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.

REPORT FOR THE HEARING
in Case C-381/89 *

I — Facts and procedure

1. *Legal background*

(a) The Second Directive on company law

1. Article 54(3)(g) of the EEC Treaty provides that the Council and the Commission are to coordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58. In order to achieve that objective the Council adopted, on 13 December 1976, the Second Directive 77/91/EEC on the formation of public limited liability companies and on the maintenance and alteration of their capital (hereinafter referred to as 'the Second Directive', Official Journal 1991 L 26, p. 1). Articles 25 to 29 of the Second Directive contain provisions relating to increases in capital.

2. The first two paragraphs of Article 25 provide as follows:

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

2. Nevertheless, the statutes or instrument of incorporation or the general meeting, the decision of which must be published in accordance with the rules referred to in paragraph 1, may authorize an increase in the subscribed capital up to a maximum

* Language of the case: Greek.

amount which they shall fix with due regard for any maximum amount provided for by law. Where appropriate, the increase in the subscribed capital shall be decided on within the limits of the amount fixed, by the company body empowered to do so. The power of such body in this respect shall be for a maximum period of five years and may be renewed one or more times by the general meeting, each time for a period not exceeding five years.'

3. Article 29(1) provides that whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares. Under Article 29(4), that right of pre-emption may not be restricted or withdrawn by the statutes or instrument of incorporation. That may, however, be done by decision of the general meeting. The administrative or management body is to be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price.

4. Article 29(5) concerns a further restriction on the right of pre-emption. It gives the Member States the option of introducing the restriction by means of legislation. Thus the national legislation may provide that the statutes, the instrument of incorporation or the general meeting may give the power to restrict or withdraw 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. That power may not be granted for a longer period than the power for which provision is made in Article 25(2).

5. It should also be pointed out that under Article 41(1), Member States may derogate from both Article 25 and Article 29 to the extent that such derogations are necessary for the adoption or application of provisions designed to encourage the participation of employees, or other groups of persons defined by national law, in the capital of undertakings.

(b) Greek Law No 2190/1920

6. Under Articles 2 and 145 of the Act concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties (Official Journal, Special Edition of 19 November 1979), the Hellenic Republic ought to have adopted provisions implementing the Second Directive from 1 January 1981. Those provisions, contained in Presidential Decrees Nos 409/1986 and 498/1987 (Official Gazette of 28 November 1986 and 31 December 1987) were not adopted until 1986 and 1987. The decrees in question amended Law No 2190/1920 on public limited liability companies, codified by Royal Decree No 174/1963 (Official Gazette 1963, Part I, No 37). The codified Law contains provisions that comply with Article 25(1) and (2) and Article 29(1) and (4) of the Second Directive. However, it does not make use of the option of restricting or withdrawing the right of pre-emption pursuant to Article 29(5) of the directive. Nor does the codified Law contain a provision corresponding to Article 41(1) of the Second Directive. However, the possibility of having employees participate

in the capital of companies is provided for by the legislation on the restructuring of undertakings.

(c) Greek Law No 1386/1983

7. Law No 1386/1983 of 5 August 1983 (Official Gazette No 107 of 8 August 1983, p. 1926) forms a public limited liability company with capital entirely subscribed by the State and with the name 'Organismos Ikonomikis Anasinkrotiseos Epikhiriseon' (Organization for the Restructuring of Undertakings, hereinafter referred to as 'the OAE'). Article 2 of the Law provides that the object of the OAE is to contribute to the economic and social development of Greece by financially rationalizing undertakings, by importing and applying foreign know-how, by developing national know-how and by creating and running nationalized or mixed-investment undertakings.

8. Article 2(3) provides, *inter alia*, that for the achievement of its object, the OAE may in particular:

— take over the day-to-day administration and management of undertakings that are being rationalized or are nationalized;

— take shares in the capital of undertakings already in existence or to be formed;

— grant loans of any kind to undertakings in which it has a shareholding and, moreover, provide guarantees for the security of such loans;

— acquire bonds issued by the State or by State-controlled organizations, and bonds issued by undertakings, organizations and banks;

— transfer shares, in particular to employees or to organizations representing them, to local authorities or to other corporate bodies governed by public law, to charity organizations, to social organizations or to individuals;

— contract loans from the Greek State, the Bank of Greece or other financial institutions in Greece or abroad, with or without the guarantee of the Greek State, and accept deposits from corporate bodies governed by public law and undertakings in which it has a shareholding.

