OPINION OF ADVOCATE GENERAL TESAURO
delivered on 19 September 1996 *

1. The preliminary question in this case, which has been raised by the Bundesgerichtshof (Federal Court of Justice), is concerned with the interpretation of Article 29(1) and (4) of the Second Council Directive (77/91/EEC) of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 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 [1] ('the Second Directive').

In particular, the Bundesgerichtshof raises the question of the compatibility with the aforementioned provisions of case-law of that court according to which a resolution of the general meeting withdrawing the shareholders' right of pre-emption in respect of shares newly issued upon an increase in capital for consideration *in kind* is lawful only if certain conditions are satisfied; those conditions appear to be stricter than those imposed by the directive itself in the event of withdrawal of the right of pre-emption, albeit in relation to the only eventuality governed by the directive, that of an increase in capital by consideration in *cash*.

Relevant Community legislation and the national law

2. Article 29(1) of the Second Directive provides that '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'. [2]

Under Article 29(4), the right of pre-emption may be withdrawn or restricted only by decision of the general meeting (acting in accordance with the rules for a quorum and a majority laid down in Article 40 [3]). In that event, the administrative or management body is required to present to the meeting 'a written report indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price'.

In contrast, the directive contains no provisions relating to the right of pre-emption in

* Original language: Italian.

1 — OJ 1977 L 26, p. 1.

2 — My emphasis.

3 — A majority of not less than two-thirds of the votes attaching to the securities or the subscribed capital represented or, if the national law so provides, a simple majority of the votes when at least half the subscribed capital is represented.

respect of shares paid up by contributions *in kind*.

3. It emerges from the order for reference that the relevant national legislation makes it compulsory for the newly issued shares to be offered to any members so requesting, both where the subscribed capital is increased by consideration in cash and where it is increased by considerations in kind. [4]

The right of pre-emption may be withdrawn by resolution of the general meeting subject to the 'management committee' [5] submitting to the general meeting a written report giving the reasons for withdrawing the right and the issue price of the new shares. [6]

The case-law of the Bundesgerichtshof

4. By virtue of the case-law at issue in these proceedings, the legality of the resolution of the general meeting withdrawing the shareholders' right of pre-emption is dependent upon compliance with conditions additional to those laid down by the Second Directive.

In particular, in a judgment of 13 March 1978 [7] concerning an increase in capital by consideration in kind, the Bundesgerichtshof held that the right of pre-emption may be withdrawn only if, having regard to the resulting consequences for shareholders from whom it was withdrawn, such a measure is justified on objective grounds in the company's interest and that, in order to review whether that is so, the respective interests of the shareholders should be balanced and it should be assessed whether the measure itself is proportionate to the aim pursued.

In a subsequent judgment of 19 April 1982 [8] the Bundesgerichtshof confirmed that judgment and further held that, where the general meeting resolves to withdraw the right of pre-emption in the same resolution by which it authorizes the directors to increase the capital, the aforementioned requirements must actually be met and be clear at that time in order that the general meeting can take a definitive decision in that connection.

Facts and the preliminary question

5. On 28 March 1991 the general meeting of shareholders of Siemens AG ('the respondent') authorized the 'management board' to

4 — Paragraph 186 of the Aktiengesetz (Companies Law) read together with Paragraph 183.

5 — This is the management body of share companies under German law. For present purposes, it can be equated with the board of directors of a share company coming under other jurisdictions.

6 — See Paragraph 186 of the Aktiengesetz, which also lays down further formal conditions.

7 — BGHZ 71, 40.

8 — BGHZ 83, 319. That case, in common with the one at issue in these proceedings, was concerned with an increase in capital carried out by means of a mandate given to the directors.

increase the company's nominal capital by 1 March 1996 to a maximum amount of DM 300 million by issuing ordinary shares for consideration in cash or in kind.

The resolution, by which the general meeting decided at the same time to amend the statutes, expressly provided for the withdrawal of the shareholders' right of pre-emption in respect of the newly issued shares.

6. The report by which the 'management committee' sought the general meeting's authorization to effect the increase in capital referred to the management's need to have access to the company's shares without having to have recourse to the stock exchange. The report also indicated that the increased capital was to be used for two purposes: 'In the first place, the aim is to enable shares to be offered to employees as in past years. Secondly, it is intended to afford the company the possibility of acquiring holdings in appropriate individual cases in return for ordinary shares in Siemens AG. The proposed withdrawal of the shareholders' right of pre-emption takes this into account.'

