



Reports of Cases

Case C-41/15

Gerard Dowling and Others
v
Minister for Finance

(Request for a preliminary ruling from the High Court (Ireland))

(Regulation (EU) No 407/2010 — European Financial Stabilisation Mechanism —
Implementing Decision 2011/77/EU — European Union financial assistance to Ireland —
Recapitalisation of national banks — Company law — Second Directive 77/91/EEC — Articles 8, 25
and 29 — Recapitalisation of a bank by means of judicial direction order — Increase in share capital
without general meeting decision and without the shares issued being offered on a pre-emptive basis to
existing shareholders — Issue of new shares at a price lower than their nominal value)

Summary — Judgment of the Court (Grand Chamber), 8 November 2016

*Freedom of movement for persons — Freedom of establishment — Companies — Directive 77/91 —
Alteration of the share capital of a public limited liability company — Recapitalisation by means of
judicial direction order of a bank whose insolvency is such as to threaten the financial stability of the
European Union — Increase in share capital without general meeting decision and without the shares
issued being offered on a pre-emptive basis to existing shareholders — Lawfulness*

(Council Directive 77/91, Recital 2 and Arts 8(1), 25 and 29)

Article 8(1) and Articles 25 and 29 of the Second Directive 77/91 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 54 TFEU, 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, must be interpreted as not precluding a measure, such as a direction order, adopted in a situation where there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the agreement of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied any pre-emptive subscription right.

The aim of the Second Directive is to achieve, as stated in its second recital, minimum equivalent protection for both shareholders and creditors of public limited liability companies. Accordingly, the measures provided for by that directive relating to the formation of public limited liability companies and to the maintenance, increase or reduction of their capital guarantee such protection against acts taken by the governing bodies of those companies and relate, therefore, to their normal operation. However, a direction order is not a measure taken by a governing body of a public limited liability company as part of its normal operation, but is an exceptional measure taken by the national authorities intended to prevent, by means of an increase in share capital, the failure of such a

company, which failure would threaten the financial stability of the European Union. The protection conferred by the Second Directive on the shareholders and creditors of a public limited liability company, with respect to its share capital, does not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a Member State and that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned.

The provisions of the Second Directive do not therefore preclude an exceptional measure affecting the share capital of a public limited liability company, such as a direction order, taken by the national authorities where there is a serious disturbance of the economy and financial system of a Member State, without the approval of the general meeting of that company, with the objective of preventing a systemic risk and ensuring the financial stability of the European Union.

(see paras 49-51, 55, operative part)