Articles 12, 15, 16, 18, 19 and 42 of [the Second Company Law Directive], as amended, 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 Articles 12 and 13 of [the Safeguards Directive] 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 Articles 12, 15, 16, 18, 19 and 42 of [the Second Company Law Directive], as amended, and Articles 12 and 13 of [the Safeguards Directive] 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?'

40. Written observations were submitted by Mr Hirmann, Immofinanz, Aviso Zeta, the Austrian and Portuguese Governments and the European Commission. Mr Hirmann, Immofinanz, the Portuguese Government and the Commission presented oral argument at the hearing held on 17 April 2013.

Preliminary issues

41. Before considering the five questions referred by the national court, it is necessary to clarify a number of preliminary matters.

42. First, I note that whilst the directives concerned with shareholder protection harmonise key elements, they leave, in many respects, a large margin of appreciation to national law.

43. Thus (for example) Article 6(2) of the Prospectus Directive requires Member States to ensure that 'their laws, regulation[s] and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus'. That is complemented by Article 25(1), which requires Member States 'to ensure, *in conformity with their national law*, that appropriate administrative measures may be taken or administrative sanctions imposed on the persons responsible'(emphasis added), that being 'without prejudice to their civil liability regime'.

44. In similar vein, Article 28(1) of the Transparency Requirements Directive and Article 14(1) of the Market Abuse Directive contain what are essentially parallel provisions. First, the Member States' right to impose criminal sanctions is expressly preserved. Next, Member States are placed under an obligation ('shall ensure'), *in conformity with their national law*, that appropriate administrative measures may/can be taken and/or administrative sanctions or penalties be imposed. (24) Finally, Member States 'shall ensure' that 'those measures are effective, proportionate and dissuasive'.

45. It follows that, unless a particular remedy for breach of an obligation falling within the scope of these directives is specifically *prohibited* (either by that directive or by another EU measure), Member States remain at liberty to prescribe what they deem appropriate.

46. Second, whilst the national court has not yet made findings of fact as to whether, and, if so, to what extent, Immofinanz supplied misleading information that led Mr Hirmann to make a share purchase that he might otherwise not have made, certain facts are not in dispute. Mr Hirmann purchased a number of shares, on a specific date, for a specific price. Those shares were purchased on the secondary market, through a broker (Aviso Zeta). The share price was paid in full. However, the purchase had nothing to do with an increase in the subscribed capital of Immofinanz. It was a perfectly ordinary shares transaction, such as happens day in, day out on the stock market.

47. Third, it is important not only to draw a distinction between civil and administrative sanctions, on the one hand, and criminal sanctions, on the other hand; but to consider what is really being sought in the national proceedings that have given rise to the present request for a preliminary ruling. In those proceedings, Mr Hirmann seeks to be put back in the position that he would have been in had he not purchased the shares: to undo the transaction and get his money back, plus interest from the date of purchase (7 January 2005) to the date of judgment by the national court. One might initially wonder whether such a claim is really to be characterised as a claim seeking to impose a 'sanction' at all – it seems more like a claim for restitution or a claim that the company should be held liable in civil law for its breach. However, to the extent that the success or failure of that claim depends on whether there was a duty to supply correct information to a potential shareholder and whether that duty was breached, one can perhaps say that the civil sanction for the breach (if one is shown to have occurred) specified here by national law is that the company is under an obligation to undo the transaction and effect restitution of the purchase price. If there were no such obligation, there would be no sanction for the breach of duty (still less a sanction that was 'effective, proportionate and dissuasive').

48. Finally, there are issues related to timing that need to be borne in mind.

49. Mr Hirmann purchased his shares on 7 January 2005. If and to the extent that he did so on the basis of misleading information supplied by Immofinanz, that was the date at which the breach of duty occurred. At that date, the deadlines for transposing the Second Company Law Directive (1 January 1994) (25) and the Market Abuse Directive (12 October 2004) had both passed. The relevant date for considering the remedy that should be available to him is not that date, however, but 15 August 2011, the date at which he brought proceedings before the national court seeking to undo the share transaction. By that stage, the deadlines for transposing the Prospectus Directive (1 July 2005), the Transparency Requirements Directive (20 January 2007) and the Safeguards Directive (a codification – the last deadline for transposition shown in Annex I, Part B is 1 January 2007) had all also expired.

