EUROPEAN COMMISSION

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Court procedural documents

TO THE PRESIDENT AND MEMBERS

OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

WRITTEN OBSERVATIONS

submitted pursuant to Article 23, second paragraph, of the Statute of the Court of Justice by the

EUROPEAN COMMISSION

represented by Mr. Leo Flynn and Mr. Jean-Paul Keppenne, Legal Advisers, and Ms. Audronė Steiblytė and Mr. Hans Støvlbaek, Members of its Legal Service, acting as agents, with an address for service at the office of Ms. Merete Clausen, also a Member of its Legal Service, Bâtiment Bech, L-2721 Luxembourg, who consent to service by e-Curia,

in **Case C-41/15**,

Dowling and others,

Reference to the Court under Article 267 of the Treaty on the Functioning of the European Union from the High Court of Ireland for a preliminary ruling on the interpretation 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.

The European Commission ('the Commission') has the honour to present the following submissions and arguments to the Court:

1. BACKGROUND TO THE CASE

1. This reference for a preliminary ruling concerns the interpretation 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 Company Directive').

2. The reference has been made in proceedings between, on the one hand, Mr Dowling and other shareholders of Irish Life and Permanent Group Holdings plc ('ILPGH') (the 'applicants before the national court') and, on the other, the Minister for Finance of Ireland (the 'Minister'), in which ILPGH and Irish Life and Permanent plc ('ILP' or the 'Bank') have been joined as notice parties. The applicants before the national court have applied to the High Court of Ireland (the 'High Court') to set aside a Direction Order that was made by the High Court on 26 July 2011 (the 'Direction Order') pursuant to section 9 of the Credit Institutions (Stabilisation) Act, 2010 (the '2010 Act'). In the course of those proceedings, the applicants before national court claimed that the Direction Order breaches, inter alia, the Second Company Directive. The Minister, ILPGH and the Bank deny that the Direction Order breaches European Union law ('Union law').

3. The High Court has made a series of findings of law and fact which are set out in points 1.1 to 1.34 of order for reference of 12 November 2014. For the sake of brevity, the Commission will not repeat them but will, as needs be, refer to them in the following synopsis of the background to the case.

1 OJ L 26, 31.1.1977, p. 1. The Second Company Directive was amended on several occasions, of which the most recent modifications at the time relating to the facts before the referring court were those introduced by Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009, OJ L 259, 2.101.2009, p. 14. It was repealed by Directive 2012/30/EU, OJ L 315, 14.11.2012, p. 74.

4. Against the background of the severe effects of the financial crisis which erupted in 2008, and of the increasingly difficult conditions created by that crisis, in the first place, for ILP along with other banks in Ireland and, subsequently, for the Irish State, there was a serious threat to the financial stability of the Member State.[2]

5. The difficulties faced by Ireland were to some extent due to commitments which it had given to various banks in that Member State.[3] As a result of those commitments, Ireland had guaranteed deposits in respect of ILP to an amount of approximately EUR 26 billion.[4]

6. As a result of intensifying funding difficulties for the Irish sovereign and the Irish banking sector, Ireland officially requested financial assistance from the Union, the Member States whose currency is the euro and the International Monetary Fund ('IMF') on 21 November 2010. On 28 November 2010 a Programme for Support (the 'Programme') was agreed at technical level between the Irish authorities, the Commission and the IMF, in liaison with the European Central Bank ('ECB') (together, the 'Programme Partners'). By decision of 7 December 2010 the Council granted EFSM financial assistance to Ireland and approved the economic and financial adjustment programme prepared by the Irish authorities.[5] The part of the Programme dealing with the banking sector required four banks in Ireland, including ILP, to undertake a comprehensive forward-looking prudential capital assessment ('PCAR') as well as a prudential liquidity assessment ('PLAR'). The resulting capital needs of those banks were to be met by 31 July 2011, which was a condition for the financial assistance provided to Ireland.[6]

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2 Order for reference, points 1.1 and 1.2.

