OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 4 September 2008 [1]

I — Introduction

1. The present case arises from an action brought by the Commission pursuant to Article 226 EC for failure to fulfil Treaty obligations, in which the Commission seeks a declaration from the Court of Justice of the European Communities that the Kingdom of Spain has failed to fulfil its obligations under Articles 29 and 42 of Council Directive 77/91/EEC of 13 December 1976 [2] ('Directive 77/91') by failing to implement those provisions correctly in national law.

2. The action concerns various aspects of the shareholders' pre-emption right in connection with capital increases for cash, above all the legal conditions for withdrawing the pre-emption right, the compatibility with Community law of a national provision which grants such a right also to holders of convertible bonds [3] and the conditions laid down by Community law which are to be taken into account when the issue price of the new shares is fixed.

II — Legislative context

A — *Community law*

3. The legal basis of Directive 77/91 is Article 44(2)(g) EC, which provides that the

1 — Original language: German.

2 — 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 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).

3 — Convertible bonds are bonds the holder of which has, in addition to the right to repayment, the right to convert the bonds into shares or to subscribe for new shares as a special profit participation right (see Nagele, *Kommentar zum Aktiengesetz* [publ. Peter Jabornegg/Rudolf Strasser] 4th ed., Vienna 2002, Part III [§§ 145-273AktG], No 5, p. 5; Peifer, K.-N., *Münchener Kommentar zum Aktiengesetz*, 2nd ed., 2005, § 186 AktG, No 33; Hüffer, U., *Aktiengesetz*, 8th ed., vol. 53, § 160 AktG, No 12; Holland, B., 'Die Bedienung von Wandelanleihen aus genehmigtem Kapital', *Neue Zeitschrift für Gesellschaftsrecht*, 2006, No 23, p. 892; Kocbek, M., *Veliki komentar Zakona o gospodarskih družbah / ZGD-1* [publ. Marijan Kocbek], vol. 2, Ljubljana 2007, Article 371, p. 664). In the financial respect convertible bonds are hybrid securities as at first, as bonds, they provide a fixed income and, if converted, a variable income (see Tapia Hermida, A.J., 'Obligaciones convertibles', *Diccionario de Derecho de Sociedades* [publ. Carmen Alonso Ledesma], Madrid 2006, p. 820 et seq.).

Council and the Commission are to coordinate the safeguards which, for the protection of the interest of members and others, are required by Member States of companies or firms with a view to making such safeguards equivalent throughout the Community.

4. The second and fifth recitals of the preamble to Directive 77/91 are worded as follows:

'Whereas 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.

...

Whereas it is necessary, having regard to the objectives of Article [44(2)(g) EC], that the Member States' laws relating to the increase or reduction of capital ensure that the principles of equal treatment of shareholders in the same position and of protection of creditors whose claims exist prior to the decision on reduction are observed and harmonised.'

5. Article 29 of Directive 77/91 provides as follows:

'(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.

...

...

(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.'

6. Article 42 of Directive 77/91 provides as follows:

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

'Where the capital is increased by means of the issue of new ordinary or preference shares, the shareholders and holders of convertible bonds may, within the period allowed for that purpose by the directors of the company and which, in the case of listed companies, shall not be less than 15 days and in all other cases not less that one month from the publication of the announcement of the offer for subscription for the new issue in the *Boletín Oficial del Registro Mercantil* [Commercial Registry Gazette], exercise their right to subscribe for a number of shares proportionate to the nominal value of the shares which they already hold or, in the case of holders of convertible bonds, which they would hold if, at that time, they exercised their right to conversion.'

B — *National law*

7. Directive 77/91 is implemented in Spanish law by Articles 158, 159 and 293 of Royal Legislative Decree 1564/1989 of 22 December 1989, which amends the Law on public companies ('the LSA').

8. Article 158(1) of the LSA acknowledges the pre-emption right in connection with an increase in the capital of public companies by means of the issue of new shares:

9. Article 159 of the LSA regulates the withdrawal of the pre-emption right provided for in Article 158:

'1. If necessary in the company's interest, the general meeting may, when deciding to increase the capital, resolve to withdraw the pre-emption right entirely or partly. For this resolution to be valid, it must conform with the provisions of Article 144, and ensure that:

(a) The notice convening the meeting must state the proposal to withdraw the pre-

emption right and the issue price of the new shares.

(b) At the time of convening the meeting, the shareholders shall be provided, in accordance with Article 144(1)(c), with a report drawn up by the directors in which they justify in detail the proposal and the issue price of the shares, giving the names of the persons to whom they are to be allotted, together with a report, for which the directors are liable, prepared by an auditor who is not the company's auditor and is appointed for that purpose by the Commercial Registry, on the fair value of the company's shares, the theoretical value of the pre-emption rights which it is proposed to withdraw and the accuracy of the information in the directors' report.

(c) The nominal value of the shares to be issued, together with the issue premium, as the case may be, shall correspond to the fair value shown in the auditor's report. In the case of a listed company, the fair value shall mean the market value of the company's shares, which shall be presumed to be the stock exchange quotation, unless the contrary is proved.

Nevertheless, in the case of listed companies, the general meeting of shareholders may, as soon as the directors' report and the auditor's report required under (b) above, which must indicate the net asset value of the shares, are available, freely determine the issue price of the new shares, provided that the price is higher than the corresponding net asset value shown in the auditor's report. The general meeting may also confine itself to laying down the procedure for determining the price.'

10. Article 293 of the LSA regulates the pre-emption right for convertible bonds:

'1. The shareholders of the company shall have a right of pre-emption for the convertible bonds.

2. The holders of convertible bonds issued earlier shall have the same right in the proportion laid down in the conversion conditions.

3. The provisions of Article 158 of this law shall apply to the preferential right of subscription for convertible bonds.'

III — Pre-litigation procedure

11. By letter of formal notice of 15 January 2004, the Commission drew the Spanish Government's attention to certain inconsistencies in the transposition of Directive 77/91 by means of the LSA.

12. In its reply of 10 March 2004, the Spanish Government denied that the law in question was inconsistent in any way with Directive 77/91.

13. The Commission found this reply unsatisfactory and therefore decided to send the Spanish Government a reasoned opinion dated 5 January 2005, which allowed the Spanish Government a period of two months to make the necessary amendments to the national legislation.

14. Following this, the Spanish Government sent the Commission a letter of 4 March 2005, written by its Ministry for the Economy and Finance, rejecting the Commission's demands.

15. The Commission was not satisfied by the Spanish Government's submissions and decided to bring an action before the Court of Justice.

