JUDGMENT OF THE COURT (Sixth Chamber)
23 March 2000 *

In Case C-373/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Polimeles Protodikio Athinon, Greece, for a preliminary ruling in the proceedings pending before that court between

Dionisios Diamantis

and

Elliniko Dimosio (Greek State),

Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE),

on the interpretation of Articles 25 and 29 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 abuse of a right arising from those provisions,

* Language of the case: Greek.

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting for the President of the Sixth Chamber, P.J.G. Kapteyn (Rapporteur), G. Hirsch, H. Ragnemalm and V. Skouris, Judges,

Advocate General: A. Saggio,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mr Diamantis, by S. Andronikos, of the Athens Bar,

— the Greek Government, by P. Milonopoulos, Deputy Legal Adviser in the Special Legal Service — European Community Law Section of the Ministry of Foreign Affairs, and V. Kiriazopoulos, Authorised Legal Agent of the State Legal Service, acting as Agents,

— Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE), by I. Soufleros and S. Felios, of the Athens Bar,

— the Commission of the European Communities, by D. Gouloussis, Legal Adviser, and M. Patakia, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Diamantis, of the Greek Government, of Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE) and of the Commission at the hearing on 16 September 1999,

after hearing the Opinion of the Advocate General at the sitting on 28 October 1999,

gives the following

Judgment

1 By order of 24 June 1997, received at the Court on 31 October 1997, the Polimeles Protodikio Athinon (Court of First Instance, Athens) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 25 and 29 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 abuse of a right arising from those provisions.

2 Those questions were raised in proceedings between, on the one hand, Mr Diamantis and, on the other hand, the Greek State and Organismos Ikonomikos Anasinkrotisis Epikhiriseon AE (Organisation for the Restructuring of Undertakings, hereinafter 'the OAE').

Legal Background

Community law

3 Under Article 25(1) of the Second Directive:

'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.'

4 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.

5 It should be noted that the Second Directive does not provide for any penalty in the event of breach of any of its provisions. Furthermore, it does not require the Member States to introduce such penalties in the rules which they are to implement.

National law

6 Law No 1386/1983 of 5 August 1983 (*FEK* A' 107/8.8.1983, p. 14) applies to companies that are experiencing serious difficulties; it established the OAE, the object of which is to contribute to the financial and social development of the country (Article 2(2)). To that end, the OAE may, *inter alia*, take over the administration and day-to-day management of undertakings undergoing reorganisation or nationalised undertakings, take shares in the capital of undertakings, grant, issue or take out certain loans, acquire bonds and transfer shares, in particular to workers or to organisations representing them, to local authorities or to other legal persons constituted under public law, charitable institutions, social organisations or individuals (Article 2(3)).

7 Under Article 5(1) of Law No 1386/1983, the Minister for the National Economy may decide to place undertakings in serious financial difficulties under the scheme established by that Law.

8 Article 7 of Law No 1386/1983 provides that the competent Minister may decide to transfer to the OAE the administration of an undertaking subject to the scheme established by that Law, to reschedule its debts in such a way as to ensure its viability by way of a compulsory increase in its capital by way of subscriptions of capital or capitalisation of existing debts or by restructuring the debts, or to take steps to place the undertaking in liquidation in accordance with Article 9.

9 Under Article 8(8) of Law No 1386/1983, the OAE may decide, in the course of its provisional administration, to increase the capital of the company concerned by way of derogation from the legislation in force relating to public limited liability companies, which provides that the general meeting of shareholders is to have exclusive competence. The increase must be approved by the competent Minister. The former shareholders nevertheless retain their right of pre-emption and may exercise it within a period prescribed in the ministerial decision approving the increase.

10 On 7 March 1989, that is to say subsequent to the facts that gave rise to the main proceedings but prior to the order for reference, the Commission instituted proceedings for a declaration pursuant to Article 169 of the EC Treaty (now Article 226 EC) that the Hellenic Republic had failed to fulfil its obligations under the Second Directive. On 10 March 1990 the Greek Parliament adopted Law No 1882/1990 (*FEK* A' 43/23.3.1990). Since then, even during the provisional administration of a company pursuant to Law No 1386/1983, any alteration in its capital must be decided upon by the general meeting of shareholders.

11 Like the Second Directive itself, Law No 1882/1990 does not provide for any specific penalty for breach of any of its provisions, so that the normal penalties under private law could be applicable.

12 However, Law No 2685/1999 of 11 January 1999 (*FEK* A' 35/18.2.1999), which entered into force on the date of its publication, provides for a single remedy where an increase in capital has been decided upon in breach of the provisions of the Second Directive and, in particular, of Article 25(1), namely the right to full compensation for the damage suffered following such an increase. Under Article 28(2) of that Law, the action for compensation is directed exclusively against the Greek State rather than against the company concerned.

