OPINION OF ADVOCATE GENERAL TESAURO

delivered on 4 February 1998 *

1. The two questions, subject of the present proceedings, referred for a preliminary ruling by the Efetio-Athinon (Court of Appeal, Athens) call upon the Court to rule whether it is possible to assert abuse of rights in relation to individual rights conferred by Community law. More precisely, the Athens court asks whether the principle of abuse of rights, as defined by national law, can also apply in cases where the right relied upon is conferred by provisions of Community law; and, in the negative, whether in the present case the conditions (under Community law) for determining whether the right concerned has been exercised abusively are met.

It should be noted from the outset that the case has arisen from contentious proceedings in Greece concerning the application and interpretation, in a case concerning companies in financial difficulties, of Article 25 of 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 'the Second Directive'). The Court is well-acquainted with such proceedings as it has already had several occasions to give very clear rulings to the effect that Article 25 of the Second Directive is also applicable to companies in critical difficulties and subject to special administration regimes. [2] In the present proceedings, the Court is therefore called upon, in substance, to decide whether the interpretation it has given of Article 25 of the Second Directive may be set aside, and under which conditions, when the criteria specified by national law for an effective claim of abuse of rights are met. The Court has, in fact, had occasion to consider this question, if only incidentally, in the *Pafitis* case. [3]

The regulatory framework and the relevant case-law

Community law

2. It is sufficient to recall here that Article 25(1) of the Second Directive provides that:

* Original language: Italian.

1 — OJ 1977 L 26, p. 1.

2 — See Joined Cases C-19/90 and C-20/90 *Karella and Karellas* v *Minister for Industry, Energy and Technology and Organismos Anasygkrotiseos Epicheirisseon AE* [1991] ECR I-2691; Case C-381/89 *Syndesmos Melon tis Eleftheras Evangelikis Ekklissias and Others* v *Greek State and Others* [1992] ECR I-2111; Joined Cases C-134/91 and C-135/91 *Kerafina-Keramische-und Finanz Holding AG and Vioktimatiki AEVE* v *Hellenic Republic and Organismos Oilonomikis Anasygkrotissis Epicheirisseon AE* [1992] ECR I-5699; and Case C-441/93 *Pafitis and Others* v *Trapeza Kentrikis Ellados AE and Others* [1996] ECR I-1347.

3 — Judgment cited in the preceding footnote, at paragraphs 67 to 70.

'Any increase in capital must be decided upon by the general meeting. Both this decision and the increase in 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.'

The relevant provisions of national law

3. Law No 1386 of 5 August 1983 [4] set up the *Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE* (Organisation for the Restructuring of companies, hereinafter 'the OAE'), a public limited liability company the capital of which is fully subscribed by the Greek State, with the aim of furthering the country's economic and social development (Article 2(2)). To this end, the OAE may, *inter alia*, take over the administration and day-to-day running of companies undergoing financial difficulties or of nationalised companies, acquire participations in the capital of companies, grant loans, issue bonds and transfer shares to public bodies and private individuals (Article 2(3)).

Pursuant to Article 8(8) of the aforesaid Law, the OAE may even, during provisional administration of an undertaking, decide to increase the capital of the company concerned; this is in derogation from the general rules governing public limited liability companies which provide that only the general meeting has decision-making power in the matter. Former shareholders retain, however, a right of pre-emption on the purchase of new shares, to be exercised within the period stipulated in the ministerial decision approving the capital increase.

4. Article 281 of the Greek Civil Code, which provides that 'the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith or morality or the economic or social purpose of that right', is of particular relevance here. It is precisely on the grounds of this provision that the Hellenic Republic challenges the applicability of Article 25 of the Second Directive in the present case.

The relevant case-law

5. As indicated above, the Court has already had occasion to clarify the scope and effect of Article 25 of the Second Directive, precisely in relation to the aforesaid provisions of Greek law. Asked to give a preliminary ruling in various proceedings instituted by shareholders opposing capital increases effected by administrative act, the Court ruled in effect that the general meeting of shareholders has exclusive competence to decide alterations of capital. More particu-

4 — Official Journal of the Hellenic Republic, EK Edition 107 of 8 August 1983, p. 14. The provisions of Law No 1386/1983 were subsequently amended by Law No 1882/1990 (Official Journal of the Hellenic Republic EK Edition A43 of 23 March 1990) in order to comply with the Second Directive, and in particular with Articles 25 and 29 thereof. Needless to say, the case at issue is governed by the provisions of Greek law in force prior to the amendments enacted by Law No 1882/1990.

larly, the Court ruled that Article 25(1) of the Second Directive has direct effect, [5] and that this provision precludes application of a national provision which, in order to ensure the reorganisation of companies in critical difficulties, provides that capital increases may be decided by administrative act with no involvement by the general meeting, [6] even when original shareholders are granted pre-emptive rights on the new shares. [7] The aim of ensuring a minimum level of protection for shareholders in all Member States, which is the main aim of the Second Directive, would, the Court stated, 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 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'. [8]

In other words, as I have already observed in the Opinion I delivered in the *Pafitis* case, [9] the Court made it clear that, even on the basis of special regulations designed to enable companies in financial difficulties to be restructured, the general meeting may not be deprived of that most essential, unrelinquishable right, namely the right to alter the composition of the share capital, that is to say the assets of the company and of the shareholders themselves.