50. Against that background, I turn to consider the various questions referred by the national court.

Assessment

Questions 1, 2 and 3

51. The national court's first three questions are concerned with different facets of whether the Second Company Law Directive precluded undoing a share transaction where a company had breached its obligations to supply information to prospective investors. I shall therefore consider them together. Essentially, the referring court asks whether Articles 12, 15, 16, 18 19, and/or 42 of the Second Company Law Directive precluded national legislation implementing the Shareholder Protection Directives which provided that, where a public limited liability company breached its obligations, it was liable as issuer to an investor and was required to refund the purchase price and redeem the shares. Further, the national court asks whether it was contrary to the Second Company Law Directive for a public limited liability company to be required to meet such a liability even if to do so required use of its net assets (subscribed capital plus reserves) and/or might render the company insolvent.

52. The national court's underlying concern appears essentially to be that, in some way, the steps taken by Austria to implement 'other' EU measures – notably, the Shareholder Protection Directives – may be ones that the EU legislator did not envisage; and that (inadvertently) Austria has thus created a situation in which the remedy prescribed for breach of rights conferred by one

or more of those directives is one that falls foul of the Second Company Law Directive. In order to be of the greatest assistance to the national court, I shall therefore adopt a somewhat unorthodox approach in analysing the first three questions. I shall look first at what those three directives do (and, more importantly, do not) say about how they are to be implemented, drawing attention to the margin of appreciation left by the EU legislator to the Member States. I shall then turn to the Second Company Law Directive and examine the (numerous) provisions of that directive identified by the referring court, asking whether any of those provisions nevertheless preclude a national rule such as that at issue in the main proceedings.

Shareholder Protection Directives

The Prospectus Directive

53. Article 6(1) of the Prospectus Directive requires Member States to ensure that responsibility for the information contained in the prospectus attaches at least to, inter alia, the issuer. So far from being precluded, a national rule which renders a public limited liability company, as issuer, liable to an investor when the information obligations are breached complies with that provision. It is true that Article 6(1) permits bodies other than the issuer, 'as the case may be', to be held liable in respect of breaches of information obligations. However, there is nothing in the material before the Court to suggest that in the present case any entity other than Immofinanz, as issuer, was responsible for the information contained in its prospectus. In circumstances in which the issuer is responsible for the information provided, Article 6 clearly requires that the issuer be held liable if that information is incorrect or misleading.

54. Article 6(1) of the Prospectus Directive does not specify what 'administrative measures' must be taken or 'administrative sanctions' imposed where such liability is established. Article 6(2) indicates (in mandatory terms) that Member States 'shall ensure that their laws, regulation[s] and administrative provisions on civil liability' apply to 'those persons responsible for the information given in a prospectus' but likewise goes no further in specifying what civil remedy should be made available. Article 25 merely confirms that the administrative measures and sanctions that it requires Member States to impose are 'without prejudice to their civil liability regime[s]' (or indeed to their right to impose criminal sanctions).

55. Under the Prospectus Directive, therefore, Member States have a wide discretion, subject to the general principles of EU law and any relevant provision of EU legislation, as to the nature of the remedy that they make available pursuant to their civil liability regime.

56. Here, the national rule in the main proceedings provides for the refund of the purchase price coupled with the return of the shares to the company. That choice of remedy is a matter for the Member State. It does not obviously cut across or undermine any criminal sanctions or administrative measures or sanctions that may also be in place. It is certainly not precluded by the Prospectus Directive. It is clearly proportionate to the damage suffered by the investor. It is not obviously disproportionate to the breach of the information requirements. It is likely to discourage issuers from misleading investors into purchasing shares by failing to comply with their information obligations; and is therefore likely also to be effective and dissuasive. It seems to me thus both to comply with general principles of EU law and to be likely to further the aims pursued by the Prospectus Directive.

