JUDGMENT OF THE COURT (Grand Chamber)

8 November 2016 (*)

(Regulation (EU) No 407/2010 — European Financial Stabilisation Mechanism — Implementing Decision 2011/77/EU — European Union financial assistance to Ireland — Recapitalisation of national banks — Company law — Second Directive 77/91/EEC — Articles 8, 25 and 29 — Recapitalisation of a bank by means of judicial direction order — Increase in share capital without general meeting decision and without the shares issued being offered on a pre-emptive basis to existing shareholders — Issue of new shares at a price lower than their nominal value)

In Case C-41/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 2 December 2014, received at the Court on 2 February 2015, in the proceedings

Gerard Dowling,

Padraig McManus,

Piotr Skoczylas,

Scotchstone Capital Fund Limited

v

Minister for Finance,

intervening parties:

Permanent TSB Group Holdings plc, formerly Irish Life and Permanent Group Holdings plc,

Permanent TSB plc, formerly Irish Life and Permanent plc,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič and T. von Danwitz (Rapporteur), Presidents of Chambers, J. Malenovský, J.-C. Bonichot, A. Arabadjiev, C. Toader, M. Safjan, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 19 April 2016,

after considering the observations submitted on behalf of:

– G. Dowling, by himself, and by G. Rudden, Solicitor, and N. Travers SC,

– P. McManus, by himself, and by G. Rudden, Solicitor, and N. Travers SC,

– P. Skoczylas, by himself,

– Scotchstone Capital Fund Limited, by S. O’Donnell and J. Flynn, Solicitors,

– Permanent TSB Group Holdings plc, formerly Irish Life and Permanent Group Holdings plc, and Permanent TSB plc, formerly Irish Life and Permanent plc, by C. MacCarthy and A. Walsh, Solicitors, P. Gallagher SC, and C. Geoghegan, Barrister,

– Ireland, by A. Joyce, L. Williams and E. Creedon, acting as Agents, and by A. O'Neill, Barrister-at-Law and E. McCullough SC,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

– the Cypriot Government, by E. Zachariadou and D. Kalli, acting as Agents,

– the European Commission, by J.-P. Keppenne, H. Støvlbæk, L. Flynn and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 June 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 8, 25 and 29 of the 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 54 TFEU], 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 Directive').

2 The request has been made in the course of proceedings between, on the one hand, Mr Gerard Dowling, Mr Padraig McManus, Mr Piotr Skoczylas and Scotchstone Capital Fund Limited ('Scotchstone') and, on the other, the Minister for Finance ('the Minister'), where the former seek the setting aside of the direction order made by the High Court on 26 July 2011 ('the Direction Order'), directing a company, of which the applicants in the main proceedings are members and shareholders, to increase its share capital and to issue, in favour of the Minister, new shares at a price lower than their nominal value.

Legal context

EU law

The Second Directive

3 The second recital of the Second Directive reads as follows:

'… 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'.

4 Article 8(1) of the Second Directive provides:

'Shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par.'

5 Article 25 of that directive provides :

‘1. Any increase in capital must be decided upon by the general meeting. Both this decision and the increase in the subscribed capital shall be published ...

2. Nevertheless, the statutes or instrument of incorporation or the general meeting, the decision of which must be published in accordance with the rules referred to in paragraph 1, may authorize an increase in the subscribed capital up to a maximum amount which they shall fix with due regard for any maximum amount provided for by law. Where appropriate, the increase in the subscribed capital shall be decided on within the limits of the amount fixed, by the company body empowered to do so. The power of such body in this respect shall be for a maximum period of five years and may be renewed one or more times by the general meeting, each time for a period not exceeding five years.

3. Where there are several classes of shares, the decision by the general meeting concerning the increase in capital referred to in paragraph 1 or the authorization to increase the capital referred to in paragraph 2, shall be subject to a separate vote at least for each class of shareholder whose rights are affected by the transaction.

4. This Article shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.’

6 Article 29 of the Second Directive provides:

‘1. Whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.

...

4. The right of pre-emption may not be restricted or withdrawn by the statutes or instrument of incorporation. This may, however, be done by decision of the general meeting. The administrative or management body shall be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price. The general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 40. Its decision shall be published ...