6. In *Pafitis*, moreover, the Court further stated, although no specific question had been submitted in this respect, that 'the uniform application and full effect of Community law would be undermined if a shareholder relying on Article 25(1) of the Second Directive were deemed to be abusing his rights merely because he was a minority shareholder of a company subject to reorganisation measures or had benefited from the reorganisation of the company. Since Article 25(1) applies without distinction to all shareholders, regardless of the outcome of any reorganisation procedure, to treat an action based on Article 25(1) as abusive for such reasons would be tantamount to altering the scope of that provision'. [10]

This clarification was made necessary because, as was apparent from the order for reference, the judgment of the Court, and with it the interpretation given to Article 25, would not have been applied had the

5 — See *Karella and Karellas, Syndesmos Melon tis Eleftheras Evangelikis Ekklissias* and *Kerafina-Keramische* (cited in footnote 2), at paragraphs 23, 38 and 18 respectively.

6 — See *Karella and Karellas, Syndesmos Melon tis Eleftheras Evangelikis Ekklissias* and *Kerafina-Keramische* (cited in footnote 2), at paragraphs 36, 37 and 18 respectively.

7 — See *Karella and Karellas and Kerafina-Keramische* (cited in footnote 2), at paragraphs 36 and 18 respectively.

8 — See *Karella and Karellas*, at paragraphs 26, 33 and 39 respectively.

9 — Opinion delivered on 9 November 1995 ([1996] ECR I-1349, at paragraph 13).

10 — *Pafitis* (cited in footnote 2), at paragraph 70.

national court reached the conclusion that the facts of the case before it met the conditions required by national law to determine that the right conferred by Article 25 had been exercised abusively. Even before excluding that this had occurred, the Court expressly stated that it was not necessary 'to rule as to whether it is permissible, under the Community legal order, to apply a national rule in determining whether a right conferred by the provisions of Community law at issue is being exercised abusively'; it cautioned however that 'the application of such a rule must not detract from the full effect and uniform application of Community law in the Member States'. [11]

The facts and the questions referred for a preliminary ruling

7. The main proceedings were instituted by certain shareholders who sought to have the ministerial measures effecting an increase in capital annulled on the grounds that they were adopted in infringement of Article 25 of the Second Directive. This time, the case involves shareholders of Athinaïki Khartopiia AE, a public limited liability company subject to special arrangements under Law No 1386/1983 since 30 March 1984. On 28 May 1986, the OAE, which had taken over the company's administration, decided — in the framework of its temporary administration and in accordance with Article 8(8) of the Law — to increase the capital by DR 940 million. By Decision No 153 of 6 June 1986, the Minister for Industry, Research and Technology approved the capital increase and set out the terms thereof, providing in particular for pre-emptive rights, to be exercised within one month of the publication of the decision in the Official Journal, for former shareholders in respect of the new share issue.

The former shareholders did not exercise this right. They in fact considered that the capital increase, decided in the aforesaid manner, was in conflict with Article 25(1) of the Second Directive. On 10 November 1987, they therefore brought an action before the Polimeles Protodikio (Court of First Instance), Athens, seeking annulment of the capital increase. This action was dismissed by judgment No 5136/1988.

8. On 28 June 1989, the shareholders concerned appealed against this ruling before the Efetio-Athinon. By judgment No 5943/1994, the latter annulled the judgment of the lower court on the grounds that it was in overt conflict with Community case-law in the matter. [12] In the same judgment, the Efetio

11 — *Pafitis* (cited in footnote 2), at paragraph 68.

12 — On the basis of that case-law, the court in the main proceedings stressed in its order for reference that Article 25(1) of the Second Directive prohibits capital increases such as that effected for the company Athiniki Chartopoiia AE. More precisely, the national court noted that, according to Community case-law, the rule concerned is 'set out in clear and precise terms and lays down, without specifying any conditions, a rule providing for the general principle that it is the general meeting of shareholders that must decide upon any increase in capital and not third persons such as the Minister, whose decisions are invalid and do not in principle bind natural or legal persons affected by the measure'.

stayed its final judgment and required the Greek State, which had raised the objection of abuse of rights, to produce evidence that the right, conferred by Article 25 of the Second Directive, to bring an action in annulment had been exercised abusively by the shareholders. The national court therefore takes the view that the general rule laid down in Article 281 of the Greek Civil Code sanctioning the abusive exercise of rights could well be capable of application even in cases where the provision relied upon before a court had its origin in Community law.

