OPINION OF ADVOCATE GENERAL TESAURO

delivered on 9 November 1995 *

1. By the questions submitted in these proceedings, the Athens Court of First Instance asks the Court to interpret certain provisions 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 national court asks, in particular, whether the national legislation on the reorganization of credit institutions is compatible with Article 25(1) (exclusive rights of the general meeting regarding alterations of capital) and Article 29(3) (notification to shareholders of any offer of subscription on a preemptive basis) of the Second Directive.

The facts and the national legislative background

2. In Greece, banks must be constituted in the form of public limited companies and therefore are subject to the general rules governing such companies, as well as to certain special provisions applicable to credit institutions. [2]

Under normal circumstances, the only body empowered to approve changes to the capital of the company is the general meeting of shareholders.

3. In certain cases provided for by law, banks may be placed under permanent supervision by an administrator. This may occur in particular where a bank finds it impossible, or refuses, to increase its capital; where obstacles are placed in the way of the supervision entrusted to the Monetary

* Original language: Italian.

1 — OJ 1977 L 26, p. 1.

2 — The legislative background briefly described here essentially comprises the following provisions, read in conjunction: Articles 29 and 31 of Law No 2190/1920, Article 8(1) and (3) of Law No 1665/1951, and Article 1(1) and (3) of Presidential Decree No 861/1975, converted into Law No 236/1975.

Commission; or where any direction issued by the latter is not complied with.

In such cases, the Governor of the Bank of Greece may also, where he considers that such action is necessary and urgent in order to safeguard the interests of the State, the bank or third parties, or to forestall possible adverse repercussions on the financial market or the economy in general, appoint a temporary administrator.

As soon as he is appointed, and his appointment is ratified by law, the temporary administrator is vested *ipso jure* with all the powers and prerogatives of the organs responsible for the management of the company by virtue of its statutes, including those of the general meeting.

4. Following the events of this case, the Greek legislation was amended by Law No 2114/1993, Article 3 of which repealed the provisions allowing the appointment of temporary administrators to oversee credit institutions.

In that connection, according to a Commission press release of 6 April 1993, annexed to the observations of the plaintiffs in the main proceedings, the amendments to the legislation in question were made following the commencement of an infringement procedure (91/711-A) against the Hellenic Republic for infringement of Article 25 of the Second Directive. In that release, the Commission states that it closed the file after taking note of the changes made to the Greek legislation and the specific undertaking given by the Greek authorities to comply with Article 25 of the Second Directive in relation to banks as well as other companies.

5. In 1984, under the legislation at issue here, the Governor of the Bank of Greece placed Trapeza Kentrikis Ellados (hereinafter 'TKE') under temporary administration. At that time, TKE's capital was DR 670 000 000.

On 29 July 1986, at the request of the Governor of the Bank of Greece, the temporary administrator then in office decided to increase the capital to DR 1 700 000 000, at the same time amending the relevant provision of the statutes of TKE (Article 6). The documents before the Court do not clearly show by what procedures that increase was effected. What is certain is that the parties agree that the decision was taken regardless of, if not exactly counter to, specific wishes expressed by the shareholders.

6. The shareholders were invited, by means of a notice published in two Athens daily

newspapers, to exercise, within 30 days, their pre-emptive rights to subscribe for the new shares to be issued.

However, that deadline passed without most of the existing shareholders having exercised their rights, [3] so that almost all the new shares were placed on the market and offered to new shareholders.

7. In November 1986, the Governor of the Bank of Greece brought the temporary administration to an end and placed TKE under permanent administration. The general meeting of shareholders, constituted on the basis of the new shareholdings, passed three resolutions increasing the capital in 1987 (DR 1 500 000 000), 1988 (DR 125 000 000) and 1990 (DR 1 281 250 000). In the meantime, Law No 1682 of 16 February 1987 had ratified the appointments of the various temporary administrators who had successively managed the company, and the first increase of capital.

At present, according to the information provided by the plaintiffs, which has not been contested by the defendants, 53% of the voting shares in TKE belong to the Agricultural Bank, a defendant in the main proceedings, whose capital is held in its entirety by the Greek State.

8. The plaintiffs in the main proceedings are shareholders in TKE and were shareholders when the temporary administrator decided upon the first increase of capital. Considering that that increase had taken place by arrogation of the powers of the general meeting, and therefore in breach of their rights guaranteed by the Second Directive, the shareholders brought proceedings before the national court for annulment of the administrator's decision.

