JUDGMENT OF THE COURT
24 March 1992 *

In Case C-381/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Polimeles Protodikio Athinon for a preliminary ruling in the case pending before that court between

Sindesmos Melon tis Eleftheras Evangelikis Ekklisias,

VASKO SA,

Konstantinos Sotiropoulos,

Sotirios Panayotou Sotiropoulos,

Theokharis Anastasiou Sotiropoulos,

Sotirios Anastasiou Sotiropoulos,

Anastasios Sotiriou Sotiropoulos,

and

the Greek State,

Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE,

Elliniki Parketoviomikhania Adelfi Sotiropouli AE,

Ethniki Trapeza tis Ellados AE,

Yeniki Trapeza tis Ellados AE,

* Language of the case: Greek.

Emboriki Trapeza tis Ellados AE,

Elliniki Trapeza Viomikhanikis Anaptixeos AE,

Ethniki Trapeza Ependiseon Viomikhanikis Anaptixeos AE

on the interpretation of Articles 25 and 29 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 (Official Journal 1977 L 26, p. 1),

THE COURT,

composed of: O. Due, President, R. Joliet and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, G. C. Rodríguez-Iglesias and M. Díez de Velasco, Judges,

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the plaintiffs in the main proceedings, by G. I. Anastasopoulos, Dikigoros, with a right of audience before the Greek Court of Cassation,

— the Greek Government, represented by Panayotis Milonopoulos, Dikigoros, Lawyer, Legal Adviser of the Second Class in the Department for European Community affairs of the Ministry for Foreign Affairs, and Constantinos Stavropoulos, Lawyer, also a Legal Adviser in that department, and Nicolaos Frangakis, Lawyer, acting as Agents,

— the Commission of the European Communities, represented by Antonio Caeiro, Legal Adviser, and Maria Patakia, a member of its Legal Service, acting as Agents,

— Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE, represented by L. Georgakopoulos,

— Ethniki Trapeza tis Ellados AE, represented by K. Vordis, of the Athens Bar,

— Yeniki Trapeza tis Ellados AE, represented by L. Deligianni, of the Athens Bar,

— Elliniki Trapeza Viomikhanikis Anaptixeos AE, represented by S. Stratigis, of the Athens Bar,

— Ethniki Trapeza Ependiseon Viomikhanikis Anaptixeos AE, by P. Papanikolaou, of the Athens Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiffs in the main proceedings, represented by I. Anastasopoulu and G. I. Anastasopoulos, Dikigori, with a right of audience before the Greek Court of Cassation, of Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE, represented by L. Georgakopoulos, Professor of Commercial Law, and A. Tsouderos, of the Athens Bar, of Elliniki Parketoviomikhania Adelfi Sotiropouli AE, represented by S. Felios and V. Karagiannis, of the Athens Bar, of Ethniki Trapeza tis Ellados AE, Emboriki Trapeza tis Ellados AE, and Ethniki Trapeza Ependiseon Viomikhanikis Anaptixeos AE, represented by I. Spyridakis, Professor of Civil Law, of the Greek Government, represented by N. Mavrikas, Assistant Legal Adviser to the State Attorney, and of the Commission of the European Communities, represented by D. Goulosis, Legal Adviser, acting as Agent, at the hearing on 20 November 1991,

after hearing the Opinion of the Advocate General at the sitting on 16 January 1992,

gives the following

Judgment

1 By judgment of 2 October 1989, which was received at the Court Registry on 21 December 1989, the Polimeles Protodikio Athinon (Court of First Instance, Athens) referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 25 and 29 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 (Official Journal 1977 L 26, p. 1, hereinafter referred to as 'the Second Directive').

