OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 30 January 1991 *

Mr President,
Members of the Court,

1. In this case, the Court is asked to interpret a number of provisions 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] (hereinafter referred to as 'the Second Directive').

2. I shall briefly summarize the relevant national legislation and the background to the main proceedings.

Greek Law No 1386/1983 of 5 August 1983[2] set up the Organismos Ikonomikis Anasygkrotiseos Epicheiriseon AE (Business Reconstruction Organization, hereinafter referred to as 'the OAE'), a public limited liability company whose capital is entirely subscribed by the State and whose purpose is to contribute to the economic and social development of the country. To that end, the OAE may *inter alia* take over the administration and day-to-day operation of undertakings undergoing rejuvenation or nationalized undertakings. Article 8(8) of Law No 1386/1983 provides that, during its provisional administration of the undertaking subject to the system established by the Law, the OAE may decide *inter alia*, by way of derogation from the provisions in force relating to public limited liability companies as regards the exclusive power of the general meeting, to increase the capital of the undertaking concerned. However, the original shareholders continue to have pre-emptive rights, which they must exercise within a certain period.

Law No 1386/1983 was the subject of Commission Decision 86/167/EEC of 7 October 1987,[3] which was adopted in the course of the procedure provided for in Article 93 of the EEC Treaty. In that decision, the Commission stated that it had no objections to the implementation of the Law, provided that, among other things, the Greek Government amended the provisions relating to capital increases in order to bring them into line with Articles 25, 26, 29 and 30 of the Second Directive. Subsequently, on 7 March 1989, the Commission initiated proceedings under Article 169 of the EEC Treaty on the ground that the Hellenic Republic had failed to fulfil its obligations under the Second Directive. Finally, on 10 March 1990, the Greek Parliament passed Law No 1882/1990[4] amending the previous legislation as regards the point at issue in the way desired by the Commission.

* Original language: Italian.

1 — OJ 1977 L 26, p. 1.

2 — *Official Journal of the Hellenic Republic* No 107 of 8. 8. 1983, p. 1926.

3 — OJ 1988 L 76, p. 18.

4 — *Official Journal of the Hellenic Republic* No A 43 of 23. 3. 1990.

3. The applicants in the main proceedings are shareholders in Klostiria Velka AE, a company subjected to the provisions of Law No 1386/1983 by decision of 14 December 1983 of the State Secretary for Industry, Energy and Technology.[5] On 28 May 1986 the OAE, which had taken over the administration of the company, decided to increase its capital of approximately DR 200 million by DR 400 million under Article 8(8) of the Law. The decision was ratified by the Greek authorities by Decree No 162 of 6 June 1986.[6]

The Council of State, to which the applicants applied for the annulment of the decree ratifying the increase in capital, which they claimed was unlawful on the ground that it infringed the Greek Constitution and the Second Directive, dismissed as unfounded their claims that the act was unconstitutional, but decided at the same time to stay the proceedings and submit three questions to the Court for a preliminary ruling on the interpretation of the relevant Community legislation.

4. In its first question, the national court refers impliedly to the Court's consistent case-law on the direct effect of directives and asks whether Article 25 in conjunction with Article 41(1) and Article 42 of the Second Directive are free of conditions left to the discretion of the Member States and are sufficiently precise for individuals to rely on them against the administration before the national courts, claiming that the rules set out in a legislative provision are incompatible with them.

For the moment, I shall not consider the question of the direct effect, if any, of Article 42, to which I reserve the right to return in the final part of my Opinion. In contrast, as far as Article 25 of the Second Directive is concerned, it must be observed that it lays down extremely clearly and precisely a general principle concerning capital increases of public limited liability companies in so far as the first paragraph states that 'any increases in capital must be decided upon by the general meeting'. This precept does not appear to be conditional on the provisions of the next paragraph, according to which the statutes, the instrument of incorporation or the general meeting may authorize an increase in the subscribed capital up to a maximum amount fixed by them with due regard for any maximum amount provided for by law. In fact, Article 25(2) provides for an individual, clearly defined derogation from the principle under which decisions to increase the company's capital are to be reserved for the general meeting, which itself precludes a national legislature from derogating from that principle above and beyond the cases for which express provision is made. Consequently, the derogation provided for in Article 25(2) is not such as to rule out the direct effect of Article 25(1).