In particular, the plaintiffs alleged infringement of Article 25(1) of the Second Directive, according to which 'any increase in capital must be decided upon by the general meeting', and infringement of Article 29(3) thereof, which provides that any offer of subscription on a pre-emptive basis and the period within which that right must be excised are to be published in the national gazette appointed in accordance with Directive 68/151/EEC, [4] or, where the shares are registered, and if the national legislation so provides, by written notification to all the shareholders.

3 — With the exception of a very small number, accounting, according to the plaintiffs, for only 0.4% of the capital.

4 — OJ, English Special Edition 1968 (I), p. 41; that directive had not been transposed into Greek law at the material time. Today, the appointed gazette is the Official Gazette of the Greek Republic.

The preliminary questions

9. It was against the background of that dispute that the national court submitted the three questions now to be considered.

The first seeks to establish the scope of the Second Directive, in particular Articles 25 and 29, as regards the persons to whom it applies, in order to determine whether it covers public limited companies engaged in banking.

In its second question, the national court seekS a ruling as to whether those provisions of the Second Directive 'run counter to ... the provisions to the contrary' of the special Greek legislation on the reorganization of banking companies 'and thus preclude the application' of the latter provisions. In other words, the court, recognizing that, if the first question is answered affirmatively, the Greek legislation will be shown to be incompatible with the Second Directive, is asking whether the application of the national legislation may nevertheless be upheld by virtue of its special nature.

Finally, in its third question the national court seeks a ruling as to whether the requirement that the shareholders be informed 'in writing', under the third sentence of Article 29(3) of the Second Directive, is satisfied by publication of the offer in daily newspapers.

10. It is also clear from the order for reference that the national court has reserved judgment as to the merits of the objections raised by the defendants in the main proceedings. Of them, it mentions only the objection based on Article 281 of the Greek Civil Code, concerning the abusive exercise of rights.

Under that provision, a right may not be exercised where it manifestly exceeds the bounds of good faith or good usage or the economic and social purposes associated with that right. If that objection were upheld, it would follow that, even if the plaintiffs' right to invoke the illegality and seek the annulment of the decision to increase the capital taken in breach of Community law were recognized, the exercise of that right would be prohibited, being regarded by the national court as abusive. It seems that the allegation of abuse is based essentially on the plaintiffs' lack of *locus standi* in that they are minority shareholders, and, what is more, shareholders of a company that is subject to a special regime intended to ensure its recovery; and on the fact that they have suffered no damage, material or otherwise, from the reorganization of the company but indeed have in fact benefited from it.

In expressing its reservation, the national court made it clear that, in its opinion, the objection under Article 281 of the Civil Code may be properly raised even to prevent the exercise of rights conferred by Community law; it also states that it alone has jurisdiction to rule on that point, being the 'court of the Member State of which the party raising the objection is a citizen'.

The first and second questions

11. The first two questions are closely connected. It is therefore appropriate to consider them together.

The Court has given its views on Article 25(1) of the Second Directive on several occasions.

12. In its three judgments in *Karella and Karellas,* [5] *Syndesmos Melon tis Eleftheras Evangelikis Ekklisias and Others,* [6] and *Kerafina — Keramische-und Finanz-Holding and Vioktimatiki* [7] (hereinafter together referred to in some instances as 'the *Karella* cases'), the Court interpreted that provision specifically in relation to the Greek legislation on the reorganization of undertakings. [8]

In the three abovementioned preliminary rulings, in relation to proceedings brought by shareholders of companies following increases of capital by means of administrative measures, the Court upheld the absolute nature of the principle that the general meeting of shareholders has exclusive powers regarding alteration of the capital of the company.

13. It stated first that Article 25(1) has direct effect; secondly, that that article precludes the application of national rules which, being designed to ensure the rationalization and continued trading of undertakings that are in an exceptional situation, allow an increase of capital to be decided upon by an administrative measure even where the shareholders have a pre-emptive right to subscribe for the new shares.

In other words, the Court made it clear that not even a special law designed to ensure the recovery of a company can deprive the shareholders of a most 'intimate' and

5 — Joined Cases C-19/90 and C-20/90 [1991] ECR I-2691.