3 They included measures providing capital to Allied Irish Banks, Anglo-Irish Bank, Bank of Ireland, Educational Building Society, Irish Nationwide Building Society and Permanent TSB (the name under which ILP traded). Ireland provided capital totalling EUR 64 billion to those six banks. In September 2008, prior to providing any capital to any bank, the Member State had provided a guarantee in respect of all deposits and all liabilities at systemically important banks in Ireland, which covered those six banks. The various commitments constituted State aid, which the Commission found in a series of decisions to be compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union ('TFEU') as necessary to address a serious disturbance in the economy of the Member State.

4 Order for reference, point 1.3.

5 Council Implementing Decision 2011/77/EU of 7 December 2011 on granting Union financial assistance to Ireland, OJ L 30, 4.2.2011, p. 34.

6 Article 3(7)(g) of Council Implementing Decision 2011/77/EU, as amended by Council Implementing Decision 2011/326/EU of 30 May 2011: "(g) the recapitalisation of the domestic banks by end July 2011 (subject to appropriate adjustment for

7. The PCAR exercise was undertaken to determine the recapitalisation requirements of the participating credit institutions if they were to meet regulatory capital needs in both a base case and a stress case scenario for the period 2011 to 2013. The base case and the stress case capital targets under the Programme were 10.5% and 6.0% Core Tier 1 capital ratio respectively. For the exercise, the Central Bank of Ireland (the 'Central Bank') relied on an extensive loan loss analysis of the banks' loan book performed by external experts. Two buffers were imposed by the Central Bank on top of the capital needs determined through the exercise, a regulatory capital buffer in the form of equity and one in the form of contingent capital, expected to cover any unexpected losses beyond those determined by the stress test exercise.

8. The PLAR exercise was aimed at determining the capital needs that would arise for the same four banks as they deleveraged to meet a range of target funding ratios. The main target funding ratio was a 122.5% loan-to-deposit ratio to be reached by the banks by 2013 and was laid down in the Programme. For the PLAR exercise, the Central Bank also relied on input from external advisers.

9. The results of the combined PCAR/PLAR (including the regulatory buffers) were announced on 31 March 2011. A major goal of the PCAR/PLAR review was to restore market confidence in Irish banks so that once the necessary restructuring measures were taken the banks should be able to return to the markets for funding. For the Irish banking system as a whole, the outcome was a capital increase of EUR 24 billion. Out of the EUR 24 billion, a capital need of EUR 4 billion was identified for ILP. While ILP was able to raise some capital through its own efforts, it was faced with a shortfall which could not be made good by existing shareholders or by new private investors.[7] ILP was under an obligation to raise that regulatory capital by 31 July 2011, in the absence of which the referring court found that ILP would have failed, with a complete loss of value to the shareholders.[8]

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expected asset sales in the case of Irish Life & Permanent) in line with the findings of the 2011 PLAR and PCAR, as announced by the Central Bank of Ireland on 31 March 2011;".

7 Order for reference, points 1.9 and 1.10.

8 Order for reference, points 1.8. 1.11 and 1.12.

10. Ireland decided to make up the shortfall in the required capital for ILP, by means of a subscription by the Minister of ordinary shares, contingent capital and a "stand by" investment.[9] Although the board of the Bank supported the Minister's proposal, it was not accepted by the shareholders voting at the extraordinary general meeting ('EGM') on 20 July 2011, who instructed the Board to explore other potential avenues for raising the required capital and to seek an extension of the time for the recapitalisation.[10]

11. Neither the Minister nor the Central Bank were minded to seek such an extension, given that it would have required the consent of Ireland's Programme Partners and the Council of the EU, upon proposal of the Commission. Accordingly, the Minister proposed a Direction Order under the 2010 Act, which with the agreement of the Central Bank he applied for to the High Court of Ireland on 26 July 2011 and was granted on the same day.[11]

12. As a result of the Direction Order, the Memorandum and Articles of Association of ILPGH were altered, new shares in ILPGH were issued to the Minister at a price dictated by him (at a 10% discount to the share price on 23 June 2011) which gave him 99.2% of ILPGH in return for a capital injection of EUR 2.7 billion, while provision was also made for him to inject a further EUR 400 million into ILPGH by way of contingent capital notes.

