OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 28 October 1999 *

1. By order of 24 June 1997 the Polimeles Protodikio (Court of First Instance) Athinon has referred to the Court for a preliminary ruling 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 (hereinafter 'the Directive'), [1] and on the abuse of a right arising from a Community provision. The national court asks specifically whether, given the circumstances in the main action, the provision of national law which penalises the abuse of a right can validly be relied on in relation to an action for annulment of company measures brought by a shareholder for breach of a right conferred by the Directive.

2. This case is part of a long-running dispute which began in Greece regarding the interpretation and application of Article 25 of the Directive relating to undertakings in difficulties. I should add at this point that the dispute arose from a delay on the part of that Member State in fully implementing the Directive. The Court has already, a number of times, had occasion to examine that dispute, [2] and has stated quite clearly, as regards national legislative provisions incompatible with the Directive, that the objective of the provision of Community law cited above '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'. [3]

Community law

3. The Directive is intended to coordinate, with a view to rendering them equivalent, the safeguards required by Member States of companies within the meaning of Article 58(2) of the EC Treaty (now Arti-

* Original language: Italian.

1 — OJ 1977 L 26, p. 1.

2 — See Joined Cases C-19/90 and C-20/90 *Karella and Karellas* v *Minister for Industry, Energy and Technology and Another* [1991] ECR I-2691; Case C-381/89 *Syndesmos Melon tis Eleftheras Evangelikis Ekklisias and Others* v *Greek State and Others* [1992] ECR I-2111; Joined Cases C-134/91 and C-135/91 *Kerafina-Karamische und Finanz-Holding and Vioktimatiki* v *Hellenic Republic* [1992] ECR I-5699; Case C-441/93 *Pafitis and Others* v *Trapeza Kentrikis Ellados A.E. and Others* [1996] ECR I-1347; Case C-367/96 *Kefalas and Others* v *Elliniko Dimosio* [1998] ECR I-2843.

3 — *Kefalas*, cited above, paragraph 28.

cle 48(2) EC), for the protection of the interests both of members and third parties in respect of the formation of public limited liability companies, and the maintenance and alteration of their capital.

Under Article 25(1) of the Directive, '[A]ny 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'. Article 25(2) states; '[N]evertheless, 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 authorise an increase in the subscribed capital up to a maximum 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'.

Article 29(1) of the Directive provides; '[W]henever the capital is increased by consideration in cash, the shares must be offered in a pre-emptive basis to shareholders in proportion to the capital represented by their shares'. Paragraph 4 adds that the right of pre-emption may not be restricted or withdrawn by the statutes or instrument of incorporation. Restriction or withdrawal may, however, be decided by the general meeting on presentation of a written report by the administrative or management body indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price.

4. Finally, Article 41(1) grants Member States the option of derogating from Article 25 of the Directive, to the extent that this is 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.

5. The Directive allows Member States two years to bring it into force. In the case of the Hellenic Republic, the period in question, by virtue of the Act of Accession, expired on 1 January 1981.

National legislation

6. Law No 1386/1983 of 5 August 1983[4] (hereinafter 'the Law') established the 'Organismos Oikonomikis Anasinkrotisis Epicheiriseon AE' (hereinafter 'the OAE')

4 — FEK A' 107/8.8.1983, p. 14.

in Greece, a public limited company with capital entirely underwritten by the State, the object of which is to contribute to the financial and social development of the country through financial reorganisation of companies, the import and application of foreign technologies, the development of national technological patrimony and the establishment and management of nationalised or mixed economy undertakings (Article 2(2) of the Law).

To that end, the OAE may take over the administration and day-to-day management of undertakings undergoing reorganisation or nationalised undertakings, take shares in the capital of undertakings, grant, issue or take out certain loans, acquire bonds and transfer shares, in particular 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 (Article 2(3) of the Law).

7. Under Article 5(1) of the Law, the Minister for the National Economy may decide to place undertakings in serious financial difficulties under the scheme established by that Law. Article 7 provides that the competent Minister may decide to transfer to the OAE the administration of an undertaking, to reschedule its debts in such a way as to ensure its viability, or to proceed to liquidation.