9. After its summary of the facts, the Efetio went on to examine the evidence submitted by the Greek State with regard to the contended abuse of the right conferred on the shareholders by Article 25 of the Second Directive and, on this basis, reached the conclusion that the conditions laid down in Article 281 of the Civil Code had under the circumstances been met. The referring court held that the appellant shareholders had exercised the right abusively in so far as the exercise thereof manifestly exceeded the bounds of good faith, morality and the socio-economic purpose of the right in question.

This was stated to be demonstrated by a series of extremely revealing evidence, some of them objective, others subjective. In particular, the national court refers to the company's catastrophic financial situation, which made bankruptcy certain; [13] to the evident advantages that the appellants themselves had drawn from the government's reorganisation measures; [14] as well as to the fact that the appellants did not exercise their pre-emptive rights in respect of the shares issued after the company was reorganised.

10. The same court questions, however, whether such an approach is consistent with Community law. In its view, the indications provided by the Court in *Pafitis* leave the issue open, in the sense that it is not clear who (the national court or the Community court), and under the rules and/or principles of which legal order (national law or Community law), is to decide whether or not a right conferred by a rule of Community law has been exercised abusively.

13 — The order for reference states in this respect that '... at the time when it fell under the special régime of Law 1386/[1986]/1983 (...), Athinaiki Khartopiia AE had due bills to banks and various other creditors of approximately DR 17 203 894 160 in total, it had an acute liquidity problem because of its heavy loan burden, it was lacking its own capital and its assets were not sufficient to satisfy its debts. The shortfall on the basis of its existing assets was of the order of at least DR 3 500 million. Accordingly, even if those assets were liquidated at the best possible market prices, liabilities of that order would have remained unsatisfied'.

14 — The referring court notes in the order for reference that: 'Share value at that time was essentially negative, whilst with the increase in the capital in the amount of DR 940 000 000 on the part of the OAE and the consequent conversion of liabilities into shares, there was a recovery in the progress of works and the undertaking might be sold to third parties under advantageous terms which would enable liabilities to be discharged as well as a financial guarantee to be given to the former shareholders, on the basis of the number of shares which they continue to hold'.

Following this line of reasoning, the national court consequently considered it necessary, in order to rule on the proceedings pending before it, to ask the Court to clarify whether, to what extent and under which conditions, it is possible to apply the concept of abuse of rights also in cases where the right relied upon is conferred by Community law. More precisely, it referred to the Court the following two questions for a preliminary ruling:

'1. Can the national court apply a provision of national law (in this case Article 281 of the Greek Civil Code) in order to assess whether a right granted by the Community provisions at issue is being exercised by the party possessing it or are there other Community law principles, and if so which, to be found in legislation or settled case-law, on which the national court may, if need be, base itself?

2. If the reply to Question 1 is in the negative, if, that is, the Court of Justice reserves such competence for itself, for reasons relating, for instance, to the uniform application of Community provisions, may the specific circumstances as formulated by the defendant-respondent State as an objection, which constituted the issue of proof in judgment No 5943/1994 of this court, and which were set out succinctly in the previous paragraph of this judgment, or certain of them and if so which, prevent an action founded on infringement of Article 25(1) of the Second Council Directive 77/91/EEC from succeeding?'

The first question

11. By its first question, the referring court therefore asks the Court to clarify whether the possible abusive exercise of a right conferred by a provision of Community law may be assessed by the referring court on the basis of the relevant provisions of its own national law, or whether, precisely because the right relied upon in the proceedings has its origin in Community rules, the abuse of rights should be examined with reference to the general principles laid down in Community law.

Clearly, the question of abuse of rights is posed by the national court in general terms, independently, that is, of the Community provision relied on in the proceedings and of the national provision governing abuse of rights under the domestic legal order concerned. The question being asked is in effect whether it is for the national court to decide whether there has been an abuse of rights and whether it may, for this purpose, apply provisions of its own law or whether it must apply the general principles of Community law which may be relevant in the matter and the definition of which is a matter for the Court of Justice.

12. First of all, a clarification is necessary. It is indisputable, in proceedings for a preliminary ruling, that the decision as to whether or not there has been an abuse of rights lies in any case with the national court: and this regardless of whether the abuse of rights is determined on the basis of national rules or on the basis of Community criteria. It goes without saying, however, that in all cases the Court has the power of interpretation, albeit from different angles, in order to ensure that the provision of Community law relied upon is correctly construed and applied.