13. The applicants before the national court have attacked the legality of the Direction Order in proceedings before the High Court of Ireland, in the course of which the latter referred questions to the Court of Justice for a preliminary ruling.

2. APPLICABLE LEGISLATION

14. The fifth recital of the Second Company Directive reads as follows:

[I]t is necessary, having regard to the objectives of Article 54(3)(g) [EEC Treaty], 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

9 Order for reference, point 1.16.

10 Order for reference, points 1.24 and 1.25.

11 Order for reference, points 1.26 to 1.31.

protection of creditors whose claims exist prior to the decision on reduction are observed and harmonized.

15. Article 8 of the Second Company Directive reads as follows:

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

2. However, Member States may allow those who undertake to place shares in the exercise of their profession to pay less than the total price of the shares for which they subscribe in the course of this transaction.

16. Paragraphs 1 and 2 of Article 25 of the Second Company Directive read as follows:

1. Any increase in capital must be decided upon by the general meeting. Both this decision and the increase in the subscribed capital shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.

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

17. Paragraphs 1 and 4 of Article 29 of the Second Company Directive read 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. Its decision shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.

3. THE QUESTIONS REFERRED

18. The referring court asks the following two questions:

Having regard to:
(i) the Second Company Law Directive(Council Directive 77/91/EEC, as amended);
(ii) the Credit Institutions Winding Up Directive (2001/24/EC);
(iii) the obligations of the Irish State under the provisions of the Treaty on the Functioning of the European Union and in particular Articles 49, 65, 107, 120 and Title VIII of Part Three thereof:
(iv) the obligations of the Irish State under the EU/IMF Programme of Support;
(v) the terms of the Council Implementing Decisions on granting EU financial assistance to Ireland, made pursuant to Council Regulation (EU) No. 407/2010,

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

(2) Was the Direction Order made by the High Court pursuant to section 9 of the Credit Institutions (Stabilisation) Act 2010 in relation to Irish Life and Permanent Group Holdings plc and Irish Life and Permanent plc in breach of European Union Law?

19. The Commission considers that the two questions of the referring court should be answered together. Although the referring court refers to several provisions of Union law, the Commission considers that none of those provisions provides on their own an answer to the dispute before the national court, for the reasons set out below.

20. The first instrument of Union law mentioned in the order for reference is the Second Company Directive. Articles 8, 25 and 29 of the Second Company Directive reserve a series of decisions relating to the share capital of a company covered by that Directive to the general meeting of that company. ILPGH is a company covered by the Second Company Directive. That fact on its own is not sufficient to answer to questions posed by the referring court, in light of the context and the purpose of the Direction Order.

21. The referring court then refers to Directive 2001/24/EC.[12] The Commission considers that Directive 2001/24/EC is not relevant to the questions posed in the order for reference. Directive 2001/24/EC does not harmonise the procedural and substantive rules for reorganisation measures for credit institutions. It essentially establishes rules on conflicts of jurisdiction and on conflicts of applicable law in the event that a reorganisation measure is taken by the administrative or judicial authorities of the home Member State in respect to a credit institution that has branches in a different Member State from the one in which its head office is registered, without seeking to harmonise national legislation on that subject.[13] Directive 2001/24/EC seeks to ensure that a credit institution and its branches in other Member States are reorganised or wound up according to the principles of unity, ensuring that there is only one set of insolvency proceedings in which the credit institution is subject to and there it, including the branches, is treated as one entity.[14] That objective is clearly stated in recitals 3, 4, 6 and 16 of the Directive. Directive 2001/24/EC achieves that objective by providing that reorganisation and winding up measures taken by the home Member State shall have full effect in the host Member States (i.e. where the branches are established). Because Directive 2001/24/EC does not establish substantive rules, it cannot determine the means by which a Member State which seeks to inject capital into a bank should proceed.

