# JUDGMENT OF THE COURT (Third Chamber)

10 May 2007 *

In Case C-391/04,

REFERENCE for a preliminary ruling under Article 234 EC, from the Simvoulio tis Epikratias (Greece), made by decision of 6 July 2004, received at the Court on 14 September 2004, in the proceedings

**Ipourgos Ikonomikon,**

**Proistamenos DOI Amfissas**

v

**Charilaos Georgakis,**

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet and U. Lõhmus (Rapporteur), Judges,

* Language of the case: Greek.

Advocate General: P. Mengozzi,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 July 2006,

after considering the observations submitted on behalf of:

— Mr Georgakis, by N. Korogiannakis and A. Mouzaki, dikigori,

— the Greek Government, by M. Apessos, S. Spyropoulos, S. Trekli and M. Tassopoulou, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and P. Gentili, avvocato dello Stato,

— the Commission of the European Communities, by G. Braun and G. Zavvos, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2006,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 1 to 4 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (OJ 1989 L 334, p. 30).

2 The reference has been made in the context of proceedings between the Ipourgos Ikonomikon (Greek Minister for Economic Affairs) and the Proistamenos DOI Amfissas (Tax authority of Amphissa) (Greece), on the one hand, and Mr Georgakis, on the other, concerning the taking advantage by him of inside information by reason of his participation, with the other principal shareholders and members of the board of directors of a company, in stock-market transactions agreed on in advance between them to increase artificially the price of transferable securities in that company.

## Legal context

*Community legislation*

3 Article 1 of Directive 89/592 provides that:

'For the purposes of this Directive:

(1) "inside information" shall mean information which has not been made public of a precise nature relating to one or several issuers of transferable securities or to

one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question;

(2) "transferable securities" shall mean:

(a) shares and debt securities, as well as securities equivalent to shares and debt securities;

...

when admitted to trading on a market which is regulated and supervised by authorities recognised by public bodies, operates regularly and is accessible directly or indirectly to the public.'

4 Under Article 2(1) of that directive:

'Each Member State shall prohibit any person who:

— by virtue of his membership of the administrative, management or supervisory bodies of the issuer,

— by virtue of his holding in the capital of the issuer, or

— because he has access to such information by virtue of the exercise of his employment, profession or duties,

possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.'

5 Under Article 3 of Directive 89/592:

'Each Member State shall prohibit any person subject to the prohibition laid down in Article 2 who possesses inside information from:

(a) disclosing that inside information to any third party unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;

(b) recommending or procuring a third party, on the basis of that inside information, to acquire or dispose of transferable securities admitted to trading on its securities markets as referred to in Article 1(2) *in fine*.'

6 Article 4 of Directive 89/592 provides that:

'Each Member State shall also impose the prohibition provided for in Article 2 on any person other than those referred to in that Article who with full knowledge of the facts possesses inside information, the direct or indirect source of which could not be other than a person referred to in Article 2.'

*National legislation*

7 Directive 89/592 was transposed into Greek law by Presidential Decree No 53/1992 on insider dealing ('the Decree'). The purpose of the Decree was to bring Greek legislation governing stock exchanges into line with that directive.

8 Articles 2, 3 and 4 of the Decree respectively repeat Articles 1, 2 and 3 of Directive 89/592.

9 Article 5 of the Decree, based on Article 4 of the Directive, provides that:

'The prohibitions laid down in Articles 3 and 4 of this Decree shall also apply to any person other than those referred to in those articles who with full knowledge of the facts possesses inside information, the direct or indirect source of which could not be other than a person referred to in Article 3.'

10 Article 11 of the Decree provides that:

'If Articles 3(1) and (2), 4 and 5 of this Decree are infringed, apart from the penalties that are prescribed in Article 30(1) and (3) of Law No 1806/1988, the Capital Market Commission shall impose a fine amounting to at least GRD 10 000 000 and a maximum of GRD 1 000 000 000, or of an amount equal to five times the profit made by the person taking advantage of the inside information.'