IV — Procedure before the Court and forms of order sought by the parties

16. In its application, which was received by the Registry of the Court on 4 August 2006, the Commission claims that the Court should:

— declare that, by failing to transpose correctly 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 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, the Kingdom of Spain has failed to fulfil its obligations under that directive, and in particular:

(a) Article 42 in conjunction with Article 29(1) and (4), by allowing the general meeting of shareholders to decide to issue new shares at a price below their fair value and to withdraw the right of pre-emption;

(b) Article 29(1), by granting a pre-emption right for shares in the event of a capital increase by consideration in cash, not only to the shareholders, but also to the holders of convertible bonds;

(c) Article 29(6) in conjunction with Article 29(1), by granting a pre-emption right for convertible bonds not only to the shareholders, but also to the holders of convertible bonds pertaining to earlier issues;

(d) Article 29(6) in conjunction with Article 29(4), by failing to provide that the general meeting may decide to withdraw the pre-emption right for convertible bonds.

— order the Kingdom of Spain to pay the costs.

17. The Kingdom of Spain contends that:

— the action should be dismissed;

— the Commission should be ordered to pay the costs.

18. The Commission lodged its reply on 4 December 2006. The Spanish Government's rejoinder was received by the Court on 6 February 2007, after it was granted an extension of the time-limit.

19. By order of the President of the Court of 18 January 2007, the United Kingdom, the Republic of Poland and the Republic of Finland were given leave to intervene within the meaning of Article 93(1) of the Rules of Procedure in support of the forms of order sought by the Kingdom of Spain. They lodged written statements.

20. As neither of the parties applied for the oral procedure to be opened, the Opinion on this case could be prepared after the plenary session of the Court on 29 April 2008.

V — Pleas in law and main arguments of the parties

21. The Commission advances four grounds of complaint against the Kingdom of Spain.

A — *The first complaint*

22. The *Commission's* first ground of complaint is that the requirement of equal treatment of shareholders laid down in Article 42 of Directive 77/91 has not been fulfilled as, in the event of a capital increase, Article 159(1)(c) of the LSA allows an issue price for new shares to be set which may be substantially less than the market price, while withdrawing the pre-emption right.

23. In particular, the Commission points out that, under Article 159(1)(c) of the LSA the general meeting of a listed company may resolve to issue shares at any price, but only if it is higher than the corresponding net asset value. However, according to the Commission, the net asset value may be 20% or even 80% less than the market value. In this connection the Commission refers to the legislation of other Member States which allows the issue price of new shares to be set at not more than 5% to 10% below the market price.

24. The Commission concludes that Article 159(1)(c) of the LSA is contrary to Article 42 of Directive 77/91 because, in relation to listed companies, it permits manifest discrimination between shareholders who purchased their shares at the market value and new shareholders who are allowed by the company to purchase shares at a price considerably lower than the market price (and therefore 'unfair').

25. The *Kingdom of Spain* contends, first, that the LSA lays down conditions for withdrawing the pre-emption right which are actually stricter than those of Directive 77/91. In the first place, the LSA provides for a minimum issue price, which in any case may not be less than the net asset price for the shares; this has

also been pointed out by the *Republic of Poland*, the *United Kingdom* and the *Republic of Finland*. In the second place, the LSA provides that the directors' report must be accompanied by a report by an independent auditor.

26. The Kingdom of Spain submits that the Commission wrongly concludes from this that the second subparagraph of Article 159(1)(c) of the LSA allows an 'unfairly low price' to be fixed in comparison with the market value of the relevant shares. In actual fact, the first subparagraph merely sets up a rebuttable presumption that the 'fair value' of the shares of a listed company corresponds to their 'market value'. Nevertheless the general meeting may set an issue price of less than the 'market value' which does not cease to be fair if it appears justified in the light of the above-mentioned reports.

27. The *Kingdom of Spain*, the *Republic of Poland* and the *United Kingdom* also claim that no discrimination between existing shareholders and potential shareholders who join a listed company on the occasion of an increase in capital is possible because the two categories are not in a comparable situation. Because of stock exchange listing and fluctuations in the market for shares every shareholder acquires his shares at a different price, depending on the date of purchase and the respective stock exchange price. Therefore it is normal that many shareholders acquire their shares at a lower or higher price than the issue price.

28. The *Kingdom of Spain* and the *Republic of Poland* go on to stress that Article 159(1)(c) of the LSA requires the consent of the general meeting, which means that regard must be had to the quorum and the majority necessary for altering the statutes of the company.

29. In addition, the *United Kingdom* considers that there can be no question of different treatment because the price of a share is a purely financial factor. Even if unequal treatment were to be presumed, it is in any case justified by the company's financial interest in a capital increase.

30. The *Republic of Finland* takes the view that, to be able to judge whether there is

unequal treatment, all the circumstances of a share issue must be taken into account.

31. The *Republic of Poland* considers that the possibility of issuing new shares at a price below the market price should not be examined in the light of the requirement for equal treatment, but by reference to the principle that the company organs must act in the interest of the company itself.

B — *The second complaint*

32. The *Commission's* second ground of complaint is that Article 29(1) of Directive 77/91 has been infringed on the ground that Article 158(1) of the LSA gives not only the shareholders, but also the holders of convertible bonds a right of pre-emption for shares in the event of an increase in capital by consideration in cash.

33. Article 29(1) of the Directive requires new shares to be 'offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares'. As convertible bonds do not form part of a company's subscribed capital, the pre-emption right conferred by the LSA on holders of convertible bonds does not allow new shares to be offered to shareholders in proportion to their shareholding in the company. Consequently a provision of that kind is contrary to the directive's aim of preventing any risk of dilution of the existing shareholders' shares in the company. Furthermore, such a measure is not necessary to protect the interests of the holders of convertible bonds.

34. The *Kingdom of Spain* considers that a literal interpretation of Article 29(1) of Directive 77/91, as proposed by the Commission, contradicts the wording of the provision itself because, according to what it says, the shares must be offered 'on a pre-emptive basis' to the shareholders, which, however, does not mean they must be offered 'exclusively' to the shareholders. Furthermore, the Directive says nothing with regard to convertible bonds.

35. The *Kingdom of Spain* and the *Republic of Poland* on the other hand favour a purposive interpretation of Article 29(1) in order to protect not only the holders of convertible bonds but equally the potential new shareholders of the company and to maintain the value of the shares reserved for them. By this means the issuer is also prevented from influencing the (favourable) date of conversion.

36. Finally the *Republic of Poland* points out that the directive also aims to protect 'third parties', that is to say, persons who in certain circumstances may be treated as shareholders such as, for example, holders of convertible bonds. The directive aims at only a minimum degree of protection and leaves the Member States to adopt stricter protective measures.

C — *The third complaint*

37. The *Commission* claims that Article 293(2) of the LSA is contrary to Article 29(1) and (6) of Directive 77/91 for the same reasons as those in relation to the second complaint in so far as it confers a pre-emption right for convertible bonds not only on the shareholders, but also on the holders of earlier issues of convertible bonds.

38. The *Kingdom of Spain* and the *Republic of Poland* refer to the submissions that have already been made in relation to the second complaint and observe that there is no reason for a literal interpretation of the directive, as proposed by the Commission.