6 — Case C-381/89 [1992] ECR I-2111.

7 — Joined Cases C-134/91 and C-135/91 [1992] ECR I-5699.

8 — Law No 1386/1983 of 5 August 1983. Under that law, a public limited company wholly owned by the State (the 'Business Reconstruction Organization') was entitled to take over the running and day-to-day management of companies undergoing rationalization or nationalization and, in doing so, could decide to increase the capital of such companies, by derogation from the provisions vesting exclusive powers in the general meeting of shareholders.

unrelinquishable right: that of making changes to the capital structure of the company, that is to say to its assets, and thereby the composition of its shareholding.

That view, it is said, is confirmed by the proposal for a directive put forward by the Council concerning the reorganization and winding up of credit institutions [9] which expressly authorized application of the national legislation at issue.

14. In these proceedings, the problems giving rise to the judgments in the *Karella* cases are encountered again. Logically, therefore, the principles upheld by the Court in those cases can but be applied here.

15. In response to those arguments, it need merely be stated, once again, that the Second Directive, adopted in order to ensure minimum equivalence of the protection of shareholders and creditors of companies, [10] defines unequivocally the persons to whom it applies.

The view that the provisions of the Second Directive, in particular Articles 25(1) and 29(3), do not apply to banks cannot be regarded as correct. The objection has been raised, in particular, that the reorganization of such companies in crisis is an objective pursued in the public interest with a view to protecting, first, savers who have deposited funds with the credit institution in difficulties and, secondly, the balance and cohesion of the general system of public savings management; and that, therefore, any assessment of national rules designed to avoid as far as possible the winding up of banks should disregard the Second Directive. Moreover, it is claimed, the legislation in question, in so far as it relates specifically to banks, is 'special' as compared with national and Community legislation on companies and, as such, takes precedence over the latter in the event of conflict.

As is clear from its title and from Article 1, it applies to companies within the meaning of the second paragraph of Article 58 of the Treaty constituted as public limited companies. [11] The criterion adopted by the legislature to define the field of application of the directive is thus that of the legal form of the company, the business which it carries on or proposes to carry on being entirely irrelevant, except with reference to certain specific provisions.

9 — COM(85) 788 final, OJ 1985 C 356, p. 55.

10 — Second recital in the preamble to the directive, and the judgments in *Karella* and *Syndesmos Melon*, paragraphs 25 and 32 respectively.

11 — According to the second paragraph of Article 58 of the Treaty, 'Companies or firms means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making'.

The only permissible exception appears in the directive itself, in Article 1(2), on the basis of which Member States may decide not to apply the directive to investment companies with variable capital or cooperatives. That exception, however, relates to two clearly defined cases and therefore no national legislature can be allowed to create others.

16. Furthermore, the directive itself specifically takes account of the special features of banking, by providing that certain provisions need not be applied to banks and other financial institutions, even if they are in the form of public limited companies. [12]

The directive thus contains specific and clearly circumscribed exceptions relating to banks. Those exceptions show, and indeed presuppose, that, for the rest, the directive applies to banks in the same way as to all other public limited companies.

17. Nor do I consider that there is any reason to define the scope of the Second Directive in a manner which departs from and runs counter to its literal wording and the case-law of the Court of Justice.

The special nature of the Greek legislation was argued unsuccessfully in the earlier cases. Suffice it to recall that, as I indicated in my Opinions in *Karella* and *Syndesmos Melon*, [13] and as was clearly confirmed by the Court, to recognize the existence of a general reservation in the case of exceptional circumstances, beyond the express provisions of the Treaty and of the Second Directive, would be to undermine the mandatory nature and uniform application of Community law. [14]

Also, let me say again, the Community legislature duly took account in the directive of the particular needs of banks by including, where necessary, provisions specifically applicable to them. Since there are specific exceptions, it is certainly not for the Community judicature to invent others, just as, clearly, national legislators are not entitled to do so.

12 — See, for example, Articles 20(1)(c), 23(2) and 24(2).

13 — Paragraphs 6 and 4 respectively.

14 — See in particular the judgments in *Karella* and *Syndesmos Melon* cited above, at paragraphs 25 to 28 and 30 to 33 respectively.

18. Nor in my opinion are the considerations concerning the need to safeguard the interests of savers and, more generally, the equilibrium of the public savings system relevant.