9. Article 5(1) lays down the conditions under which the Law is applicable. It provides that the scheme established by the law may be applied, by decision of the Minister for the Economy, adopted on the advice of a special consultative committee, to undertaking that are in severe financial difficulties. It may also be applied to undertakings that are involved in national defence, that are vitally important for the exploitation of national resources or whose principal object is a public service, provided that they are manifestly insolvent. Undertakings which so request may also be made subject to the Law. Article 6 lays down the procedure by which undertakings are made subject to the Law.

10. The substantive rules of the Law are laid down in Articles 7 to 10. According to Article 7, the competent minister may decide to transfer to the OAE the administration of an undertaking which has been made subject to the Law, to settle the debts of the undertaking in such a way as to ensure its viability by compulsorily increasing its capital by means of new subscriptions or the capitalization of existing liabilities, or to wind up the undertaking pursuant to Article 9 of the Law. However, the capitalization of liabilities may be imposed only on the State, corporate bodies governed by public law and State-controlled banks.

11. Article 8(1), relating to the transfer of the administration of the undertaking, was amended by Law No 1472/1984 of 3 August 1984 (Official Gazette No 112 of 6 August 1984, p. 1273). The amended provision lays down the transfer procedure and regulates relations between the administrators appointed by the OAE and the organs of the undertaking. It is thus provided that the publication of the ministerial decision terminates the powers of the administrative organs of the undertaking and that the general meeting of the shareholders is retained, but may not remove the members of the administration appointed by the OAE or fix the amount of their remuneration or compensation. The approval of the Minister is, moreover, essential for the distribution of profits and transfers to reserves. Under Article 8(4), the Minister may also decide to suspend payment of the undertaking's debts and adopt the corresponding measures of enforcement.

12. Article 8(5) provides that during the provisional administration the OAE is to carry out a study of the undertaking's viability and to negotiate an agreement with the creditors and shareholders concerning its survival. The validity of such an agreement is conditional on the written agreement of a certain proportion of the total number of creditors of the undertaking, of 51 per cent of the shareholders or members, and of the OAE. The agreement takes effect once it has received the Minister's approval. Article 8(6) provides that the publication of the ministerial decision brings the temporary administration by the OAE to an end. If, however, no agreement is reached within a period determined by the OAE, the liquidation procedure laid down in Article 9 is applied.

13. During its provisional administration, the OAE may also decide, by way of derogation from the provisions applicable to public limited liability companies, to increase the capital of the company in question, pursuant to Article 8(8). The increase must be approved by the Minister, may be for cash or for consideration other than cash. Consideration may also be in the form of a set-off arrangement. However, the existing shareholder retain their pre-emptive right, which they must exercise within a period fixed by the ministerial decision granting approval.

14. Article 10 also concerns increases in company capital. Unlike the measures laid down in Article 8(8), those provided for in Article 10 are independent of the provisional administration by the OAE. The increase provided for in Article 10 is a permanent rationalization measure. Under Article 10 the Minister can, in the cases referred to in Articles 7 and 8(5), decide to increase the company capital or to capitalize the liabilities of the undertaking vis-à-vis the State or other public bodies or under-

takings. Article 10 does not confer on existing shareholders a pre-emptive right over the new shares. However, they are not entirely without protection. The Minister must fix the number and the price of the new share issues in accordance with the net worth of the undertaking, as established in the proposal of the OAE. The Minister may also provide for the possibility of the new shares going to existing shareholder. The new shares may also go to creditors, the OAE, the employees of the undertaking, to cooperatives and to local authorities.

15. When the liabilities of public bodies are capitalized, the decision is to determine whether all only some of the shares are to be allocated to creditors or to the OAE. In the former case, the liabilities are paid off. In the latter case, the OAE draws up and issues to the creditors a bond representing all or part of their claims.