The Transparency Requirements Directive

57. Article 7 of the Transparency Requirements Directive requires Member States to ensure that responsibility for the information which is drawn up and made public in accordance with that directive rests with the issuer, or its administrative, management or supervisory bodies. A national

rule which makes a company, as issuer, liable for breaches of obligations under that directive seems to me correctly to reflect the requirements of that article. Nor does such a rule appear to offend against the principle of equal treatment enunciated in Article 17 of that directive.

58. The Transparency Requirements Directive does not specify what civil remedy should be made available where the issuer's liability is established. Article 28(1) merely requires Member States to ensure that 'at least the appropriate administrative measures may be taken or civil and/or administrative penalties imposed in respect of the persons responsible' (without prejudice to their right to impose criminal penalties), adding that 'Member States shall ensure that those measures are effective, proportionate and dissuasive'.

59. As with the Prospectus Directive, the EU legislator has left the Member States a wide margin of discretion here. A remedy which requires a company to refund the purchase price and reacquire its shares seems to me to fall squarely within that margin of discretion and (as I have indicated above) to be unexceptionable when viewed in the light of the general principles of EU law. Nor does it, so far as I can tell, cut across or undermine any criminal sanctions or administrative measures or sanctions that may also be in place.

The Market Abuse Directive

60. Article 14 of the Market Abuse Directive requires Member States to ensure that 'appropriate administrative measures' can be taken or 'administrative sanctions' be imposed against the 'persons responsible' when the requirements of that directive are breached, 'without prejudice to the right of Member States to impose criminal sanctions'. As with the Prospectus Directive and the Transparency Requirements Directive, the Market Abuse Directive does not specify what civil remedy should be made available where the issuer's liability is established. Member States therefore again enjoy a wide discretion in that regard, subject to the limitations imposed by the general principles of EU law and any other relevant EU legislation. In so far as a public limited liability company is in breach of that directive, a national rule which renders it liable for that breach complies with the text and the objective of Article 14 of the Market Abuse Directive.

61. The remedy provided for by Austrian national law within its civil law regime if such liability is established seems to me to fall squarely within the margin of discretion enjoyed by the Member States. It also (for the reasons that I have already given) seems to me to be consistent with the general principles of EU law. Finally, it does not, so far as I can tell, cut across or undermine any criminal sanctions or administrative measures or sanctions that may also be in place.

62. I therefore conclude that the Prospectus Directive, the Transparency Requirements Directive and the Market Abuse Directive do not preclude a national rule which provides that, if a public limited liability company breaches its obligations stemming from those directives, it is required to re-acquire its shares and refund the purchase price to the investor.

The Second Company Law Directive

63. Even if such a national rule is not precluded by the Shareholder Protection Directives (even if, indeed, it appears to be in conformity with their texts and to promote their objectives), does it nevertheless – as Immofinanz contends – fall foul of the Second Company Law Directive?

64. Immofinanz and Aviso Zeta submit that such a national rule was precluded by the Second Company Law Directive because it is contrary to the principle of maintenance of capital, contrary to the prohibition on a company acquiring its own shares and contrary to the principle of equal treatment. In particular, Immofinanz and Aviso Zeta submit that the Second Company Law Directive precluded such a liability from attaching to a company's net assets or from being so

extensive that it might render the company insolvent.

65. Mr Hirmann, the Portuguese Government and the Commission submit that the national rule at issue was not precluded by the Second Directive, even if in order to meet the liability a public limited liability company would be required to use its net assets or would be rendered insolvent.

66. The Austrian Government confines itself to drawing to the Court's attention two judgments of the Oberster Gerichtshof (the Austrian Supreme Court) dated 30 March 2011 (26) and 15 March 2012, (27) with which it concurs. In those decisions, the Oberster Gerichshof held that the provisions of the Second Company Law Directive did not preclude the cancellation of a share purchase contract and the reimbursement of the monies paid.