13 Lastly, mention must be made of Article 281 of the Greek Civil Code, according to which 'the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith, morality or the social or economic purpose of that right'.

Facts of the case and main proceedings

14 Mr Diamantis was a shareholder in the public limited liability company Plastika Kavalas AE (hereinafter 'Plastika Kavalas'), holding 1 000 shares with a nominal value of GRD 1 000 each, out of the initial capital of GRD 87 000 000, divided into 87 000 shares (or 1.15%).

15 At the beginning of the 1980s that company, which had been founded in 1973, was facing serious financial difficulties. In September 1982 its factory operations were suspended and in 1983, as a result of its over-indebtedness, it was close to bankruptcy. On 24 August 1983, 32 shareholders of Plastika Kavalas asked that it be placed under the scheme provided for by Law No 1386/1983. That request was repeated on 20 December 1983.

16 Following that request, the Advisory Committee provided for in Article 11 of Law No 1386/1983, having noted the extremely difficult situation in which Plastika Kavalas found itself, on 22 December 1983 issued an opinion recommending that the company be made subject to the special liquidation scheme provided for in Articles 7 and 9 of the Law.

17 The consequence of that scheme would have been the immediate liquidation of the assets of Plastika Kavalas and payment of its debts, which is what happened to a number of other over-indebted undertakings in difficulty.

18 Despite the opinion recommending and giving reasons for liquidation, by Decision No 212 of 3 February 1984 (*FEK* B' 60/8.2.1984) the Minister for the National Economy decided to place Plastika Kavalas under the scheme for provisional OAE administration provided for in Article 7 of Law No 1386/1983. That scheme was maintained until the beginning of January 1987.

19 On 28 May 1986, under that provisional administration, the OAE decided to increase the capital of Plastika Kavalas by GRD 177 000 000 by the issue of 1 770 000 new shares with a nominal value of GRD 100 each. The capital of the company was thus increased to GRD 264 000 000. That decision was approved by the Minister for Industry by Decision No 155 of 6 June 1986 (*FEK* B' 414/11.6.1986).

20 Since the former shareholders did not exercise their right of pre-emption within the prescribed period of 45 days from publication of that ministerial decision, all the new shares were issued to the OAE, which accordingly held approximately 67% of the capital of Plastika Kavalas.

21 On 11 December 1986, by resolution of the general meeting of the shareholders, where the OAE held a majority of the votes, the capital of the company was reduced to GRD 5 000 000, the minimum allowed by law. That reduction was prompted by the negative nature of the net situation of Plastika Kavalas and was effected by the cancellation of all the former shares and the issue of 5 000 new shares with a nominal value of GRD 1 000 each, which were allocated between those who had held shares in the company until that date in proportion to their shareholding. That resolution of the general meeting was approved by the Prefect of Kavala by Decision No 882 of 4 March 1987 (*FEK* 262/19.3.1987).

22 By Decision No 14 of 9 January 1987, the Second Minister for Industry, Energy and Technology (*FEK* B' 25/16.1.1987) approved a further increase in the capital of the company. The increase amounted to GRD 1 262 200 000 and was the result of, first, the compulsory conversion into shares of debts amounting to GRD 972 000 000 and, secondly, a contribution of GRD 290 000 000 in cash from the OAE for the repayment of creditors.

23 Following those alterations, the capital of Plastika Kavalas amounted to GRD 1 267 200 000, divided into 1 267 200 shares. From that time Plastika Kavalas operated normally for more than four years. Pursuant to Ministerial Decision No 14, the provisions of Law No 1386/1983 ceased to apply. The administration and operation of Plastika Kavalas were governed from then on by the decisions of the general meeting of shareholders and its administrative board.

24 In 1991 the majority of shares in Plastika Kavalas were transferred to Plastika Makedonias AE at a price of GRD 860 000 000. Lastly, in February 1994, Plastika Kavalas was taken over by the Petzetakis Group.

25 On 22 February 1991 Mr Diamantis brought an action in the national court seeking a declaration that the alterations in the capital of the company (two increases and one reduction) were invalid, on the ground that they were contrary to Article 25 of the Second Directive. The Greek Government and the OAE pleaded abuse of rights by Mr Diamantis and asked that the action be dismissed.

26 In its order for reference the national court cited, first, the Court's previous case-law on the direct effect of Article 25 of the Second Directive (Joined Cases C-19/90 and C-20/90 *Karella and Karellas* v *Minister of Industry, Energy and Technology and Another* [1991] ECR I-2691 and Case C-381/89 *Sindesmos Melon tis Eleftheras Evangelikis Ekklisias and Others* v *Greek State and Others* [1992] ECR I-2111) and concluded that it was clear from that case-law that Articles 8 and 10 of Law No 1386/1983 were contrary to the provisions of the Second Directive.