Therefore, the question referred to the Court should be properly understood as seeking to ascertain on the basis of the provisions of which legal order, national or Community, an abuse of rights should be ascertained. For this purpose it is however necessary first of all to determine whether it is permissible under Community law for the application of Community provisions to be subordinated to, and in some cases paralysed by, an abuse of rights.

13. That being said, the starting point for such an analysis can only be the judgment in *Pafitis*, [15] in which the Court had occasion to consider facts very similar to those in the present case. While explaining that the application of a national rule on abuse of rights must not detract from the full effect and uniform application of Community law, the Court in effect confined itself to ascertaining whether in that case the conditions for regarding the right conferred by Article 25(1) of the Second Directive as having been exercised abusively were fulfilled. Basing itself on the interpretation of the rule of Community law at issue, the Court answered this question in the negative.

As already pointed out, on that occasion the Court expressly stated that it did not consider it necessary to determine whether or not it was permissible under the Community legal order to apply a national rule in order to assess whether a right conferred by provisions of Community law has been exercised abusively. In substance, therefore, while leaving open the question of principle, the Court ruled out that the shareholders' action, seeking annulment of the capital increase decided on in breach of Article 25(1) of the Second Directive, could be treated as abusive. It did so on the ground that the application of such a national rule, even if permissible, would undermine the full effect and uniform application of Community law.

14. Applying such a solution to the present case, it is clear that the answer can be no different, in the sense that now, just as then, it would have to be ruled out that the shareholders exercised the right conferred by

15 — I would point out that in *Syndesmos Melon tis Eleftheras Evangelikis Ekklissias* (cited in footnote 2), the Court did not consider the issue because, although it had been raised by the parties in the main proceedings, no question on it was referred for a preliminary ruling (paragraph 18). In this connection, see also my Opinion concerning this case ([1992] ECR I-2126, at paragraph 8).

Article 25(1) of the Second Directive abusively. Such a reply was without doubt sufficient in the earlier case, but could well seem too summary here, given that the referring court asks the Court to resolve the issue left open in *Pafitis*, in other words to clarify whether or not it is permissible under Community law to apply a national rule on abuse of rights — obviously where rights conferred by provisions of Community law are involved — or whether only Community criteria may be used to determine whether such a right has been exercised abusively.

15. That being so, I would first point out that to allow a domestic rule relating, in this case, to the abuse of rights, to consolidate a breach of Community law, in this case the rule that alterations of capital are to be decided by the general meeting, would go against the fundamental principle that Community law has primacy over national law. [16] It stands to reason that the provision of Community law concerned would thus be rendered inoperative by virtue of a conflicting principle of substantive domestic law, which would inevitably undermine the full effect and uniform application of Community law. A conflict of this kind — and there is indeed a conflict here — would therefore have to be resolved according to the principle of primacy of Community law.

16. This conclusion is confirmed by the position taken by the Court in a case where the national court asked whether it could apply a 'principle of objective unfairness', which would have resulted in the non-application of a Community provision. The Court did not fail to point out that it would be contrary to the division of powers between the Community and the Member States if it were to be accepted that 'a national authority were entitled, or even obliged, not to apply a provision of Community law in a case in which it considered that its application would lead to a result which the legislature would clearly have sought to avoid if it had envisaged such an eventuality when enacting the provision in question. If such a general principle were recognised, it might prevent the provisions of Community law from having full effect in the Member States and would be prejudicial to the fundamental principle that Community law must be applied uniformly throughout the Community'. [17]

Moreover, the Court had already given a ruling to the same effect in a previous judgment in which, asked to decide whether it was possible to grant an exemption, for reasons of natural justice, from charges due under Community law, it stated that the application of a rule of natural justice for which provision is made under national legislation

16 — On this point see also my observations in the Opinion in *Pafitis* ([1996] ECR I-1349, at paragraph 27).

17 — Case 299/84 *Firma Karl-Heinz Neumann* v *Bundesanstalt für Landwirtschaftliche Marktordnung* [1985] ECR 3663, at paragraph 25. In the same judgment, the Court added however that 'Community law provides all courts of the Member States with a solution which is wholly in accordance with the division of powers between the Community and the Member States: (...) a court (...) may ask the Court of Justice under Article 177 of the EEC Treaty for an interpretation of the Community provision in question or for a declaration that it is invalid, if necessary, thus avoiding what it regards as an injustice' (at paragraph 26).

may possibly be justified in connection with the formalities applicable to the imposition of a charge introduced by Community law; on the other hand, 'such a rule may not be applied in so far as its effect would be to modify the scope of the provisions of Community law concerning the basis of assessment, the manner of imposition or the amount of a charge introduced by that law'. [18]

17. The case-law just cited therefore shows that a provision of domestic law cannot be applied if it modifies the scope of the Community rule in question, that is to say if it detracts from its full effect and uniform application: in short, if it would defeat the principle of the primacy of Community law.

