

JUDGMENT OF THE COURT (Sixth Chamber)
30 May 1991 *

In Joined Cases C-19/90 and C-20/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Symvoulío Epikrateias (Council of State) in the proceedings pending before that court between

Marina Karella

and

Minister for Industry, Energy and Technology, and

Organismos Anasygkrotiseos Epicheiriseon AE,

and between

Nikolaos Karellas

and

Minister for Industry, Energy and Technology, and

Organismos Anasygkrotiseos Epicheiriseon AE,

on the interpretation of Articles 25, 41 and 42 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 (Official Journal 1977 L 26, p. 1),

* Language of the case: Greek.

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, T. F. O'Higgins, C. N. Kakouris, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

Advocate General: G. Tesauro

Registrar: H. A. Rühl, Principal Administrator

After considering the written observations submitted on behalf of:

Marina Karella and Nikolaos Karellas, by Konstantinos Adamantopoulos, of the Athens Bar, and Philip Bentley, Barrister of Lincoln's Inn;

the Greek Government, by Panagiotis Milonopoulos, Lawyer, Legal Adviser of the Second Class in the Department for Community Legal Affairs of the Ministry of Foreign Affairs, Konstantinos Stavropoulos, Lawyer, also a member of that department, and Nikos Fragkakis, Lawyer, acting as Agents;

the Commission of the European Communities, by Antonio Caeiro, Legal Adviser, and Maria Patakia, a member of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

after hearing oral argument at the hearing on 12 December 1990 from Marina Karella and Nikolaos Karellas; Organismos Anasygkrotiseos Epicheiriseon AE, represented by Leonidas Georgakopoulos and Andreas Tsouderos, of the Athens Bar; the Greek Government; and the Commission,

after hearing the Opinion of the Advocate General delivered at the sitting on 30 January 1991,

gives the following

Judgment

- 1 By two judgments dated 25 May 1989 which were received at the Court on 22 January 1990, the Symvoulío Epikrateías (Council of State) referred to the Court pursuant to Article 177 of the EEC Treaty three questions for a preliminary ruling on the interpretation of Articles 25, 41 and 42 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 (Official Journal 1977 L 26, p. 1, hereinafter referred to as 'the Second Directive').
- 2 Those questions were raised in two sets of proceedings between two shareholders in the company Klostiria Velka AE, on the one hand, and the Minister of Industry, Energy and Technology and Organismos Anasygkrotiseos Epicheiriseon AE (Business Reconstruction Organization, hereinafter referred to as 'the OAE'), on the other. Those proceedings are concerned with an increase in that company's capital which was decided upon by the OAE and approved by the State Secretary for Industry, Energy and Technology.
- 3 The OAE is a public-sector body having the form of a public limited liability company which acts in the public interest under the control of the State. It was set up by Greek Law No 1386/1983 of 5 August 1983 (*Official Journal of the Hellenic Republic* No 107/A of 8. 8. 1983, p. 14). Under Article 2(2) of that law, the purpose of the OAE is to contribute to the economic and social development of the country through the financial rejuvenation of undertakings, the importation and application of foreign know-how and the development of Greek know-how and through the establishment and operation of nationalized or mixed economy undertakings.
- 4 Article 2(3) of Law No 1386/1983 lists the powers conferred on the OAE in order to achieve those objects. It may take over the administration and day-to-day operation of undertakings undergoing rejuvenation or nationalized undertakings; participate in the capital of undertakings; grant loans and issue or agree certain loans; acquire bonds; and make over shares, in particular to employees or their representative bodies, local government bodies or other legal entities governed by public law, charitable institutions, social organizations or private individuals.