2 Those questions were raised in proceedings between a number of shareholders of Elliniki Parketoviomikhania Adelfi Sotiropouli AE ('EPAS'), the Greek State, Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (Organization for the Restructuring of Undertakings, hereinafter referred to as 'the OAE'), EPAS and several banks. The proceedings are concerned with the increases in the capital of EPAS effected under the scheme provided for in Greek Law No 1386 of 5 August 1983 (Official Journal of the Hellenic Republic A, 107 of 8 August 1983, p. 14) to which EPAS had been made subject by decision of the Minister for the National Economy of 26 November 1984 (Ministerial Order No 1406, Official Journal of the Hellenic Republic B, 839, of 27 November 1984, p. 7697).

3 The OAE is a public-sector body set up by Law No 1386/1983. It is in the form of a public limited company and acts in the public interest, under the control of the State. Under Article 2(2) of that law, the object of the OAE is to contribute to the economic and social development of the country through the financial rationalization of undertakings, the importation and application of foreign know-how and the development of Greek know-how and through the establishment and operation of nationalized or mixed-economy undertakings

4 Article 2(3) of Law No 1386/1983 lists the powers conferred on the OAE in order to achieve those objectives. It may thus take over the administration and day-to-day operation of undertakings undergoing rationalization or nationalized

undertakings, acquire holdings in the capital of undertakings, grant loans and make or arrange for certain loan issues, acquire bonds and transfer shares, in particular to employees or their representative leaders, local government bodies or other legal entities governed by public law, charitable organizations, social organizations or private individuals.

5 Under Article 5(1) of Law No 1386/1983, the Minister for the National Economy may decide that the system establised by the Law may be applied to undertakings which are undergoing serious financial difficulties.

6 Under Article 7 of Law No 1386/1983, the competent minister may decide to transfer to the OAE the administration of an undertaking which is subject to the abovementioned system, to deal with the undertaking's debts so as to secure its viability or wind it up.

7 Article 8 of Law No 1386/1983 contains provisions on transferring the administration of the undertaking to the OAE. Article 8(1), as amended by Law No 1472/1984 (Official Journal of the Hellenic Republic A, 112, of 6 August 1984, p. 1273), lays down the detailed rules as to how the transfer is to be affected and governs relations between the persons appointed by the OAE to administer the undertaking, and the organs of the undertaking. Accordingly it provides that publication of the ministerial decision to subject the undertaking to the system established by the Law to an undertaking terminates the powers of the administrative organs of the undertaking and that the general meeting is to continue to exist but may not terminate the appointment of the members of the administration appointed by the OAE.

8 Article 8(8) of Law No 1386/1983 provides that, during its provisional administration of the company concerned, the OAE may decide to increase its capital, by way of derogation from the provisions in force concerning public limited liability companies. The increase must be approved by the competent minister. The former shareholders retain their pre-emptive rights, which they may exercise within a time-limit laid down in the decision granting ministerial approval.

9 Article 10 of Law No 1386/1983 is also concerned with increases of capital. The measures under Article 10, by contrast with those envisaged in Article 8(8), do not fall within the scope of the provisional administration by the OAE. The increase provided for in Article 10 is a definitive restructuring measure.

10 According to that article, the competent minister may, in the cases provided for in Articles 7 and 8(5) of the Law, decide to increase the capital of the company or to capitalize the debts owed by the company to the State or other public bodies and undertakings. Article 10 does not grant the former shareholders a pre-emptive right to subscribe for the new shares.

11 Following ministerial order No 1406 of 26 November 1984 which made EPAS, at its own request, subject to the system established by Law No 1386/1983, the OAE took over administration of the company and, on 26 March 1986, decided to increase its capital by DR 650 million. Pursuant to Article 8(8) of Law No 1386/1983, that decision was approved by the Secretary of State of Industry, Energy and Technology by Order No 98 of 28 March 1986 (*Official Journal of the Hellenic Republic* B, 143, of 3 April 1986, p. 1615).

12 According to that order, former shareholders enjoyed an unlimited pre-emptive right, to be exercised in writing within a period of one month following publication of the order in the (Official Journal of the Hellenic Republic. Since no shareholder took advantage of that possibility, the OAE acquired the new shares, with the result that it became the holder of 68.64% of the capital of the company, amounting to DR 947 000 000.