27 The national court accordingly held that the action was well founded in law, but also considered that the plea of abuse of rights as provided for in Article 281 of the Civil Code was well founded in law and on the facts.

28 The facts on which that plea was based were as follows:

— Mr Diamantis and 32 other shareholders asked for Plastika Kavalas to be made subject to the scheme under Law No 1386/1983,

— because of the difficult financial situation in which Plastika Kavalas found itself, Mr Diamantis had not been in favour of increasing the capital of the company and therefore did not exercise the right of pre-emption granted to him at the time of the first increase,

— Plastika Kavalas was reorganised by means of capitalisation of its debts and the payment of its creditors, which had substantial and irreversible consequences as far as shareholdings in its capital were concerned, in view of the fact that periods of five years and four years elapsed after the above-mentioned increases and the intervening reduction.

29 The national court therefore accepted that Article 281 of the Civil Code could be applied to defeat rights arising under Community law when there was an abuse of rights within the meaning of that provision. However, in view of the attitude taken by the Court of Justice in Case C-441/93 *Pafitis and Others* v *TKE and Others* [1996] ECR I-1347, paragraphs 68 to 70 in relation to the same plea

raised pursuant to Article 281 of the Civil Code, the national court considered that it was faced with a problem of interpretation of Articles 25(1) and 29(1) of the Second Directive with regard to the plea of abuse of rights.

30 In the circumstances the Polimeles Protodikio Athinon decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. In the specific factual circumstances set out in the grounds of this order, does a question arise as to the application, in law and in substance, of Article 281 of the Greek Civil Code concerning abuse of rights by a plaintiff in relation to Articles 25(1) and 29(1) of the Second Directive?

2. Should the Court of Justice of the European Communities find the above plea well founded in law and in substance, how will that affect the validity of the ministerial decisions increasing and reducing the capital of the company in question, of which the plaintiff happens to be a shareholder, and, by extension, are Articles 8(8) and 10(1) of Law No 1386/1983 compatible with Community law, in view of the fact that, where Article 281 of the Civil Code does not come into play, it has been held in accordance with the above that those provisions are contrary to the Second Directive?'

Question 1

31 By its first question the national court is asking, essentially, whether, in the light of the circumstances at issue in the main proceedings, a national provision which penalises abuse of rights may validly be relied on to defeat an action for a

declaration that social measures are invalid brought by a shareholder on the basis of breach of a right conferred by Article 25 of the Second Directive.

32 The preliminary point must be made that, as the Court has already held in Case C-367/96 *Kefalas and Others* v *Greek State and Others* [1998] ECR I-2843, paragraph 28, the objective of Article 25(1) of the Second Directive is to ensure, for the benefit of shareholders, that a decision increasing the capital of the company and, consequently, affecting the share of equity held by them, is not taken without their participation in the exercise of the decision-making powers of the company. According to the case-law, 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 categorised as special or exceptional — under which it was possible to decide by administrative measure, outside any decision by the general meeting of shareholders, to effect an increase in the company's capital (*Karella and Karellas*, cited above, paragraph 26).

33 However, Community law cannot be relied on for abusive or fraudulent ends (see *Kefalas and Others*, cited above, paragraph 20, and the case-law cited there). That would be the case if a shareholder, in reliance on Article 25(1) of the Second Directive, brought an action for the purpose of deriving, to the detriment of the company, an improper advantage, manifestly contrary to the objective of that provision (*Kefalas and Others*, cited above, paragraph 28).

34 Although national courts may, therefore, take account — on the basis of objective evidence — of abuse on the part of the person concerned in order, where appropriate, to deny him the benefit of the provisions of Community law on which he seeks to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions (Case C-206/94 *Paletta* [1996] ECR I-2357, paragraph 25). The application of a national rule such as Article 281 of the Civil Code must not, therefore, detract from the full effect and uniform application of Community law in the Member States (*Pafitis and Others*, cited above, paragraph 68).

35 It is for the national court to determine whether, in the case before it, application of Article 281 of the Civil Code is compatible with that requirement. However, the Court has jurisdiction to provide the national court with guidance on interpretation to enable it to assess that issue of compatibility.

36 In that connection, it is clear from the above judgments in *Pafitis and Others*, paragraph 70, and *Kefalas and Others*, paragraph 29, that a shareholder relying on Article 25(1) of the Second Directive cannot be deemed to be abusing his rights merely because he is a minority shareholder of a company subject to reorganisation measures, or has benefited from the reorganisation of the company, or has not exercised his right of pre-emption. Similarly, the fact that the plaintiff in the main proceedings asked that Plastika Kavalas be made subject to the scheme under Law No. 1386/1983 does not indicate an abuse of rights.