- 5 Under Article 5(1) of Law No 1386/1983, the Minister for the National Economy may make undertakings undergoing serious financial difficulties subject to the system established by the Law.
- 6 Under Article 7 of Law No 1386/1983, the competent minister may decide to transfer to the OAE the administration of the undertaking subject to the system established by the Law, deal with the undertaking's debts so as to secure its viability or wind it up.
- 7 Article 8 of Law No 1386/1983 contains provisions on transferring the administration of the undertaking to the OAE. Article 8(1), as amended by Law No 1472/1984 (*Official Journal of the Hellenic Republic* No 112/A of 6. 8. 1984, p. 1273) lays down the rules as to how the transfer is to be effected and governs relations between the persons appointed by the OAE to administer the undertaking and the undertaking's bodies. Accordingly, it provides that publication of the ministerial decision to subject the undertaking to the system established by the Law terminates the powers of the undertaking's administrative bodies and that the general meeting is to continue to exist but cannot terminate the appointment of the members of the administration appointed by the OAE.
- 8 Article 8(8) of Law No 1386/1983 provides that, during its provisional administration of the company subject to the system established by the Law, the OAE may decide, by way of derogation from the provisions in force relating to public limited liability companies, to increase the capital of the company concerned. The increase, which has to be approved by the minister, may take the form of contributions in cash or in kind. The undertaking's capital may also be increased by set-off. However, the original shareholders retain their pre-emptive rights, which they may exercise within a time-limit laid down in the ministerial decision granting approval.
- 9 By decision of 14 December 1983 the State Secretary for the Economy subjected Klostiria Velka AE to the provisions of Law No 1386/1983 (Decree No 2057, *Official Journal of the Hellenic Republic* No 725/B of 14. 12. 1983). The OAE took over the administration of that company in accordance with Article 8 of the Law.

- 10 During its provisional administration the OAE decided, under Article 8(8) of Law No 1386/1983, to increase the capital of the company subjected to the system established by the Law by DR 400 million. The State Secretary for Industry, Energy and Technology approved that decision (Decree No 162 of 6 June 1986, *Official Journal of the Hellenic Republic* No 374/B of 10. 10. 1986). The decree provided that the original shareholders would have an unlimited pre-emptive right which they had to exercise within one month of the publication of the decision.
- 11 Marina Karella and Nikolaos Karellas, who are shareholders in Klostiria Velka AE, brought actions for the annulment of that decree in the Greek Council of State on the ground that it was contrary to the Greek Constitution and the Second Directive.
- 12 In its judgments of 25 May 1989 the Council of State held that the applicants' pleas in law seeking the annulment of the decree on the ground of its unconstitutionality were unfounded. However, it decided that it should refer to the Court for a preliminary ruling the following questions — identically worded in the two cases — on the interpretation of the Second Directive:
- '(1) Are the provisions of Article 25 in conjunction with Article 41(1) and Article 42 of Council Directive 77/91/EEC of 13 December 1976 free of conditions which lie within the discretion of the Member States and sufficiently precise that they can be relied upon against the State before a national court by an individual claiming that a provision of a law is incompatible with those provisions of the directive?
- (2) Does a legal provision come within the scope of Article 25 of Directive 77/91/EEC where it does not permanently govern matters relating to increases in the capital of a limited liability company but is intended to deal with the exceptional circumstances of over-indebted companies which are of particular economic and social importance for society as a whole and provides, in order to ensure the survival and continued operation of those companies for the adoption by administrative act of a decision to increase the company capital, without prejudice, however, to the pre-emptive right of the existing shareholders when the new shares are distributed, and if so to what

extent is it compatible with that provision in conjunction with Article 41(1) of the directive?

- (3) Is such a law compatible with the provisions of Article 42 of Directive 77/91/EEC in view of the fact that it does not prescribe that the price of the shares is to be fixed by the State on the basis of the objectively established net worth of the undertaking and the resultant inherent value of the old shares but leaves it to the discretion of the administration to fix the price so as to make possible the necessary immediate inflow of capital into companies which, because of their difficulties, have had confidence in them shaken, although it does safeguard the pre-emptive right of existing shareholders when the new shares are distributed?
- 13 Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the applicable legislation and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 14 The national court's questions essentially raise two issues. The first is concerned with Article 25(1) of the Second Directive. The national court wishes to establish whether, having regard to Article 41(1) of the Second Directive, Article 25(1) may be relied upon against the administration by individuals in the national courts. It then asks whether Article 25(1), in conjunction with Article 41(1), is applicable with regard to public rules, such as those provided for in Law No 1386/1983, which govern the completely exceptional cases of undertakings which are of particular economic and social importance for society and are undergoing serious financial difficulties.
- 15 The second issue is concerned with Article 42 of the Second Directive. The national court asks whether that provision may be relied upon by individuals and whether it has to be interpreted as precluding national rules of the type referred to above.