5. The same applies to Article 41 of the Second Directive, under which the Member States may derogate from Article 25 if such derogation is necessary for the adoption or application of provisions designed to encourage the participation of employees or other groups of persons defined by national law in the capital of undertakings. Whilst it is true that the provision does give the national authorities a discretion to derogate from the principle set out in Article 25, it is

5 — *Official Journal of the Hellenic Republic* No 725 of 14. 12. 1983.

6 — *Official Journal of the Hellenic Republic* No 374 of 10. 6. 1986.

also true that such a possibility appears to be strictly limited to the case provided for, namely that of encouraging popular participation in companies' capital by facilitating share purchase on the part of a number of groups of people, in particular employees.

Apart from the express reference to employees, the aim pursued by the provision is also apparent from the fact that it also enables derogations to be made from Article 9(1) and Article 26, under which shares issued for a consideration must be paid up at not less than 25% of their nominal value. This is intended in fact to facilitate share purchase by social groups which normally do not dispose of substantial sums.

Consequently, Article 41 does not enable Member States to limit *ad nutum* the scope of the principle set forth in Article 25, but merely lays down a precise derogation with a view to the achievement of a specific social aim. The very reference to 'other groups of persons' must therefore be construed as referring to associations of employees or legal persons whose aim is in any event to foster popular shareholding and evidently not credit institutions or any entity governed by public or private law irrespective of the aims which they pursue. Consequently, the scope of Article 41 is not such as to preclude the direct effect of Article 25, apart from those cases for which express provision is made.

6. In its second question, the national court asks whether a legal provision comes within the scope of Article 25 of the Second Directive 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 it is compatible with that provision in conjunction with Article 41(1) of the directive.

The first part of the question is concerned with the actual scope of Article 25 of the Second Directive. Indeed, as appears from the national court's order, the Greek Council of State is inclined to consider that Article 25 does not cover a national law which does not specifically govern increases in company capital but is intended to deal with exceptional situations in which some undertakings have found themselves on account of their over-indebtedness.

I shall say forthwith that I cannot agree with that view. The aim of the Second Directive consists in particular of ensuring minimum equivalence in terms of the protection afforded to shareholders. To concede that a Member State was entitled, by means of special or exceptional legislation, to derogate from the provisions laid down at Community level to that end would considerably detract from the system of safeguards intended to be laid down by the

directive and would therefore impair the uniformity of the minimum level of shareholder protection.

There is nothing in the wording or in logic to suggest that the Community legislature intended to restrict the scope of Article 25 to cases where undertakings are without difficulties, leaving the Member States free to adopt special, exceptional provisions to cover crisis situations. On the contrary, the Second Directive expressly contemplates such situations but it does not mention any possible derogations from other provisions of the directive and merely provides 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 national legislation to consider whether the company should be wound up or any other measures taken.

7. On the other hand, where the EEC Treaty itself seeks to allow the Member States to adopt particular measures in order to safeguard vital interests, it makes express provision for this and generally arranges for appropriate control mechanisms designed to obviate abuses.[7]

It is in fact obvious that if every provision of Community law were to be regarded as being subject to a general reservation as regards exceptional events, this might impair the binding nature of Community law and its uniform application.[8]

By way of confirmation of the legislative approach whereby any derogations are expressly set out, I would point to the Third Council Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies,[9] a special provision of which provides that Member States need not apply the directive in cases where the company or companies which are being acquired or will cease to exist are the subject of bankruptcy, composition or other similar proceedings (Article 1(3)).

The absence of similar provisions in the Second Directive must lead one to the conclusion that the Community legislature intended to confer the greater scope on the provision which reserves to the general meeting decisions on increases in capital, precisely because of the major potential effects of such a change for the situation of the company.