5. The laws of a Member State may provide that the statutes, the instrument of incorporation or the general meeting, acting in accordance with the rules for a quorum, a majority and publication set out in paragraph 4, may give the power to restrict or withdraw the right of pre-emption to the company body which is empowered to decide on an increase in subscribed capital within the limits of the authorized capital. This power may not be granted for a longer period than the power for which provision is made in Article 25 (2).

6. Paragraphs 1 to 5 shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.’

Directive 2001/24/EC

7 An objective of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ 2001 L 125, p. 15), as stated in recital 6 thereof, is to establish mutual recognition by the Member States of the measures taken by each of them to restore to viability the credit institutions which it has authorised. To that end, Articles 3, 9 and 10 of that directive provide that the reorganisation measures and winding-up proceedings decided on by the authorities of the home Member State are, as a general rule, to have in all other Member States the effects determined by the law of the home Member State.

Regulation (EU) No 407/2010

8 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ 2010 L 118, p. 1) is based on Article 122(2) TFEU. Recitals 4 and 5 of that regulation state:

‘(4) The deepening of the financial crisis has led to a severe deterioration of the borrowing conditions of several Member States beyond what can be explained by economic fundamentals. At this point, this situation, if not addressed as a matter of urgency, could present a serious threat to the financial stability of the European Union as a whole.

(5) In order to address this exceptional situation beyond the control of the Member States, it appears necessary to put in place immediately a Union stabilisation mechanism to preserve financial stability in the European Union. Such a mechanism should allow the Union to respond in a coordinated, rapid and effective manner to acute difficulties in a particular Member State. Its activation will be in the context of a joint EU / International Monetary Fund (IMF) support.’

9 Article 1 of that regulation provides:

‘With a view to preserving the financial stability of the European Union, this Regulation establishes the conditions and procedures under which Union financial assistance may be granted to a Member State which is experiencing, or is seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond its control, taking into account the possible application of the existing facility providing medium-term financial assistance for non-euro-area Member States’ balances of payments, as established by [Council] Regulation (EC) No 332/2002 [of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States’ balances of payments (OJ 2002 L 53, p. 1)].’

10 Article 3 of Regulation No 407/2010 reads as follows:

‘1. The Member State seeking Union financial assistance shall discuss with the Commission, in liaison with the European Central Bank (ECB), an assessment of its financial needs and submit a draft economic and financial adjustment programme to the Commission and the Economic and Financial Committee.

2. Union financial assistance shall be granted by a decision adopted by the Council, acting by a qualified majority on a proposal from the Commission.

3. The decision to grant a loan shall contain:

(a) the amount, the average maturity, the pricing formula, the maximum number of instalments, the availability period of the Union financial assistance and the other detailed rules needed for the implementation of the assistance;

(b) the general economic policy conditions which are attached to the Union financial assistance with a view to re-establishing a sound economic or financial situation in the beneficiary Member State and to restoring its capacity to finance itself on the financial markets; these conditions will be defined by the Commission, in consultation with the ECB; and

(c) an approval of the adjustment programme prepared by the beneficiary Member State to meet the economic conditions attached to the Union financial assistance.

…

5. The Commission and the beneficiary Member State shall conclude a Memorandum of Understanding detailing the general economic policy conditions laid down by the Council. The Commission shall communicate the Memorandum of Understanding to the European Parliament and

to the Council.'

Implementing Decision 2011/77/EU

11 Council Implementing Decision 2011/77/EU of 7 December 2010 on granting Union financial assistance to Ireland (OJ 2011 L 30, p. 34), as amended by Council Implementing Decision 2011/326/EU of 30 May 2011 (OJ 2011 L 147, p. 17) ('Implementing Decision 2011/77'), is based on, inter alia, Article 3(3) of Regulation No 407/2010. Recitals 1 to 3 of that decision read as follows:

'(1) Ireland has recently come under increasing pressure in financial markets, reflecting rising concerns about the sustainability of the Irish public finances in view of comprehensive public support measures to the weakened financial sector. Due to its excessive exposure to real estate and construction projects, the domestic banking system has experienced large losses in the aftermath of the collapse of those sectors. The current crisis in the economic and banking sectors has also had a dramatic impact on Ireland's public finances, compounding the impact of the recession. … Support measures for the banking sector, including significant capital injections, have added greatly to the deterioration in the public finance position. Current market concerns primarily reflect the fact that the solvency of the Irish sovereign and the banking system have become inextricably linked in the crisis; they have led to a steep increase in Irish sovereign bond yields, while the domestic banking system is effectively cut off from international market funding.