Mr Nold ('the appellant'), a minority shareholder in the respondent company, challenged the resolution of the general meeting by an action in which he asked that it be set aside. In support of his action, he claimed, *inter alia*, that the withdrawal of the shareholders' right of pre-emption in respect of the new shares was not justified in fact, and that no reasons were given for the withdrawal in the resolution or in the report. He further maintained that the resolution and the report contained no particulars of the issue price of the shares, even though this was required by law.

7. Ruling at last instance, the Bundesgerichtshof held that application of the aforementioned national case-law would have resulted in the contested resolution's being set aside for failure to satisfy the requirements laid down. The court held that the necessary preconditions for withdrawing the right of pre-emption had not yet been sufficiently clearly divulged at the time of the general meeting, with the result that the general meeting could not have weighed the interests at stake as it was required to do.

The national court has expressed doubts, however, as to the compatibility of that case-law with the aforementioned provisions of the Second Directive in so far as the case-law imposes stricter requirements with regard to the legality of withdrawing the right of pre-emption (albeit in regard to the only case expressly governed by the directive, namely increases in capital by consideration in cash). Consequently, since it considered that the action turned on the interpretation of the Community legislation, the Bundesgerichtshof stayed proceedings and referred the

following question to the Court for a preliminary ruling:

'Is it compatible with the Second Council Directive of 13 December 1976 (77/91/EEC; OJ 1977 L 26, p. 1), in particular Article 29(1) and (4) thereof, for the legality of a resolution of a general meeting of shareholders relating to an increase in capital in return for contributions in kind while at the same time withdrawing the shareholders' right of pre-emption to be determined on the basis of a substantive review in accordance with the principles laid down in the Bundesgerichtshof's judgments of 13 March 1978 (BGHZ 71, 40) and 19 April 1982 (BGHZ 83, 319)?' [9]

8. Notwithstanding the tenor of the question, these proceedings in fact raise two different — albeit related — issues of compatibility with the Second Directive: first, the compatibility of the German *legislation* which, unlike the Second Directive, makes a right of pre-emption obligatory also for increases in capital for consideration in kind, and, secondly, the compatibility of the case-law at issue.

9. Before considering the substance of those questions, I would, however, make a preliminary observation. It is common ground that the German legislation, in particular Paragraph 186 of the Aktiengesetz, which essentially reproduces the wording of the Second Directive (except for the fact that the directive refers only to consideration in cash), enables the shareholders' right of pre-emption in respect of the new shares to be withdrawn on condition, *inter alia*, that the relevant resolution fixes the issue price of the new shares (and justifies its amount).

In contrast, it emerges reasonably clearly from the order for reference that that condition does not seem to have been complied with in this case. Neither the wording of the resolution nor that of the 'management committee's' report to the general meeting where it deals with the withdrawal of the right of pre-emption (the passage in quotation marks in the order) seems to contain any such reference to the issue price of the new shares, notwithstanding the fact that — as I have already mentioned — what is involved here is an increase in capital by consideration either in kind or in cash. That fact, which was raised by the appellant (apparently unsuccessfully), could prove to be determinative of the fate of the resolution at issue. A judgment declaring unlawful a resolution adopted in breach of the conditions laid down by the national legislation, which, in turn, are predicated by the requirements of a Community directive, might in fact raise problems of compatibility with the directive itself.

9 — As can be seen, the question, as worded by the national court, refers solely to increases in capital by consideration in kind. It seems to me, however, that the case-law at issue presumably also applies in cases of increases in capital by consideration in cash or, at least, that there are no obvious reasons why it should be limited only to the first of the two possibilities. Consequently, the Court's answer will affect, albeit indirectly, also the legality of that case-law in regard to operations of that type.

However, since the national court has not raised that aspect of the question before the Court, I shall deal with that matter in the manner described in point 8 above.

10. I have considered at length in my Opinion in the case of *Meilike*, [10] both in general terms and from the point of view of specific aspects, the question as to whether or not the rules laid down by the Second Directive are exhaustive or, in other words, the question of the limits within which the Member States' laws are entitled to supplement or flesh out the detailed provisions of the directive.

In that Opinion I stated that, notwithstanding the wording of the second recital in the preamble to the Second Directive, which states that its purpose is 'to ensure *minimum equivalent* protection for both shareholders and creditors of ... companies', [11] even a superficial analysis of the Second Directive shows that some of its provisions are worded in such a manner as to rule out any discretion and hence any action on the part of the national legislature.