67. I consider that the national rule in question is not precluded by the Second Company Law Directive.

68. The referring court has invoked numerous provisions of the Second Company Law Directive. In order to impose some order on my analysis, I shall approach them as follows: (1) I shall begin by considering whether a payment made to Mr Hirmann under the national rule would constitute a distribution prohibited by Article 15 that required to be recovered under Article 16; (2) next, I shall consider the rule against a company acquiring its own shares and the exceptions thereto (Articles 18, 19 and 20); (3) I shall go on to examine the requirement to treat shareholders equally (Article 42); (4) I shall complete my analysis by considering the remaining article listed by the referring court (Article 12); (5) finally, I shall touch on the issue of whether the possibility that in meeting such a liability a public limited liability company might be required to use its net assets or be rendered insolvent affects the conclusion that I reach.

The rules on distributions (Articles 15 and 16)

69. Article 15 precluded a distribution from being made to a shareholder when the company's last annual accounts showed that its net assets were, or following distribution would become, less than its subscribed capital. (Article 6 specified a minimum amount of subscribed capital before a public limited liability company might be incorporated or obtain authorisation to commence business.) But did the term 'distribution' include a company's legal liability to refund the purchase price to an investor in circumstances where it had breached its obligations to provide information?

70. The term 'distribution' in Article 15 was not defined in the Second Company Law Directive, although Article 15(1)(d) stated that it 'includes in particular the payment of dividends and of interest relating to shares'. It seems to me that this term should be interpreted as excluding a payment made to compensate an investor who suffers damage as a result of the company breaching its obligations.

71. Such an interpretation is not contrary to the aims of Article 15, which, as articulated in the second and fourth recitals in the preamble to the Second Company Law Directive, was to ensure minimum equivalent protection for both shareholders and creditors by, inter alia, requiring public limited liability companies to maintain their capital, 'in particular by prohibiting any reduction thereof by distribution to shareholders where they are not entitled to it'. The intention was to avoid inappropriate distributions from subscribed capital to shareholders *in their capacity as shareholders* to which they are *not entitled*. In contrast, a payment made to an investor who has been misled by the company's prospectus into purchasing shares is not made to him in his capacity as a shareholder (for reasons that I shall now go on to explain) and it is a payment of compensation to which that person is entitled.

72. Such a payment is not initiated by the company itself, but is made to meet a legal

obligation. The obligation to make the payment arises out of the company's relationship to potential investors who rely on the prospectus when deciding whether to invest, not out of its relationship with existing shareholders. Thus, were any payment to be ordered at the end of the proceedings before the national court in the present case, that payment would be made because Mr Hirmann would be a third-party creditor who had a claim on the company, not because he was a shareholder.

73. Such a payment is not, in my view, a 'distribution' of capital within the meaning of Article 15(1), even where the third-party creditor is also a shareholder in the company concerned. A couple of illustrations may help to clarify this point.

74. Suppose, for example, the landlord of the company's office building were a shareholder in the company, and the company fell behind with paying him the rent due. The landlord would sue for arrears of rent. His entitlement to rent would not be founded on his status as a shareholder; and rent payments made by the company to the landlord (whether after correspondence or in pursuance of a court order) would not constitute a distribution of capital within the meaning of Article 15.

75. Similarly, if an employee of the company who had purchased or received shares in that company were subsequently injured at work in breach of the company's duty of care towards him, his right to recover damages from the company to compensate him for his injuries would have nothing to do with his status as a shareholder. A payment of compensation by the company in those circumstances would not constitute a distribution of capital.

76. Since a payment made to a third-party creditor who happens also to be a shareholder is not a 'distribution' of capital within the meaning of Article 15, such a payment is not precluded by that provision.

77. Article 16 of the Second Company Law Directive merely requires any distribution made contrary to Article 15 to be returned. In the light of the view that I have reached as to the correct interpretation of Article 15, it follows that Article 16 does not impinge upon the situation.

The rule against a company acquiring its own shares and the exceptions thereto

78. Article 18(1) of the Second Company Law Directive prohibited companies from subscribing for their own shares. Article 19, however, provided that Member States might permit a company to acquire its own shares in accordance with the conditions that it laid down, whilst Article 20 permitted Member States not to apply Article 19 to particular circumstances in which a company acquired shares.