(2) In view of this severe economic and financial disturbance caused by exceptional occurrences beyond the control of the government, the Irish authorities officially requested financial assistance from the European Union, the Member States whose currency is the euro and the International Monetary Fund (IMF) on 21 November 2010 with a view to supporting the return of the economy to sustainable growth, ensuring a properly-functioning banking system and safeguarding financial stability in the Union and in the euro zone. On 28 November 2010, an agreement at technical level was reached in respect of a comprehensive policy package for the period 2010-2013.

(3) The draft economic and financial adjustment programme … submitted to the Council and the Commission aims at restoring financial market confidence in the Irish banking sector and the sovereign, enabling the economy to return to sustainable growth. To achieve these goals, the Programme contains three main elements. First, a financial sector strategy which comprises fundamental downsizing, deleveraging and reorganisation of the banking sector, complemented by appropriate recapitalisation to the extent needed. ...'

12 Article 1 of that decision provides:

'1. The Union shall make available to Ireland a loan amounting to a maximum of EUR 22.5 billion, with a maximum average maturity of 7½ years.

...

4. The first instalment shall be released subject to the entry into force of the Loan Agreement and the Memorandum of Understanding [on specific economic policy conditionality concluded by the Commission and Ireland]. Any subsequent loan releases shall be conditional upon a favourable quarterly assessment by the Commission, in consultation with the [European Central Bank (ECB)], of Ireland's compliance with the general economic policy conditions as defined by this Decision and the Memorandum of Understanding.'

13 Article 3 of Implementing Decision 2011/77 provides:

'1. The economic and financial adjustment programme ... prepared by the Irish authorities is

hereby approved.

2. The disbursement of each further instalment shall be made on the basis of a satisfactory implementation of the Programme to be included in the Stability Programme of Ireland, in the National Reform Programme and, more particularly, the specific economic policy conditions laid down in the Memorandum of Understanding. These shall include, inter alia, the measures provided for in paragraphs 4 to 9 of this Article.

…

4. Ireland shall adopt the measures specified in paragraphs 7 to 9 before the end of the indicated year, with exact deadlines for the years 2011-2013 being specified in the Memorandum of Understanding ...

5. With a view to restoring confidence in the financial sector, Ireland shall adequately recapitalise, rapidly deleverage and thoroughly restructure the banking system as set out in the Memorandum of Understanding. In that regard, Ireland shall develop and agree with the European Commission, the ECB and the IMF a strategy for the future structure, functioning and viability of the Irish credit institutions which will identify how to ensure that they are able to operate without further state support. …

...

7. Ireland shall adopt the following measures during 2011, in line with specifications in the Memorandum of Understanding:

...

(g) the recapitalisation of the domestic banks by the end of July 2011 (subject to appropriate adjustment for expected asset sales in the case of Irish Life & Permanent), in line with the findings of the 2011 PLAR and PCAR [the 2011 Prudential Liquidity Assessment Review and Prudential Capital Assessment Review] as announced by the Central Bank of Ireland on 31 March 2011;

...'

Irish law

14 The purposes of the Credit Institutions (Stabilisation) Act 2010 ('the 2010 Act'), as set out in Section 4 thereof, include:

(a) to address the serious and continuing disruption to the economy and the financial systems and the continuing serious threat to the stability of certain credit institutions in the State and the financial system generally,

(b) to implement the reorganisation of credit institutions in [Ireland] to achieve the financial stabilisation of those credit institutions and their restructuring (consistently with the State Aid rules of the European Union) in the context of the National Recovery Plan 2011-2014 and the European Union / International Monetary Fund Programme of Financial Support for Ireland,

...'

15 Section 7 of the 2010 Act provides:

'(1) Subject to *subsections (2) and (4)*, the Minister may make a proposed direction order proposing that a relevant institution be directed to take (within a specified period) or refrain from taking (during a specified period) any action, or any series of actions that are together

designed to achieve a specified objective including, in particular, and without limiting the generality of the foregoing, any one or more of the following:

(a) notwithstanding any statutory or contractual pre-emption rights, … issuing shares to the Minister or to another person nominated by the Minister on terms and conditions that the Minister specifies in the proposed direction order at a consideration that the Minister sets;

...

(c) increasing the authorised share capital (including by the creation of new classes of shares) of the relevant institution to permit it to issue shares to the Minister or to any other person nominated by the Minister;

(d) making a specified alteration to the relevant institution's memorandum of association and articles of association ... ;

...