Those needs can be given equal and adequate protection by other means, such as for example the creation of a generalized system to guarantee deposits, which seek to achieve the same result but without impeding attainment of the objectives of the Second Directive. The fact that such means did not exist in Greece at the material time does not justify contravention of the principle laid down in Article 25 of the Second Directive.

19. As regards the Community legislation applicable to banking, it pursues objectives other than those of the Second Directive. For the most part it comprises directives which seek to uphold and supplement the right of establishment and the freedom to provide services in the banking sector, by means of specific provisions applicable to banks.

In any case, none of those directives presents any obstacle to the application of Article 25 of the Second Directive. Even though the numerous provisions concerning supervision confer on the competent authorities, in certain circumstances, the power to require a credit establishment to remedy within a specified period an insufficiency of assets, failing which its licence to transact business may be withdrawn, they do not affect the powers of the organs of the establishment in question to make their own arrangements to rectify matters. [15] Thus, no problem of conflicting Community provisions arises as far as this case is concerned.

20. As regards, finally, the proposal for a Council directive on the reorganization of banks, also referred to by the defendants, it need merely be stated that, at present, it does not form part of the applicable positive law.

21. The defendants in the main proceedings also argue that, even if the Court should find that the Second Directive is applicable to banks, the *Karella* decisions cannot be applicable to this case owing to a fundamental characteristic of the legislation at issue. By contrast with the provisions at issue in *Karella*, the rules on the rationalization of banks provide that, when the temporary administrator is appointed, all the powers of the organs of the company cease to exist, which means, in the defendant's opinion,

15 — I refer in particular to Article 10(1) and (5) of the Second Council Directive (89/646/EEC) of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending directive 77/780/EEC (OJ 1989 L 386, p. 1); Article 10(1) and (3) of the Council Directive of 18 December 1989 on a solvency ratio for credit institutions (89/647/EEC) (OJ 1989 L 386, p. 14); Article 4(1) and (5) of the Council Directive of 21 December 1992 on the monitoring and control of large exposures of credit institutions (92/121/EEC) (OJ 1993 L 29, p. 1); and Article 4(1), (2), (3), (4) and (8) of the Council Directive of 15 March 1993 on the capital adequacy of credit institutions (93/6/EEC) (OJ 1993 L 141, p. 1).

that the objective pursued is more akin to winding up than to reorganization of the company placed under special administration. In any event, therefore, in their view one of the conditions laid down by the Court itself for the application of the Second Directive is lacking, namely the requirement that the company must continue to exist within its own structures. [16]

I am not convinced by that argument either. I do not see how it can reasonably be contended that a company placed under administration pursuant to the legislation at issue has ceased to exist.

On the contrary, it seems to me that the aim pursued by the rules at issue is to ensure the survival, after reorganization, of the company under administration; and in any event the organs of the company certainly continue to exist while it is under administration, even if they are deprived of any power to run the company. The general meeting of shareholders retains the right referred to in Article 25 of the Second Directive; the opposite view is precisely the *quid demonstrandum*, and the point has not been proved.

22. The foregoing considerations prompt me to suggest that the Court answer the first two questions in accordance with the principles laid down in the *Karella* cases, confirming that Article 25 of the Second Directive precludes the application of special national legislation which, being designed to ensure the rationalization and continued trading of banks that are in the form of public limited companies and are experiencing exceptional difficulties, allows an increase of capital to be effected by means of an administrative measure, regardless of the wishes of the shareholders.

The third question

23. The conclusions reached on the first and second questions render the third question irrelevant, at least as far as the present case is concerned. However, merely for the sake of completeness, and in case the Court should decide to depart from the principles laid down in its case-law, I shall consider, albeit briefly, Article 29(3) of the Second Directive in relation to the question submitted by the national court.

As indicated earlier, that provision concerns the terms of the offer to subscribe for new shares made to the existing shareholders, the national legislature being entitled, in the case of registered shares, to require notification in writing to all the shareholders.

16 — *Karella* and *Syndesmos Melon*, paragraphs 30 and 28 respectively.

24. The provision concerned seeks to ensure that, if there is no publication in the officially appointed gazette, [17] all the shareholders are nevertheless duly informed of the terms and procedures for the exercise of their pre-emptive right.