D — *The fourth complaint*

39. The *Commission* complains of a breach of Article 29(6) in conjunction with Article 29(4) of Directive 77/91 as the LSA does not provide for the general meeting to be able to pass a resolution on the withdrawal of the pre-emption right for convertible bonds.

40. The Commission observes that although Article 293(3) of the LSA refers to Article 158 of the LSA, it contains no reference to Article 159 of the LSA, which regulates precisely the possibility of withdrawing the pre-emption right. Even if systematic interpretation would allow the withdrawal of the shareholders' pre-emption right for convertible bonds, Article 293 of the LSA, as worded at present, gives rise to doubt and uncertainty for individual shareholders and therefore

cannot be regarded as properly implementing the directive, particularly as there is no proof whatever that the Spanish courts would actually agree with a systematic interpretation.

41. The *Kingdom of Spain* submits that a systematic interpretation of Article 293 of the LSA can lead to no conclusion other than the possibility that the general meeting can withdraw the shareholders' pre-emption right for convertible bonds because any other outcome would be totally illogical.

42. The *Republic of Finland* observes that the purpose of the directive is, in any event, only minimum harmonisation and that even if the general meeting were not able to withdraw the shareholders' pre-emption right for convertible bonds, that would not be contrary to Directive 77/91.

VI — Legal assessment

A — *Introductory remarks*

43. So far, 13 directives and proposals for directives have been dedicated to the harmonisation of the substantive company law of the Member States. [4] They include Directive 77/91, adopted on 13 December 1976, which aims to harmonise the Member States' legislation on the formation of public limited companies and on raising and maintaining a minimum amount of capital of the company and is therefore called the 'Capital Directive'. [5]

44. Article 29(1) of Directive 77/91 establishes at Community level the pre-emption right of shareholders when a company's capital is increased. However, it must be borne in mind that this right looks back to a

4 — On the basis of Article 44(2)(g) EC 10 harmonisation directives have so far been adopted in the narrower field of company law and have been implemented in national law (sees Kindler, P., *Münchener Kommentar zum BGB*, 4th ed., 2006, vol. 11, No 33; Behrens, P., *Handbuch des ELI-Wirtschaftsrechts,* vol. 1, Munich 2004, E. III, No 10, p. 10; Trstenjak, V./Kocbek, M., *Evropsko pravo gospodarskih družb,* Ljubljana 2004, pp. 31 to 50).

5 — The main importance of Directive 77/91 lies in establishing for the whole Community the continental European principle of fixed capital. As the shareholders are not personally liable for a company's debts, to protect creditors the company is required to have a minimum capital which is secured by strict rules on the maintenance of capital. Consequently the directive regulates not only the minimum amount of capital, but also, and more importantly, the procedure for providing cash and non-cash consideration, the acquisition by the company of its own shares, the withdrawal of shares and increasing and reducing the capital. However, the Directive aims not only to protect creditors, even in so far as it regulates the raising and maintenance of share capital and reserves. As shown by the second and fifth recitals of the preamble, it also aims to protect the shareholders. This purpose is served in particular by the provisions on resolutions of the general meeting for measures concerning capital, the duty to provide information on serious losses, the introduction of a pre-emption right for shareholders on capital increases and formulating the principle of equal treatment. In addition, the directive regulates vital matters in connection with the formation of a public company. The provisions concerning the minimum information to be given in the statutes, the instrument of incorporation or a separate document should be particularly noted (see Habersack, M., *Europäisches Gesellschaftsrecht*, 3rd ed., Munich 2006, Nos 3 and 4, p. 129 f; Lutter, M., *Europäisches Unternehmensrecht*, 4th ed., Berlin 1996, p. 109 et seq.).

long legal tradition in certain Member States, which began in the middle of the 19th century. [6] Writers on comparative law generally agree that this right originated in the legal system of the United Kingdom, but from the middle of the 20th century was significantly influenced, at least in the European context, by developments in the legal systems of Germany, France and Italy. [7] The harmonisation of the Member States' company law connected with Directive 77/91 led in turn to other Member States whose legal systems did not previously provide for a pre-emption right or did not give it mandatory effect having to adopt the pre-emption right, which helped to spread the concept and make it uniform beyond the borders of the European Union.

45. The pre-emption right entitles a shareholder to a number of new shares in proportion to his existing holding when the capital is increased, thereby enabling him to maintain the proportion of his total holding. [8] Consequently he has the right to hold the same percentage share of the company's capital as before. For that reason the shareholders' pre-emption right is traditionally regarded as an effective device for protecting individual and minority shareholders against the disadvantages arising from the issue of new shares in connection with an increase in capital. These include the loss of member rights of a financial nature (e.g. reduction in dividend entitlement) and policy nature, perhaps in the form of co-determination rights (e.g. restriction of voting rights) and other non-financial rights (e.g. information rights, right to call a general meeting). [9]

6 — For a study of the development of the pre-emption right in the legal systems of Germany, Italy, France, the United Kingdom, Belgium, Portugal and Switzerland, see Vásquez, Albert, D., *Revista de derecho de sociedades,* No 11 (1999), pp. 79 to 131.

7 — See Vásquez, Albert, D.,'El derecho de suscripción preferente en el Derecho Comunitario', *Revista de derecho mercantil,* No 230 (1998), p. 1693. At the same time the German Law on public companies substantially influenced the structure and also the substantive provisions of Directive 77/91, which caused the Member States of the common-law family of legal systems certain difficulties in implementation (see Trstenjak, V./ Kocbek, M., loc. cit. [footnote 4], p. 34; Schutte-Venstra, J. N., *Harmonisatie van het Kapitaalbeschermingsrecht in de EEG,* Apeldoorn 1991, p. 16).

8 — Natterer, J., *Kapitalveränderung der Aktiengesellschaft, Bezugsrecht der Aktionäre und sachlicher Grund,* Bielefeld 2000, p. 8; Peifer, K.-N., loc cit. [footnote 3], § 186 Law on public companies, No 16; *Lamy Sociétés Commerciales* (publ. by Jacques Mestre/Dominique Velardocchio), Rueil-Malmaison 2008, p. 1835. See Case C-42/95 *Siemens* [1996] ECR I-6017, paragraph 19, in which the Court examines the purpose of the principle of the pre-emption right, which is to prevent a reduction in the percentage holding of shareholders in the company's share capital.