(2) The Minister may make a proposed direction order only if the Minister, having consulted with the Governor [of the Central Bank], is of the opinion that making a direction order in the terms of the proposed direction order is necessary to secure the achievement of a purpose of this Act specified in the proposed direction order.

...'

16 Section Article 9(1) and (2) of the 2010 Act provides:

'(1) As soon as may be after completion in relation to a proposed direction order of the procedures required by *section 7*, the Minister shall apply *ex parte* to the Court for an order (in this Act called a "direction order") in the terms of the relevant proposed direction order.

(2) The [High] Court, when hearing an *ex parte* application under *subsection (1)*, shall, if satisfied that the requirements of *section 7* have been complied with and that the opinion of the Minister under that section was reasonable and was not vitiated by any error of law, make a direction order in the terms of the proposed direction order ...'

17 Section 11 of the 2010 Act provides that the relevant institution in question, or any of its members, may apply to the High Court of Ireland to have a direction order set aside. That court may set a direction order aside only if it is of the opinion that there has been non-compliance with any of the requirements of Section 7 of that act or that the opinion of the Minister under Section 7(2) of the act was unreasonable or vitiated by an error of law.

18 Section 47 of the 2010 Act provides for the inclusion in a direction order of a provision to the effect that any power exercisable by the members of the relevant institution concerned in general meeting may be exercised instead by the Minister.

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

19 Permanent TSB plc, formerly Irish Life and Permanent plc, ('ILP') is a credit institution operating in Ireland.

20 Permanent TSB Group Holdings plc, formerly Irish Life and Permanent Group Holdings plc, ('ILPGH') is a company incorporated with limited liability in Ireland. ILPGH is not a credit institution. During the period at issue in the main proceedings, ILPGH owned the entire share capital of ILP.

21 The applicants in the main proceedings are members and shareholders of ILPGH.

22 The economic and financial crisis, faced by Ireland in 2008, had serious effects on the financial stability both of the Irish banks and of Ireland, the two being particularly strongly linked because of the relative size of the banking sector compared to the size of the national economy and the significant guarantees of bank liabilities that Ireland had granted to those national banks in 2008.

23 Notwithstanding the measures taken by Ireland to support the banking sector, the markets continued to lose faith in the Irish banks and the financial situation of Ireland continued to deteriorate. In those circumstances, the Irish authorities produced an economic and financial adjustment programme, for which, on 21 November 2010, they sought inter alia, European Union financial assistance. In that programme, Ireland undertook to reorganise and recapitalise the banking sector.

24 By Implementing Decision 2011/77, the Council approved that programme and made available to Ireland European Union financial assistance under the European financial stabilisation mechanism, established by Regulation No 407/2010. On 16 December 2010 Ireland and the Commission entered into a Memorandum of Understanding on the basis of Article 1(4) of that decision ('the Memorandum of Understanding'). In accordance with the commitments made in that Memorandum of Understanding and with Article 3(4), (5) and 7(g) of that decision, Ireland was to ensure the recapitalisation of the national banks by the end of July 2011, on the basis of the results of a Prudential Capital Assessment Review and a Prudential Liquidity Assessment Review published by the Central Bank of Ireland.

25 The Central Bank of Ireland published the results of its reviews on 31 March 2011. On the basis of those results, the Governor of the Central Bank of Ireland ordered ILP, by a decision adopted on that date, to raise additional capital of EUR 4 billion.

26 In July 2011 the Minister submitted to the shareholders of ILPGH a proposal designed to facilitate the recapitalisation of ILP by means of, inter alia, a capital injection of EUR 2.7 billion. That proposal was rejected by the extraordinary general meeting of ILPGH held on 20 July 2011, which meeting mandated the directors of that company to examine other recapitalisation options and to request, for that purpose, an extension of the recapitalisation deadline laid down in Implementing Decision 2011/77.

27 Pursuant to Sections 7 and 9 of the 2010 Act, in order to recapitalise ILP the Minister prepared a Proposed Direction Order, which he submitted to the High Court. The Direction Order was adopted by the High Court in the terms sought, directing ILPGH to issue, in return for the capital injection of EUR 2.7 billion, new shares to the Minister at a share price dictated by him, that is at a price 10% below the quoted share price of 23 June 2011. Consequently, the Minister obtained, without any decision having been made by the general meeting of shareholders of ILPGH, 99.2% of the shares of that company. In addition, the delisting of the company on the Irish and London Stock Exchanges was ordered.