(d) Commission Decision 88/167/EEC

16. Law No 1386/1983 was the subject of a Commission decision adopted as part of the procedure laid down in Article 93 of the EEC Treaty. By its Decision 88/167/EEC of 7 October 1987 (Official Journal 1987 L 76, p. 18), the Commission stated that it had no objection to the implementation of Law 1386/1983 subject to the condition, *inter alia*, that the Greek Government amended the provisions relating to increases in capital so as to bring them into conformity with Articles 25 and 26 and with Articles 29 and 30 of the Second Directive. It emerges from the decision that the individual interventions of the OAE have covered 45 companies, 22 of which have been placed into liquidation.

(e) Other Commission measures taken with regard to Law No 1386/1983

17. On 7 March 1989 the Commission commenced the procedure laid down by Article 169 by reason of the alleged failure of the Hellenic Republic to fulfil its obligations under the Second Directive. On 9 February 1990 it forwarded its reasoned opinion to the Greek Government. On 10 March 1990 the Greek Parliament adopted a Law amending Law No 1386/1983 so as to bring it into conformity with the Second Directive (Law No 1882/1990, Official Gazette No A 43 of 23 March 1990).

2. *Background to the dispute in the main proceedings*

18. The plaintiffs in the main proceedings are shareholders of the company 'Elliniki Parketoviomikhania Adelfi Sotiropouli AE', (hereinafter referred to as 'EPAS'). They held 27 799 shares in the company capital of EPAS, which, before the increase in capital in 1986, amounted to DR 297 400 000 divided into 29 740 shares of DR 10 000 each.

19. Following a request made by EPAS, pursuant to Article 5(1) of Law No 1386/1983, the Minister for Economic Affairs made that company subject to the provisions of the Law by a decision of 26 November 1984 (Ministerial Decree No 1406/1984, Official Gazette No B 839 of

27 November 1984, p. 7697). The OAE then took over the administration of EPAS. On 26 March 1986, the OAE decided to increase the company capital of the company by the sum of DR 650 000 000. That decision was approved by the State Secretary for Industry, Energy and Technology, as required under Article 8(8) of Law No 1386/1983, by Decree No 98 of 28 March 1986 (Official Gazette No B 143 of 3 April 1986, p. 1615). According to that decree, the existing shareholders had an unfettered right of pre-emption which they were required to exercise by means of a written declaration within one month following the publication of the decree in the Official Gazette. The temporary board of directors could freely dispose of shares which had not been subscribed for by the existing shareholders within the prescribed time-limit. Since the existing shareholders did not subscribe for the new shares, the OAE came forward to purchase them, with the result that it held 68.64 per cent of the company capital, which amounted to DR 947 000 000.

20. At the end of 1986, negotiations took place, pursuant to Article 8(5) of Law No 1386/1983, between the creditors, the OAE and the other shareholder of EPAS. Those negotiations resulted in an agreement concerning the survival of EPAS. That agreement concluded between shareholders representing at least 51 per cent of the shareholders, the OAE and creditors representing at least 60 per cent of claims, was approved by the abovementioned State Secretary by Decree No 15 of 9 January 1987 (Official Gazette No B 25 of 16 January 1987, p. 210). Following publication of Decree No 15, the temporary administration of the OAE and the suspension of the payment of the debts of EPAS were brought to an end, pursuant to Article 8(6) of Law No 1386/1983.

21. The objective of the approved agreement was to reduce the company's capital by DR 947 000 000 to the statutory minimum of DR 5 000 000 and subsequently to increase the reduced capital to DR 6 062 000. That increase was imposed by the Minister in accordance with Article 10(1) of Law No 1386/1983 and was implemented by capitalization of a part of the liabilities of EPAS vis-à-vis the Greek State and the State banks that are defendants in the main proceedings, the State electricity undertaking and certain social security funds, and by the contribution of new funds by the OAE. The majority of the shares are thus held by those State-controlled public bodies. The plaintiffs in the main proceedings now have only a very small shareholding in EPS.

22. The existing shareholders, who had become minority shareholders, considered that the increases so made infringed Articles 25 et seq. of the Second Directive and Article 1 of the Protocol of 20 March to the international Convention for the Protection of Human Rights signed in Rome on 4 November 1950. They therefore brought an action before the Court of First Instance, Athens, against the abovementioned increases in the capital of EPAS and against the distribution of its shares among the public undertakings.