All things considered, the Court followed the reasoning in *Pafitis*. Declaring that Article 25(1) applies without distinction to all shareholders regardless of the outcome of any reorganisation procedure, and that consequently 'to treat an action based on Article 25(1) as abusive for such reasons would be tantamount to altering the scope of that provision', [19] the Court again underscored that a provision or principle of national law can in no case be applied in such manner as to cause the Community legal order to give its 'blessing' to an infringement of its provisions.

18. The foregoing leads to the following first conclusion: it is not permissible under Community law for a national court to apply a domestic rule where that rule would entail a solution inconsistent with Community law. This would certainly be the case in this instance, given that, as it emerges from settled case-law and as the national court itself recognises in its order for reference, the domestic rule which the abuse of rights provision is meant to safeguard manifestly conflicts with Article 25(1) of the Second Directive, which is the provision relied upon by the applicant shareholders for the precise purpose of challenging the violation in question.

This conclusion, however, does not fully answer the question referred, since the national court also asks whether there are principles of Community law which are capable of sanctioning cases of abuse of rights. Certainly, it seems difficult even to envisage the existence of a general rule of Community law capable of negating a right conferred by a Community provision, especially in a harmonised field such as the company law field involved here, in confrontation with a domestic provision infringing that right. None the less, given the terms and

18 — Case 118/76 *Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1977] ECR 1177, at paragraph 5.

19 — See *Pafitis* (cited in footnote 2), at paragraph 70.

the scope of the question submitted, I believe a few remarks on this matter are due.

19. Firstly, I would recall that in Community practice the elaboration and application of unwritten principles have assumed an importance which is not insignificant, despite the lack of any express provision to this effect. Besides being used as interpretation criteria, these principles essentially serve to identify the limits on the powers exercised by the administration over subjects and, more generally, to determine the legality of an act or of the conduct of a Community institution or of a Member State.

It should be pointed out that these principles are simply created by the Court, as occurs in the national sphere, and they accordingly constitute principles specific to Community law, in the sense that they are not borrowed in individual cases from other legal systems. Therefore, while the Court is certainly inspired by national legal practice in elaborating and defining general principles, it nevertheless always adapts the specific principle concerned to the needs, functioning and objectives of the Community.

20. It would not be superfluous to add here that the fact that the only Community provision which refers to 'the general principles common to the laws of the Member States', namely Article 215 of the Treaty, is confined to the field of the non-contractual liability of the Community and to defining the ensuing obligation to make good damage is certainly not to be understood as meaning that the Court is precluded from making reference to the practice of national courts in elaborating and applying unwritten principles in the Community legal order. In fact, the reference to generally accepted principles is a constant in Community case-law in which general unwritten principles are affirmed. Indeed, the Court has expressly pointed out that it is for it, 'in pursuance of the task conferred on it by Article 164 of the Treaty (...), to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States'. [20]

However, that affirmation should not be understood as meaning that there are two different categories of general principles: those specific to the Community legal order and those derived from national practice. It is indeed true that certain principles have their foundation in the actual provisions of the Treaty itself, or can at least be traced back to them (I refer here, for example, to the principle of proportionality), whereas

20 — Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA* v *Bundesrepublik Deutschland* and *The Queen* v *Secretary of State for Transport, ex parte: Factortame Ltd and Others* [1996] ECR I-1029, at paragraph 27. See also paragraph 41 of the same judgment, where the Court stated that, in the absence of written rules, it referred to the general principles common to the laws of the Member States in areas other than the non-contractual liability of the Community.

others have been illumined and determined by reference to the practice of national courts (for example, the principle of legitimate expectations). None the less, in both cases, the principles concerned are principles which the Community legal order has made its own, that is to say principles which, once enucleated, become an integral part of it.

21. It is in the light of these general observations, therefore, that it should now be determined whether, under Community law, the conditions are fulfilled for elaborating and/or defining a general principle of law relative to abuse of rights. Even legal writers have recently expressed the wish to see this happen. [21]

In the Opinion I delivered in *Pafitis*, while noting that the abusive exercise of rights by a person on whom a right is conferred may be contested in nearly all Member States, albeit in different manners and under different conditions, I promptly added that no such rule was then to be found in Community law. [22] I have not changed my point of view, in the sense that I do not believe that in the meantime the conditions have been fulfilled for 'consecrating' in the Community legal order a general principle pursuant to which one could refuse to recognise as abusive the exercise of a right conferred by a Community provision.