28 The applicants in the main proceedings brought before the High Court, on the basis of Section 11 of the 2010 Act, an application for the setting aside of the Direction Order. Before that court, they claimed that the increase in share capital resulting from that order is incompatible with Articles 8, 25 and 29 of the Second Directive, since it was effected without the approval of the general meeting of ILPGH.

29 The Minister and both ILPGH and ILP rejected that argument, relying on Directive 2001/24, Regulation No 407/2010, Implementing Decision 2011/77, Articles 49, 65, 107, 119, 120 and 126 TFEU and on the provisions in Title VIII of Part III of the FEU Treaty. In their opinion, those provisions of EU law authorised Ireland to take measures necessary to defend the integrity of its own financial system notwithstanding the provisions of the Second Directive. Pursuant to its obligations under Title VIII of Part III of the FEU Treaty and, in particular, Articles 119 and 120 thereof, Ireland was required to take those measures in order to secure the safety of an institution of

systemic importance for Ireland and the European Union.

30 The referring court concluded, on the balance of probabilities, that ILP could not have raised the required amount of capital of EUR 4 billion either from private investors or from existing shareholders, after the extraordinary general meeting of ILPGH had rejected, on 20 July 2011, the Minister's recapitalisation proposal. In the opinion of that court, if ILP had not been recapitalised by the deadline laid down in Implementing Decision 2011/77, that would have led to the failure of ILP, due to a number of possible developments, such as a run on deposits held with ILP, a call for repayment of various notes or a cessation of funding under the emergency liquidity assistance scheme, or a combination of some or all of those possibilities.

31 Further, the High Court considers that ILP's failure would not only have led to the complete loss of value of the shares to the shareholders, but would also have had adverse consequences for Ireland. The court refers to, inter alia, the possibility of a run on deposits held with the national banks, the subsequent call on the guarantee granted to ILP by the Irish State and the possibility of full or partial withdrawal of funding to Ireland under the economic and financial adjustment programme for non-compliance with the terms of that programme. In the opinion of the referring court, those adverse consequences for Ireland would probably have worsened the threat to the financial stability of other Member States and of the European Union.

32 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'Having regard to:

(i) The [Second Directive];

(ii) Directive [2001/24];

(iii) the obligations of the Irish State under the provisions of the [FEU Treaty] and in particular Articles 49, 65, 107, 120 and Title VIII of Part III thereof ;

(iv) the obligations of the Irish State under the EU/IMF Programme of Support;

(v) the terms of the Council Implementing Decision 2011/77, made pursuant to [Regulation No 407/2010],

(1) Does the Second Directive preclude in all circumstances, including the circumstances of this case, the making of a Direction Order pursuant to Section 9 of the 2010 Act, on foot of the opinion of the Minister that it is necessary, where such an order has the effect of increasing a company's capital without the consent of the general meeting; allotting new shares without offering them on a pre-emptive basis to existing shareholders, without the consent of the general meeting; lowering the nominal value of the company's shares without the consent of the general meeting and, to that end, altering the company's memorandum and articles of association without the consent of the general meeting?

(2) Was the Direction Order made by the High Court pursuant to Section 9 of the 2010 Act in relation to ILPGH and ILP in breach of European Union Law?'

The request to reopen the oral procedure and the request for measures of inquiry

33 After the delivery of the opinion of the Advocate General, Mr Skoczylas lodged, on 25 August 2016, a request that the oral procedure be reopened, under Article 83 of the Court's Rules of Procedure. By means of a letter received at the Court's Registry on the same date, Scotchstone made a similar request and further requested measures of inquiry on the basis of Article 64 of the Court's Rules of Procedure.

34 In support of their requests, those applicants in the main proceedings argue, in essence, that the judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570), and the factors which distinguish the case that gave rise to that judgment from the case in the main proceedings, have not been debated by the parties to this case.

35 In a letter that was received at the Court's Registry on 6 September 2016, Scotchstone extended its argument in favour of reopening the oral procedure by referring to the Commission's decision of 30 August 2016 finding that tax advantages amounting to EUR 13 billion granted by Ireland to Apple in the period from 2003 to 2014 did not comply with the EU rules on State aid. In the light of that decision, Scotchstone considers that, at the material time in the main proceedings, Ireland had available to it financial resources other than those obtained by European Union financial assistance to remedy the serious disturbance of its economy. Those other financial resources would have given that Member State the possibility of recapitalising ILP with the approval of the general meeting of ILPGH and in accordance with the provisions of the Second Directive.