13 Towards the end of 1986, following negotiations between the creditors, the OAE and the other shareholders of EPAS, it was decided to keep the company alive and to end the provisional administration and the suspension of payment of its debts. The agreement, approved by the Secretary of State of Industry, Energy and Technology by Order No 15 of 9 January 1987 (Official Journal of the Hellenic

Republic B, 25, of 16 January 1987, p. 210), provided for a reduction of the capital of the company by DR 947 000 000 to the minimum allowed by law of DR 5 000 000, followed by an increase intended to raise it to DR 6 062 660 000.

14 That increase was required by the competent minister pursuant to Article 10(1) of Law No 1386/1983 and was brought about by capitalization of certain debts owed by EPAS to the Greek State and to banks, the public electricity company and a number of social security funds, and by the contribution of new funds by the OAE. The new capital was allotted to the banks and the OAE, with the result that they hold a majority of the shares.

15 The plaintiffs in the main proceedings, who have only a very small holding in EPAS, initiated proceedings before the Polimeles Protodikio contesting the abovementioned increases in the capital of EPAS and the allotment of shares to the banks and OAE. They consider, *inter alia*, that the increases infringe the Second Directive.

16 In those circumstances, the Polimeles Protodikio stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Has the Second Community Directive on company law (77/91 of 13 December 1976), in particular the provisions relating to the maintenance or alteration of the capital of public limited lability companies (Articles 25 et seq. and 29), been directly applicable in the territory of Greece since 1 January 1981 in the sense that the Greek courts are required to apply its provisions in disputes before them?

2. Do the abovementioned provisions take precedence over conflicting provisions of Law 1386/1983, which differ from the other provisions of Greek national law which govern such matters in regard to public limited liability companies inasmuch as the law in question, which set up the second defendant, the

Organismos Anasinkrotisis Epikhiriseon, which operates in the public interest under the supervision of the State, was brought into force on 8 August 1983 principally for the purpose of the eoncomic rationalization of companies?'

17 Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant legislation and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

18 It must be observed, as a preliminary point, that certain arguments put to the Court by the parties relate to issues not covered by the questions referred to it. They include in particular questions as to whether individuals who seek to rely, before a national court, on rights based on a general principle of law must have a legitimate interest in invoking a legal provision, in the absence of which their claim constitutes a misuse or abuse of law, and whether the Community is competent to legislate on matters of insolvency law and other collective procedures for the satisfaction of creditors' claims.

19 It must be emphasised in that regard that, by virtue of the division of jurisdiction provided for in Article 177 in preliminary-ruling proceedings, it is for the national court alone to assess the relevance of such arguments and to make a fresh request to the Court if it considers that it is necessary to obtain a further ruling on the interpretation of Community law for the purpose of giving its judgment (see in particular the judgment in Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261.

20 It must also be observed that the national court's questions seek essentially to determine whether the provisions of the Second Directive preclude increases in the capital of a company which were effected under a system established by a law intended to facilitate the economic rationalization of undertakings, where such increases had not been authorized by the general meeting of shareholders and no pre-emptive subscription rights had been made available to the existing shareholders.

21 It asks first whether Articles 25(1) and 29(1) of that directive have direct effect. It then asks whether those provisions take precedence over a law for the restructuring and rationalization of undertakings such as Law No 1386/1983.

22 It is apparent from the national court's judgment that the second question is not concerned with the primacy of Community law as such. The national court observes that primary and secondary Community law forms an integral part of Greek national law and prevails over any conflicting legal provision. In its second question, it seeks rather to determine whether the provisions of the directive apply in circumstances such as those in point in the main proceedings, which involve the economic rationalization of an undertaking by a public-sector body such as the OAE.

23 It is appropriate to answer the second question first. If it becomes apparent that the directive does not apply to a special procedure for the rationalization of undertakings of the kind at issue in the main proceedings, the problem raised in the first preliminary question, concerning the direct effect of Articles 25(1) and 29(1), no longer arises.

