JUDGMENT OF THE COURT
12 May 1998 *

In Case C-367/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Efetio Athinon for a preliminary ruling in the proceedings pending before that court between

Alexandros Kefalas and Others

and

Elliniko Dimosio (Greek State),

Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE),

intervener: **Athinaiki Khartopiia AE and Others,**

on the interpretation of Article 25 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

* Language of the case: Greek.

alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1), and on the abusive exercise of a right arising from a provision of Community law,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and M. Wathelet (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn (Rapporteur), J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Kefalas and others, by A. Tegopoulos and D. Livieratos, of the Athens Bar,

— the Greek Government, by M. Stathopoulos, of the Athens Bar, and V. Kontolaimos, Deputy Legal Adviser in the State Legal Department, acting as Agent,

— Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE), by K. Kerameos and I. Soufleros, of the Athens Bar,

— Athinaiki Khartopiia AE and others, by S. Felios and M. Manolas, of the Athens Bar,

— the Commission of the European Communities, by D. Gouloussis, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Kefalas and others, represented by A. Tegopoulos and D. Livieratos, of the Greek Government, represented by M. Stathopoulos, V. Kontolaimos and P. Mylonopoulos, Legal Assistant in the Department for Community Matters of the Ministry of Foreign Affairs, acting as Agent, of Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE), represented by K. Kerameos and I. Soufleros, of Athinaiki Khartopiia AE and others, represented by S. Felios and M. Manolas, and of the Commission, represented by D. Gouloussis, at the hearing on 18 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 4 February 1998,

gives the following

Judgment

1 By judgment of 6 June 1996, received at the Court on 21 November 1996, the Efetio (Court of Appeal), Athens, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 25 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 (OJ 1977 L 26, p. 1), and on the abusive exercise of a right arising from a provision of Community law.

2 Those questions were raised in proceedings between, on the one hand, Mr Kefalas and others, shareholders in the public limited liability company Athinaiki Khartopiia AE ('Khartopiia'), and, on the other hand, the Greek State and Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (Organisation for the Restructuring of Undertakings, hereinafter 'the OAE'), in which the plaintiffs are contesting the validity of the increase in the capital of Khartopiia effected under the scheme provided for by Greek Law No 1386/1983 of 5 August 1983 (*Official Journal of the Hellenic Republic*, 107, of 8 August 1983, p. 14), which was applied to Khartopiia by decision of the Minister for the National Economy of 30 March 1984.

3 The OAE is a public body set up by Law No 1386/1983. Its legal form is that of a public limited liability company and it acts in the public interest under the control of the State. According to Article 2(2) of that Law, the object of the OAE is to contribute to the economic and social development of the country by means of the financial reorganisation of undertakings, the importation and application of foreign know-how, the development of national know-how and the formation and operation of nationalised and mixed-investment undertakings.

4 Article 2(3) of Law No 1386/1983 lists the powers conferred on the OAE for the purposes of attaining those objectives. These include the power to assume the administration and day-to-day management of undertakings undergoing reorganisation or nationalised undertakings, participate in the capital of undertakings, grant, issue or take out certain loans, acquire bonds and transfer shares, particularly to workers or to organisations representing them, to local authorities or to other legal persons constituted under public law, charitable institutions, social organisations or individuals.

5 According to Article 5(1) of Law No 1386/1983, the Minister for the National Economy may decide to apply the scheme set up by that law to undertakings in serious financial difficulties.

6 Article 7 of Law No 1386/1983 provides that the competent Minister may decide to transfer to the OAE the administration of an undertaking subject to the scheme established by that law, to reschedule its debts in such a way as to ensure its viability or to take steps to place it in liquidation.

7 Article 8 of Law No 1386/1983 contains provisions relating to the transfer of 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 governing such transfers and regulates the relationship between the persons appointed by the OAE to administer the undertaking and its organs. Thus it provides that the powers of the administrative organs of the undertaking are to cease upon publication of the ministerial decision placing the undertaking within the scheme established by that law, and that the general meeting of the company is to subsist but that it may not remove members of the board of directors who have been appointed by the OAE.

8 Article 8(8) of Law No 1386/1983 provides that the OAE may decide, in the course of its provisional administration of the company concerned, to increase the capital of that company by way of derogation from the legislation in force relating to public limited liability companies. The increase must be approved by the competent minister. The former shareholders retain their preferential right and may exercise it within a period prescribed in the ministerial decision approving the increase.