9 — See, to that effect, Grechenig, K.,'Discriminating Shareholders through the Withdrawal of Pre-emption Rights?', *European Company and Financial Law Review*, vol. 4 (2007), No 4, p. 577. Yanes Yanes, P., 'Derecho de suscripción preferente', *Diccionario de Derecho de Sociedades* (publ. by Carmen Alonso Ledesma), Madrid 2006, p. 511 and Davies, P., *Gower and Davies' Principles of Modern Company Law*, 7th ed., London 2003, p. 631 et seq., point out that the pre-emption right performs two functions. First, it is intended to protect shareholders against the dilution of their financial share in the company. Secondly, the pre-emption right is intended to safeguard them against the loss of influence on the company's business. Pisani Massamormile, A., 'Aumento del capitale sociale', *Armonie e disarmonie nel diritto comunitario delle società di capitali*, vol. 1, Milan, 2003, p. 714, distinguishes between a management-related (in relation to the voting weight of each shareholder) and asset-related (with reference to each shareholder's right to a share of the profit) function of the pre-emption right.

46. Directive 77/91 adopts this legal idea by ensuring that members' and third parties' rights are safeguarded, in particular in operations for setting up companies and increasing and reducing company capital. In accordance with the aims of its legal basis in Article 44(2)(g) EC, the pre-emption right ensures a minimum level of protection for shareholders in all the Member States. [10]

B — *Examination of grounds of complaint*

1. First ground of complaint

47. In view of the procedural distribution of the burden of asserting facts and the burden of proof, it must first be observed that in proceedings for failure to fulfil obligations pursuant to Article 226 EC, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose. [11] It is incumbent on the Member State to contest substantively and in detail the information produced and the consequences thereof. [12]

48. The Commission's first ground of complaint alleges failure to comply with the requirement of equal treatment of shareholders laid down in Article 42 of Directive 77/91, in conjunction with Article 29(1) and (4) of the directive. The Commission sees a failure to comply with those Community provisions in the fact that the contested national provision, Article 159(1)(c) of the LSA, in the event of an increase in capital and the withdrawal of the pre-emption right, permits an issue price to be set for new shares which could be substantially lower than their market value.

49. Article 159(1)(c) of the LSA prescribes certain conditions for the withdrawal of the pre-emption right. It states that the price of

10 — Joined Cases C-19/90 and C-20/90 *Karella* [1991] ECR I-2691, paragraphs 25 and 30, and Case C-381/89 *Epas* [1992] ECR I-2111, paragraphs 27 and 32.

11 — Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 27; Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 35; Case C-263/99 *Commission* v *Italy* [2001] I-4195, paragraph 27; Case C-68/99 *Commission* v *Germany* [2001] ECR I-1865, paragraph 38; C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 102; and Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6.

12 — Case 272/86 *Commission* v *Greece* [1988] ECR 4875, paragraph 21.

the shares to be issued must correspond to the 'fair value' shown in the directors' report referred to in Article 159(1)(b) of the LSA. In the case of listed companies, the fair value means the market value, unless a different value can be justified.

50. However, as the Commission observes, the second subparagraph of Article 159(1)(c) of the LSA provides for a significant exception for listed companies in that the general meeting may resolve to issue new shares at any price, provided that it exceeds the proportionate value of the company's assets. In this connection the Commission points out that the value of a share may be much less than its market value, a value which is presumed by the LSA itself to correspond to the market value and, consequently, the 'fair value' of the share. The Commission concludes from this that the Spanish legislature has expressly empowered the general meeting to withdraw the pre-emption right and to issue new shares below the market value as it thinks fit, and therefore below the value regarded as 'fair' by the Spanish legislature.

51. The Commission regards this provision as manifest discrimination against shareholders who acquired their shares at the market price and in favour of new shareholders who acquire their shares at less than the market price. In the Commission's opinion, the former suffer a financial disadvantage in so far as they would have to accept a reduction or dilution of the value of their shares as a result of the 'discount' given to the new shareholders.

52. However, in reply to the Commission's argument, it must be observed that, however questionable it may appear at first sight on grounds of shareholder protection, [13] the second subparagraph of Article 159(1)(c) of the LSA is not inconsistent with the provisions of Directive 77/91.

53. As mentioned at the outset, Directive 77/91 aims to provide only a minimum level of protection for shareholders throughout the Community. This follows, first, from the normative statement of its legal basis and, secondly, from the second recital of the preamble to the Directive, which

13 — Grechenig, K., *Spanisches Aktien- und GmbH-Recht — Das einstufige Verwaltungssystem in Beziehung zur Hauptversammlung und zu Gesellschafterrechten*, Vienna 2005, p. 136, describes the second subparagraph of Article 159(1)(c) of the LSA as questionable on grounds of shareholder protection and refers to the present action against Spain for failure to fulfil its obligations, but does not conclude that there was discriminatory treatment of shareholders.

states that 'in order to ensure minimum equivalent protection for … shareholders..., the coordination of national provisions relating to the … increase … of their capital is particularly important'. [14]

54. It must also be noted that Directive 77/91 includes no provisions requiring new shares to be issued at the 'market price' or even at a 'fair price'. This is all the more remarkable in so far as the directive otherwise contains detailed rules, for example, on the constitution of public companies.

55. The only provision of the directive that deals with the issue price of shares and is therefore of some relevance to the present action is Article 8, which states that 'shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par'. On the other hand, as the United Kingdom Government correctly notes, the directive says nothing as to the price at which the new shares may be offered in the event of a capital increase.

56. All that follows from Article 29(4) of Directive 77/91 is that the administrative or management body is required to 'justify the proposed issue price' in its written report to the general meeting. Therefore Article 29(4) leaves the final decision on the issue price to the general meeting, [15] without laying down any further requirements.

57. Moreover, the second subparagraph of Article 159(1)(c) of the LSA reveals no case of discrimination against shareholders. The requirement of equal treatment in Article 42 of Directive 77/91 corresponds in its normative statement to a prohibition of discrimination which, as the Court has consistently

14 — Vásquez Albert, D., loc. cit. [footnote 7], p. 1714, points out that the Member States' legal systems generally lay down stricter rules than Community law does. In the author's opinion, the nature of Directive 77/91 as a minimum protection standard allows the Member State to adopt stricter rules. Natterer, J., 'Bezugsrechtssausschluss und zweite gesellschaftsrechtliche Richtlinie', *Zeitschrift für Wirtschaftsrecht*, 1995, p. 1483, also regards Directive 77/91 as a minimum protection standard and refers to the second recital in that connection.

15 — According to Article 25(1) of Directive 77/91, every increase in capital must be decided upon by the general meeting.

held, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [16]

58. The Commission considers that the second subparagraph of Article 159(1)(c) of the LSA does not ensure the equal treatment of existing shareholders and new shareholders. In other words, in the present case the Commission evidently presumes that there is different treatment of similar situations However, it must be observed that the Commission places allegedly unequal treatment in the foreground of the first complaint, [17] whereas the Commission's arguments concentrate on setting out the potentially adverse financial consequences of a share issue below the market price for the existing shareholders. [18] Consequently the Commission omits to argue and to substantiate adequately to what extent the existing shareholders and the new shareholders are in one and the same situation. This is all the more important in that Article 42 of Directive 77/91 requires the laws of the Member States to ensure equal treatment of all shareholders, provided that they are 'in the same position'. Consequently the Commission does not consider in detail whether the first requirement of the principle of equality is fulfilled. [19] The Spanish Government and also the United Kingdom Government rightly complain of this.