The scope of the Second Directive

24 In their observations to the Court, the defendants in the main proceedings argue that the Second Directive does not apply to public measures like those provided for in Law No 1386/1983 concerning the rationalization or winding up of undertakings.

25 It is first necessary to examine the arguments put forward by the OAE. It considers that the Second Directive does not apply to the present case since it concerns an area of law other than that governed by Law No 1386/1983. It maintains in particular that the Second Directive is concerned with company law, whereas national rules such as those laid down in Law No 1386/1983 concern the restruc-

turing and rationalization of undertakings and are similar to collective procedures, such as insolvency proceedings, which are intended to settle creditors' claims. The OAE submits that rules of that kind are not concerned with the normal functioning of a company and relations between shareholders but is intended to uphold the interests of creditors by means of collective execution measures.

26 In that regard, it must be borne in mind that the Court expressly rejected that argument in its judgment in Joined Cases C-19/90 and C-20/90 *Karella and Karellas* [1991] ECR I-2691.

27 The Court held in paragraph 30 of that judgment that the Second Directive is intended to ensure that members' and third parties' rights are safeguarded, in particular in operations for setting up companies and increasing and reducing company capital. In order to be effective, that safeguard must be secured for members as long as the company continues to exist within its own structures. Whilst the directive does not preclude the taking of execution measures and, in particular, liquidation measure placing the company under compulsory liquidation in the interests of safeguarding creditors' rights, it nevertheless continues to apply as long as the company's shareholders and normal bodies have not been divested of their powers. Certainly, this is true where there is a straightforward rationalization measure involving public bodies or companies governed by private law where the members' right to the capital and decision-making power in the company is in question.

28 Consequently, for so long as the company continues to exist within its own structures, the Second Directive applies, even if that company has been the subject of measures of rationalization of the kind provided for in Law No 1386/1983.

29 Moreover, it must be pointed out that even if the provisional administration of the OAE is likely to result in the special liquidation procedure provided for in Article 9 of Law No 1386/1983, the liquidation of companies by the levying of execution does not appear among the objects of the OAE, as set out in Article 2(2) of that

law. On the contrary, it is expressly provided, in subparagraph (a), that the object of the OAE is to contribute to the economic and social development of Greece by financially rationalizing undertakings in accordance with the provisions of the Law.

30 It is next necessary to consider the arguments put forward by the other defendants in the main proceedings. They maintain that the Second Directive does not cover the exceptional situations to which Law No 1386/1983 relates. In their view, that law does not govern increases of the capital of public limited liability companies for an indefinite period but lays down special measures to ensure the survival of undertakings that are of particular importance to the national economy but can no longer function normally because of excessive debts. They also state that those special measures are needed in order to avoid social disturbances resulting from collective redundancies.

31 In that regard, it must first be borne in mind that the Court also rejected that argument in its judgment in Joined Cases C-19/90 and C-20/90 cited above, in particular at paragraphs 25 to 28.

32 According to that judgment, that directive seeks, in accordance with Article 54(3)(g) of the Treaty, to coordinate the safeguards required in the Member States in relation to companies, within the meaning of the last paragraph of Article 58 of that Treaty, in order to make such guarantees equivalent and to protect the interests of members and third parties. Consequently, the aim of the Second Directive is to provide a minimum level of protection for shareholders in all the Member States.

33 That objective would be seriously compromised if the Member States were allowed to derogate from the provisions of the directive by maintaining in force rules — even rules categorized as special or exceptional — which make it possible

to decide, by administrative measure, outside any decision of the general meeting of shareholders, to effect an increase in the company's capital without guaranteeing them pre-emptive rights in respect of the shares to be issued.