22. The referring court next refers to Ireland's obligations under the provisions of the Treaty on the Functioning of the European Union ('TFEU'), and specifically Articles 49, 65, 107 and 120 and Title VIII of Part Three ('Economic and Monetary Policy').[15]

23. In relation to Articles 49 and 65 TFEU, setting out the freedom of establishment and limitations on the free movement of capital and payments, the Commission has not identified obligations imposed by them on Member States that determine the means by which a Member State which seeks to inject capital into a bank should proceed.

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12 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ L 125, 05.05.2001, p. 15.

13 See Case C-85/12 *LBI* ECLI:EU:C:2013:697, paragraph 39.

14 See Case E-28/13 *LBI hf.* v *Merrill Lynch Int Ltd.*, paragraph 29.

15 Articles 119 to 144 TFEU.

24. In relation to Article 107 TFEU, setting out substantive rules on State aid, the Commission recalls that the capital which was injected into the Bank as a result of the Direction Order has been the object of two decisions by the Commission.

25. The Commission decided on 20 July 2011 that the recapitalisation measures in favour of the Bank which had been notified to it by Ireland on 6 July 2011, consisting of a placing of EUR 2.3 billion in ordinary shares, a contingent capital contribution of EUR 400 million and a standby State investment of EUR 1.1 billion, qualified as State aid but fulfilled the requirements of Article 107(3)(b) TFEU. The Commission found those State aid measures to be temporarily compatible with the internal market for reasons of financial stability (the 'ILPGH rescue decision').[16] The rescue aid in favour of ILP was accordingly approved for six months or, if Ireland submitted a restructuring plan by 31 July 2011, until the Commission had adopted a final decision on that restructuring plan.

26. Ireland submitted such a plan for the Bank. The Commission decided on 9 April 2015 that the recapitalisation measures which had been temporarily approved by the ILPGH rescue decision were compatible with the internal market for reasons of financial stability in light of the restructuring plan submitted by Ireland (the 'ILPGH final decision').[17] Recital 18 of the ILPGH final decision reads as follows[18]:

Following PTSB's recapitalisation, a number of PTSB's former shareholders (the "PTSBGH shareholders") filed a lawsuit notably on the grounds that the capital injection described in recital (17) is incompatible with the Second Company Law Directive. Their action in still pending before Irish courts. The PTSBGH shareholders sent several letters to the Commission to assert that the Commission could not adopt a final restructuring decision because to do so would validate a capital injection made in contravention of an EU directive. However, the application of the Second Company Law Directive to PTSB's recapitalisation is not intrinsically linked to the State aid rules since there is no necessary connection between the amounts of aid to PTSB and purposes for which it is granted, on the one hand, and the detailed arrangements by which that aid is granted, on the other. Any decision taken by the Commission on the capital injections made by the Irish authorities into PTSB does not relate to the means by which those capital injections

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16 Commission Decision C(2011) 5258 final of 20 July 2011 on State aid SA.33311 (2011/N) – Ireland - Rescue recapitalisation in favour of ILPGH, OJ C 268, 10.9.2011, p. 4.

17 Commission Decision C(2015) 2353 final of 9 April 2015 on State aid SA.33442 (2011/N) – Ireland - Restructuring of ILPGH. The final decision is not yet published in the Official Journal, because a public version has not yet been established.

18 Footnotes not reproduced.

have occurred, but only to the presence of aid and to whether it is appropriate, necessary and proportionate to the objective of remedying a serious disturbance in the economy of a Member State. The present decision is therefore without prejudice to the litigation initiated by the PTSBGH shareholders.