The term 'informed in writing' used in Article 29(3) must therefore, in my view be taken to refer to a communication which the management of the company must send in writing, individually and by name, to every owner of a registered share. I do not consider therefore that publication of the offer of subscription in two daily newspapers can constitute a lawful alternative since it does not guarantee the same result.

25. The defendants also contend that Article 29(3) does not have direct effect, for the purposes of the present case. Whilst conceding that that provision is clear, precise and unconditional, they deny that it can be relied on against TKE, which at the material time was a private bank. To admit the contrary, they say, would be tantamount to giving the Second Directive the horizontal direct effect which the Court has so far never accepted.

In that connection suffice it to say that the measure contested by the plaintiffs before the national court is an administrative measure adopted by a temporary administrator nominated by the Governor of the Bank of Greece, whose appointment and performance of duties are subject to legislative ratification (and were in fact ratified). It is therefore clear that the administrator was 'made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State' and has for that purpose exceptional powers as defined in the case-law of the Court of Justice. [18] It follows that the plaintiffs were fully entitled to invoke Article 29(3) of the Second Directive in contesting a measure adopted in contravention of the terms of that provision.

Abusive exercise of rights

26. As indicated earlier, it appears from the order for reference that an objection was raised in the course of the main proceedings alleging the abusive exercise of rights by the plaintiffs. Although that point is not the subject of a specific question, it is clearly raised in the order for reference and is liable significantly to influence the outcome of the case.

17 — It will be remembered that no such gazette had been officially appointed in Greece at the material time since Directive 68/151/EEC had not yet been transposed into national law (see footnote 4 above).

18 — See in particular Case 188/89 *Foster and Others* [1990] ECR I-3313, paragraph 20.

The national court expressly declares that it will reserve judgment on the merits of that objection, which is based on Article 281 of the Greek Civil Code. [19] It states that that provision, on the basis of which the exercise of a right may be prohibited if it is held to be abusive, may also be invoked to prevent the exercise of a right conferred by Community law; and it claims exclusive jurisdiction to adjudicate on that point.

In order to render the right under Article 25 of the Second Directive inoperative it would be sufficient for the national court to find that the plaintiffs had no standing to seek the annulment of the measure, being minority shareholders and not having suffered any damage from the reorganization — indeed, having benefited from it. [20]

27. The question seems to me to be an important one. Accordingly, it seems inevitable that the Court should rule on the point since what is at stake is the primacy of Community law over domestic law and the effectiveness of the preliminary rulings given by the Court.

There is a risk that an interpretative ruling, in which the Court had defined the scope of the rights conferred on individuals by a Community provision having direct effect, would be negated by the very court that sought the ruling by virtue of a principle of substantive national law conflicting with it.

That, moreover, is precisely what happened in the *Kerafina* judgment cited earlier. After the ruling was given by the Court of Justice, the judge who sought it upheld the objection raised by the defendants on the basis of Article 281 of the Greek Civil Code and directed that inquiries be undertaken to establish whether it was factually well founded. [21]

28. The problem therefore arises of establishing whether, and if so within what limits, the national court may, whilst nevertheless observing the Community principles expounded above, apply a national provision

19 — The underlying basic provision being Article 25 of the Greek Constitution.

20 — It also seems that the plaintiffs could be regarded as improperly exercising the right conferred on them by the Community provision because of their failure to exercise the pre-emptive right to subscribe for new shares issued in connection with the increase of capital. In view of my suggested answers to the preliminary questions, and in the event of the Court adopting my suggestions, I take it for granted that an argument to that effect would fail entirely, in the main proceedings as well.

21 — See judgment No 9337/1992 of the Athens Court of Appeal; but see also, to the same effect and based on almost identical grounds, judgments of the same court Nos 9162/1992 of 19 November 1992 and 464/1993 of 4 March 1993. It is noteworthy that the three judgments of the Athens Court of Appeal all expressly refer to *Karella*.
For the sake of completeness, it should also be pointed out that the *Karella* and *Syndesmos Melon* judgments have not yet been given effect by the courts which sought the rulings; in the former case, it appears that the parties abandoned their action after the Court of Justice gave judgment; but in the latter case it seems that, so far, no decision has been given.

in order to declare that a right conferred by Community law has been exercised abusively.