3. *Questions referred for a preliminary ruling*

23. In its judgment of 2 October 1989, the Court of First Instance, Athens, took the view that Community law took precedence over all conflicting provisions of

Community law, that directives are also a source of Community law and that they may be directly effective, if certain conditions are satisfied. In the case in point, the national court raised the question whether the provisions of the Second Directive can be directly effective and if they take precedence over national law and in particular Law No 1386/1983. Accordingly, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'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 economic rationalization of companies?'

4. *Procedure*

24. The judgment making the reference was received at the Court Registry on 21 December 1989.

25. Pursuant to Article 20 of the Protocol on Statute of the Court of Justice of the EEC, written observations were submitted by:

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

— the Greek Government, by Mr Panayotis Milonopoulos, Dikigoros, legal officer, second class, with the special legal department for European Community affairs of the Ministry for Foreign Affairs, and Constantinos Stavropoulos, Dikigoros, legal officer in the same department, and Nicolaos Frangakis, Dikigoros;

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

26. By a decision of 10 October 1990, the Court decided to assign the case to the Sixth Chamber pursuant to Article 95(1) and (2) of the Rules of Procedure.

27. By the same decision the Court decided to open the oral procedure.

28. By letter from the Registry of 20 December 1990, the Court informed the parties in the main proceedings that it had decided to reopen the oral procedure in order to permit the parties that had not yet had an opportunity to submit written observations, to do so. Following that letter, written observations were submitted, pursuant to Article 20 of the Protocol on the Statute of the Court, by:

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

— Ethniki Trapeza tis Ellados AE, represented by K. Voridis;

— Yeniki Trapeza tis Ellados, represented by L. Deliyanni;

— Elliniki Trapeza Ependiseon Viomikhanikis Anaptixeos, represented by P. Papanikolaou.

29. By letter of 10 February 1991, the OAE requested the joinder of the present case and Joined Cases C-19/90 and C-20/90 *Karella* and *Karellas*, in which the hearing took place on 12 December 1990. The Court did not grant that request. It delivered its judgments in the *Karella* and *Karellas* cases on 30 May 1991 [(1991] ECR I-2691).

30. By letter of 2 April 1991, the Greek Government requested, pursuant to Article 95(2) of the Rules of Procedure, that the case be decided in plenary session.

31. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the observation submitted to the Court

1. *Concerning direct effect*

32. The *plaintiffs in the main proceedings* observe that the national courts are required, by virtue of the mandatory nature of directives in conjunction with Article 5 of the EEC Treaty, to implement Community directives in so far as their provisions have direct effective. That obligation may be relied on only against the State (judgment in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723).

33. The Court has consistently held that Community directives are capable of conferring rights on individuals which may be relied upon before the courts of the Member States provided that their provisions are clear, unconditional and leave the national legislature no discretion. The plaintiffs consider that Articles 25(1) and 29(1) and (4) of the Second Directive satisfy those conditions by reason of their clear and mandatory wording. The same is true for the second paragraph of Article 25. The

discretionary power that it confers on the national legislature is strictly delimited. The clear and unconditional nature of those provisions is, moreover, confirmed by the manner in which they have been transposed into the national legal system in Codified Law No 2190/1920.

34. Article 41 of the Second Directive does not constitute an obstacle to the direct applicability of the abovementioned provisions of the directive. That article contains only a derogation in favour of well defined classes of persons. It does not permit any class of persons designated arbitrarily, on the spur of the moment, by the national legislature to participate in the company capital. Such participation would be contrary to the very concept of harmonization, which implies bringing similar solutions to bear on the same problems in all the Member States and thereby preventing arbitrariness and surprises at the national level.

35. The *Greek Government* states that Law No 1386/1983 does not regulate definitively increases in the capital of public limited liability companies; rather it lays down special measures as part of the restructuring of undertakings in difficulties. Its provision are exceptional and intended to protect the public interest, and are dictated by the need to ensure the survival of undertakings that are important for the national economy and to avoid social problems resulting from collective redundancies. The Commission itself acknowledged the exceptional nature of the law when it based its decision of approval of 7 October 1987, cited above, on the existence of a serious disturbance in the economy of a Member State, within the meaning of Article 92(3)(b) of the EEC Treaty.