79. The objective of those articles was to protect shareholders and creditors from market behaviour that might reduce a company's capital and falsely raise its share price. That objective is not defeated by a company acquiring its own shares where a legal obligation requires it to do so. Indeed, as the Portuguese Government and the Commission rightly point out, Article 20(1)(d) specifically permits Member States to allow a company to acquire shares 'by virtue of a legal obligation' without having recourse to the procedures laid down in Article 19. Thus, in so far as the national rule in issue requires a public limited liability company to (re-)acquire its shares as part of a remedy in respect of a breach of the company's obligations, that is an acquisition by virtue of a legal obligation which Article 20(1)(d) expressly enabled Member States to permit.

80. It follows that Article 18 was no bar to the national legal rule at issue.

The principle of equal treatment

81. Article 42 provided that in the implementation of the Second Company Law Directive, Member States were required to ensure ‘equal treatment to all shareholders who are in the same position’. That obligation applied, as was clear from the phrase ‘for the purposes of the implementation of this Directive’, only within the framework of that particular measure directive. (28)

82. A shareholder who is legally entitled to redress in respect of a share purchase made on the basis of a misleading prospectus is not in the same position as a shareholder who did not rely on that prospectus. The principle of equal treatment of shareholders is therefore no impediment to providing a remedy to a shareholder (29) who is entitled to that remedy.

Article 12

83. Article 12 of the Second Directive precluded shareholders from being released from the obligation to pay up their contributions, thereby protecting subscribed capital at a company’s foundation by requiring all the capital subscribed to be raised. Since Mr Hirmann (a) bought ordinary shares on the secondary market and (b) paid for those shares in full, this provision is irrelevant to the present case.

What if making a payment requires the use of subscribed capital or reserves, or might make the company insolvent?

84. I begin by observing that, so far as I can tell, this question is hypothetical. There is nothing in the file before this court to suggest that, if Immofinanz were required by court order to re-acquire 1 375.02406 shares and pay Mr Hirmann EUR 10 013.75 plus accrued interest, it would have to dip into reserves or raid subscribed capital in order to meet that obligation.

85. If and to the extent that it is necessary to answer this question, I remain unshaken in my view that, since such a payment to a third-party creditor is not a distribution of capital within the meaning of Article 15, the limitations which that article imposed on the amount of capital that a public limited liability company might distribute to its shareholders did not apply to such a payment. It follows that payment of compensation to an investor by a public limited liability company that has breached its obligations would not have been prohibited by Article 15, even where meeting that liability might have involved the use of the company’s net assets and might have resulted in the company becoming insolvent.

86. I can only reiterate, however, that on the information before this Court the question appears to be hypothetical rather than real.

87. I therefore conclude that the Second Company Law Directive did not preclude a national rule such as that in issue in the present proceedings.

Questions 4 and 5

88. In its fourth and fifth questions, the national court is essentially concerned with questions of timing; and I shall therefore consider these questions together. The alleged breach occurred on 7 January 2005. Mr Hirmann brought his claim for a remedy on 15 August 2011. Does the Safeguards Directive and/or did the Second Company Law Directive preclude national legislation which provides for the retroactive cancellation of a contract to purchase shares, resulting in the refund of the original purchase price paid at the date on which the breach occurred (refund based on share value *ex tunc*)? Or, did those directives effectively require that the issuer’s liability be

determined by reference to the price of the shares at the date when the claim was brought (refund based on share value *ex nunc*)?

89. Mr Hirmann claims that he is entitled to the original purchase price paid (plus interest) on the basis that, had he not been misled, he would not have entered into the share transaction. The Austrian Government having aligned itself with the position adopted by the Oberster Gerichtshof (30) to the effect that shareholder protection takes precedence over maintaining the totality of a company's share capital intact, does not address these questions as such.