22. More than one reason leads me to this conclusion. Firstly, I believe that under present circumstances a common definition, drawn from national legal practice, of abuse of rights is not possible. A survey, even approximate, of the way in which this principle is laid down and works in the various Member States only serves to confirm this point.

Although it is true that the majority of the Member States recognises the concept of abuse of rights, [23] it is also true that in certain States this legal concept, far from having the value of a general principle of law, is

21 — See L. Neville Brown, *Is there a General Principle of Abuse of Rights in European Community Law?* in *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, vol. II, Dordrecht/Boston/London 1994, page 511 et seq.

22 — It was precisely for this reason that I came to the conclusion that it is under its own legal order that a national court may, in principle, ascertain whether a right conferred by a provision of Community law has been exercised abusively (see the Opinion in *Pafitis*, cited in footnote 16, at paragraph 28). As explained in that Opinion, such an assessment can under no circumstances detract from the objectives of the provision at issue and, consequently, from its uniform application in all Member States: such a result would clearly have occurred in that case (see paragraphs 30 to 33).

23 — However, the concept does not exist at all, at least not as such, in the law of the United Kingdom, of Ireland or of Denmark.

confined to regulating very specific cases provided for by law. [24] Furthermore, the tenor and application of such a 'principle' vary significantly from one State to another. [25]

23. Certainly, I am aware that these circumstances are hardly decisive. In this respect, I need only recall, besides what I have already stated, that the elaboration of a general principle at Community level does not necessarily require that the principle exist in all the national legal systems or that it be subject to the same conditions and application criteria. These are principles which must be incorporated in the Community order and which, therefore, acquire their own autonomy in function of the structure and the objectives of that order.

The fact that it is not possible to arrive at a common, but precise and detailed, definition of abuse of rights by drawing on the general principles common to Member States is significant but it is not the only reason which leads me to deny the existence of such a principle in the Community legal order. I consider that the very characteristics and *raison d'être* of a principle relative to abuse of rights demonstrate that it is a legal concept which certainly has a home, or at least a foundation, in well-established legal systems, but much less so in a legal order like that of the Community, whose evolution towards integration is far from being capable of being considered to be complete. More generally, I consider that the risk of there being a gap in the system — which is, after all, what the abuse of rights principle, like all other so-called catch-all provisions, seeks to avoid — is minor, or non-existent, in a legal order like that of the Community which, through judicial interpretation and case-law in general, is more promptly amenable to adaptation to the needs of society.

24. That said, it is none the less true that any legal order which aspires to achieve a minimum level of completion must contain self-protection measures, so to speak, to ensure that the rights it confers are not exercised in a manner which is abusive, excessive or distorted. This requirement is not at all alien to Community law; on the contrary, it has been repeatedly recognised in the Court's case-law.

I refer, above all, to the established case-law according to which 'the facilities created by the Treaty cannot have the effect of allowing

24 — This is the case, for example, in Italian law, in which the concept of abuse of rights relates solely to property rights (Article 833 of the Civil Code). Similarly, even if one were to categorise the cases where United Kingdom, Danish and Irish law sanctions certain conduct as entailing application of a concept of abuse of rights, the fact remains that these cases are still confined to certain specific areas.

25 — Although this is in any case a simplification, in certain legal systems abuse of rights covers conduct that goes beyond the limits of the exercise of the right involved (Belgium, Spain, Luxembourg and Portugal), while in others it relates to conduct which is contrary to good faith and accepted principles of morality (Germany, Greece, Portugal). Moreover, while in certain legal systems the determination of an abusive exercise of rights is based solely on objective elements (Germany, Belgium, Luxembourg, the Netherlands, Greece, Spain and Portugal), in others certain subjective elements are required, in particular the intent to harm others (Italy and, according to some writers, France).

the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse'. [26] Similarly, the Court has had occasion to explain that it is permissible for national legal orders to deny the right to rely upon Community law where the conduct of the person relying upon a right conferred by a provision of Community law can be demonstrated to be a fraudulent evasion of statutory law. [27]

25. More generally, it is appropriate to recall the statement of the Court whereby 'although the national courts may, therefore, take account, on the basis of objective evidence, of abuse or fraudulent conduct on the part of the worker 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'. [28]

So, essentially, the Court recognises that a national court may sanction an excessive or distorted use of Community law only where this is not prejudicial to the objectives pursued by the relevant provision, in particular in cases where the provision relied upon is only 'apparently' the one governing the circumstances concerned, or when the situation of the person relying upon the right concerned only 'apparently' meets what is laid down by the provision at issue. This really means that the Court reserves itself the right, as is appropriate, to define the substantive scope of the Community right at issue, that is to say, to define the intrinsic limits of the subjective legal position concerned. So, reliance on a right may be refused only where it is proved that those limits have been exceeded. From that angle, where a legal position is one conferred by Community law, the question of any abuse of rights