11. Consequently, the problem cannot be resolved in the abstract, but by considering each provision of the directive and the overall set of rules laid down for each sector. This is because — and this, in my view, is essential — the interests of the groups of individuals (creditors and shareholders) which the directive sets out to protect are not invariably uniform: greater protection of one group could in fact be detrimental to others.

In other words, as far as the case before the Court is concerned, it is necessary to consider in the first place the literal reading and also the *rationale* of the provision in question. If, after that, the conclusion is reached that the provision concerned is not exhaustive and thus does not preclude a priori any margin of discretion on the part of the national legislature, it should in any event be ascertained whether national legislation (or case-law) which is stricter than the provision itself — in the sense that its application entails more effective protection *vis-à-vis* one of the individuals identified above — does not ultimately have an adverse effect on the interests of the other group.

12. It is therefore appropriate to start out from the wording. Article 29(1) of the Second Directive provides for an obligatory right of pre-emption on the part of shareholders in proportion to their share of the capital in respect of newly issued shares 'whenever the capital is increased by consideration in cash'. In addition, that article

10 — Opinion in Case C-83/91 *Meilike* [1992] ECR I-4871, at p. I-4897, in particular points 12 and 17 to 21. I would point out, however, that the Court did not give a ruling on the point on the ground that, since it regarded the questions referred by the national court as 'hypothetical', it did not have to go into the merits of the case (judgment at [1992] ECR I-4919).

11 — My emphasis.

embodies other provisions, including those on the manner of exercise of the right of pre-emption and on the requirements for withdrawing it (paragraphs 3 and 4). Article 29 therefore lays down rules on the right of pre-emption in respect of the specific case of an increase in capital by consideration in cash, whereas it makes no stipulation with regard to increases in capital for consideration in kind.

I would rule out an 'oversight' forthwith. The directive itself includes numerous provisions which, by taking express account of the specific features of 'non-cash' consideration, lay down detailed, specific rules on that kind of consideration (see, for example, Article 9(2) and Articles 10, 11 and 27).

13. Neither, on the other hand, can it be inferred a priori, that is to say simply from the fact that the provision at issue fails to refer to consideration in kind, that the Community legislator intended to restrict the rules laid down therein *solely* to increases in capital by consideration in cash, thereby prohibiting the Member States from extending them (or introducing or maintaining in force specific rules) to increases in capital by consideration in kind.

It should in fact be presumed that, in laying down an obligation to offer the new shares to members only in the case where consideration in kind was given, the Community legislator simply took account of the situation common to most of the Member States' legal systems. Largely, those legal systems limit to a great extent or even preclude rights of pre-emption in respect of consideration in kind; [12] this is essentially due to the practical difficulties to which exercising the right may give rise in practice, given the non-fungible nature of the consideration itself.

14. Moreover, in those legal systems in which the right of pre-emption is not obligatory or is even restricted or precluded where shares are paid up by consideration in kind, the fact that it is precluded is generally expressly stated as an exception. However, as I have repeatedly pointed out, the directive is simply silent on this point.

Consequently, the wording of the provision in question does not seem to me to suggest that it must be interpreted as prohibiting the

12 — See, for example, the fourth paragraph of Article 2441 of the Italian Civil Code, which provides that 'No right of pre-emption shall attach to newly issued shares which, in accordance with the resolution increasing the capital, are to be paid up by consideration in kind'. Provisions of similar scope are to be found in French, Belgian, Dutch, Luxembourg, British, Irish, Greek and Portuguese legislation.

Member States from providing for an obligatory right of pre-emption also in the case of consideration in kind where they regard this as appropriate.

15. In contrast, useful evidence for answering the national court's question is provided by the analysis of *rationale* of the relevant provision. That provision prescribes that where the company's capital is increased (by consideration in cash), shareholders are to be given preference over third parties in subscribing for the newly issued shares: the aim is to safeguard the shareholders' right to retain unchanged their proportional share of their holding in the capital.

On a proper view, this is a right inherent in the actual capacity of being a shareholder, which may be limited, as I have mentioned, only in respect of specific procedures and where there are genuine, objectively verifiable requirements.