9 Following the application to Khartopiia of the scheme provided for by Law No 1386/1983, the OAE took over the management of that company and decided on 28 May 1986 to increase its capital by DR 940 million. That increase was approved, in accordance with Article 8(8) of Law No 1386/1983, by Decision No 153 of 6 June 1986 of the Minister for Industry, Research and Technology.

10 That decision shows that the former shareholders retained an unlimited preferential right to acquire the new shares which was to be exercised by them within one month from publication of the decision in the *Official Journal of the Hellenic Republic*. The plaintiffs in the main proceedings did not avail themselves of that right.

11 In the plaintiffs' view, the increase in capital decided upon by the OAE is contrary to Article 25(1) of the Second Directive, which provides that 'Any increase in capital must be decided upon by the general meeting'. Consequently, they brought an action before the Polimeles Protodikio (Court of First Instance), Athens, which dismissed their application.

12 The plaintiffs in the main proceedings therefore appealed against that judgment to the Efetio Athinon. The Greek State considered that the plaintiffs' application for a declaration of invalidity was abusive, and raised an objection of abuse of rights based on Article 281 of the Civil Code, which provides that 'the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith, morality or the economic or social purpose of that right'.

13 In its judgment making the reference, the national court considers that Article 281 of the Civil Code may be applied in order to preclude the exercise of rights arising from provisions of Community law where such exercise would be abusive. In the present case, the national court considers that to allow the plaintiffs' claim under Article 25(1) of the Second Directive for a declaration that the OAE's decision authorising an increase in capital was invalid would manifestly exceed the bounds of good faith, morality and the economic or social purpose of the right.

14 The national court based its conclusion in that regard on various findings of fact.

15 First, at the time when it was made subject to the scheme provided for by Law No 1386/1983, Khartopiia was heavily indebted to banks and other creditors, it had an acute liquidity problem and it no longer possessed its own capital resources, so that its assets were no longer sufficient to cover its liabilities and its shares were worthless.

16 In addition, the increase in capital effected by the OAE and the subsequent conversion of debt into equity led to the financial recovery of Khartopiia. The economic value of the shareholders' equity was secured, the risk of job losses for thousands of workers was averted and trading with numerous suppliers could continue, all with beneficial effects on the national economy. If, by contrast, the increase in capital had not been effected, Khartopiia would have been declared insolvent and its assets would have been liquidated at the request of the creditors, with the result that all the company's assets would have been lost to the detriment of the shareholders, the workers would have been laid off and the national economy would have been deprived of an important undertaking.

17 Lastly, when the capital was increased, the shareholders were given a preferential right to acquire shares, but declined to avail themselves of that right.

18 The national court decided, with reference to the judgment in Case C-441/93 *Pafitis and Others* v *TKE and Others* [1996] ECR I-1347, paragraphs 67 to 70, to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

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

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

19 By those questions, which it is appropriate to examine together, the referring court essentially seeks to ascertain, first, whether a national court may apply a provision of domestic law in order to assess whether the exercise of a right arising from a provision of Community law is abusive, or alternatively whether that assessment must be made on the basis of Community law and, second, whether, in the light of the facts of the case as established in the main proceedings, the right arising from Article 25(1) of the Second Directive must be regarded as having been exercised in an abusive manner.

20 According to the case-law of the Court, Community law cannot be relied on for abusive or fraudulent ends (see, in particular, regarding freedom to supply services, Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paragraph 13, and Case C-23/93 *TV 10* v *Commissariaat voor de Media* [1994] ECR I-4795, paragraph 21; regarding the free movement of goods, Case 229/83 *Leclerc and Others* v *'Au Blé Vert' and Others* [1985] ECR 1, paragraph 27; regarding freedom of movement for workers, Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161, paragraph 43; regarding the common agricultural policy, Case C-8/92 *General Milk Products* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-779, paragraph 21; and regarding social security, Case C-206/94 *Brennet* v *Paletta* [1996] ECR I-2357, paragraph 24).

21 Consequently, the application by national courts of domestic rules such as Article 281 of the Greek Civil Code for the purposes of assessing whether the exercise of a right arising from a provision of Community law is abusive cannot be regarded as contrary to the Community legal order.