36 It should be noted in that regard that the Court may, at any time, after hearing the Advocate General, order that the oral procedure be reopened, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument that has not been debated by the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

37 Under Article 64(1) of the Court's Rules of Procedure, the Court, after hearing the Advocate General, is to prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved.

38 In this case, the Court considers, after hearing the views of the Advocate General, that it has all the material necessary to enable it to give a decision on the reference for a preliminary ruling before it and that the case does not have to be examined in the light of an argument that has not been debated before it.

39 Consequently, the requests of Mr Skoczylas and Scotchstone must be rejected.

Consideration of the questions referred for a preliminary ruling

40 As a preliminary point, it must be observed that although it is clear from the request for a preliminary ruling that an interpretation of Article 8(1) and Articles 25 and 29 of the Second Directive is sought, that request does not identify which other provisions of EU law could, in the view of the referring court, preclude a measure such as the Direction Order.

41 Article 8 of the Second Directive prohibits shares being issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par. Article 25 of that directive provides that, as a general rule, any increase in the share capital of a public limited liability company must be decided by the general meeting of its shareholders. Article 29 of that directive provides, in essence, that, in the event of such an increase in share capital, the shares must be offered on a pre-emptive basis to the existing shareholders.

42 As regards the Direction Order, it is clear from the file submitted to the Court that the effect of that order was that shares in ILPGH were issued at a price lower than their nominal value and that the share capital of that company was increased, while the pre-emptive right to subscribe was denied, without the agreement of the general meeting of that company. It is therefore common ground that the requirements set out in the preceding paragraph were not applied in this case.

43 That being the case, the two questions referred, which can be examined together, must be understood as meaning that the referring court is seeking, in essence, to ascertain whether Article 8(1), together with Articles 25 and 29 of the Second Directive, must be interpreted as

precluding a measure, such as the Direction Order at issue in the main proceedings, adopted where there is a serious disturbance of the economy and financial system of a Member State that threatens the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the approval of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied any pre-emptive right to subscribe.

44 In that regard, it is clear from the information provided by the referring court that the Direction Order was adopted in the context of the financial and economic crisis which led Ireland, in 2008, to grant significant guarantees to the national banks affected by that crisis and, in late 2010, when the financial situation of those banks was continuing to deteriorate and was also threatening the financial stability of that Member State, to request financial assistance from the European Union and to undertake to restructure and recapitalise the national banking sector.

45 According to the referring court, that situation of serious disturbance of the national economy made it essential, because of the fact that it was impossible for ILP itself to achieve the recapitalisation by the end of July 2011, as required in particular by the Memorandum of Understanding, that the Irish State take action in order to avoid a failure of ILP that would threaten both the financial stability of Ireland and that of other Member States and of the European Union.

46 The recapitalisation of national banks, including ILP, by 31 July 2011 was also laid down by Article 1(4) and Article 3(2), (4), (5) and (7)(g) of Implementing Decision 2011/77, as a condition for the payment of European Union financial assistance to Ireland. That financial assistance constituted, in accordance with recitals 4 and 5 and Article 1 of Regulation No 407/2010 — itself adopted on the basis of Article 122(2) TFEU which is designed to allow action to be taken to deal with ‘exceptional occurrences’ — a measure taken as a matter of urgency with a view to maintaining the financial stability of the European Union.

47 Admittedly, in order to recapitalise ILP, the Direction Order required an increase in the share capital of ILPGH. However, Article 3(7)(g) of Implementing Decision 2011/77 provides for the recapitalisation of national banks, one such being ILP, but does not specify how that was to be achieved. Consequently, the Irish authorities were not obliged to make a direct injection of capital into the share capital of ILP, but could carry out that recapitalisation by means of increasing the share capital of ILPGH.

48 Further, as stated in paragraphs 30 and 31 of this judgment, the referring court, after weighing the competing interests, came to the conclusion that, once the decision of ILPGH’s extraordinary general meeting of 20 July 2011 was made to reject the Minister’s proposed recapitalisation, the Direction Order was the only means of ensuring, within the time limit laid down by Implementing Decision 2011/77, the recapitalisation of ILP that was necessary to prevent the failure of that financial institution and thereby to forestall a serious threat to the financial stability of the European Union.