27. The referring court notes that all the parties in the case accepted that the ILPGH rescue decision does not in itself determine the legality of the Direction Order.[19] The Commission agrees with that position. State aid is prohibited as a matter of principle in Union law, pursuant to Article 107(1) of the Treaty. As a result of that prohibition Member States cannot be compelled under Union law to grant State aid. Member States when proposing to grant State aid and seeking the Commission's approval thereof receive permission from the Commission to do so when the latter decides to raise no objections to the notified measure (after a preliminary examination) or when the latter takes a positive decision (after a formal investigation procedure). As such, the legality of the means employed by Ireland to inject capital into the Bank is not determined by either the ILPGH rescue decision or the ILPGH final decision.

28. In relation to Article 120 TFEU and the other provisions of Title VIII of Part Three of the TFEU, the Commission has also been unable to identify provisions that determine the means by which a Member State which seeks to inject capital into a bank should proceed.

29. Finally, the referring court asks the Court of Justice to have regard to the obligations of Ireland under the Programme and to the terms of the Council Implementing Decisions on granting EU financial assistance to Ireland, made pursuant to Council Regulation (EU) No 407/2010.[20] Regulation (EU) No 407/2010 establishes the European Financial Stability Mechanism ('EFSM'). Articles 3(3)(b) and 3(4)(b) of that Regulation state that the Council decision to grant a loan or credit line shall contain the general economic policy conditions attached to the assistance. Those economic policy conditions are further developed in a Memorandum of Understanding concluded between the Commission and the recipient Member State.[21] It should be underlined that the power of the Council to grant financial

19 Order for reference, point 101.

20 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stability mechanism, OJ 118, 12.5.2010, p. 1.

21 Article 3(5) of Regulation (EU) No 407/2010.

assistance is limited, in line with Article 122(2) TFEU which is the legal basis for Regulation (EU) No 407/2010, to making such assistance subject to certain conditions, and not to autonomous legal obligations on the recipient Member State as regards its economic policy. Therefore, the contested Direction Order cannot be construed as implementing a legal obligation imposed on Ireland by Union law. Moreover, as such, neither the Council Implementing Decisions relating to Ireland made pursuant to Regulation (EU) No 407/2010 nor the Programme determine the means by which Ireland should have proceeded when seeking to inject capital into the Bank.

30. To answer the questions posed by the referring court, it is necessary to have regard to the circumstances in which the Direction Order was adopted and to the nature of that measure.

31. The Direction Order was granted so that Ireland could grant State aid to the Bank in order to fill a capital gap identified in the latter so as to remedy a serious disturbance in the economy of that Member State and to fulfil conditions set down in the Programme which Ireland had to meet so as to be able to obtain financial assistance from the Programme Partners at a time when Ireland was not in a position to obtain financing at reasonable rates on the market. The referring court has established that the Bank would, on the balance of probabilities, have entered a disorderly liquidation if it had been unable to raise the capital required by 31 July 2011, that it was unable to do so on its own or with the assistance of any person other than the Member State, and that the decision of the EGM was an obstacle to the Member State providing that assistance within the relevant period of time.

32. Therefore, the Direction Order adopted by the Irish authorities must be considered not as an encroachment on the rights of the competent organ of the concerned company, namely its general meeting, but as an act *jure imperii* imposed on the company as a whole and which was justified by the exceptional circumstances of the financial crisis and had the legitimate objective of avoiding a collapse of the whole Irish financial system. The ILPGH rescue decision and the ILPGH final decision both recognise that the collapse of the Bank would cause a serious disturbance in the economy of the Member State, and that the amount of State aid to be granted in order to avoid that outcome was both appropriate for that purpose and necessary for

that purpose. That conclusion is also in line with the content of the conditionality foreseen for Ireland to obtain financial assistance as part of the EFSM assistance programme.