37 As the Advocate General observed in point 29 of his Opinion, once a company is placed under the scheme provided for under Law No 1386/1983, a wide range of solutions regarding the treatment to be applied to it is available, so that a request for that Law to be applied cannot be treated as agreement to the power to take decisions with regard to increases in capital being transferred to a body external to the general meeting. A shareholder relying on Article 25(1) of the Second Directive cannot, therefore, be said to be abusing his rights under that provision on the ground that he was one of the shareholders who asked that the company be placed under the scheme of Law No 1386/1983.

38 It must next be determined whether Community law precludes the national court from verifying whether, in choosing to bring an action for a declaration that the alterations in capital were invalid, after periods of five years and four years had elapsed, the plaintiff in the main proceedings was seeking to derive, to the detriment of Plastika Kavalas, an improper advantage manifestly contrary to the objective of Article 25(1) of the Second Directive, thus constituting an abuse of his rights under that provision.

39 On that point it must be observed that the fact of having instituted proceedings, even after a certain lapse of time, within the limitation period provided for under national law for such actions cannot, as such, be described as sufficient telling evidence of abuse of rights.

40 However, it appears from the order for reference that if the action brought by the plaintiff in the main proceedings for a declaration of invalidity in respect of the alterations in the capital of Plastika Kavalas when it was under provisional administration were upheld, several operations that took place during that period could be affected, in particular purchases, sales, enforcement measures, acquisitions of businesses and the merger of Plastika Kavalas with another company. Moreover, it is indisputable that the invalidity of those alterations would inevitably affect the rights of *bona fide* third parties.

41 In this connection it must be borne in mind that the Second Directive does not provide for any specific penalty for breach of any of its provisions, so that the normal penalties under private law could be applicable. When he instituted proceedings the plaintiff in the main proceedings was thus entitled to elect, as he did, from among the remedies in national law available for penalising a breach of Article 25 of the Second Directive, an action for a declaration that the alterations in the capital of the company that took place were invalid.

42 It must therefore be ascertained whether Community law precludes the national court from verifying whether, in view of all that has taken place, in law and in fact, since the alterations in the capital of the company, the type of reparation sought constitutes sufficient telling evidence, in the sense indicated above, of abuse of the shareholder's rights under Article 25(1) of the Second Directive.

43 In this case it would not appear that the uniform application and full effect of Community law would be compromised if it were to be held an abuse of rights for a shareholder to rely on Article 25(1) of the Second Directive on the ground that, of the remedies available for a situation that has arisen in breach of that provision, he has chosen a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate. Such a determination would not alter the scope of that provision and would not compromise its objectives.

44 The reply to the first question must therefore be that Community law does not preclude national courts from applying a provision of national law which enables them to determine whether a right deriving from a Community law provision is being abused. However, in making that determination, it is not permissible to deem a shareholder relying on Article 25(1) of the Second Directive to be abusing his rights under that provision merely because he is a minority shareholder of a company subject to reorganisation measures, or has benefited from reorganisation of the company, or has not exercised his right of pre-emption, or was among the shareholders who asked for the company to be placed under the scheme applicable to companies in serious difficulties, or has allowed a certain period of time to elapse before bringing his action. In contrast, Community law does not preclude national courts from applying the provision of national law concerned if, of the remedies available for a situation that has arisen in breach of that provision, a shareholder has chosen a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate.

Question 2

45 In view of the foregoing considerations there is no need to reply to the second question.

Costs

46 The costs incurred by the Greek Government and the Commission, 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 action 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 Polimeles Protodikio Athinon by order of 24 June 1997, hereby rules:

Community law does not preclude national courts from applying a provision of national law which enables them to determine whether a right deriving from a Community law provision is being abused. However, in making that determination, it is not permissible to deem a shareholder relying on Article 25(1) of the Second 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, to be abusing his rights under that provision merely because he is a minority shareholder of a company subject to reorganisation measures, or has benefited from reorganisation of the company, or has not exercised his right of pre-emption, or was among the shareholders who asked for the company to be placed under the scheme applicable to companies in serious difficulties, or has allowed a certain period of time to elapse before bringing his action. In contrast, Community law does not preclude national courts from applying the provision of national law concerned if, of the remedies available for a situation that has arisen in breach of that provision, a shareholder has chosen a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate.

Schintgen Kapteyn Hirsch

Ragnemalm Skouris

Delivered in open court in Luxembourg on 23 March 2000.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber