the fact that the latter represents the company alone, even if his authority to do so clearly flows from national law.

Lecourt Ó Dálaigh Donner

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 12 November 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 23 OCTOBER 1974 [1]

Mr President,
Members of the Court,

Introduction

It is unnecessary to dwell upon the importance of the role of companies in economic life, nor upon the position which they must occupy in the working of the Common Market.

This of course is why the rules in the Treaty of Rome relating both to the right of establishment and to the freedom to provide services apply to companies by virtue of the principle postulated in Article 58, according to which companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purpose of these rules, be treated in the same way as natural persons who are nationals of Member States.

This is also why Article 54 (3), which gives to the Council and to the Commission respectively the power to adopt certain directives, includes, at letter (g), a provision enjoining them to coordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms, with a view to making such safeguards equivalent throughout the Community.

On 9 March 1968, on the basis of this provision, the Council adopted a First Directive, the object of which is somewhat limited; it is concerned only with companies limited by shares or otherwise having limited liability, and deals only with three questions:

1 — Translated from the French.

1. measures to ensure disclosure of the instruments of constitution, of any amendment to those instruments and of certain accounting documents;
2. the validity of obligations entered into by a company;
3. nullity of the company.

Of these three questions it is that concerning the validity of obligations entered into by a company and of the powers of the organs of the company which forms the subject matter of this case. The interests of third parties as well as those of members of the company are very directly involved, and there can be little doubt that the interests of members and those of third parties are in conflict.

The members, for their part, are basically seeking to protect themselves against abuse of powers by the organs of the company. They enjoy such protection on condition that the company has not entered into obligations as a result of its organs having exercised their functions in an irregular manner or having exceeded the powers conferred on them by the basic documents of by decision of the general meeting.

On the other hand, the protection of third parties requires that the company should not be able to avoid obligations resulting from acts done by its representatives by relying upon the irregularity of the latters' decision or upon any abuse of powers of which they may be guilty.

Third parties must be able to trust appearances while having the guarantee that, if they deal with one or more persons purporting to be the legal representatives of the company, contracts concluded with such person or persons will be binding upon the company itself.

The national laws of the six States which at that time were members of the European Economic Community did not employ the same legal techniques either to solve these problems or to achieve the necessary balance between the opposing interests of members and of third parties, in particular in the matter of methods of disclosure; it is a fact that the solution to such a problem can be reached only by reference to the economic and social situation in each State and that the balance between these opposing interests also varies over a period of time, taking account of developments in commerce and the structure of credit.

It has quite rightly been pointed out that, over the last thirty years, measures for the protection of third parties have been strengthened in France, Italy and Germany, whereas in the Benelux countries, for example, the legal rules have remained, in general, more favourable to members. Indeed, national case laws, refined over the years, have significantly reduced certain divergences as a result of the concern, shared by all judiciaries, to protect bona fide third parties.

There can be no doubt that disclosure is an effective means of lessening the conflict of interests between members and third parties, particularly in the field of disclosure of nominations, resignations or revocations concerning the organs of the company, and in that of disclosure of the clauses in the basic documents setting out the latters' precise powers.

Where third parties are informed by such disclosure, to which they generally have access, the company is entitled to rely on statements published.

Article 2 (1) (d), first sentence, of the Directive of 9 March 1968 requires disclosure of the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body are authorized to represent the company in dealings with third parties and in legal proceedings, this with reference to those types of company enumerated at Article 1 of the same Directive, including the limited liability company governed by German law: 'Gesellschaft mit beschränkter Haftung

(GmbH)'. The second sentence of this provision lays down that: 'It must appear from the disclosure whether the persons authorized to represent the company may do so alone or must act jointly.'

German law was amended, to take account of this Directive, by a Law of 15 August 1969 (Gesetz zur Durchführung der ersten Richtlinie des Rates der Europäischen Gemeinschaften zur Koordinierung des Gesellschaftsrechts) and amendment was made to the Law relating to limited liability companies (Gesetz betreffend die Gesellschaften mit beschänkter Haftung). These amendments, which came into force on 1 September 1969, essentially concern Article 8, laying down the conditions required for the entry on the Companies Register of a limited liability company governed by German law, to which a paragraph (3) was added, worded as follows: 'The application must *further* indicate the power of representation of directors'.

Likewise, Article 10 (1), concerning the content of the entry made on the Companies Register, was supplemented by the sentence: *'further,* the power of representation of directors must be indicated'.

Prior to this amendment, the power of representation had to be registered only in cases where the basic documents of the company included, in this field, specific clauses constituting exceptions to the law. On the other hand, if this power was defined in accordance with the letter of the law, it was not necessary either to notify it or enter it on the register.