8. As for the view that the national legislation at issue may fall within the derogations expressly provided for in Article 41 of the Second Directive, it must be observed that it emerges from an examination of the wording of Law No 1386/1983 that transfers of shares, in particular to employees or their representative organizations, local authorities, other public-law entities, charitable institutions or social organizations or private individuals (Article 2(3)), constitutes just one of the possibilities and potential activities of the OAE and is not the principal purpose of its operations. Consequently, the provision is not such as

7 — See in particular Article 36; Article 48(3) and (4); Article 73(2); Article 92(3); Article 100a(4); Article 108; Article 109; Article 223; Article 224; Article 226.

8 — See to that effect the judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 26.

9 — OJ 1978 L 295, p. 36.

to make the legislation at issue, taken as a whole, comply with the Second Directive.

The fact that the Greek Government amended the legislation at issue as regards the very point with which the Court is concerned is further confirmation, albeit not decisive in itself, of the observations which I have made in the foregoing.

9. The conclusions which I have reached regarding the interpretation of the provisions in question release me from having to consider the question on the direct effect of Article 42 of the Second Directive as raised in the third question concerning the interpretation of that provision. [10]

10. Before concluding, I shall briefly dwell on the Greek Government's request to the effect that the scope *ratione temporis* of the Court's judgment should possibly be limited.

In that connection, I would point out by way of preliminary that, according to the Court's case-law, the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 of the Treaty, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of the rule in question as it must or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule are to be brought before the courts having jurisdiction are satisfied. [11]

It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order and in taking account of the serious effects which its judgment might have, as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with view to calling into question those legal relationships. [12]

The Court has made use of that possibility in very specific circumstances, that is to say a risk of serious economic repercussions due in particular to the large number of legal relationships established in good faith on the basis of the legislation deemed to be validly in force together with the consideration that individuals and the national authorities were moved to act inconsistently with the Community legislation in view of an objective, substantial uncertainty relating to the scope of the Community provisions, which uncertainty

10 — In its third question, the Council of State asked whether provisions of the type embodied in Law No 1386/1983 were compatible with the provisions of Article 42 of the Second Directive (which provides that the Member States are to ensure equal treatment to all shareholders who are in the same position) in view of the fact that they did not prescribe that the price of the shares was 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 left 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, had had confidence in them shaken, although it did safeguard the pre-emptive right of existing shareholders when the new shares were distributed.

11 — Judgment in Case 61/79 *Amministrazione dello Finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205, paragraph 16; judgment in Joined Cases 66/78, 127/78 and 128/78 *Salumi* [1980] ECR 1237, paragraph 9.

12 — Judgment in *Denkavit Italiana*, cited above, paragraph 17; judgment in *Salumi*, cited above, paragraph 10.

may possibly have contributed towards other Member States or the Commission adopting that same conduct. [13]

However, even in such circumstances, the Court has made an exception for the rights of persons who brought court proceedings or took equivalent action before the date of the judgment.

In this case, there is no element — in relation to either the interpretation of the provision at issue or the number of persons concerned — such as to justify derogating from principle of the retroactive nature of the interpretative rulings. I therefore propose that the Court should abide by the strict criteria which it has applied in its previous case-law in this field and not limit the scope of its judgment *ratione temporis*.

1. In the light of the foregoing considerations, I propose that the questions referred by the Greek Council of State should be answered as follows:

'(1) Article 25 in conjunction with Article 41(1) of Council Directive 77/91/EEC are unconditional and sufficiently precise, with the result that individuals may rely upon them before national courts as against the administration, claiming that rules set out in a legal provision are incompatible with them.

(2) Article 25 in conjunction with Article 41(1) of Council Directive 77/91/EEC must be interpreted as meaning that they preclude the application of national rules which, in order to regulate the administration of certain undertakings in crisis situations, provide for the adoption by administrative act, without a vote by the general meeting, of a decision to increase the company capital, without prejudice to the right of pre-emption of the original shareholders.'

13 — Judgment in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraphs 40 to 45; judgment in Case 24/86 *Blaizot* [1988] ECR 379, paragraphs 25 to 35; judgment in Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 69 to 75.