22 Although the Court cannot substitute its assessment for that of a national court, which is the only forum competent to establish the facts of the case before it, it must be pointed out that the application of such a national rule must not prejudice the full effect and uniform application of Community law in the Member States (Case C-441/93 *Pafitis and Others*, cited above, paragraph 68). In particular, it is not open to national courts, when assessing the exercise of a right arising from a provision of Community law, to alter the scope of that provision or to compromise the objectives pursued by it.

23 In the present case, the uniform application and full effect of Community law would be prejudiced if a shareholder relying on Article 25(1) of the Second Directive were deemed to be abusing his right on the ground that the increase in capital contested by him resolved the financial difficulties threatening the existence of the company concerned and clearly enured to his economic benefit.

24 It is settled case-law that the decision-making power of the general meeting provided for in Article 25(1) applies even where the company in question is experiencing serious financial difficulties (see, in particular, Joined Cases C-19/90 and C-20/90 *Karella and Karellas* [1991] ECR I-2691, paragraph 28, and Case C-381/89 *Sindesmos Melon tis Eleftheras Evangelikis Ekklisias and Others* [1992] ECR I-2111, paragraph 35). Since an increase in capital is, by its very nature, designed to improve the economic situation of the company, to characterise an action based on Article 25(1) as abusive on the ground mentioned in paragraph 23 of this judgment would be tantamount to a declaration that the mere exercise of the right arising from that provision is improper.

25 It would mean that, in the event that the company found itself in a financial crisis, a shareholder could never rely on Article 25(1) of the Second Directive. Consequently, the scope of that provision would be altered, whereas, according to the case-law cited above, the provision must remain applicable in such a situation.

26 Similarly, the uniform application and full effect of Community law would be prejudiced if a shareholder relying on Article 25(1) of the Second Directive were deemed to be abusing the right conferred on him by that provision because he did not exercise his preferential right under Article 29(1) of the Second Directive to acquire new shares issued on the increase of capital at issue.

27 By exercising his preferential right, the shareholder would have shown his willingness to assist in the implementation of the decision to increase the capital without the approval of the general meeting, whereas he is in fact contesting that very decision on the basis of Article 25(1) of the Second Directive. Consequently, to

require a shareholder, as a condition of his being able to rely on that provision, to participate in an increase in capital adopted without the approval of the general meeting would be to alter the scope of Article 25(1).

28 However, Community law does not preclude a national court, on the basis of sufficient telling evidence, from examining whether, by bringing an action under Article 25(1) of the Second Directive for a declaration that an increase in capital is invalid, a shareholder is seeking to derive, to the detriment of the company, an improper advantage, manifestly contrary to the objective of that provision, which is to ensure, for the benefit of shareholders, that a decision increasing the capital of the company and, consequently, affecting the share of equity held by them, is not taken without their participation in the exercise of the decision-making powers of the company.

29 In the light of the foregoing, the reply to the questions referred must be that Community law does not preclude national courts from applying a provision of national law in order to assess whether a right arising from a provision of Community law is being exercised abusively. However, where such an assessment is made, a shareholder relying on Article 25(1) of the Second Directive cannot be deemed to be abusing the right arising from that provision merely because the increase in capital contested by him has resolved the financial difficulties threatening the existence of the company concerned and has clearly enured to his economic benefit, or because he has not exercised his preferential right under Article 29(1) of the Second Directive to acquire new shares issued on the increase in capital at issue.

Costs

30 The costs incurred by the Greek Government and by the Commission, 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 action 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 Efetio Athinon by judgment of 6 June 1996, hereby rules:

Community law does not preclude national courts from applying a provision of national law in order to assess whether a right arising from a provision of Community law is being exercised abusively. However, where such an assessment is made, a shareholder relying on Article 25(1) 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, cannot be deemed to be abusing the right arising from that provision merely because the increase in capital contested by him has resolved the financial difficulties threatening the existence of the company concerned and has clearly enured to his economic benefit, or because he has not exercised his preferential right under Article 29(1) of that directive to acquire new shares issued on the increase in capital at issue.

Rodríguez Iglesias Gulmann Ragnemalm Wathelet

Mancini Moitinho de Almeida Kapteyn Murray

Edward Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 12 May 1998.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President