However, these amendments to German law did not in fact make any material alteration to the provisions which it already contained in relation to the actual exercise of the power of representation. According to the law, in fact, this power continues to be exercised jointly if there are several directors and individually if there is only one, as laid down by Article 35 of the Law, which remains unchanged.

I — Context of the problem

The preliminary question referred to you by the Bundesgerichtshof is concerned, as you know, with the interpretation of the abovementioned text of Article 2 (1) (d), second sentence, of the Directive of 9 March 1968. The German supreme court wishes to know whether, in cases where the body authorized to present a company consists of only one member, there must be disclosure of the fact that he alone represents the company, when:

— the representative body of a company may consist of one or of several members;

— German law compulsorily lays down that in the event of only one member being appointed, he alone has authority to represent the company.

But we must briefly recall the circumstances and procedure which led the Bundesgerichtshof to requested a preliminary ruling pursuant to the procedure laid down by Article 177 of the Treaty.

Firma Haaga, whose head office is in Stuttgart, manufactures equipment, in particular, sterilizing equipment, for medical or hospital use.

Originally, this limited liability company had two directors, Rudolph and Albert Haaga, the founders of the undertaking; each, acting alone, could represented the company. This is clear from paragraph 5 of the basic document. However, in the event of other directors being appointed, the basic document provided that in any case two directors or a director and a duly authorized person, respectively, could represent the company and sign in its name. Paragraph 6 of the basic document added that the power of directors to represent the company in dealings with third parties was unlimited.

However, it appears from the Companies Register at Stuttgart that at present the company has only one

director, Friedrich Haaga Junior, and that there is in addition a duly authorized person, whose name is also entered on the register with that of the director.

Accordingly, the entry on the Companies Register corresponded to the acutal situation of the company as it existed in the beginning. It appears that this entry was in fact in conformity with Article 10 (2) of the German Law on limited liability companies, in the text as worded prior to 15 August 1969, that is to say before the amendment adopted pursuant to the Community Directive in issue. However, the text as worded after this amendment requires, as we have seen, that the power of directors to represent the company must further be indicated.

The question therefore arises whether, in order to comply with the new text adopted pursuant to the Directive, it should be interpreted as meaning that, henceforward, the company should make an entry on the Companies Register, beside the original entry, to the effect that, 'in the event of only one director being appointed, he alone is authorized to represent the company'.

And in fact, by letter of 11 August 1971, the judge of the Amtsgericht of Stuttgart, fulfilling the functions of Companies Register, asked firma Haaga to indicate the powers of representation of the directors in relation to their number and required it in particular to declare, in the event of only one director being appointed, that the latter was authorized to represent the company alone.

The company objected on the ground that, in its opinion, such an entry would have been superfluous since, at that time, the company had only one director. This objection was rejected by the Court, which referred it on appeal to the Landgericht. This appeal was dismissed by decision of 8 December 1971.

The company then brought an appeal before the Oberlandesgericht of Stuttgart. The latter found that the appeal was unfounded, basing this view on the fact that the new text of Articles 8 and 10 of the Law on limited liability companies was intended to allow third parties to take notice at any time of the persons in fact exercising the power of representation; it added that, in trade between Member States of the Common Market, it is not possible to assume that interested parties have a precise knowledge of the state of the national legislations, which may well be widely divergent, of the various Member States of the Community. The Court therefore held that the power of representation must, under all circumstances, be subject to complete disclosure, and that the implicit power of representation of a single director must be indicated unequivocally in the entry on the Companies Register.

However, the Stuttgart Oberlandesgericht was not able to give a definitive ruling to this effect because another Oberlandesgericht, that of Frankfurt-am-Main, had several months previously expressed a contrary opinion in a decision of 6 May 1971.

In such a case, in order to avoid the risk of divergence within the case-law, German procedural law requires that the competent Oberlandesgericht refer the case to the Bundesgerichtshof, that is to say the Federal Court of Justice, so that the latter may decide the legal problem over which the two Oberlandesgerichte are at variance.

The reference to the Bundesgerichtshof in relation to an entry on the Companies Register is not the only example of such a reference under German law; it also occurs in criminal procedure, as provided by the Gerichtsverfassungsgesetz. When an Oberlandesgericht proposes to derogate from a criminal law decision either of the Bundesgerichtshof or of another Oberlandesgericht, it must, in certain cases, refer the case before the Bundesgerichtshof.

This procedure was followed in the present case but, on 14 February 1974, the Bundesgerichtshof decided to stay

the proceedings and to refer to this Court a request for a preliminary ruling, the text of which I shall not trouble to recall here since it appears in the report for the hearing.