26 — Case C-370/90 *The Queen* v *Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265, at paragraph 24. To the same effect, see, *inter alia*, Case 33/74 *van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, at paragraph 13; Case 115/78 *Knoors* v *Secretary of State for Foreign Affairs* [1979] ECR 399; Case 205/84 *Commission* v *Germany* [1986] ECR 3755, at paragraph 22; Case C-148/91 *Vereniging Veronica Omroep Organisatie* v *Commissariaat voor de Media* [1993] ECR I-487, at paragraph 12; and finally Case C-23/93 *TV10* v *Commissariaat voor de Media* [1994] ECR I-4795, at paragraph 21.

27 — This was the case in Case C-8/92 *General Milk Products GmbH* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-779, in which the Court stated that 'the position would be different only if it could be shown that the importation and re-exportation of that cheese were not realised as *bona fide* commercial transactions but only in order *wrongfully to benefit* from the grant of monetary compensatory amounts. The *bona fide* nature of those transactions is a question of fact to be decided by the national court' (at paragraph 21, the italics are mine). It was also the case in Case 130/88 *van de Bijl* v *Staatssecretaris van Economische Zaken* [1989] ECR 3039, at paragraph 26, in which the Court held that the host Member State was not bound by a certificate confirming that the holder had exercised a period of professional activity in the Member State from which he came when 'it is clear that during that same period the person in question has pursued his activities in the territory of the host Member State' (at paragraph 27). The judgment in Case C-206/94 *Brennett* v *Paletta* [1996] ECR I-2357 took the same line. At paragraph 27 thereof, the Court stated that the Community provision relied upon 'does not preclude employers from adducing evidence to support, where appropriate, a finding by the national court of *abuse or fraudulent conduct* on the part of the worker concerned, in tht, although he may claim to have become incapacitated for work, such incapacity having been certified in accordance with Article 18 of Regulation No 574/72, he was not sick at all' (the italics are mine).

28 — *Paletta II* (cited in the preceding footnote), at paragraph 25. The Court thus stated in the case before it that the presumption of abusive conduct on the part of the person relying upon a legal position conferred by Community law could not in any case be such as to require that the worker prove, by other means different from those required by the applicable provision of Community law, that he was actually sick. This was precisely because the objective of the provision, designed specifically to allow workers who fall ill in another Member State to provide a simple medical certificate drawn up by the competent authorities of that State, would thereby have been defeated. On a proper view, therefore, that case did not involve abuse of rights in the true sense of the term but fraud.

which may be raised under provisions of national law ultimately turns into a question of interpretation of the Community provision at issue.

26. This interpretation of the case-law to which I have referred is, in my view, confirmed by a recent judgment in which the Court explicitly ruled on an abusive exercise of rights. The case involved a Turkish worker who, despite the fact that he had expressly declared he would return to Turkey after a period of vocational training and had obtained, on the basis of such declaration, a temporary residence permit from the competent authorities in Germany, intended to extend his stay in Germany and sought to rely upon the relevant 'Community' provision for this purpose. [29] The Court's answer was clear and to the point: 'The fact that a Turkish worker wishes to extend his stay in the host Member State, although he expressly accepted its restriction, does not constitute an abuse of rights'. The Court then added that the fact that the worker had declared his intention of returning to Turkey after having been employed in the Member State for the purpose of perfecting his vocational skills was not liable to deprive him of the rights deriving from Article 6(1) of Decision No 1/80 of the EEC-Turkey Association Council of 19 September 1980 'unless it is established by the national court that that declaration was made with *the sole intention of improperly obtaining* work and residence permits for the host Member State'. [30]

Once again, therefore, the Court began by defining the aim of the provision at issue and determining its intrinsic limits and then left it to the national court to rule out its invocability only where those limits were exceeded, that is to say where in the specific case the worker's conduct was shown to be fraudulent.

27. So, the Court has essentially allowed each national legal system to apply its own rules of ordinary law (whether sanctioning 'fraudulent evasion of statutory law', 'false representation', or, why not, even 'abuse of rights') to withdraw the right to rely upon rules of Community law in well-defined cases, in which, in the final analysis, such rules were not meant to apply, and where there can therefore be no adverse effect on the uniform application of Community law. In such cases, I repeat, the Court's interpretation may still be necessary in order to define the objectives and the limits of the

29 — See Case C-36/96 *Faik Günaydin and Others* v *Freistaat Bayern* [1997] ECR I-5143. More specifically, the Court was asked: 'Can a claim under Article 6(1) of Decision No 1/80 be opposed as an abuse of law if the Turkish worker has expressly declared his intention of returning to Turkey after preparation for the work there and the competent authority has authorised him to reside in the country temporarily only in view of that declaration?'