11 Article 34 of Law No 3632/1928 provides that:

'A prison sentence or a financial penalty not exceeding GRD 50 000 or both of those two punishments shall be imposed on:

(a) any person who, with a view to illegitimate gain, knowingly uses means liable to deceive the public in order to influence stock-market prices ...'

12 Article 72(1) of Law No 1969/1991 provides that:

'Any person who knowingly, through the press or by any other means, spreads false or incorrect information that might affect the price of one or more transferable securities listed on a stock exchange shall be liable to a prison sentence and a financial penalty not exceeding GRD 100 000 000.'

13 Article 76(10) of that Law states that:

'Without prejudice to the application of the relevant provisions of criminal law, the Capital Market Commission has the power to impose a fine not exceeding GRD 100 000 000 on undertakings which infringe the legislation concerning the capital market or the decisions of the Capital Market Commission.'

14 Article 30 of Law No 1806/1988 imposes criminal penalties on persons who make unlawful use of inside information in their possession.

**The dispute in the main proceedings and the question referred for a preliminary ruling**

15 Following the stock-market crisis of November 1996, the Department of Capital Markets and Stock Exchanges for Transferable Securities of the Ministry of Economic Affairs carried out investigations into transactions relating to the shares of the companies Parnassos and Atemke. The persons implicated by significant evidence as having breached the legislation relating to the capital market were requested to submit written statements.

16 According to the information available to the Athens Stock Exchange, in August 1996, Mr Georgakis and certain members of his family ('the Georgakis group') were the main shareholders of Parnassos. At the same time, Parnassos and its subsidiary, Syrios AVEE, held the majority of shares in Atemke. In each case, the shares were registered shares. Mr Georgakis and most of the members of the Georgakis group were members of the board of directors of Parnassos and of Atemke, companies in which they performed managerial functions.

17 The members of the Georgakis group took the decision, on the recommendation of their financial advisers, to support the price of Parnassos shares at a time when their value was coming under downward pressure. Consequently, they undertook various sale, purchase and buy-back transactions in Parnassos and Atemke shares which were carried out between themselves, Parnassos and a foreign institutional investor.

18 The Capital Markets Commission decided that Mr Georgakis had thereby effected transactions in transferable securities using inside information and fined him GRD 70 000 000. Its decision was confirmed by the Trimeles Diikitiko Protodikio Livadia (Administrative Court of First Instance (three judges), Livadia).

19 The transactions at issue which Mr Georgakis is accused of effecting were, in particular, the assignment of 92 000 Parnassos and 11 100 Atemke shares and acting as purchaser in 1 of 26 contentious transactions relating to Parnassos shares and acting as vendor of some of the 112 500 Atemke shares bought from certain members of the group by one of its members. At the time of these transactions, no shares were released onto the open market and all were sold and bought primarily between the members of the Georgakis group. Those transactions were, it is alleged, agreed on in advance since the members effected the sales and purchases following their decision to support Parnassos shares. They were allegedly designed to increase artificially the volume of trading in Parnassos shares in order to give a misleading impression of their value, unconnected with the value they would have achieved had it not been for those fictitious transactions.

20 Mr Georgakis successfully appealed against the judgment at first instance to the Diikitiko Efetio Piraios (Administrative Appeal Court, Piraeus).

21 The Ipourgos Ikonomikon and the Proistamenos DOI Amfissas appealed on a point of law to the Simvoulio tis Epikratias (Council of State) asking for that judgment to be quashed.

22 Against this background, the Simvoulio tis Epikratias decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Where stock-market transactions agreed on in advance which result in the increase or artificial inflation of the price of the securities transferred are carried out between persons or groups of persons having one of the characteristics set out in Article 2(1) of ... Directive 89/592 ..., are the persons carrying out those transactions to be regarded as persons possessing inside information within the meaning of Articles 1 and 2 of that directive, so that their actions fall within the prohibition, laid down by Articles 2, 3 and 4 of the directive, on taking advantage of inside information?'