33. The protection of the Member State's financial system from an imminent risk of collapse caused by the failure of a bank of systemic importance preserves, in the view of the Commission, an essential State function within the meaning of Article 4(2) of the Treaty on European Union ('TEU'). The collapse of the financial system in a Member State would lead to a crash of its real economy, because vital functions for the economy would cease, such as the payment systems of the country, the systems of lending between banks and the flow of credit to households and economic activities. The crash of the real economy would in its turn lead to problems of public security. Accordingly, safeguarding of the financial system is to be regarded as preservation of an essential State function that the Union and its institutions are required to respect pursuant to Article 4(2) TEU.

34. The Direction Order is in substance similar to a nationalisation measure because it enabled the Member State to acquire ownership of the Bank.[22] Nationalisation measures are in principle compatible with Union law in accordance with Article 345 TFEU.

35. The order for reference sets out several judgments of the Court in which measures taken by Greece were considered contrary to the Second Company Directive.[23] The Commission considers that those rulings deal with situations which are not equivalent to that giving rise to the case before the referring court. First, the Direction Order is taken *jure imperii* and as a response to an exceptional situation giving rise to a serious disturbance in the economy of a Member State in relation to a systemically important credit institution, while the national measures under consideration in the Greek cases dealt with situations of crisis relating to a specific

22 The Commission understands that the protection given to property rights under the Constitution of Ireland would have rendered it highly unlikely that the Minister could have expropriated the shares of the existing shareholders of ILPGH and exercised the voting rights of those shares in that company's general meeting. As such, the Direction Order appeared to be the only method open to the Member State to acquire control of the Bank in a manner consistent with Irish constitutional law.

23 Case C-381/89 *Syndesmos Melon tis Eleftheras Evangelikis Ekklisias* v *Greek State and others* ECLI:EU:C:1992:142; Joined Cases C-19/90 and C-20/90 *Karella and others* v *Ypourgio viomichanias, energeias & technologias and others* ECLI:EU:C:1991:229; and Case C-441/93 *Pafitis and others* ECLI:EU:C:1996:92.

company. Second, in the case at hand, the measure in question was not an "ordinary reorganisation measure" which the Court considered in *Pafitis* as being within the scope of the Second Company Directive, but a measure equivalent to placing the company "under compulsory administration with a view to safeguarding the rights of creditors" which the Court saw outside the scope of that Directive.[24] In the situation underlying the present case, the purpose pursued was the protection of the financial system as such in the face of a systemic crisis. In such a situation of exceptional crisis, superseding the decision of the general meeting (which had objected to the measure) by a judicial measure could be seen as not derogating from the rules related to the functioning of the companies.

36. Based on the above, in the exceptional circumstances of the case, the Second Company Directive, in combination with Article 4(2) TEU and Article 345 TFEU, must be interpreted as not precluding a measure such as the Direction Order adopted by the Irish authorities.

37. For the sake of completeness, and even if this is not covered by the questions of the referring court, the Commission wishes to make the following additional observations.

38. The fact that the Second Company Directive, in combination with the relevant provisions of the TEU and the TFEU, must be interpreted as not precluding a measure such as the Direction Order adopted by the Irish authorities, does not mean that Ireland is free to disregard the rules relating to the free movement of capital. Accordingly, since the Direction Order would fall within the scope of Article 63 TFEU,[25] it must be examined in the light of that article.

39. The Court of Justice has repeatedly held that the free movement of capital may be limited by national legislation only if it is justified by one of the reasons mentioned

24 Case C-441/93 *Pafitis and others* ECLI:EU:C:1996:92, paragraph 57.

25 The Court has stated that national measures must be regarded as ‘impediments’ for the purposes of Article 63(1) TFEU if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing in their capital. See for example Case C-367/98 *Commission* v *Portugal* ECLI:EU:C:2002:326, paragraphs 45 and 46.

in Article 65 TFEU or by overriding reasons in the public interest within the meaning of the Court's case-law.[26]