59. Consequently the Commission has adduced no evidence whatever to show how far the requirement of equal treatment in Article 42 of Directive 77/91 should be applied to the present case. Mere criticism of a national provision which may under certain circumstances be financially disadvantageous (and which was not proved by the Commission with reference to specific grounds) is no substitute for asserting and proving the existence of objectively unjustified unequal treatment of comparable situations. Therefore the Commission has not fulfilled its obligation to assert facts and to prove them.

60. Apart from that, it is questionable whether, on the basis of its very vague normative statement, [20] the equal treatment

16 — Joined Cases 66/79, 127/79 and 128/79 *Salumi and Others* [1980] ECR 1237, paragraph 14; Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39; Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 49; and Case C-182/03 *Belgium* v *Commission* [2006] ECR I-5479, paragraph 170.

17 — See paragraph 34 of the reply.

18 — See paragraph 23 of the application and paragraphs 10 and 22 of the reply.

19 — In the opinion of Rossi, M., in Calliess/Ruffert (publ.), *Kommentar zu EUV/EGV*, 3rd ed., 2007, Article 20 Grundrechtecharta, paragraph 19, p. 2629, the general principle of equality is characterised by a two or three-stage test. The first stage is always to determine whether there is unequal treatment of comparable situations (or similar treatment of situations which are different). The second stage is to ascertain whether that unequal treatment (or equal treatment) is possibly justified. There may also be a test of proportionality.

20 — Grechenig, K., loc. cit. [footnote. 9], p. 581, complains of the vague normative statement of the equal treatment provision of Article 42 of Directive 77/91. Hefermehl, W./Bungeroth, E., *Aktiengesetz*, vol. 1, Munich 1984, § 53 a, paragraph 13, p. 14, criticise its lack of precision. Grundmann, S., *Europäisches Gesellschaftsrecht*, Heidelberg 2004, paragraph 325, p. 146, observes, with regard to the dogmatism of the provision, that the requirement of equal treatment applies above all to questions concerning capital, but is worded in general terms. Consequently it needs to be amplified by detailed rules.

provision of Article 42 of Directive 77/91 can be applied to such a specific situation as setting the issue price of new shares in the event of an increase in capital.

61. Furthermore, the principle of equal treatment of shareholders, which is recognised in the legal systems of several Member States of the Community, is not, according to the prevailing opinion, construed as an obligation on the part of the company to treat shareholders in the same way, but is understood to mean that unequal treatment needs sufficiently objective justification. [21] The Commission's aim of preventing the issue price of new shares from being set below the price paid for shares by existing shareholders amounts in the final analysis to strict implementation of the principle of equal treatment which, as we have already seen, is, for want of clear legal guidance, neither required by the directive nor in accordance with actual practice in companies, particularly as the value and therefore the price of the shares of a listed company will always differ as a result of stock market fluctuations.

62. As the Spanish Government and the United Kingdom Government correctly observe, this means that every shareholder will have acquired his shares at a different price, depending on the date of purchase and the respective market quotation. Consequently there will always be shareholders who have acquired their shares at a lower or higher price than the issue price. For that reason the argument that all shareholders are in the same situation cannot succeed. It must also be noted that the price of shares depends on many economic factors such as the financial situation of a particular company and also the world economy generally. Prices are also decisively influenced by the development of the market, that is to say, supply and demand. Consequently the differences appearing between existing and new shareholders with regard to the respective purchase price are not due to unequal treatment attributable to the company, [22] but are the result of circumstances typical of financial markets.

21 — With regard to the wording of Paragraph 53a of the Law on public companies ('unter gleichen Voraussetzungen' (under equal conditions)), which implements Article 42 of Directive 77/91 in German law, Hefermehl, W./Bungeroth, E., *loc. cit.* (footnote 20), Paragraph 53 a, paragraphs 13 and 14, p. 14, point out that this provision leaves room for appropriate differentiation which would avoid the rigidity of the impractical requirement for equal treatment. Consequently these commentators interpret that provision as a prohibition of arbitrary acts. Similar views are expressed by Grundmann, S., loc.cit., [footnote 20], paragraph 325, p. 146; Bujalka, E., *Der Schutz von Minderheitsaktionären bei Umstrukturierungen im deutschen und slowakischen Aktienrecht*, Frankfurt am Main 2006, p. 56; Castellano Ramírez, M. J., 'Aumento del capitale sociale', *Armonie e disarmonie nel diritto comunitario delle società di capitali*, vol. 1, Milan 2003, p. 837. As Vásquez Albert, D., *Comentarios a la Ley de Sociedades Anónimas* (publ. by Ignacio Arroyo and José Miguel Embid), vol. II, Article 159, p. 1671 f., explains, there is no express requirement in Spanish law for equal treatment, but it has been developed mainly by legal doctrine on the basis of the idea behind Article 42 of Directive 77/91. In that writer's opinion, the principle of equal treatment does not require all shareholders to be treated in the same way. It merely prohibits arbitrary or discriminatory unequal treatment, but not unequal treatment which is objectively justified. This writer considers that the principle of equal treatment would be breached in the event of a capital increase if some of the new shares were issued to only some of the shareholders, excluding the other shareholders and shares.

22 — However, this would be a precondition for the applicability of the requirement of equal treatment in company law because in principle it applies only to the social relations between a public company and its shareholders (see Hefermehl, W./Bungeroth, E., loc. cit. [footnote 20], Paragraph 53a, No 19, p. 16).

63. In response to the Commission's complaint that the issue price of new shares could be set below the market value, it must be observed, first, that the Commission's argument is one-sided because, to all appearances, the Commission assumes that unequal treatment as between existing and new shareholders is conceivable only where the price at which existing shareholders acquired their shares corresponded exactly to the market value, whereas only the new shareholders profit from a discount. On the other hand, the Commission does not state its view on the possible applicability of the principle of equal treatment to the equally possible variants of that situation, where third parties acquire the new shares at a price exceeding the market value or the existing shareholders acquired their shares below the market value.

64. It must also be borne in mind that it is perfectly possible to set the issue price of new shares below the market value not only under the contested Spanish rules, but also under the relevant legislation of other Member States, which the Commission expressly acknowledges in its reply. [23] This applies, for example, to the legal systems of Germany, [24] France, [25] Italy, [26] Slovenia [27] and the United Kingdom. [28]

65. In addition, the Spanish and the Polish Governments argue that Directive 77/91 and the LSA certainly provide for safeguards to prevent an issue price being set which is too

23 — See paragraph 16 of the reply.