**The question referred for a preliminary ruling**

23 By its question, the national court asks essentially whether Articles 1 and 2 of Directive 89/592 are to be interpreted as meaning that, when the main shareholders and members of the board of directors of a company agree to effect between themselves stock-market transactions in the transferable securities of that company in order to increase the price artificially, they possess inside information of which they take advantage with full knowledge of the facts when they carry out the transactions.

24 In order to determine whether, on the particular facts of the case in the main proceedings, a group of persons acts on the basis of inside information which its members possess, it is necessary, at the outset, to consider whether the decision to effect the stock-market transactions was taken on the basis of information disclosed

directly or indirectly by a person belonging to one of the categories referred to in Article 2 of Directive 89/592 and possessing 'inside information' within the meaning of Article 1(1) of that directive.

25 It is clear from the order for reference that the decision taken by the Georgakis group to act on the secondary market for transferable securities in a concerted way in order to support the price of Parnassos shares, of which company they were the main shareholders and members of the board of directors, was taken on the recommendation of their financial advisers.

26 It follows from the wording of Article 1(1) of Directive 89/592 that 'inside information', in order to be considered as such, must fulfil a number of conditions, namely, it must not have been made public, and must be of a precise nature, relate to an issuer of transferable securities or to transferable securities as such, and be likely, if made public, to have a significant effect on the price of those securities.

27 Consequently, a mere recommendation to take certain steps, made solely on the basis of an expert analysis of the subject, cannot be considered as meeting such conditions.

28 Article 2(1) of Directive 89/592 prohibits any person who, by virtue, in particular, of his membership of administrative bodies or by virtue of the exercise of his employment, profession or duties, possesses inside information, relating to one or more transferable securities, from taking advantage of that information by acquiring or disposing of those transferable securities (see Case C-384/02 *Grøngaard and Bang* [2005] ECR I-9939, paragraph 23).

29 Article 3 of Directive 89/592 prohibits those same persons from disclosing that inside information to any third party and recommending or procuring a third party, on the basis of that inside information, to acquire or dispose of transferable securities, whilst Article 4 of that directive prohibits any other person from taking advantage of inside information disclosed by any person belonging to one of the categories referred to in Article 2(1) of that directive.

30 It is clear from the decision making the reference that the financial advisers to the Georgakis group were not in any one of the situations set out in Article 2(1) of Directive 89/592 and that their recommendation to support Parnassos shares when their value was coming under downward pressure was not, moreover, based on information which might have been disclosed by a person in one of those situations.

31 Consequently, in following the recommendations of their financial advisers, the members of the Georgakis group were not prompted to effect the transactions at issue in the main proceedings on the basis of information fulfilling the conditions laid down in Article 1(1) of Directive 89/592. Nor, moreover, did they act on the basis of information or a body of information obtained directly from one of the categories of persons referred to in Article 2 of that directive or indirectly by way of a third party.

32 It is necessary to examine, next, whether, by virtue of having participated in the adoption of a decision such as that at issue in the main proceedings, in the circumstances described above, the members of the Georgakis group were in possession of inside information within the meaning of Article 1(1) of Directive 89/592.

33 The decision of the members of the Georgakis group concerning support for Parnassos shares appears to establish a common position within that group as to the

transactions to be effected between its members in order to cause the price of the transferable securities of Parnassos to be increased artificially. Knowledge of the existence of such a decision and of its content constitutes, for those who participated in its adoption, inside information within the meaning of Article 1(1) of Directive 89/592.

34 It is information which had not been made public of a precise nature relating to transferable securities, which, if it had been made public, was likely to have a significant effect on the price of Parnassos shares, capable even of leading to its stock-market collapse.

35 It follows that persons such as the members of the Georgakis group, by virtue of having been the originators of such inside information and of having disclosed it in their capacity as main shareholders of Parnassos and members of its board of directors, fall under the prohibition laid down in Article 2 of Directive 89/592 on taking advantage of that information with full knowledge of the facts.