49 The aim of the Second Directive is to achieve, as stated in its second recital, minimum equivalent protection for both shareholders and creditors of public limited liability companies. Accordingly, as ILPGH and ILP and also Ireland have stated in their observations submitted to the Court, the measures provided for by that directive relating to the formation of public limited liability companies and to the maintenance, increase or reduction of their capital guarantee such protection against acts taken by the governing bodies of those companies and relate, therefore, to their normal operation (see, by analogy, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 86 and 87).

50 However, as is clear from paragraphs 44 to 48 of this judgment, the Direction Order is not a measure taken by a governing body of a public limited liability company as part of its normal operation, but is an exceptional measure taken by the national authorities intended to prevent, by means of an increase in share capital, the failure of such a company, which failure, in the opinion of

the referring court, would threaten the financial stability of the European Union. The protection conferred by the Second Directive on the shareholders and creditors of a public limited liability company, with respect to its share capital, does not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a Member State and that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned.

51 The provisions of the Second Directive do not therefore preclude an exceptional measure affecting the share capital of a public limited liability company, such as the Direction Order, taken by the national authorities where there is a serious disturbance of the economy and financial system of a Member State, without the approval of the general meeting of that company, with the objective of preventing a systemic risk and ensuring the financial stability of the European Union (see, by analogy, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 88 to 90).

52 That conclusion cannot be called into question by the fact that the Direction Order could be classified, as claimed by the applicants in the main proceedings, not as a 'judicial measure', but a 'provisional administrative act'. It follows from the two preceding paragraphs that the Second Directive does not preclude, in circumstances such as those at issue in the main proceedings, the adoption of a measure such as the Direction Order, the nature of the national authority which issued that order being of no relevance in that regard.

53 The above interpretation is in no way irreconcilable with the interpretation adopted by the Court in the judgment of 12 March 1996, *Pafitis and Others* (C-441/93, EU:C:1996:92), contrary to what is claimed by the applicants in the main proceedings. The factors set out in paragraphs 44 to 48 of this judgment distinguish the situation at issue in the main proceedings from the case that gave rise to the judgment of 12 March 1996, *Pafitis and Others* (C-441/93, EU:C:1996:92), the feature of that case being that it concerned the insolvency of a single bank. While the Court held that the Second Directive continues to apply in the case of 'ordinary reorganisation measures' (judgment of 12 March 1996, *Pafitis and Others*, C-441/93, EU:C:1996:92, paragraph 57), the Court did not, however, give a ruling, as the Advocate General observed in point 45 of his Opinion, on extraordinary reorganisation measures, such as a direction order designed to avoid, in a situation where there is a serious disturbance of the national economy and of the financial system of a Member State, the failure of a bank and thereby to maintain the financial stability of the European Union.

54 Further, as ILPGH and ILP and also Ireland have stated in their observations submitted to the Court, the national measures contested in the *Pafitis and Others* case (C-441/93, EU:C:1996:92) had been adopted in the 1986-1990 period and the Court delivered its judgment on 12 March 1996, thus well before the start of the third stage for the implementation of the Economic and Monetary Union, with the introduction of the euro, the establishment of the Eurosystem and the related amendments to the EU Treaties. Although there is a clear public interest in ensuring, throughout the European Union, a strong and consistent protection of shareholders and creditors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system established by those amendments (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 91).

55 In the light of the foregoing, the answer to the questions referred is that Article 8(1) and Articles 25 and 29 of the Second Directive must be interpreted as not precluding a measure, such as the Direction Order at issue in the main proceedings, adopted in a situation where there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the agreement of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied a pre-emptive right to subscribe.

Costs

56 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 (Grand Chamber) hereby rules:

Article 8(1) and Articles 25 and 29 of the 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 54 TFEU], 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, must be interpreted as not precluding a measure, such as the Direction Order at issue in the main proceedings, adopted in a situation where there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the agreement of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied any pre-emptive subscription right.

Lenaerts Tizzano Silva de Lapuerta

Ilešič von Danwitz Malenovský

Bonichot Arabadjiev Toader

Safjan Fernlund Vajda

Rodin

Delivered in open court in Luxembourg on 8 November 2016.

A. Calot Escobar K. Lenaerts

Registrar President

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* Language of the case: English.