- 16 The Court will initially consider the first issue, since, in the cases at issue in the main proceedings, the lawfulness of the increase in capital predominates over the question of the value of the issue price.

The direct effect of Article 25(1) of the Second Directive

- 17 As the Court has consistently held, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, individuals are entitled to invoke them against the State (see, in particular, the judgment in Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53).
- 18 Consequently, it should be examined whether Article 25(1) of the Second Directive, which provides that any increase in capital must be decided upon by the general meeting, satisfies those conditions.
- 19 It must be held in that connection that that provision is clearly and precisely worded and lays down, unconditionally, a rule enshrining the general principle that the general meeting has the power to decide upon increases in capital.
- 20 The unconditional nature of that provision is not affected by the derogation provided for in Article 25(2) of the Second Directive to the effect that the company's instrument of incorporation or the general meeting may authorize an increase in the subscribed capital up to a maximum amount which is to be fixed with due regard for any maximum amount provided for by law. That individual, clearly defined derogation does not leave Member States any possibility of making the principle of the power of the general meeting subject to any exceptions other than that for which express provision is made.
- 21 The same applies to Article 41(1) of the Second Directive, under which Member States may derogate from Article 25(1) and Article 9(1) and the first sentence of Article 19(1)(a) and (b) to the extent that such derogations are necessary to encourage the participation of employees or other groups of persons defined by

national law in the capital of undertakings. That derogation, too, is strictly confined to the case provided for.

- 22 Moreover, the fact that the Community legislature provided for precise, concrete derogations confirms the unconditional character of the principle set forth in Article 25(1) of the Second Directive.
- 23 It is appropriate therefore to answer the national court by stating that Article 25(1) of the Second Directive may be relied upon by individuals against the public authorities before national courts.

The scope of Article 25(1) of the Second Directive

- 24 As for the scope of Article 25(1) of the Second Directive with respect to a law, such as Law No 1386/1983, it should be examined in the first place whether such a law falls within the field of application of the directive, since that legislation does not set out the basic rules on increases of capital and merely seeks to deal with exceptional situations. If that legislation falls within the field of application of the Second Directive, it should then be considered whether it can qualify for the benefit of the derogation provided for in Article 41(1) of that directive.
- 25 As far as the field of application of the Second Directive is concerned, it should be stated first of all that, in accordance with Article 54(3)(g) of the Treaty, it seeks to coordinate the safeguards which, for the protection of the interests of members and others, are required by Member States of companies and firms within the meaning of the second paragraph of Article 58 of the Treaty with a view to making such safeguards equivalent. Consequently, the aim of the Second Directive is to provide a minimum level of protection for shareholders in all the Member States.
- 26 That objective would be seriously frustrated if the Member States were entitled to derogate from the provisions of the directive by maintaining in force rules — even rules categorized as special or exceptional — under which it is possible to decide

by administrative measure, outside any decision by the general meeting of shareholders, to effect an increase in the company's capital which would have the effect either of obliging the original shareholders to increase their contributions to the capital or of imposing on them the addition of new shareholders, thus reducing their involvement in the decision-taking power of the company.

- 27 However, that observation does not signify that Community law prevents Member States from derogating from those provisions in any circumstances. The Community legislature has made specific provision for well-defined derogations and for procedures which may result in such derogations with the aim of safeguarding certain vital interests of the Member States which are liable to be affected in exceptional situations. Instances of this are Articles 19(2) and (3), Article 40(2), Article 41(2) and Article 43(2) of the directive.
- 28 In this connection, it must be held that no derogating provision which would allow the Member States to derogate from Article 25(1) of the directive in crisis situations is provided for either in the EEC Treaty or in the Second Directive itself. On the contrary, Article 17(1) of the directive provides expressly that, in the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States to consider whether the company should be wound up or any other measures taken. Consequently, that provision confirms the principle laid down by Article 25(1) and applies even where the company concerned is undergoing serious financial difficulties.
- 29 The OAE further claimed at the hearing that the Second Directive could not apply to the special collective liquidation or rejuvenation procedures for companies incapable of meeting their commitments, since its field of application was confined to the normal operation of companies.
- 30 That objection cannot be accepted. The directive is intended to ensure that members' and third parties' rights are safeguarded, in particular in operations for setting up companies and increasing and reducing company capital. In order to be effective, that safeguard must be secured for members as long as the company continues to exist with its own structures. Whilst the directive does not preclude