30 — As above, at paragraph 61; the italics are mine.

provision at issue, thereby ensuring that the needs which Community law seeks to safeguard are respected, needs which in this case relate to harmonisation in relation to companies.

To sum up, I conclude that at present Community law has no general principle sanctioning the abusive exercise of a right conferred by Community law and that, even if one were to exist, it could not in any event be applied so as to 'endorse' a breach of Community law, which would otherwise be the result in this case. Given the wording of the question submitted, I would add, finally, that it is also not possible in this case to refer to established principles of Community law, such as the principles of proportionality, legal certainty and legitimate expectations. Nor do I consider it possible to envisage the use of those principles to render inoperative the protection afforded to individuals by Community law, much less to 'endorse' an established breach of Article 25(1) of the Second Directive.

The second question

28. By its second question, the referring court asks whether — in the event that it is precluded from assessing whether there has been an abuse of rights on the basis of provisions of its own national law, which would mean that any abuse of rights could only be sanctioned by the Court of Justice on the basis of Community law — the conditions are fulfilled in this case for considering that the right conferred on shareholders by Article 25(1) of the Second Directive has been exercised abusively.

In view of the conclusion I reached on the first question, I consider it unnecessary to rule on this point. Moreover, in *Pafitis*, [31] the issue of the application of the Greek provision on abuse of rights for the purpose of preventing Article 25(1) of the Second Directive from being relied upon has already been considered and resolved by the Court. I shall therefore confine myself to a few brief observations.

29. I would recall that, according to the Greek court, the shareholders' attempt to oppose an increase in share capital would constitute an abuse of rights, in that, first, the shareholders themselves derive evident economic benefits from this, and second, the appellants have not exercised their preferential rights to take up the new shares issued as a result of the increase in share capital.

31 — Judgment cited in footnote 2, at paragraph 70.

30. In so far as the abuse of rights is connected with the company's serious financial difficulties, it seems to me that the objective of the respondents in the main proceedings is not so much to challenge the exercise of the right by the shareholders, but to challenge the provision of the Directive itself, which, as the Court has repeatedly stated, does not permit any capital increase decided on outside the general meeting, even in the case of companies subject to special arrangements. The evidence submitted by the Greek Government, which is entirely concerned with the company's critical situation, is clearly not such as to allow the conduct of the shareholders affected by the capital increase to be characterised in one sense or the other.

Moreover, as further confirmation of the foregoing conclusion, the fact that the outcome of reorganisation measures is not foreseeable *from the outset* and that it would therefore be arbitrary to judge the shareholders' intentions *after the fact*, particularly in view of the positive results achieved through government intervention, should not be underestimated. In any case, it would be odd to make the abusive character of the exercise of a right dependent on the fact that the capital increase led to an improvement in the company's asset position, that is to say to the very achievement of the main objective pursued by an increase in share capital.

31. Nor do I believe that the appellants can be held to have exercised abusively the right conferred by the Community provision on the grounds that they did not exercise their option on the new shares issued pursuant to the contested capital increase.

On this point, it is sufficient to note that, had they exercised their option on the new shares, the shareholders would have thereby endorsed the decision to increase capital taken without the general meeting's consent, a decision which they challenged precisely on the ground that it infringed Article 25(1) of the Second Directive. Under the circumstances, it would be odd, not to say paradoxical, to characterise as abusive the exercise of the right conferred on the shareholders by that provision, when the shareholders themselves wanted to oppose the infringement of this right, brought about, without their consent, through an increase of capital by means of administrative act. Otherwise, the scope of the rule of Community law at issue would be modified: and one would arrive at a result inconsistent with the result pursued by Community law through harmonisation of the company law rules in question.

Conclusion

32. In the light of the foregoing, I propose that the Court answer the questions referred by the Efetio-Athinon as follows:

(1) Community law precludes the application of a national rule which would allow a national court to determine whether a right derived from a provision of Community law has been exercised abusively by the holder of the right, if this would impair its full effect and uniform application. Neither may the national court rely on general principles of Community law for the purpose of making such a determination.

(2) The exercise of the right conferred on shareholders by Article 25(1) of the Second Directive, which provides that increases in share capital must be decided on by the general meeting, cannot be characterised as abusive simply on the ground that the shareholders concerned have taken benefit from the capital increase, decided on in violation of that provision, or have not exercised an option to take up new shares.