

JUDGMENT OF THE COURT (Sixth Chamber)
12 November 1992^{*}

In Joined Cases C-134/91 and C-135/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Efeteio, Athinas (Court of Appeal, Athens), for a preliminary ruling in the proceedings pending before that court between

Kerafina — Keramische und Finanz-Holding AG and

Vioktimatiki AEVE

and

Greek State and

Organismos Oikonomikis Anasygkrotissis Epicheirisseon 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 (OJ 1977 L 26, p. 1), and on the interpretation of Commission Decision 88/167/EEC of 7 October 1987 concerning Law 1386/1983 by which the Greek Government grants aid to Greek industry (OJ 1988 L 76, p. 18),

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. F. Mancini, F. A. Schockweiler, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

^{*} Language of the case: Greek.

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

Kerafina — Keramische und Finanz Holding AG and Vioktimatiki AEVE, by
G. I. Anastasopoulos and I. Anastasopoulou, of the Athens Bar;

Organismos Oikonomikis Anasygkrotissis Epicheirisseon AE, by L. Georgakopoulos, of the Athens Bar;

the Greek Government, by Nikolaos Mavrikas, Assistant Legal Adviser in the
State Legal Service, acting as Agent;

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

having regard to the Report for the Hearing,

after hearing oral argument at the hearing on 25 June 1992 from Organismos
Oikonomikis Anasygkrotissis Epicheirisseon AE, represented by L. Georgakopoulos and V. Karagiannis, of the Athens Bar; the Greek Government, represented
by F. Georgakopoulos, of the Athens Bar; and the Commission, represented by D.
Gouloussis, Legal Adviser, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 September
1992,

gives the following

Judgment

1 By judgments of 31 January 1991, received at the Court on 24 May 1991, the Efeteio, Athinas, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions 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 (OJ 1977 L 26, p. 1, hereinafter 'the Second Directive'), and on the interpretation of Commission Decision 88/167/EEC of 7 October 1987 concerning Law 1386/1983 by which the Greek Government grants aid to Greek industry (OJ 1988 L 76, p. 18).

2 Those questions were raised in proceedings between shareholders of the company Kerafina AVETE ('Kerafina'), on the one hand, and the Hellenic Republic and Organismos Anasygkrotissis Epicheirisseon AE (Business Reconstruction Organization, hereinafter 'the OAE'), on the other. The proceedings are concerned with increases in Kerafina's capital which were carried out under the system provided for by Greek Law 1386/1983 of 5 August 1983 (*Official Journal of the Hellenic Republic* No A 107 of 8 August 1983, p. 14), to which Kerafina was made subject by decision of the Minister for the National Economy (Ministerial Decree No 271, *Official Journal of the Hellenic Republic* No B 113 of 14 March 1985).

3 The OAE is a public-sector body set up by Law 1386/1983 in the form of a public limited liability company which acts in the public interest under the control of the State. 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 reorganization of undertakings, the importation and application of foreign know-how, the development of Greek know-how and the establishment and operation of nationalized or mixed-economy undertakings.

4 Article 2(3) of Law 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 opera-

tion of undertakings undergoing reorganization 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 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 the Law, 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 1386/1983 contains provisions on transferring the administration of the undertaking to the OAE. Article 8(1), as amended by Law 1472/1984 (*Official Journal of the Hellenic Republic* No A 112 of 6 August 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 be convened but cannot terminate the appointment of the members of the administration appointed by the OAE.

- 8 Article 8(8) of Law 1386/1983 provides that, during its provisional administration of the company in question, 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 has to be approved by the competent minister. 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 A procedure in respect of Law 1386/1983 was initiated by the Commission pursuant to Article 93(2) of the EEC Treaty and closed by Decision 88/167/EEC. In that decision the Commission stated that it had no objection to the implementation of the said Law provided that, *inter alia*, the Greek Government amended the provisions concerning increases of capital so as to bring them into conformity with Articles 25 et seq. and 29 et seq. of the Second Directive by 31 December 1987.
- 10 Kerafina AVETE was made subject to Law 1386/1983 by Decision No 271 of the Minister for the National Economy. Acting under Article 7(1) of the Law, the OAE took over the management of the company. In the course of its provisional administration, the OAE decided to increase Kerafina's share capital pursuant to Article 8(8) of the Law. There were two increases in succession, one of DR 200 000 000 and the other of DR 486 222 000. Those two increases, which were approved by the Minister for Industry, Research and Technology and as a result of which the OAE became the majority shareholder in Kerafina, are the subject of the dispute in the main proceedings.
- 11 Kerafina's original shareholders took the view that the capital increases decided upon by the OAE were contrary to Article 25 of the Second Directive, and instituted proceedings before the Polymeles Protodikeio, Athinas (Court of First Instance, Athens), in November 1988. Their actions were dismissed, whereupon they appealed against the judgments to the Efeteio, Athinas. That court considered that the cases before it raised certain problems connected with the interpretation of the Second Directive and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Are the provisions of Article 25, in conjunction with Articles 41(1) and 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 may be relied upon against the State before a national court by an individual claiming that a provision of 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 public 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 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 original shareholders when the new shares are issued, and if so to what extent is it compatible with that provision in conjunction with Article 41(l) of the directive?