90. Immofinanz submits, in contrast, that allowing an investor to claim back the original purchase price could generate the same effect as declaring the nullity of the company. That would create legal uncertainty and be contrary to Articles 12 and 13 of the Safeguards Directive, which sets out exhaustively the conditions under which the nullity of a company may be recognised. Immofinanz further contends (relying on *E. Friz* (31) and supported on this point by Aviso Zeta) that preserving the continued existence of the company is paramount. Thus, if the share transaction is to be undone, the shares returned to Immofinanz and monies refunded, the sum to be refunded should be calculated *ex nunc* (value of shares when the claim was brought) and not *ex tunc* (original purchase price).

91. The Portuguese Government and the Commission consider that Articles 12 and 13 of the Safeguards Directive are not applicable. Cancelling the share transaction would not lead to the nullity of Immofinanz. Such a decision is one that must be taken by a court of law. Moreover, neither those articles of the Safeguard Directive nor the Second Company Law Directive requires that the cancellation of a contract should produce only *ex nunc* effects, or that any consequent liability be determined on an *ex nunc* basis. The Commission adds that it is for the national court to determine the extent of an issuer's liability, having regard to the principle of equal treatment of shareholders who are in the same position.

92. I agree with the submissions of the Portuguese Government and the Commission.

93. Article 12(a) of the Safeguards Directive provides that 'nullity must be ordered by decision of a court of law' and that it may only be ordered on one of the six grounds listed exhaustively in Article 12(b)(i) to (vi). Article 13 is concerned with the consequences of such nullity. However, a decision by a court that a company has incurred liability towards an investor is not the same as a decision of nullity. Articles 12 and 13 of the Safeguards Directive are therefore manifestly irrelevant to the liability incurred by a public limited liability company which has breached its information obligations, and do not affect the question of whether such liability produces *ex nunc* or *ex tunc* effects.

94. The Shareholder Protection Directives contain no specific requirements as regards the nature of the remedy which a Member State must impose if an issuer breaches its obligations to provide information, save that the sanctions imposed must be 'effective, proportionate and dissuasive'. Member States thus enjoy a wide margin of discretion, which necessarily includes deciding whether the cancellation of a share purchase should produce *ex tunc* or *ex nunc* effects.

95. In *E. Friz*, (32) the Court held that where a consumer exercised his right to cancel a contract for membership of a closed-end real property fund established in the form of a partnership (Directive 85/577) (33) did not preclude cancellation of the contract on an *ex nunc* basis. (34) That judgment cannot be read as *requiring* Member States, in the context of the different directives here under consideration, to ensure that cancellation of a share transaction arising from a breach of the company's duty to provide information only produces *ex nunc* effects.

96. Finally, I find nothing in the texts of Articles 12, 15, 16, 18, 19 and/or 42 of the Second

Company Law Directive to suggest that they contained such a requirement. I agree with the Commission that a national court may need to take steps to ensure that all shareholders who purchased shares on the basis of the same misleading information are treated equally, as required by Article 42. Save for that, I consider those articles all to be irrelevant to deciding the *ex tunc*/*ex nunc* question. As I have already indicated, that decision is a matter for national law.

Conclusion

97. In the light of all the foregoing considerations, I suggest that the Court should answer the questions referred by the Handelsgericht Wien to the following effect:

(1) Directive 2003/71/EC of the European Parliament and of the Council, Directive 2004/109/EC of the European Parliament and of the Council and Directive 2003/6/EC of the European Parliament and of the Council do not preclude a national rule which provides that, if a public limited liability company breaches its obligations stemming from those directives, it is required to re-acquire its shares and refund the purchase price to the investor. Nor is such a national rule precluded by Articles 12, 15, 16, 18, 19 and/or 42 of Council Directive 77/91/EEC.

(2) Neither Directive 2009/101/EC of the European Parliament and of the Council nor Council Directive 77/91/EEC preclude the retroactive cancellation of a share purchase contract entailing the refund of the original purchase price.

1 – Original language: English.