36. The derogation from company law provided for in Article 8(8) of Law No 1386/1983 is therefore only by way of exception. The Greek Government also points out that Article 10(2) of the same Law does not constitute a general abolition of the right of existing shareholders to participate in the increase in the capital and to purchase new shares. That article provides for the possibility of the Minister allocating shares to them, a possibility which he did not make use of in the case at issue.

37. Accordingly, it matters little whether or not Articles 25 and 29 of the Second Directive produce direct effect, since those articles do not concern the particular case of undertakings in difficulties. Law No 1386/1983 governs matters which are outside the scope of those provisions.

38. The Greek Government observes, moreover, that, according to the judgment of the Court in Case 24/86 (*Blaizot* v *University of Liège and Others* [1988] ECR 379), pressing considerations of legal certainty preclude any reopening of the question of legal relationships that have exhausted their effects in the past, whereas the reopening of that question would retroactively upset the goals that have been achieved and the results that have been obtained by the implementation of Law No 1386/1983.

39. The *OAE* points out that the Court has recognized that directives may produce a direct effect when their provisions are sufficiently precise, in particular with regard to penalties and the conditions for the exercise of the rights that they confer. Consequently, only those directives that are sufficiently precise with regard to their penalties are directly applicable. That is why repealing directives may in general have direct effect whereas 'positive' directives, which require

compliance with positive rules of law, can have such direct effect only if they are accompanied by appropriate penalties (judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891).

40. The OAE states, secondly, that the directives relating to company law are not precise, because they do not define either the penalties to be imposed in the event of infringement or the links and relationships that exist between such directives and the other fields of company law. It follows that they cannot be given direct effect. That conclusion is consistent with the wishes of the Community legislature, as expressed in Articles 189 and 54(3)(g) of the Treaty. The first of those provisions excludes in principle the direct effect of directives and, with regard to the second, it cannot be argued that direct effect is a necessary condition for the right of establishment.

41. The *Ethniki Trapeza tis Ellados AE* (National Bank of Greece) observes that Article 189 of the EEC Treaty draws a clear distinction between regulations and directives. It expressly provides that regulations are directly applicable, whereas it does not do so with regard to directives. It follows, by contrary inference, that in principle directives do not have direct effect. However, the Court has acknowledged that directives may in exceptional cases produce such an effect when certain conditions are fulfilled. In such cases the directive is assimilated to a regulation.

42. The the National Bank of Greece concludes that the Second Directive manifestly does not satisfy the conditions necessary for it to be have direct effect. It does not specify which national legal provisions must be repealed and it confers on the Member States a discretionary power with regard to the form and the method of implementation.

43. The *Yeniki Trapeza tis Ellados AE* (the General Bank of Greece), *the Elliniki Trapeza Viomikhanikis Anaptixeos AE* (Greek Bank for Industrial Development) and *the Ethniki Trapeza Ependiseon Viomikhanikis Anaptixeos* (National Bank for Investment in Industrial Development) agree with the observations of the National Bank of Greece. The General Bank of Greece adds, however, that the Second Directive does not apply to undertakings which can no longer function normally because they are insolvent and which are of particular importance for the national economy. Law No 1386/1983 lays down special rules for such undertakings, that derogate from the common company law as contained in the Second Directive and Law No 2190/1920. Those rules are temporary and are applied for the sole purpose of restructuring those companies in the public interest.

44. The *Commission* is of the opinion that Articles 25(1), (2) and 29(1) and (4) of the Second Directive are clear provisions and that they lay down, in an unambiguous manner, exclusive and obligatory rules that may be relied on by an individual and applied by the courts. Those provisions are unconditional and do not give the Member States the possibility of subjecting them to certain conditions or of limiting their application. The possibility given to the Member States in Article 25(2) of authorizing an increase in the capital up to a maximum amount, does not detract from the mandatory nature of the other rules laid down in that provision. The derogation from the rule laid down in Article 29(1),

contained in Article 29(4), is also not of such a kind as to preclude the direct effect of that article. The derogation is in no way subject to conditions which may be imposed by the Member States. Even if the abovementioned provisions are considered in conjunction with Article 29(5), their direct applicability cannot be excluded. The content of the measures that the Member States may adopt under that article is strictly defined.

