OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 12 March 1997 *

I — Introduction

1. In this case the Court of Justice is being asked to give a ruling on the provisions of Directive 68/151/EEC [1] (hereinafter 'the directive') and, more especially, the provisions concerning the limits placed on the conferment of powers of representation on the directors of a company, as well as to determine in what circumstances a conflict of interests involving the directors may be relied upon as against third parties.

II — The facts

2. The Coöperatieve Rabobank 'Vecht en Plassengebied' BA (hereinafter 'Rabobank') was the bank financing the holding company Holland Data Groep BV (hereinafter 'HDG') and five of its subsidiaries. On 23 October 1989, Rabobank concluded with those companies an agreement concerning the calculation of interest on joint accounts and the offsetting of debit balances against credit balances. Under that agreement the companies concerned were jointly and severally liable to Rabobank.

On 21 November 1989, HDG and Stichting Nieuwegein (Nieuwegein Foundation) established a new company, Mediasafe BV (hereinafter 'Mediasafe') in which HDG, appointed sole director, held 99 shares and Stichting Nieuwegein one share. On the proposal of Stichting Nieuwegein two company commissioners were also appointed to exercise control over the management of Mediasafe. Article 12(3) and (4) of the statutes of Mediasafe provide that:

'3. In the event of a conflict of interests between the company and one or more of its directors, the remaining director(s) shall be empowered to bind the company.

4. If there is only one director or if there is a conflict of interest involving all its directors, the company shall be represented by the board of commissioners.'

* Original language: Italian.

1 — First Council Directive of 9 March 1968 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, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41).

On 11 December 1989, Rabobank concluded a fresh agreement with HDG and its subsidiaries, including Mediasafe, which was represented by HDG itself as director of Mediasafe. Under that agreement, which was identical in content to the earlier agreement of 23 October 1989, the individual companies in the group declared themselves jointly and severally liable for their debts to Rabobank.

On 22 May 1990, Mediasafe was declared bankrupt and Mr Erik Aarnoud Minderhoud was appointed receiver in bankruptcy. At that date, Mediasafe's account with Rabobank showed a credit balance of HFL 447 117.60.

By letter of 5 June 1990, Rabobank informed the receiver in bankruptcy that, on the basis of the abovementioned agreement of 11 December 1989 and Article 53 of the Netherlands Law on Bankruptcy, it had exercised its right to offset the debt against the credit balances on the current accounts in respect of which Mediasafe was joint and several co-debtor. The letter stated that, following that operation, Mediasafe's credit balance with Rabobank amounted to HFL 67 337.36 at the date of the bankruptcy. By judgment of 31 July 1990, HDG and its five other operating companies were also declared bankrupt.

The receiver in bankruptcy has sought payment from Rabobank of the difference, amounting to HFL 379 780.24, between Mediasafe's credit balances before and after the offsetting operation. That claim is based on the contention that Mediasafe is not bound by the agreements of 11 December 1989 on the ground that HDG — which, as its sole director, concluded the agreements on behalf of Mediasafe also — was actually involved in a conflict of interests with Mediasafe within the meaning of Article 12(3) and (4) of the company statutes and Article 2: 256 of the Netherlands Civil Code. HDG therefore had no authority to act on behalf of Mediasafe at the time when the agreements were concluded.

3. The Rechtbank (District Court) Utrecht found in favour of the application by Mediasafe's receiver in bankruptcy. The Gerechtshof (Regional Court of Appeal) Amsterdam then upheld the Rechtbank's judgment on appeal. The appellant subsequently challenged the decision of the appeal court before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) and, in the light of the possible relevance of the interpretation of the provisions of Directive 68/151/EEC for the determination of the dispute, the Hoge Raad referred to the Court of Justice the following questions for a preliminary ruling:

'(1) Is it consistent with the First Directive for a company to be allowed to rely, as against a third party with whom a director generally authorized to represent the company has entered into a transaction on its behalf, on the fact that the director lacked authority on the ground that the transaction involved a conflict of interests between him and the company?

(2) Is Question 1 to be answered in the affirmative only if the third party had knowledge of the conflict of interests at the time when the transaction took place, or could reasonably have been expected to have knowledge of that conflict of interests on the basis of the information available to him at the time?

(3) Is Question 1 to be answered in the affirmative only if the conflict of interests at the time when the transaction took place was so plain that no reasonable party could have asserted that no such conflict existed?'

III — The applicable Community legislation

4. Article 9 of the directive provides that:

'1. Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.

However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it; disclosure of the statutes shall not of itself be sufficient proof thereof.