40. In *Essent and others* the Court stated that the interest underlying the choice of the Member State in relation to the rules on the public or private ownership of companies in the energy sector may be taken into consideration as an overriding reason in the public interest.[27] The reasons underlying the choice of the rules of property ownership adopted by the national legislation within the scope of Article 345 TFEU constitute factors which may be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital.[28]

41. It should be examined by the referring court whether the Direction Order is justified for the prudential supervision of financial institutions in accordance with Article 65(1)(a) TFEU or pursues overriding objectives in the public interest. In light of the objectives of the Direction Order, the Commission considers that it pursues such overriding reasons. According to the preamble to the Direction Order, the Order was made among others because the Irish authorities found it necessary to secure the achievement of a purpose of the 2010 Act, namely "*to address the serious and continuing disruption to the economy and the financial system and the continuing threat to the stability of certain credit institutions in the State and the financial system generally"*. The objective referred to in the Direction Order may, in principle, be regarded as an overriding reason in the public interest, which may justify the identified restrictions on fundamental freedoms.

42. However, according to the Court in *Essent and others*, it is also necessary that the restrictions at issue are appropriate to the objectives pursued and do not go beyond what is necessary to attain those objectives.[29] It would be for the referring court in the main proceedings to conduct such an examination based on the facts of the case.

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26 See Case C-274/06 *Commission* v *Spain* ECLI:EU:C:2008:86, paragraph 35.

27 See Joined Cases C-105/12 to C-107/12 *Essent and others* ECLI:EU:C:2013:677, paragraph 53.

28 See Joined Cases C-105/12 to C-107/12 *Essent and others* ECLI:EU:C:2013:677, paragraph 55.

29 See Joined Cases C-105/12 to C-107/12 *Essent and others* ECLI:EU:C:2013:677, paragraph 67.

43. The Commission considers it relevant in that regard that it appears from the facts described in the order for reference that, while the shareholders objected to the proposed recapitalisation by the Minister, no private resources or alternative measures to fill the substantial capital gap of the Bank were available or forthcoming at the relevant time and that failure to adopt and implement the Direction Order would have in all likelihood rendered Ireland unable to meet the conditions under the Programme, in particular the recapitalisation of Ireland's domestic banks, including ILP, by 31 July 2011.

44. As final observation, the Commission would point out that, if the Court was to consider, contrary to the views expressed above, that the Direction Order is not compatible with Union law, the effectiveness of Union law does not require, as a remedy, that the referring court has to reinstate the situation as it was before the adoption of the Direction Order. Unlike other provisions of the Second Company Directive which foresee specific consequences in order to restore the *status quo ante* in the event of a breach, as is the case with its Articles 18, 22(3) and 23, Articles 8, 25 and 29 of that Directive do not lay down specific consequences if they are not observed. Given that the Bank was likely to no longer meet prudential requirements without the capital provided by the Minister and that there was no prospect of obtaining an equivalent amount of capital from other sources, it would be highly problematic if the shareholders of the Bank were able to retain a benefit from the Bank's continued existence as a going concern after a reversal of the capital increase resulting from the Direction Order.

45. It would be sufficient to consider that the applicants before the national court are in principle entitled to damages. In the case at hand, if it is established that, without the Direction Order, ILPGH would have had its banking license withdrawn and would have entered into liquidation, it would be for the applicants before the national court to establish that they nevertheless suffered damages.

4. CONCLUSION

46. In conclusion, the Commission has the honour to propose to the Court the following answer to the questions posed by the High Court of Ireland:

The Second Company Directive, in combination with Article 4(2) TEU and Article 345 TFEU, must be interpreted as not precluding a measure such as the Direction Order under examination by the referring court that was adopted by a Member State because it was necessary to provide sufficient capital to a credit institution to prevent the risk of its disorderly liquidation in circumstances which would have caused a serious disturbance in the economy of that Member State.

Leo Flynn Jean-Paul Keppenne Audronė Steiblytė Hans Støvlbaek

Agents for the Commission