45. According to the Commission, before conclusions are drawn concerning the unconditional nature of Article 25(1) and (2) and Article 29(1) and (4) of the Second Directive, it is necessary to look at the effect of Article 41(1). That article seeks only to encourage the achievement of social policy objectives. It follows that the abovementioned paragraphs of Articles 25 and 29 apply unconditionally for any increase in capital that does not have those social objectives. The Commission also points out that Law No 1386/1983, which seeks to bring about the recovery of undertakings in difficulties, does not fall within the scope of Article 41(1).

46. The Commission concludes that Articles 25(1) and (2) and 29(1) and (4) of the Second Directive may be relied on by individuals before the national courts. According to the judgment in Case 152/84 *Marshall*, cited above, where an individual is able to rely on a directive as against the State, he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. There is nothing to stop the plaintiffs in the main proceedings from relying on those article against the Greek State and the undertakings that it controls, namely, in the present case, the OAE and the public banks.

2. *Concerning the supremacy of Community law*

47. The *plaintiffs in the main proceedings* state that in all cases in which Community law allows derogations from its rules, the derogations, or the procedures which make them possible, are explicitly provided for in the Treaty or in secondary legislation. However, in the present case no derogation from the provisions of the Second Directive in favour of a Law such as Law No 1386/1983 is laid down either by the Treaty or by the directive itself. No derogation procedure, such as the one contained in Articles 108 and 109 of the EEC Treaty, has resulted in such a derogation. On the contrary, in its decision of 7 October 1987, cited above, the Commission expressly made its approval of Law No 1386/1983 conditional on the amendment of the provisions of the Law that were contrary to the Second Directive. Finally, the plaintiffs in the main proceedings consider that in so far as the Hellenic Republic complied with that decision by adopting Law No 1882/1990, cited above, it has itself acknowledged that Law No 1386/1983 did not conform to Community law.

48. The *Greek Government* claims that the present case does not raise any question concerning the precedence of Articles 25 and 29 of the Second Directive over Law No 1386/1983 since the Law does not fall within the scope of those articles.

49. *The OAE* observes, firstly, that the provisions of Community law are an integral part of a Community legal order which also embraces the general principles

of law. The correct, equitable and consistent application of the provisions at issue in the Member States requires that account be taken of those principles, which supplement the provisions and rectify them. One of those principles is that individuals must have a legitimate interest in relying on a provision of law and that their claim should not result in a misuse or an abuse of the law.

50. The OAE considers that in the present case the plaintiffs in the main proceedings are abusing rights that the Second Directive confers on shareholders. They never wished to increase the capital or to exercise the right of pre-emption because any contribution to the company capital would be non-repayable and could only be intended to cover some of the many liabilities. Moreover, they themselves requested that their company be made subject to the scheme of Law No 1386/1983 and that scheme never prevented them from discharging the liabilities by a voluntary increase in capital.

51. Another general principle of Community law and of the national laws is, according to the OAE, the power of the State to adopt compulsory measures vis-à-vis individuals so that they fulfil their obligations. Such measures may be individual or collective. Examples of the latter are traditional bankruptcy and restructuring intended to prevent bankruptcy. The appropriateness of such compulsory measures is not subject to judicial review since the decisions adopted in regard to such measures are not susceptible of appraisal by the courts.

52. The OAE states that the EEC Treaty does not confer any power on the Community institutions in the field of compulsory enforcement. Moreover, Community law itself entrusts its implementation to the law of the Member States. That observation is borne out not only by Article 192 of the Treaty, but also by acts of secondary legislation, such as Council Regulation No 2137/85 on the European Economic Interest Grouping (Official Journal L 199, p. 1) and in particular Article 36. The OAE also emphasizes in that regard that the fact that the Brussels Convention of 1986 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is an international convention concluded between States also indicates that the Community legislature wished to respect national competence in the field of enforcement.

53. It is from the point of view of that principle that Article 25(1) of the Second Directive should be analysed. That provision concerns the structure and internal functioning of a company with regard to third parties. It is for that reason that the Law fixes the minimum amount of company capital and regulaties the liability of members.