2 – Second Council Directive 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 58 of the Treaty, 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). The Second Company Law Directive was repealed and replaced by Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 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 54 of the Treaty on the Functioning of the European Union, 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 2012 L 315, p. 74). It had previously been amended by Council Directive 92/101/EEC of 23 November 1992 amending Directive 77/91/EEC on the formation of public limited-liability companies and the maintenance and alteration of their capital (OJ 1992 L 347, p. 64), which produced the version in force at the time of the share purchase contract on 7 January 2005 that gave rise to the national proceedings. It was later amended by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital (OJ 2006 L 264, p. 32) and Council Directive 2006/99/EC of 20 November 2006 adapting certain Directives in the field of company law, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 137).

3 – Footnote 2 above.

4 – Article 17 of Directive 2012/30 replaced Article 15 of the Second Company Law Directive, cited in footnote 2 above.

5 – Article 20 of Directive 2012/30 replaced Article 18 of the Second Company Law Directive, cited in footnote 2 above.

6 – 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). This directive was required to be transposed by Member States not later than 1 July 2005 (Article 29). I am unaware whether this version of the Prospectus Directive had been transposed into Austrian law as at 7 January 2005, the date of the share purchase contract. If it had not, national law may have reflected the earlier requirements of Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public (OJ 1989 L 124, p. 8). The Prospectus Directive has since been amended by Directive 2008/11/EC amending directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, as regards the implementing powers conferred on the Commission (OJ 2008 L 76, p. 37), although Articles 6 and 25, which are relevant in this case, were not amended.

7 – 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). This directive was not required to be transposed until 20 January 2007. At the date of the share purchase, national law may therefore have reflected the transparency requirements of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, cited above, which entered into force on 26 July 2001, and which codified a number of earlier directives, including Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing (OJ 1982 L 48, p.26).

8 – 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). Although ‘Market Integrity Directive’ would be a better description of this directive given its aims, it is commonly referred to as the Market Abuse Directive and I shall therefore follow that convention here. Member States were required to transpose this directive by 12 October 2004. It has since been amended by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (OJ 2010 L 331, p. 120), but Article 14(1), which is under consideration in the present case, was not amended.

9 – 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 of the Treaty, with a view to making such safeguards equivalent (OJ 2009 L 258, p. 11). This directive postdates the share purchase at issue in the national proceedings. Articles 12 and 13, which are cited by the national court, have not been amended to date.

10 – I shall refer to these collectively as the Shareholder Protection Directives.

11 – This listing is maintained by Article 1 and Annex I of Directive 2012/30, cited in footnote 2 above.

12 – Article 6 of Directive 2012/30 replaced Article 6 of the Second Company Law Directive.

13 – Article 14 of Directive 2012/30 replaced Article 12 of the Second Company Law Directive.

14 – Replaced by Article 17 of Directive 2012/30.

15 – Replaced by Article 20 of Directive 2012/30.

16 – Replaced by Article 21 of Directive 2012/30.

17 – Article 19(1)(a).

18 – Article 19(1)(c).

19 – Article 19(1)(d).

20 – Replaced by Article 22(1)(d) of Directive 2012/30.

21 – First and second recitals in the preamble to the directive.

22 – Consumers within the meaning of this provision are private persons acting on their own account, not on behalf of a company. It appears that Mr Hirmann falls within that definition in respect of his share purchase.

23 – It may strike the reader as curious that Mr Hirmann's share purchase should have included a fraction of a share. This is nevertheless the figure given in the order for reference.

24 – Article 28(1) of the Transparency Requirements Directive refers additionally to civil penalties.

25 – See footnote 2 above, which identifies the version of the Second Company Law Directive in force at that time.

26 – Case 7 Ob 77/10i.

27 – Case 6 Ob 28/12d.

28 – Case C?101/08 *Audiolux SA and Others* v *Groupe Bruxelles Lambert SA and Others and Bertelsmann AG and Others* [2009] ECR I?9823, paragraphs 37 to 42. See also the fifth recital in the preamble to the Second Company Law Directive.

29 – Where more than one shareholder is entitled to a remedy, the national court will clearly need to apply the principle of equal treatment in respect of all shareholders in the same position when determining the extent of the company's liability to each of them.

30 – Footnotes 26 and 27 above.

31 – Cited at paragraph 39.

32 – Ibid.

33 – 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).

34 – *E. Friz*, cited at paragraph 39, paragraph 50.