24 — Under the fourth sentence of Paragraph 186(3) of the Law on public companies, the issue price must not be 'substantially less' than the market price. Paragraph 255(1) of the Law allows a capital increase for a consideration to be challenged. According to this provision, a challenge may be based, where the shareholders' pre-emption right is partly or entirely withdrawn, on the argument that the issue price arising from the resolution to increase the capital or the minimum price below which the new shares should not be issued is 'unreasonably low'. It may be concluded from this that a discount within narrow limits is certainly possible in German law (see, to that effect, Schlitt, M./Seiler, O., (Aktuelle Rechtsfragen bei Bezugsrechtsemissionen), *Wettbewerb in Recht und Praxis* [2003], vol. 45, p. 2176).

25 — Article 7 of Decree 2005-112, 10 February 2005, amending Article 155-5 of Decree 67-236, 23 March 1967, concerning commercial companies and the transferable securities issued by commercial companies, *Journal Officiel de la Republique Française* No 36, 12 February 2005, p. 2404, text No 30, provides that the issue price must not be less than the average price of the market quotation during the last three stock exchange sessions before the price is set and, as the case may be,'allowing a discount of not more than 5%'.

26 — Article 2441(6) of the Italian Civil Code (*Codice civile*) provides that the issue price must take into account the stock exchange quotation of the last six months.

27 — Under Art. 400(2) of the Slovene Law on commercial companies (*Zakon o gospodarskih družbah*), a challenge may be based on the submission that the issue price arising from the resolution to increase the capital or the minimum price below which the new shares are not to be issued is 'unreasonably low' (see Kocbek, M., *Veliki komentar Zakona o gospodarskih družbah / ZGD-1* [publ. by Marijan Kocbek], vol. 2, Ljubljana 2007, Article 400, p. 738 et seq.).

28 — According to the Guidelines of the so-called Pre-emption Group, to which the London Stock Exchange and various listed companies and banks belong, discounts of 5% of the market value are normally permissible. However, larger discounts are not ruled out (see Myners, P., *The impact of shareholders' pre-emption rights on a public company's ability to raise new capital*, 8 February 2005, p. 47, available at http://www.berr.gov.uk/files/file28436.pdf). The Guidelines are not legally binding, but are generally obeyed (see Gower and Davies, *The Principles of Modern Company Law*, 7th ed., London 2003, p. 637).

far below the market value. This argument merits consideration. As already mentioned, Directive 77/91 leaves that decision to the general meeting. [29] Under Article 29(4) of the directive, the administrative or management body must present to the general meeting a written report indicating the reasons for restriction or withdrawal of the right of pre-emption and justifying the proposed issue price. However, Article 159 of the LSA goes further than these Community law requirements in that it requires in addition a report drawn up by an auditor appointed for the purpose by the Companies Registry which must include the following particulars: (1) an assessment of the fair value of the company's shares, (2) an assessment of the value of the pre-emption rights which it is proposed to withdraw and (3) a check on the accuracy of the information in the directors' report.

66. Contrary to the Commission's argument, the decision on withdrawing the pre-emption right and the nature [price] of the issue is not entirely within the discretion of the general meeting. Like the reporting duty under Article 29(4) of Directive 77/91, the additional reporting obligations introduced by national law aim to ensure that, in the interests of the shareholders and creditors, the decision is objectively justified. [30] Consequently the general meeting must necessarily make that decision in the interest of the shareholders themselves on the basis of the reports presented to the meeting, regardless of whether the reports are legally binding or not. Therefore the strict requirements for the issue of new shares [31] laid down by Article 159 of the LSA serve the protection of the shareholders and cannot be dismissed as mere procedural provisions. [32] They should rather be seen as additional safeguards to prevent an unreasonably low issue price from being set.

29 — See paragraph 56 of this Opinion.

30 — Likewise Bagel, F., *Der Ausschluss des Bezugsrechts in Europa*, Cologne 1999, p. 352, who states that Article 29(4) of Directive 77/91, by introducing the reporting obligation, presupposes that the decision of the general meeting will be objectively justified.

31 — In my opinion, these provisions are consistent with Community law as they lay down stricter conditions for the safeguarding the shareholders' pre-emption rights. According to the Court's case-law, that is a prerequisite of Directive 77/91 for the adoption of stricter provisions by the Member States. This follows from *Siemens* v *Nold* (cited in footnote 8, paragraph 22), the subject of which was a reference for a preliminary ruling from the German Bundesgerichtshof on the question of whether the case-law of the Court of Justice on the withdrawal of the right of pre-emption was consistent with Community law. Since 1978, i.e. after Directive 77/91 came into force, the Bundesgerichtshof had struck a balance between minority and majority interests and laid down a requirement for the withdrawal of pre-emption rights to be necessary and proportionate. The Court replied to the question in the affirmative on the ground of compatibility with the protective aim of the Directive.

32 — A similar view is expressed by Grechenig, K., *loc. cit.* [footnote 13], pp. 135 to 137, who ascribes to shareholder protection the requirements laid down in Article 159 of the LSA in connection with the withdrawal of the pre-emption right, the company's obligation to report to the general meeting and the fixing of the issue price. Bagel, F., *loc. cit.* [footnote 29], p. 353, points out that the Member States have laid down further formal and substantive requirements for withdrawing pre-emption rights in addition to those in Article 29(4) of Directive 77/91. However, in their opinion, the more stringent requirements concerning the reporting obligation and the additional reports are not contrary to the Directive, but help precisely to give the shareholders and also the creditors greater protection. This is also the opinion of Henze, H., 'Das Richtlinienrecht und der Schutz der Minderheitsgesellschafter und Gläubiger im deutschen Aktienrecht — verdeckte Sacheinlage, Bezugsrecht und Verschmelzungsbericht', *Systembildung und Systemlücken in Kerngebieten des europäischen Privatrechts*, 2000, p. 249, who states that the purpose of Article 29(4) of Directive 77/91 is not confined to regulating formal matters, but also takes into account substantive factors serving to protect minority shareholders, such as the directors' duty to present to the general meeting a report on the reasons for the withdrawal of the right of pre-emption in the case of a cash capital increase and to justify the proposed issue price.

67. Therefore it does not appear that Article 159 of the LSA could be in any way contrary to Article 42 in conjunction with Article 29(1) and (4) of Directive 77/91.

68. Consequently the first complaint must be dismissed as unfounded.

2. The second complaint

69. With its second complaint, the Commission claims that Spain failed to comply with Article 29(1) of Directive 77/91 on the ground that, where the capital is increased by consideration in cash, Article 158(1) of the LSA grants a pre-emption right not only to the shareholders, but also to the holders of convertible bonds.

70. I must agree with the Commission that, in so far as Article 158 of the LSA grants a pre-emption right also to the holders of convertible bonds, unlike Article 29(1) of Directive 77/91, which takes account only of the shareholders, [33] this contradicts the provision in the Directive, at least according to the wording, [34] which suggests a failure to comply with Community law.