36 It is necessary to consider, finally, whether, by putting into effect a decision such as that adopted within the Georgakis group, namely by effecting the stock-market transactions agreed, the members of such a group took advantage of inside information which was in their possession within the meaning of Article 2 of Directive 89/592. It follows from that provision and from the 12th recital in the preamble to that directive that insider dealing involves not only disclosing inside information but also taking advantage of it.

37 The second to the fifth recitals in the preamble to Directive 89/592 state that it is intended to ensure the proper functioning of the secondary market in transferable securities and to protect investors' confidence, which depends, in particular, on their being placed on an equal footing and protected against the improper use of inside information (*Grøngaard and Bang*, paragraph 33).

38 Consequently, the purpose of the prohibition laid down by Article 2 of Directive 89/592 is to ensure equality between the contracting parties in stock-market transactions by preventing one of them who possesses inside information and who is, therefore, in an advantageous position vis-à-vis the other investors, from profiting from that information, to the detriment of the other party who is unaware of it.

39 Thus, where, in a case such as that in the main proceedings, all of the contracting parties have the same information, they are on an equal footing and the information ceases to be inside information for them in the context of the implementation of the decision adopted within the group. Against this background, since none of them is in a position to derive an advantage over the others, the transactions effected between the members of the group on the basis of that information do not constitute taking advantage, with full knowledge of the facts, of inside information within the meaning of Article 2 of Directive 89/592.

40 The Greek and Italian Governments consider, however, that the implementation of a decision such as that in the case in the main proceedings cannot be excluded from the scope of Directive 89/592. They contend that, where the prior decision to effect a transaction is accompanied by an attempt to mislead the investing public, jeopardises the operation of the market in transferable securities and is motivated by the intention to derive a certain benefit thereby, then the information to which that decision relates is of decisive importance and taking advantage of it may deal a 'serious blow' to market transparency.

41 In the present case, whilst it is true that the practices followed in order to bring about an artificial increase in the price of certain transferable securities by means of concerted transactions are liable to provoke a loss of investor confidence in the integrity of financial markets, the fact remains that the scope of Directive 89/592 — the sole Community measure applicable to the facts in the case in the main proceedings — is limited to taking advantage of inside information by persons who are insiders or the disclosure of that information by those persons to third parties.

Consequently, the provisions of that directive are not applicable to transactions designed to determine artificially, by concerted means, the price of certain transferable securities.

42 That interpretation is confirmed by recital (11) in the preamble to Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16), in which it is stated that, when the directive was adopted, the existing Community legal framework to protect market integrity was incomplete and that in some Member States there was no legislation addressing the issues of price manipulation and the dissemination of misleading information. That interpretation is also confirmed by the specific objective of the directive, which is to prevent and penalise market abuse both when it takes the form of insider dealing and when it takes the form of market manipulation, which is defined in Article 1(2) of that directive.

43 It is necessary to state, finally, that the need to ensure transparency in transactions conducted by persons discharging managerial responsibilities within issuers of securities and, where applicable, persons closely associated with them, did not appear, as such, in Directive 89/592, and that it is clear from recitals (15), (26) and (27) in the preamble to Directive 2003/6 that, as a measure aimed at preventing market abuse, the concept of transparency was incorporated in the Community framework for the protection of markets in financial instruments in 2003 with the adoption of Directive 2003/6 which, on entering into force, repealed Directive 89/592.

44 Consequently, the answer to the question referred is that Articles 1 and 2 of Directive 89/592 must be interpreted as meaning that, when the main shareholders and members of the board of directors of a company agree to effect between themselves stock-market transactions in the transferable securities of that company in order to support artificially the price of those securities, they are in possession of inside information of which they do not take advantage with full knowledge of the facts when they carry out those transactions.

## Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**Articles 1 and 2 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing must be interpreted as meaning that, when the main shareholders and members of the board of directors of a company agree to effect between themselves stock-market transactions in the transferable securities of that company in order to support artificially the price of those securities, they are in possession of inside information of which they do not take advantage with full knowledge of the facts when they carry out those transactions.**

[Signatures]