In that connection, it must first be observed that a person's abusive exercise of a right can be censured, albeit by procedures and in circumstances which differ in some cases, in nearly all the Member States. In the absence of Community rules on the matter the national court must decide on the basis of its own national law whether or not the right in question has been exercised abusively. [22]

29. However, it is settled law that, where rights claimed by individuals under Community law are in issue, the Court should consider to what extent the judicial protection available under national law is adequate. [23]

30. In the present case it seems at first sight from the documents before the Court that the plaintiffs, far from seeking to abuse the provision, merely wish to secure observance of the right which is at the heart of that provision, namely the exercise of exclusive powers regarding alteration of the capital of the company.

The view that the plaintiffs are abusing their rights, as minority shareholders who have obtained a benefit from the reorganization of the company, appears clearly to be without foundation. The provision is in fact intended to protect all shareholders and is applicable regardless of the outcome of any reorganization. To deny the protection guaranteed by the provision concerned on such grounds would be tantamount to censuring not the *abusive exercise* of the right but rather *any*

22 — See to that effect the Opinion of Advocate General Darmon in Case 81/87 *Daily Mail* [1988] ECR 5483, in which he suggested that the Court declare that the transfer to another Member State of the central management of a company may constitute a form of exercise of the right of establishment, subject to an assessment by the national court as to 'whether, in a specific case and having regard to the circumstances, there is a suggestion of abuse of a right or circumvention of the law and whether it should decide not to apply Community law' (paragraph 9). The Court, adopting a different interpretation of the right of establishment, did not rule on the point.
See also, to the same effect, Case C-8/92 *General Milk Products* [1993] ECR 779, in which the Court held that, in order to withhold monetary compensatory amounts in respect of certain goods imported into Germany, it would be necessary to prove that the importers intended to abuse the Community system for their benefit, and ruled that the national court had jurisdiction to verify that point.

23 — Most important among the examples of the application of that principle is the *San Giorgio* case, in which the Court made it clear that 'any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law' (Case 199/82 [1983] ECR 3595, paragraph 14); the Court has since then given several judgments to the same effect: in relation to penalties under national law for breach of a principle laid down by a directive (Case C-177/88 *Dekker* [1990] ECR 3941; in relation to limitation periods for actions under national law (Case C-208/90 *Emmott* [1991] ECR I-4269); and in relation to difficulties affecting the recovery of Community aid unduly paid as a result of the principle of the protection of legitimate expectations (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437).

exercise of it, which, to say the least, would be somewhat paradoxical.

31. The position would be different if the national court were to find that the plaintiffs had not merely exercised their right but had exercised it abusively *in a different way*. Such might be the case if, for example, the plaintiffs had themselves, paradoxically, requested an increase of capital on an administrative basis and then challenged the decision by means of legal proceedings.

32. By contrast, in the present case, in which it is undisputed that the plaintiffs witnessed an increase of capital that they did not seek, it is unreasonable to describe as abusive the mere exercise of a right vested in them by Article 25 of the directive as shareholders of the company and for the lifetime of the company.

Furthermore, even if the opposing point of view were adopted, I still cannot see how the plaintiffs could have protected their rights otherwise than by relying on that provision of the Second Directive when they did.

33. It is therefore clear that recourse to the objection in question cannot have the effect of utterly negating the provision concerned since such a result would run counter to the essential imperatives of the Community legal order. I therefore suggest that the Court make it absolutely clear that legislation which allows a national court to prohibit the exercise of a right conferred by a provision of Community law by describing it as abusive cannot be applied merely because the holder of that right sought judicial protection for it, nor, in any case, can it be applied in such a way as to nullify the provision in question entirely.

34. In the light of the foregoing considerations, I therefore propose the Court give the following answers to the Athens Court of First Instance:

Articles 25(1) and 29(3) 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, must be interpreted as meaning that:

— the application is precluded of national legislation which, in order to ensure the recovery and continuing trading of banks constituted in the form of public limited companies which, as a result of their indebtedness, find themselves in exceptional circumstances, allows their capital to be increased by administrative measure and without a resolution of the general meeting; and the mere exercise by shareholders of the right granted to them by the Community directive cannot, without those provisions being rendered nugatory, be declared by the national court to be abusive;

— publication in daily newspapers of an offer of subscription on a preemptive basis and of the time-limit for exercising the right to subscribe does not amount to informing the shareholders in writing.