71. The Spanish Government concedes that there is a contradiction in the wording, [35] but replies that Article 29(1) speaks of offering new shares to the shareholders 'on a pre-emptive basis' and not 'exclusively'. Furthermore, the Spanish Government rejects an interpretation which adheres to the wording and it advocates instead an interpretation based on the aims of Directive 77/91 and on the company's interests, which would include the bondholders in the category of persons entitled under Article 29(1).

33 — With regard to comparative law, it should be observed that Article 29(1) of Directive 77/91 was implemented in Germany by Paragraphs 186 and 221(4) of the Law on public companies of 6 September 1965 (BGBl. I p. 1083, last amended by Article 11 of the Law of 16 July 2007 BGBl. I p. 1330) and in Austria by Paragraphs 153 and 174 of the Federal Law of 31 March 1965 on public companies (BGBl. 98/1965, last amended by BGBl. I 42/2001). Under those provisions, only the shareholders have a right of pre-emption in relation to new shares and convertible bonds.

34 — Vásquez Albert, D., *loc. cit.* (footnote 7), p. 1698; Pisani Massamormile, A., *loc. cit.* (footnote 9), p. 714, and Castellano Ramírez, M. J., *loc. cit.* (footnote 21), pp. 825, 829, correctly note that, unlike Article 158(1) of the LSA, Article 29(1) of Directive 77/91 does not grant a right of pre-emption to the holders of convertible bonds. Castellano Ramírez explains that the extension of this right to the bondholders was a decision of the Spanish legislature itself which was not made with a view to the implementation of Directive 77/91.

35 — See paragraph 39 of the defence.

72. I consider that the interpretation proposed by the Spanish Government is not only contrary to the clear wording of Article 29(1). There is likewise no support for it on the basis of systematic or purposive interpretation of that provision.

73. Article 29(1) of Directive 77/91 clearly prescribes that, whenever the capital is increased, the shares must be offered on a pre-emptive basis to shareholders 'in proportion to the capital represented by their shares'. As the Commission correctly notes, convertible bonds do not form part of a company's capital. It follows that a proportionate issue of shares to bondholders is impossible.

74. Contrary to the opinion of the Spanish Government, the word 'shareholder' within the meaning of Article 29(1) cannot be interpreted as including holders of convertible bonds. On the contrary, a comparison of Article 29(1) with Article 29(6) shows that, when regulating the pre-emption right of shareholders, the Community legislature was well aware of the existence of convertible bonds and similar securities, particularly as Article 29(6) refers to 'securities which are convertible into shares'. This provision would have been unnecessary if the holders of convertible bonds were also to have been regarded as shareholders.

75. As the Spanish Government correctly observes, Article 29(1) does not refer to an 'exclusive' offer of new shares to shareholders. That is not the meaning and purpose of the shareholders' pre-emption right which is the subject of the present proceedings. To that extent the Spanish Government's submissions are mistaken. Rather it is a matter of conferring a legal status by virtue of law, [36] which allows the shareholders, in the event of an increase in capital, to acquire the new shares on a preferential basis. The directive imposes on the Spanish Government an obligation, when implementing it in national law, to create the legal conditions for giving effect to their preferential status. This corresponds to the government's duty to ensure the practical effectiveness of directives, taking account of their purpose. [37] However, these legal conditions are not fulfilled if bondholders can dispute the shareholders' pre-emption rights, so that those rights, which are expressly protected by the directive, cannot be exercised. [38]

36 — Natterer, J., *loc.cit.* (footnote 8), p. 68, considers that the pre-emption right does not require legislative enactment. From the viewpoint of legal theory, it is a natural right of the members of a legal person which exists on the basis of capital.

37 — It has consistently been held that the implementation of a directive must actually ensure the full application of the directive (see, to that effect, Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 31; Case C-214/98 *Commission* v *Greece* [2000] ECR I-9601, paragraph 49; and Case C-62/00 *Marks & Spencer* 2002 [ECR] I-6325, paragraph 26).

38 — See, for comparison, the legal position in Germany and Austria. Under Paragraph 187 of the German and Paragraph 154 of the Austrian Law on public companies, the holders of convertible bonds may be granted the right to subscribe for new shares, but subject only to the subscription right of the shareholders. This rule helps to ensure that the shareholders' subscription right is not prejudiced.

76. Article 158(1) of the LSA is contrary to the purpose of Article 29(1) of Directive 77/91, which is to safeguard the shareholders' pre-emption right. As already mentioned, that right aims to protect shareholders against dilution of their share in the capital of a public company. [39] This aim would be frustrated if bondholders are also given a pre-emption right and compete with shareholders when new shares are issued in connection with a capital increase. [40]

77. The exercise of that right enables the bondholders to obtain a shareholding without having to convert their bonds into shares beforehand. This is likely to result in dilution of the shareholders' shares to the advantage of the bondholders, although the latter may not fulfil the conditions laid down by the general meeting for the conversion of their bonds. The risk of a reduction of shares and the consequent deterioration in the position of the shareholders is all the more likely if the bondholders satisfy the conditions for the conversion of their bonds into shares, particularly as they then have two ways of acquiring shares in the company. This would result in preferential treatment of the bondholders at the expense of the shareholders. [41]

78. It follows from what has been said that Article 158(1) of the LSA is contrary to the wording and also to the meaning and purpose of Article 29(1) of Directive 77/91 in that it grants not only the shareholders, but also the holders of convertible bonds, a pre-emption right to shares in the event of a increase in the capital by consideration in cash.

79. Consequently the second ground of complaint is well founded.

3. The third complaint

80. With its third ground of complaint, the Commission claims a failure to comply with Article 29(6) in conjunction with Article 29(1)

39 — See paragraph 45 above.

40 — Grechenig, K., *loc. cit.* [footnote 9], No 4, p. 583, considers that shareholders' pre-emption rights are clearly curtailed if other investors have equivalent rights. Castellano Ramírez, M. J., loc.cit. [footnote 21], p. 829, footnote 135, considers that the shareholders may be prejudiced if, because of competition with the bondholders, their rights to acquire the new shares are diminished. This writer refers to the criticism of the provision in question by Spanish commentators.

41 — Alonso Espinosa, F. J., *Comentarios a la Ley de Sociedades Anónimas* (publ. by Ignacio Arroyo and José Miguel Embid), volume III,'Articles 292, 293 and 294', p. 2815, also points out the risk of preferential treatment of bondholders at the cost of the shareholders.

of Directive 77/91 on the ground that Article 293(2) of the LSA grants a pre-emption right for convertible bonds not only to the shareholders, but also to the holders of convertible bonds pertaining to earlier issues.