34 However, that finding does not mean that Community law precludes the Member States from derogating from those provisions whatever the circumstances. Indeed, the Community legislature specifically provided for either limited derogations or procedures which might lead to such derogations with a view to safeguarding certain vital interests of the Member States which were liable to be affected in exceptional situations. Articles 19(2) and (3), 40(2), 41(2) and 43(2) of the directive are examples of provisions to that effect.

35 There is no provision, either in the EEC Treaty or in the Second Directive itself, which allows the Member States to derogate from Articles 25(1) and 29(1) of the Second Directive when there is a crisis. On the contrary, Article 17(1) of the directive expressly provides that in the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called, within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken. That provision thus confirms the decision-making power of the general meeting provided for in Article 25(1), even where the company in question is experiencing serious financial difficulties, and does not allow any derogation whatsoever from the pre-emptive right provided for in Article 29(1).

36 Consequently, the provisions of the Second Directive, and in particular Articles 25(1) and 29(1), apply to measures for the rationalization of undertakings such as those envisaged in Law No 1386/1983

37 It must therefore be stated in reply to the national court that Articles 25(1) and 29(1) of the Second Directive must be interpreted as precluding the application of rules which, being designed to ensure the rationalization and continued trading of

undertakings that are of particular importance to the economy of a Member State and are in an exceptional situation because of their debts, allow an increase of capital to be decided upon by administrative measure, without any resolution being passed by the general meeting, and enable a decision to be taken, by administrative measure, that new shares are to be allotted without being offered on a pre-emptive basis to the shareholders in proportion to the capital represented by their shares.

The direct effect of Articles 25(1) and 29(1) of the Second Directive

38 It must be borne in mind that, as the Court held in its judgment in Joined Cases C-19/90 and C-20/90, cited above, Article 25(1) of the directive may be relied upon by individuals against the public authorities before the national courts.

39 As regards Article 29(1) of the directive, it must be stated that that provision is framed in clear and precise terms and establishes unconditionally that, upon any increase of subscribed capital by consideration in cash, the shares must be offered on a pre-emptive basis to the shareholders in proportion to the capital represented by their shares.

40 The unconditional nature of that provision is not affected by Article 29(4) of the Second Directive. That paragraph enables the general meeting to decide, under certain clearly defined conditions, to restrict or withdraw the shareholders' pre-emptive rights. That specific derogation does not leave the Member States any possibility of making that right subject to any exceptions other than the one expressly provided for.

41 The same applies to Article 29(5) of the Second Directive, according to which the laws of a Member State may provide that the statutes, the instrument of incorporation or the general meeting may give the power to withdraw or restrict the

right of pre-emption to the company body which is empowered to decide on an increase in subscribed capital within the limits of the authorized capital.

42 The same applies to Article 41(1) of the Second Directive, which allows the Member States to derogate from Article 29 to the extent necessary to encourage the participation of employees or other groups of persons defined by national law in the capital of undertakings. That derogation is also strictly limited to the case specified.

43 It must therefore be stated in reply to the national court that Articles 25(1) and 29(1) of the Second Directive may both be relied upon by individuals against the public authorities before the national courts.

Costs

44 The costs incurred by the Greek Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Polimeles Protodikio Athinon by judgment of 2 October 1989, hereby rules:

Articles 25(1) and 29(1) 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 must be interpreted to the effect that

1. **it precludes the application of rules which, being designed to ensure the rationalization and continued trading of undertakings that are of particular importance to the economy of a Member State and are in an exceptional situation because of their debts, allow an increase of capital to be decided upon by administrative measure, without any resolution being passed by the general meeting, and enable a decision to be taken, by administrative measure, that new shares are to be allotted without being offered on a pre-emptive basis to the shareholders in proportion to the capital represented by their shares;**

2. **they may be relied upon by individuals as against the public authorities before the national courts.**

Due Joliet Kapteyn

Mancini Kakouris Rodríguez Iglesias Díez de Velasco

Delivered in open court in Luxembourg on 24 March 1992.

J.-G. Giraud
Registrar

O. Due
President