2. The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed.

3. If the national law provides that authority to represent a company may, in derogation from the legal rules governing the subject, be conferred by the statutes on a single person or on several persons acting jointly, that law may provide that such a provision in the statutes may be relied on as against third parties on condition that it relates to the general power of representation; the question whether such a provision in the statutes can be relied on as against third parties shall be governed by Article 3.'

IV — The national provisions in issue

5. The provisions of the Netherlands Civil Code governing company representation in the event of a conflict of interests involving the directors are contained in Article 2: 146 in the case of 'naamloze vennootschappen' (public limited liability companies) and Article 2: 256 in the case of 'vennootschappen met beperkte aansprakelijkheid' (private limited liability companies). The wording of the two provisions is the same and is as follows:

'Unless the statutes provide otherwise, the company shall, in all cases in which there is a conflict of interests between itself and one or more directors, be represented by the commissioners. The general meeting is empowered at all times to designate one or more persons for that purpose.'

V — Analysis of the dispute

6. In my view, Article 9 of the directive, cited as the point of reference for interpreting both the national legislation in the field and the parallel provision contained in the statutes of Mediasafe, is not pertinent in this case. I share the view that has been taken by the Swedish Government and also voiced — although not altogether unambiguously — by the Commission, namely that the provision contained in Article 9 of the directive does not cover cases in which the company organs responsible for representing the company are faced with a conflict of interests. The consequences of a conflict of interests involving the directors would therefore be governed by the applicable national legislation.

7. That conclusion, which I believe to be correct, is based on the actual wording of the abovementioned provision which, it seems to me, concerns only the enforceability of the limits, laid down by law, the statutes or resolutions of the company, on the powers conferred on the company representatives. In the final analysis, this is a provision which lays down rules relating to the substance and scope of those powers. These are, for instance, the kind of limits we find in rules which allow the company to be committed to a predetermined level or which differentiate between the kinds of transaction which the representative is authorized to make. This is also borne out by the fact that the provision of the directive in question refers several times to the relationship between the acts done by the representative and the objects of the company, or takes into account the disclosure of the powers enjoyed by the company organs. It does not, however, deal with the specific circumstances that

affect the proper exercise of the power of representation.

8. A conflict of interests entails a defect of intention on the part of the representative, thus preventing him from lawfully carrying out certain acts because the *contemplatio domini* is absent. I consider that the conflict of interests needs to be viewed from another, very different perspective, namely the specific circumstances in which the power of representation may properly be exercised. Conflict of interest is, after all, a bar to the power to contract in general (which affects all types of representation and not just company representation) but has no effect on the actual scope of the powers conferred on the company organ in question. The effect of the conflict of interests is therefore to suspend the representative's power and capacity to act in regard to the matters in respect of which, and the parties with whom, he may enter into contracts, where his abstract interest is different and thus divergent from that of the company he is representing. In such an event, there is an abnormal type of representation which, although it does not affect the nature or scope of the powers conferred, does influence the validity of individual acts which, for reasons attaching to the identity of the representative, have, even if only presumptively, the effect of damaging the company interest. The directive does not deal with the anomalous position of a representative faced with a conflict of interests, just as it does not regulate physical or legal incapacity or any defect of intention which may affect the validity of the acts of that representative. Those provisions are in fact designed to determine the consequences of the *objective* limits, laid down by law or the statutes or company resolutions, on the powers of the company organs.

9. My analysis is also borne out by the proposal for a fifth company directive. [2] In that text, the Commission has actually proposed the adoption of specific rules making it possible to adduce as against co-contracting third parties a conflict of interest involving the organ representing the company, but only where the company proves that the third party was aware of the irregularity of the act or that, given the circumstances, it could not have been unaware thereof (Article 10(4)). The very fact that the Commission considered it necessary to propose legislating on conflicts of interests also indicates that the directive itself does not regulate situations of that nature.

2 — Proposal for a Fifth Council Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs, submitted on 9 October 1972, published in JO 1972 C 131 and most recently amended in the version published in OJ 1991 C 7, p. 4. It will be noted that the provision of the directive in question that is relevant for present purposes, namely Article 10(4), has not been amended, even though the proposal for a directive has been substantially amended on several occasions by both the Commission and the Parliament during the continuing legislative process.

VI — Conclusion

10. I therefore propose that the Court give the following answer to the national court's questions:

Article 9 of Directive 68/151/EEC does not regulate the system for relying upon as against third parties acts done by the organs of a company where there is a conflict of interests with the company represented.