54. The OAE states in that regard that Law No 1386/1983 does not provide that the members are personally liable in the event that their company becomes insolvent, or that the company should be wound up. It simply provides for a public decision-making power parallel to that of the members where they are unable to fulfil their responsibilities. A compulsory measure

of that kind is not part of company law, but of bankruptcy law, as interpreted by the Court in its judgment in Case 133/78 (*Gourdain* v *Nadler* [1979] ECR 733). Law No 1386/1983 does not concern the relationships of shareholders but the satisfaction of the claims of creditors by means of the compulsory enforcement of the company's obligations. Law No 1386/1983 does not, therefore, interfere in a field governed by Community law since compulsory enforcement is a national competence. Consequently, the Law cannot be contrary to Community law.

55. The OAE observes, secondly, that, leaving aside those questions of principle, Article 25(1) of the Second Directive was not infringed in the present case; that provision does not define how the general meeting must adopt its decision. The OAE claims in that regard that the decision may be made by tacit consent and that the request to be made subject to the law and the inaction of the shareholders amount to positive consent to the increase in capital and the full application of Law No 1386/1983. Nor was Article 29(1) of the Second Directive infringed, since no shareholder ever applied to the company to subscribe for new shares and the company never refused to grant their application.

56. The *National Bank of Greece*, the *Greek Bank for Industrial Development*, and the *National Bank for Investment in Industrial Development* state that Law No 1386/1983 concerns only insolvent undertakings that are of particular economic and social importance. The measures laid down by the Law for those undertakings are only temporary and are implemented, by way of derogation from the provisions of Law No 2190/1920, merely with a view to restructuring them and in the interest of the national economy.

57. The Second Directive is part of the common company law and does not concern exceptional measures of that kind. Law No 1386/1983, on the other hand, belongs in the special context of public economic law and is not an integral part of Community law.

58. If the Court decides, nevertheless, not to follow that reasoning, the National Bank of Greece, the Greek Bank for Industrial Development, and the National Bank for Investment in Industrial Development propose that the temporal scope of its judgment should be limited (judgment in Case C-262/88 *Barber* [1990] ECR I-1889) in order to prevent the disruption of the Greek economic reorganization policy which has been implemented with the participation of the Community authorities. In that regard the National Bank of Greece, the Greek Bank for Industrial Development, and the National Bank for Investment in Industrial Development draw attention to the numerous economic and legal relationships entered into in good faith over many years and to the bad faith of the plaintiffs in the main proceedings who themselves requested that their undertaking be subject to Law No 1386/1983.

59. The *General Bank of Greece* observes that there can be no conflict between Law No 1386/1983 and the Second Directive because the latter does not apply to the field governed by the Law. Even if that view is not shared, there are a number of reasons why it cannot be argued that the application of the Law infringed the directive. Firstly, when the company capital was increased on the first occasion, the existing shareholders were given a right of pre-emption, which they did not exercise. Secondly, the second

increase in the capital did not infringe the provisions of Law No 2190/1920 since the abolition of the right of pre-emption is permitted by the common company law. Thirdly, the increase in the capital and the abolition of the right of pre-emption are to be regarded, in the final analysis, as acts of an organ of the company.

60. According to the *Commission*, the supremacy of Community law is a fundamental principle, of an absolute and unconditional nature, which applies to all rules of national law and which requires the national courts to disregard any conflicting provision of national law (judgment in Case 106/77 *Simmenthal* v *Amministrazione delle Finanze dello Stato* [1978] ECR 629). If Community law takes precedence over provisions of the constitutions of the Member States (judgment in Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125), it takes precedence *a fortiori* over provisions of ordinary legislation and there is no need to consider the reasons why the Member State adopted a derogation from Community law, to the extent that those reasons are not based on Community law.

61. The Commission also observes that Law No 1386/1983 does not find support in any derogation of primary or secondary Community law. The reservations expressed in its decision of 7 October 1987 and the opening of the procedure under Article 169 of the EEC Treaty against the Hellenic Republic for infringement of the Second Directive confirm that that directive takes precedence over the exceptional scheme of Law No 1386/1983. The Commission shares the view of the plaintiffs in the main proceedings that the recent amendment of that Law is tantamount to an implicit acknowledgment by the Hellenic Republic of the primacy of the Second Directive.

P. J. G. Kapteyn
Judge-Rapporteur