the taking of execution measures and, in particular, liquidation measures placing the company under compulsory administration in the interests of safeguarding creditors' rights, it nevertheless continues to apply as long as the company's shareholders and normal bodies have not been divested of their powers. Certainly, this is true where there is a straightforward rejuvenation measure involving public bodies or companies governed by private law where the members' right to the capital and to decision-making power in the company is in question.

- 31 It follows that, in the absence of a derogation provided for by Community law, Article 25(1) of the Second Directive must be interpreted as precluding the Member States from maintaining in force rules incompatible with the principle set forth in that article, even if those rules cover only exceptional situations. To recognize the existence of a general reservation covering exceptional situations, outside the specific conditions laid down in the provisions of the Treaty and the Second Directive, would, moreover, be liable to impair the binding nature and uniform application of Community law (see, to this effect, the judgment in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 26).
- 32 As for the idea that rules comparable to those set out in Law No 1386/1983 might qualify under the derogation provided for in Article 41(1), it should be observed that that provision pursues a precise, well-defined social-policy aim, namely to encourage private individuals to hold shares. Like the exceptions provided for in Article 19(3) and Article 23(2) of the Second Directive, it is intended solely to encourage, in an objective and concrete manner, persons, such as employees, who generally do not have the means necessary to do so under the normal conditions of company law in the Member States, to participate in the capital of undertakings.
- 33 Consequently, a national rule cannot take advantage of that derogation unless its practical application helps to achieve the objective of Article 41(1) of the Second Directive.

- 34 In that connection, it should be made clear that that condition is not fulfilled merely because rules, such as those contained in Law No 1386/1983, provide for the possibility, as one of the available means of achieving their objective, of the public restructuring body's transferring shares to employees or to individuals. Such a possibility is merely hypothetical and ancillary.
- 35 It should further be made clear, as stated by the Advocate General in paragraph 5 of his Opinion, that the reference in Article 41(1) of the Second Directive to other groups of persons refers to shareholding by private individuals and is not concerned with the transfer of shares to credit institutions or to public-law bodies.
- 36 Consequently, the answer to the national court's second question must be that Article 25 in conjunction with Article 41(1) of the Second Directive must be interpreted as meaning that they preclude national rules which, in order to ensure the survival and continued operation of undertakings which are of particular economic and social importance for society as a whole and are in exceptional circumstances by reason of their excessive debt burden, provide for the adoption by administrative act of a decision to increase the company capital, without prejudice to the right of pre-emption of the original shareholders when the new shares are issued.
- 37 In view of the answers set out above there is no need to consider the national court's third question or the part of the first question which is concerned with the direct effect of Article 42 of the Second Directive.

Costs

- 38 The costs incurred by the Greek Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Symvoulio Epikrateias by two judgments dated 25 May 1989, hereby rules:

- (1) Article 25 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, may be relied upon by individuals against the public authorities before national courts;**
- (2) Article 25 in conjunction with Article 41(1) of the Second Directive must be interpreted as meaning that they preclude national rules which, in order to ensure the survival and continued operation of undertakings which are of particular economic and social importance for society as a whole and are in exceptional circumstances by reason of their excessive debt burden, provide for the adoption by administrative act of a decision to increase the company capital, without prejudice to the right of pre-emption of the original shareholders when the new shares are issued.**

Mancini

O'Higgins

Kakouris

Schockweiler

Kapteyn

Delivered in open court in Luxembourg on 30 May 1991.

J.-G. Giraud

G. F. Mancini

Registrar

President of the Sixth Chamber