81. As already found, Article 29(1) of the same directive gives shareholders alone a right to preferential subscription for shares. It also follows from Article 29(6) that paragraphs (1) to (5) of Article 29 apply to the issue of all securities which are convertible into shares. This reference to Article 29(1) is to be interpreted as meaning that Directive 77/91 confers on shareholders alone a preferential right to subscribe for convertible bonds. [42]

82. In contrast, Article 293(2) of the LSA provides that the holders of earlier issues of convertible bonds have the same right. Accordingly here again it must be said that the national legislature goes further than the provisions of Directive 77/91. In any case, in going beyond the regulatory framework laid down by Community law, Article 293(2) of the LSA fails to comply with Directive 77/91 as its effect is prejudicial to the shareholders.

83. As in the situation described in relation to the second ground of complaint, there is competition also to acquire convertible bonds between the shareholders and the holders of earlier issues of such bonds. Therefore my observations concerning the second ground of complaint can be applied here.

84. Consequently the third ground of complaint is well founded.

4. The fourth complaint

85. With its fourth ground of complaint, the Commission claims failure to comply with Article 29(6) in conjunction with Article 29(4) of Directive 77/91 on the ground that the LSA does not provide that the general meeting may resolve to withdraw the right to preferential subscription for convertible blonds.

86. Article 29(4) of Directive 77/91 provides that the general meeting may, by resolution, withdraw the shareholders' pre-emption right, subject to certain conditions. Under Article 29(6), this provision also applies to the shareholders' pre-emption right, in relation to the issue of securities which are convertible into shares.

42 — To that effect, see Vásquez Albert, D., *loc. cit.* [footnote 7], p. 1698.

87. With regard to the implementation of the abovementioned Community law provisions in Spanish law, it must be said that Article 159 of the LSA expressly provides for the right of the general meeting to resolve to withdraw the pre-emption right. On the other hand, Article 293 of the LSA, which grants the shareholders a right of pre-emption for convertible bonds, does not confer upon the general meeting the same right to withdraw the pre-emption right in relation to those securities. Whereas Article 293(3) of the LSA states that the provisions of Article 158 of that law are to apply to the preferential right of subscription for convertible bonds, this reference does not extend to Article 159 of the LSA. Against this background, I must agree with the Commission that, as a Member State measure implementing Community law, the Spanish LSA differs from the requirements of the directive, at least so far as the wording is concerned.

88. The foregoing conclusion cannot be refuted by the Spanish Government's argument that systematic interpretation of the provisions of the LSA is needed in order to conclude that Spanish company law provides for the pre-emption right to be withdrawn in relation to convertible bonds. In particular, the Spanish Government should explain why Article 293(3) of the LSA does not refer directly to the central rule in Article 159 concerning the withdrawal of the pre-emption right, which would have supported its interpretation.

89. I am aware that, with regard to the question whether a provision of national law is contrary to Community law, it is necessary to take into account not only the wording of that provision but also how it is interpreted by the national courts. [43] Because the case-law of a Member State reproduces the interpretation of the law with binding effect for all persons, that case-law is the essential criterion for judging whether the implementation and interpretation of national law conforms with Community law. However, the Spanish Government has made no submissions which could have indicated a supreme court interpretation of the LSA which conforms with Community law or indicated even the predominant opinion among legal theorists. [44] Instead, the Spanish Government has relied on its own interpretation of the law, without entirely dispelling the remaining doubts concerning the correct implementation of the directive. Consequently the Spanish

43 — Lenaerts, K./Arts, D./Maselis, I., *Procedural Law of the European Union*, 2nd ed., London 2006, No 5-056, p. 162, point out that the scope of national laws, regulations and administrative provisions must be judged in the light of the interpretation placed upon them by national courts. As already mentioned in footnote 27 of this Opinion, the interpretation of national law in conformity with Community law was the subject of a reference by the German Bundesgerichtshof for a preliminary ruling in Case C-42/95 *Siemens* v *Nold*.

44 — In fact some Spanish commentators appear to have taken the view that the pre-emption right to convertible bonds could not, because of the missing reference to Article 159 of the LSA in Article 293(3), be withdrawn (see, for example, Vicent Chulia, F., *Compendio crítico de derecho mercantil*, 3rd ed., Barcelona 1991, p. 800). At the present time, the majority of Spanish legal theorists is evidently in favour of a systematic and purposive interpretation of those rules or at least the application by analogy of Article 159 of the LSA to the pre-emption right of holders of convertible bonds (see Alonso Espinosa, F. J., *loc. cit.* [footnote 40], Article 293, p. 2818 f.; Grechenig, K., *loc. cit.* [footnote 9], No 4, p. 584). However, it is well known that the application of an analogy presupposes the existence of a lacuna in the law. The Commission's application complains precisely of the existence of a lacuna.

Government cannot be said to have substantiated adequately its submissions according to the procedural rules concerning the burden of asserting and proving facts in support.

90. Regardless of this, I share the Commission's view that the abovementioned Member State's provisions in any case lack a minimum degree of certainty and clarity and therefore do not meet the requirements of legal certainty and clarity.

91. It is true that the implementation of a directive in national law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation. [45] However, the Court has consistently held that, in order to ensure that directives are fully applied in fact as well as in law, Member States must not only bring their law into conformity with Community law, but also create a situation which is sufficiently precise, clear and transparent to allow individuals to know their rights and rely on them before the national courts. [46] As Article 293(3) of the LSA does not make it clear beyond doubt that the general meeting may resolve to withdraw the preferential right of subscription for convertible bonds, the Spanish legislature has not correctly implemented Article 29(6) in conjunction with Article 29(4) of Directive 77/91.

92. Consequently this ground for complaint is also well founded.

VII — Costs

93. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the Kingdom of Spain has mainly failed in its submissions, it must be ordered to pay the costs.

45 — Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, paragraph 25; Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 8; and Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 18.

46 — See, to that effect, in relation to directives, Case C-360/87 *Commission* v *Italy* [1991] ECR I-791, paragraph 12, and Case C-220/94 *Commission* v *Luxembourg* [1995] ECR I-1589, paragraph 10. See also Case C-162/99 *Commission* v *Italy* [2001] ECR I-541, paragraphs 22 to 25, and Case C-478/01 *Commission* v *Luxembourg* [2003] ECR I-2351, paragraph 20.

VIII — Conclusion

94. Therefore I propose that the Court should:

— declare that, in failing to implement correctly Directive 77/91, the Kingdom of Spain has failed to fulfil its obligations arising from that directive, in particular those arising from:

(a) Article 29(1) thereof, in that it grants not only the shareholders, but also the holders of convertible bonds a pre-emption right for shares in the event of an increase in capital by consideration in cash;

(b) Article 29(6) in conjunction with Article 29(1) thereof, in that it grants not only the shareholders, but also the holders of earlier issues of convertible bonds a pre-emption right for convertible bonds;

(c) Article 29(6) in conjunction with Article 29(4) thereof, in that it does not provide that the general meeting may resolve to withdraw the pre-emption right for convertible bonds;

— for the remainder, dismiss the application as unfounded;

— order the Kingdom of Spain to pay the costs.