However, in view of the particular conditions under which the preliminary question was addressed to you it seems to me that the Court should consider the admissibility of this question in relation to Article 177 of the Treaty.

The Bundesgerichtshof has referred this question to the Court in the context of non-contentious proceedings. The Federal Courts was not seized of the case by a party in the strict sense of the term but by a subordinate court, for the purpose of ascertaining the correct legal decision at national law on a particular point.

Could it therefore be inferred that in so doing the Bundesgerichtshof is not fulfilling a true jurisdictional function? In my opinion it could not; it is sufficient briefly to recall that the Companies Register is kept, in Germany, by the Amtsgericht, a court of first instance, pursuant to Article 125 of the Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit, according to a procedure set out in detail in that legislative text.

Moreover, that procedure is not peculiar to the keeping of the Companies Register, but also applies in certain other matters such as guardianship, adoption, control of registration of associations, succession, etc... These are, it appears, not so much contentions matters as 'administrative matters executed in judicial form', that is to say, comprising the guarantees of a true jurisdictional procedure. As regards in particular the Companies Register, a comparison may be made between the competence of the Amtsgericht and that of the French tribunal de commerce. We may therefore be sure that the Amtsgericht, in the same way of course as the appeal courts and in particular the Oberlandesgericht, does indeed exercise a jurisdictional function in this case; the case-law of the Bundesverfassungsgericht (the Federal Constitutional Court) confirms this. The provisions of the Basic Law concerning the guarantees enjoyed by the citizen before the courts, that is to say the right of audience and the right to trial before the lawful judge, apply procedures of this kind.

For my part therefore I would have no hesitation in stating that the Bundesgerichtshof was entitled to refer to this Court the preliminary question in issue, pursuant to Article 177 of the Treaty.

In asking you for an interpretation of the Council's Directive the Federal Court of Justice is expressing its willingness to interpret the German Law adopted in implementation of that Directive according to the requirements of Community law.

The Court should welcome this initiative on the part of the Bundesgerichtshof, on the one hand because this is the first time that a national court has used the procedure for preliminary rulings for the purpose of ascertaining the Court's interpretation of a coordinating directive, which there can be no doubt belongs to the category of acts 'of the institutions' mentioned in Article 177, and on the other hand because this is also the first time, so far as I can determine, that the Bundesgerichtshof has made a reference to the Court of Justice.

II — Discussion

Although firma Haaga has not submitted written observations and is not represented before the Court it is simple to ascertain from the files the German courts the arguments which it adduced before the latter. Its line of argument is straightforward; it is refusing to comply with what appears to it to be mere administrative red tape, especially as the previous version of Article 10 of the German Law on limited liability companies required an indication of the

power to represent the company only in the event of a departure from the law.

This view is shared by the Commission and by certain of the national courts. It is based on the following considerations:

In German law, as in the law of certain other Member States, a limited liability company may be represented by a single director.

Since both the present German law and the Directive speak only of directors and not of other authorized persons, if the company comprises only one director, the latter *may* and indeed *must* represent the company. The requirement as to the assistance of a duly authorized person cannot be relied on as against third parties. For third parties having a knowledge of this branch of the law, a clause in the basic document conferring the power to represent the company upon a single director constitutes not a limitation but a widening of the power to represent the company, since, as a general rule, a limited liability company is represented by two directors. Moreover, restrictions imposed upon the power to represent the company, even if disclosed, may not be relied on as against third parties, pursuant to Article 13 of the German Law and to Article 9 (2) of the Directive.

According to what one might call the institutional conception of a company, which the Directive seems to have adopted, the mere possibility at law of granting a power of decision or of representation to a given organ of the company is equivalent to granting that power, whether the possibility is exercised or not. As against third parties, acts carried out within the limits of this legal power are valid and bind the company.

If, according to the law, the company may be represented by several persons acting jointly or by one person acting alone, which is the case of the director of a German limited liability company, this legal rule must naturally be capable of being relied upon as against third parties who are deemed to have knowledge of it. If there is only one director, the clause in the basic document laying down that the signature of one member of the collective representative body is sufficient derives its validity with respect to third parties not from a special entry on the register but from the fact that it extends the powers of each of the members of the body, in conjunction with the fact that it merely restates the legal solution. The legal situation pre-exists disclosure since it is the direct result of the law. In other words, the entry on the Companies Register is by way of ratification alone and is not constitutive in character; its omission need not therefore have the result at law that it may not be relied upon as against third parties.

