OPINION OF ADVOCATE GENERAL TESAURO

delivered on 22 September 1992 *

Mr President,
Members of the Court,

1. The questions on which the Efeteio, Athinos (Court of Appeal, Athens), has requested the Court of Justice to give a preliminary ruling in this case relate to the scope and the direct effect, if any, of certain 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 ('the Second Council Directive'). [1]

2. Replies to two of the three questions have already been given in the recent judgments in *Eleftheri Evangiliki Ekklisia* [2] and *Karella and Karellas*. [3] In particular, in the judgment in *Karella and Karellas* — to which I would refer, since the parties have not raised any new arguments in these proceedings with respect to those put forward on that occasion — the Court ruled that Article 25(1) of the Second Council Directive may be relied upon by individuals against the public authorities before national courts and that Article 25 in conjunction with Article 41(1) of the Second Council 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. The only new issue raised by the instant case relates to the effect which Commission Decision 88/167/EEC of 7 October 1987, [4] adopted under the procedure provided for in Article 93 of the EEC Treaty, may have on the applicability of the Second Council Directive.

In its third question, the national court asks whether Decision 88/167, in which the Commission stated that it had no objections to the implementation of Law No 1386/1983, *provided that the Greek Government, by 31 December 1987, amended the provisions of that law so as to bring it into conformity with Article 25 et seq. and 29 et seq. of the Second Council Directive*, was intended to exempt Greece from the obligation to implement that directive before that date (31 December 1987).

* Original language: Italian.

1 — OJ 1977 L 26, p. 1.

2 — Judgment of 24 March 1992 in Case C-381/89 *Eleftheri Evangiliki Ekklisia* [1992] ECR I-2111.

3 — Judgment of 30 May 1991 in Joined Cases C-19/90 and C-20/90 *Karella and Karellas* [1991] ECR I-2691.

4 — OJ 1988 L 76, p. 18.

Although that issue was not expressly raised by the national courts in the earlier proceedings, it was in fact mentioned in the parties' observations in *Eleftheri Evangiliki Ekklisia* and indeed in my Opinion in that case I did take up this point when I stated that, by that decision, the Commission, 'far from endorsing, even for a transitional period, an infringement of Community law, simply intended to set a final time-limit for the competent authorities to adopt the measures necessary to bring the infringement to an end and, secondly, the Commission itself had no power to suspend temporarily the applicability of provisions which are contained in a Council directive and which are directly effective' (section 7 of the Opinion).

4. In this context, I can only confirm the view which I have already given, while pointing out that, as is clear from the Court's case-law [5] and from the consistent practice of the Commission, [6] the Commission cannot, within the confines of the discretionary powers conferred upon it by the Treaty in relation to the assessment of State aids, authorize derogations from the application of Community rules other than those provided for in the Treaty provisions concerning State aid.

Neither do I consider that a careful reading of the decision in question discloses any factors suggesting that the Commission intended in this case to diverge unlawfully from its previous practice, thus possibly creating a legitimate expectation in interested parties.

In fact, the sixth paragraph in section II of Decision 88/167/EEC reads as follows:

'Examination of Law 1386/1983 showed that the provisions regarding the method to be adopted for increasing the capital of companies taken under control of the BRO infringed Articles 25 et seq. and 29 et seq. of Council Directive 77/91, Second Council Directive on Company Law. If a Member State proposes a measure incorporating State aids which infringes Community rules other than the State aids provisions of the Treaty, the procedures of Articles 92 and 93, although they grant a wide discretion to the Commission, may not nevertheless produce a result which is contrary to those rules. Accordingly, the Commission is unable to exercise its discretionary powers pursuant to Article 92(3) until such infringements have been eliminated'.

In the light of that statement, Article 1 of the decision was not capable of giving rise to any uncertainty or expectation as to the Commission's intention to grant derogations, which in any case, I repeat, were not within its powers.

5 — Judgments in Case C-21/88 *Du Pont de Nemours* [1990] ECR I-889, in Case 18/84 *Commission* v *France* [1985] ECR 1339, in Case 73/79 *Commission* v *Italy* [1980] ECR 1533 and in Case 91/78 *Hansen* [1979] ECR 935.

6 — I am referring in particular to the decisions relating to State aid in the agricultural sector in which the Commission states that even if it were possible to apply a derogation pursuant to Article 92(3) of the EEC Treaty, the fact that the aid measure in question constitutes an infringement of the common organization of the market precludes the application of a derogation: cf. decisions 90/197/EEC of 4 October 1989, OJ 1990 L 105, p. 15, 89/580/EEC of 21 March 1989, OJ 1989 L 324, p. 26, 89/229/EEC of 21 December 1988, OJ 1988 L 94, p. 43, 88/605/EEC of 8 June 1988, OJ 1988 L 334, p. 22, and 88/39/EEC of 6 May 1987, OJ 1987 L 23, p. 18.

5. In conclusion, therefore, I propose that the Court should reply the questions referred for a preliminary ruling by the Efeteio Athinion:

(1) The combined provisions of Article 25 and Article 41(1) of the Second Council Directive must be interpreted as precluding national rules which, in order to ensure the survival and continued operation of companies of particular economic and social importance for society which, in view of their over-indebtedness, are in an exceptional situation, provide for the adoption by administrative act of a decision to increase the company capital, while preserving the preemptive right of the original shareholders when the new shares are issued.

(2) Article 25(1) of the Second Council Council Directive 77/91/EEC of 13 December 1976 may be invoked against public authorities before the national courts by an individual.

(3) Commission Decision 88/167/EEC of 7 October 1987, by which the Commission stated that it had no objection to the implementation of Law 1386/1983, provided, *inter alia*, that the Greek Government amended before 31 December 1987 the provisions of that law so as to bring them into conformity with Article 25 et seq. and Article 29 et seq. of the Second Council Directive, does not introduce for the Hellenic Republic a derogation from the application of that directive until 31 December 1987.