3. Did Commission Decision 88/167 of 7 October 1987, in which the Commission stated that it had no objections to the implementation of Law 1386/1983, subject to certain conditions set out in that decision, *inter alia* that the Greek Government should, by 31 December 1987, amend the provisions of Law 1386/1983 so as to bring it into conformity with Article 25 *et seq.* and 29 *et seq.* of Directive 77/91/EEC, exempt Greece from the obligation to implement that directive before the above-mentioned date (31 December 1987)?

- 12 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, 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.

The first two questions

- 13 It should be observed *in limine* that the national court's first two questions raise issues on which the Court has already ruled on two occasions, namely in its judgments of 30 May 1991 in Joined Cases C-19/90 and C-20/90 *Karella and Karellas* [1991] ECR I-2691 and of 24 March 1992 in Case C-381/89 *Eleftheri Evangeliki Ekklesia* [1992] ECR I-2111.

- 14 The observations submitted in these proceedings are in large measure similar to those made in the previous two cases. They also contain comments on the judgments cited above. Accordingly, the OAE and the Greek Government have argued that the Court's answers to the questions referred for a preliminary ruling in those cases are incorrect on the ground that the Court did not take account of all the data which should have been considered in order to give appropriate answers.
- 15 The OAE and the Greek Government consider that, when giving judgment in those cases, the Court took into consideration neither the circumstances in which the Hellenic Republic incorporated the Second Directive into Greek law nor the precise nature of Law 1386/1983, which comes under the law relating to insolvency and enforcement. As far as the latter aspect is concerned, the OAE claims that the Community has no competence whatsoever to involve itself in this area of the law. Lastly, the OAE considers that the Court took no account of the evidence attesting to the need to increase the capital of companies subject to the system provided for by Law 1386/1983.
- 16 In this connection, it is appropriate first to recall some of the principles governing the preliminary reference procedure provided for by Article 177 of the EEC Treaty. In the first place, the right to determine the questions to be brought before the Court devolves upon the national court or tribunal alone and the parties to the main proceedings may not change their tenor (see Case 44/65 *Hessische Knappschaft v Singer* [1965] ECR 965). Secondly, under Article 177 the Court has no jurisdiction either to apply Community law to a specific case or to decide upon the validity of a provision of national law in relation to Community law, as it would be possible for it to do under Article 169 (see the judgment in Case 6/64 *Costa v ENEL* [1964] ECR 585).
- 17 Furthermore, the observations submitted in these proceedings have disclosed no new factor of such a kind as to lead the Court to answer the national court's first two questions otherwise than it answered the identically worded questions referred in *Karella and Karellas* and *Eleftheri Evangeliki Ekklesia*, cited above, in the judgments.

- 18 Accordingly, it is sufficient to refer to the grounds of those two judgments, and in particular to the operative part of the judgment in *Karella and Karellas*, according to which

Article 25(1) of the Second Council Directive may be relied upon by individuals against the public authorities before national courts, and

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.

The third question

- 19 By this question, the national court essentially asks whether Commission Decision 88/167 authorized the Hellenic Republic to maintain in force until 31 December 1987 the provisions of Law 1386/1983 which were contrary to the Second Directive.

- 20 As the Advocate General stated in section 4 of his Opinion, the discretion conferred on the Commission by Article 93 of the Treaty in the field of State aid does not permit the Commission to authorize Member States to derogate from provisions of Community law other than those relating to the application of Article 92(1) of the Treaty.

- 21 Furthermore, it is apparent from the very wording of Decision 88/167 that the Commission had no intention of authorizing the Greek authorities to derogate from the application of the Second Directive. By stating that the provisions of Law 1386/1983 which were incompatible with the directive had to be amended by 31 December 1987 at the latest, the Commission expressly requested the Greek Government to terminate that infringement of Community law.
- 22 The answer to the third question referred by the Efeteio, Athinas, must therefore be that Decision 88/167 did not authorize the Hellenic Republic to maintain in force until 31 December 1987 at the latest the provisions of Law 1386/1983 that were contrary to the Second Directive.

Costs

- 23 The costs incurred by the Greek Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 Efeteio, Athinas, by two judgments of 31 January 1991, hereby rules:

1. Article 25(1) 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.
3. Commission Decision 88/167/EEC of 7 October 1987 concerning Law 1386/1983 by which the Hellenic Republic grants aid to Greek industry did not authorize the Hellenic Republic to maintain in force until 31 December 1987 at the latest the provisions of Law 1386/1983 that were contrary to the Second Directive.

Kakouris

Mancini

Schockweiler

Diez de Velasco

Kapteyn

Delivered in open court in Luxembourg on 12 November 1992.

J.-G. Giraud

C. N. Kakouris

Registrar

President of the Sixth Chamber