While agreeing that this line of argument appears both simple and logical in the national context and that third parties and members would thereby be protected in a suitable manner by the law itself, I doubt very much whether the same is true in the context of intra-Community trade, where the third parties, in whose interest it is to have knowledge of the actual power of representation within a German limited liability company, are nationals of other Member States of the Community.

This consideration leads me to propose a wide interpretation of compulsory disclosure within the meaning of the Directive of 9 March 1968.

In fact, in my opinion, for third parties who are not nationals of the Federal Republic of Germany, as well as for companies or persons who might become members of firma Haaga, the entry on the Companies Register is ambiguous.

From a reading of the text of the basic document and the entries made on the Companies Register, in the absence of any knowledge of the provisions of German law, the following could result:

1. If there are more than two directors, the company could be represented only by two of the latter;

2. If there are only two directors, the company could be represented only by a director and a duly authorized person;
3. Finally, from a close reading of the entry on the Companies Register in the column headed 'Prokura', it appears possible that, in the absence of a director, a duly authorized person may represent the company, acting jointly with another duly authorized person.

It is said to be in the interests of third parties only to consult the basic document and the register when they are not dealing with the legal representative body. However, in order to know whether a person is indeed the legal representative body, they must first have knowledge of the provisions of the law.

In the final analysis, if third parties or foreign members do not know that a duly authorized person does not have the legal status of a company organ and that, as in this case, duly authorized persons may never represent the company alone, the possibility conferred by the law on a duly authorized person, acting jointly with a director, to represent the company could seem to them to be widening of the powers of the representative body which might be relied upon against them, especially if it is the subject of a disclosure.

Furthermore, a comparison of the successive versions of the relevant provision of the Directive seems to me to clarify the meaning of the text finally adopted.

In substance, Article 3 (4) of the draft submitted to the Economic and Social Committee and to the Parliament stated that the disclosure must make clear the respective status of persons who, by law or according to the basic document, acting as an organ of the company, have the power to represent the company in dealings with third parties.

In the draft as it stood on 30 October 1966, as it was published in the Dutch journal 'De Naamloze Vennootschap' (1967, p. 18), the wording was as follows:

'The disclosure must indicate the respective status of these persons and state whether they act alone or jointly.

The final text adopted by the Council on 9 March 1968 lays down that:

'It must appear from the disclosure whether the persons authorized to represent the company may do so alone or must act jointly'.

This therefore suggests that the final version refers more particularly to German law, in that it requires an indication of whether the members of a board of directors of a limited liability company have the power to represent the company, either individually or collectively.

Thirdly, if the fact that the powers of a single director may be relied upon as against third parties is not the result of a special entry on the Companies Register but is a direct consequence of the law, why should the Directive require disclosure of clauses of the basic document, including provisions involving limitation of the legal powers of agents of the company?

It should be noted that where the Directive does not require an indication of the powers of representatives because those powers derive expressly and exclusively from law, this is stated in the Directive: this is so in particular in respect of liquidators, dealt with in the Directive at Article 2 (1) (j).

Finally and above all, for so long as the allocation of powers between company organs is left to the discretion of national legislatures, which is the case at present, any coordination achieved at a Community level will be in danger of erosion, since the effectiveness of the Directive depends upon the care which each Member State takes to define, in its national legislation, the legal powers of each company organ.

As German positive law now stands, a clause in the basic document according to which the power to represent the

company is conferred on a duly authorized person acting jointly with a director may not be relied upon as against third parties, but who can say that this legislation will not one day recognize such a possibility? In that case third parties would have great difficulty in showing that they had good reason to believe that this clause did not apply.

For all these reasons therefore it appears to me to be necessary that third parties, in particular nationals of Member States other than the Federal Republic, who have in mind either to deal with a limited liability company or to join such a company as members, should have a precise knowledge, from the entries made on the Companies Register alone, of the structure and distribution of powers within that company. In effect, the knowledge gleaned by third parties extends only so far as extracts from public registers. They would even have difficulty in obtaining successive versions of the basic document of a company. Although they are deemed to know their own legislation, it would be over-demanding to require of them that they should know that of the Federal Republic of Germany.

Article 2 (1) (d) of the Directive should therefore, in my view, be interpreted as meaning that the power of all the members of the organs of a company to represent that company must be indicated and disclosed in the manner set out in Article 3, even where that power is directly derived from national law.

Finally, it is my opinion that the Court should hold that Article 2 (1) (d), second sentence, of the Council Directive of 9 March 1968 must be interpreted as meaning that:

Since the representative body of a limited liability company governed by German law may be composed of one or of several members, it is imperative, even in the event of a single member being appointed, that the fact that that single member is empowered to represent the company alone should be disclosed in the manner set out in Article 3 of the said Directive.