16. Since this is the situation, national legislation which guarantees more effective protection for shareholders by enabling them to maintain their relative holding in the company unchanged *also* where the capital is increased by consideration in kind does not seem to me to conflict with either the spirit or the wording of the Second Directive; on the contrary, it may assist in achieving its aims. [13]

Moreover, although the right of pre-emption is precluded by law in relation to consideration in kind in most of the Member States' legal systems, this does not escape criticism in academic writings, precisely because of the potential abuses to which it may give rise to the detriment of the minority, especially where the true aim of the increase in capital is to enable a new member to join the company, rather than the consideration. [14]

17. If, then, the directive is interpreted — as I have suggested — as enabling the Member States to regulate the right of pre-emption by extending its obligatory nature also to situations other than that expressly governed, the conclusion cannot be escaped, in my view, that the States are likewise free to determine and circumscribe the cases in which that right may be precluded.

13 — In the final analysis, the underlying logic is the same as that of my Opinion in Case C-441/93 *Pafitis and Others* v *TKE and Others* [1996] ECR I-1347, at p. I-1349, and that of the Court's judgment in that case, where it stressed the absolute nature of the exclusive competence of the general meeting with regard to alterations in the company's capital as laid down by Article 25(1) of the Second Directive (judgment in Case C-441/93 *Pafitis and Others* v *TKE and Others* [1996] ECR I-1363).

14 — See, for example, Di Sabato, *Manuale delle Società*, Turin, 1990, p. 582 et seq.

This is true *a fortiori* of the German case-law in question in this case which, as I have mentioned, is stricter in this respect than the directive itself in so far as it makes the legality of the resolution of the general meeting precluding the right of pre-emption subject to conditions additional to those laid down by the directive (which refers, evidently, only to increases in capital by consideration in cash).

Consequently, in common with the German legislation, the relevant case-law of the Bundesgerichtshof, which results in shareholders' interests being more effectively protected, cannot, in my view, be regarded as conflicting with the aims of the Second Directive. [15]

18. It remains only to check, as a final step and consistently with the premisses set out above, whether this interpretation, which would enable the national legislation (and the national case-law) to apply precisely because that legislation (and that case-law) afford greater protection to one class of person which the directive is designed to protect (shareholders), would not end up by harming the interests of that other class of person which the directive also protects (creditors).

In this connection, it has been argued that the German legislation, as it has been interpreted by the Bundesgerichtshof, would enable minority shareholders to hold up an increase in capital which has already been decided upon by the general meeting and is therefore lawful for that very reason, thereby hampering the company's activities and, in the final analysis, diminishing the safeguards which it affords its creditors. The respondent argues that an example of such a situation is afforded by this very case, in which a court action brought by a member holding no more than ten shares has delayed the relevant increase in capital by more than five years, causing the activity of the company as a whole to be hamstrung.

19. In truth, such a risk seems to me to be minimal and justified. It is clear in fact that, far from being lawful, the relevant capital

15 — For the sake of completeness, mention should be made of the lively debate which has taken place between academics with regard to this case-law, in particular in connection with the issue of the limits to judicial review of assessments which fall within the competence of the general meeting. The prevailing view is that judicial review should be confined to the objective aspects and that it may not extend to facts and circumstances falling within the exclusive competence of the general meeting (see, for example, Lutter, 'Materielle und förmliche Erfordernisse eines Bezugsrechtsausschlußes' — *Besprechung der Entscheidung* BGHZ 71, 40).

increase was decided upon (admittedly by the general meeting, but) in breach of the requirements laid down by the law, according to the account of the facts given by the national court itself. In those circumstances, therefore, I consider that the Second Directive, the mere wording of which makes plain the legislator's intention to protect minority shareholders, cannot be interpreted as precluding the review of the legality of the resolution of the general meeting sought by the small shareholder, moreover on the sole ground that that review may result in delays in achieving the capital increase decided upon by the general meeting.

Lastly, it should not be overlooked that it is always open to the court before which the case is brought to use, where appropriate, the means available to it in its legal system in order to react fittingly and timeously to actions which it deems to be manifestly unfounded and merely dilatory.

20. In the light of the aforementioned considerations, I therefore propose that the Court should answer the question referred by the Bundesgerichtshof as follows:

Article 29(1) and (4) of Council Directive 77/91/EEC of 13 December 1976 must be interpreted as not precluding a practice of national courts whereby the resolution of the general meeting withdrawing the shareholders' right of pre-emption in respect of newly issued shares in the event of an increase in capital by consideration in kind is lawful only where stricter conditions are met than those laid down by that directive with regard to the withdrawal of the right of pre-emption in the event of an increase in capital by consideration in cash.