Article 8(1), as amended by Law No 1472/1984,[5] provides that on publication of the ministerial decision making an undertaking subject to the provisions of that Law, the powers of the undertaking's administrative organs are to cease and that, while the general meeting is retained, it is no longer empowered to dismiss the members of the board of administration appointed by the OAE. Under Article 8(8), the OAE may decide, in the course of its provisional administration of the undertaking subject to the above scheme, to increase the capital of the company concerned by way of derogation from the legislation in force relating to public limited liability companies, which provides that the general meeting of shareholders is to have exclusive competence. The increase must be approved by the competent Minister. The Law provides that the former shareholders nevertheless retain their right of pre-emption on the acquisition of new share issues and may exercise it within a period prescribed in the ministerial decision approving the increase.

8. Law No 1386/1983 was the subject of Commission Decision 88/167/EEC of 7 October 1987, adopted in the context of the procedure concerning Article 93 of the EC Treaty (now Article 88 EC).[6] In the Decision the Commission states that it has no objections to the implementation of the Law as long as the Greek Government amends, by 31 December 1987, the relevant provisions on increasing capital so as to bring them into conformity with Articles 25, 26, 29 and 30 of the Directive. On 7 March 1989 the Commission instituted

5 — FEK A' 112/6.8.1984, p. 1273.
6 — OJ 1988 L 76, p. 18.

proceedings under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that the Hellenic Republic had failed to fulfil its obligations under the Second Directive. On 10 March 1990 the Greek Parliament adopted Law No 1882/1990,[7] by which it amended the previous legislation on the disputed points and as requested by the Commission. Only from that date, therefore, did Greece fulfil the requirement of transposing the Directive into national law.

9. Lastly, Article 281 of the Greek Civil Code provides that 'the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith, morality or the social or economic purpose of that right'.

Facts of the case and the questions referred for preliminary ruling

10. The order for reference states that Mr Diamantis, plaintiff in the main proceedings, is a minority shareholder in the public limited liability company Plastika Kavalas AE. At the beginning of the 1980s that company was facing serious financial difficulties. For this reason, on 24 August 1983, the majority of the shareholders, including, according to the national court, Diamantis himself, asked that it be placed under the scheme provided for by Law No 1386/1983. The request was repeated on 20 December 1983.

11. Following the request by the company, the Advisory Committee established pursuant to Article 11 of the Law was consulted. Given the precarious financial conditions of the company, the committee proposed making the company subject to the special liquidation scheme provided for in Articles 7(3) and 9 of the Law, which would have meant the immediate liquidation of the assets and payment of its debts. The opinion of the committee was, however, not followed by the Minister who, by Decision No 212 of 3 February 1984,[8] decided to place the company under a different scheme, also provided for in Article 7(1) of the Law, the scheme for provisional OAE administration.

12. On 28 May 1986 the OAE decided to increase the capital of the company by GRD 177 000 000, thus increasing the capital from GRD 87 200 000 to GRD 246 200 000. That decision was approved by the Minister. In accordance with the law, the former shareholders were given the possibility of exercising their right of preemption on the acquisition of new shares within 45 days of publication of the ministerial decision (11 June 1986). As there was no positive response on the part of the shareholders, the new shares were

7 — FEK A' 43/23.3.1990.

8 — FEK B' 60/8.2.1984.

issued to the OAE, which accordingly held approximately 67% of the capital of Plastika Kavalas. On 11 December 1986 the general meeting of the shareholders, where the OAE now held a majority of the votes, decided to reduce the capital of the company to the minimum required by law, namely GRD 5 000 000.

By Decision No 14 of 9 January 1987 of the Second Minister for Industry, Energy and Technology, the capital was once again increased, in accordance with Article 10 of Law No 1386/1983, up to a sum of GRD 1 267 200 000, divided into 1 267 200 shares. From that time the company resumed normal operations. By the same Ministerial Decision, the provisional administration under the OAE came to an end. In 1991 the majority of shares in the company were transferred to the company Plastika MaKedonias AE and in February 1994 Plastika Kavalas was taken over by the Petzetakis Group.

The legal proceedings

13. On 22 February 1991, Mr Diamantis, a shareholder in the company, brought an action in the Polymeles Protodikio Athinon seeking a declaration that the alterations in the capital of the company Plastika Kavalas (two increases and one reduction) effected under Law No 1386/1983 were void. He maintained that the deliberations of the general meeting were contrary to Article 25(1) of the Directive, and considered that these increases reduced his share as a proportion of the total shares.

14. The defendants, the Greek Government and the OAE, replied that, under Article 281 of the Greek Civil Code, Mr Diamantis had abused the right conferred on him by Article 25(1) of the Directive and asked that the action be dismissed. The facts which were considered by the defendants to constitute abuse of a right were as follows: (a) Mr Diamantis himself, together with other shareholders, asked for the company to be made subject to the scheme under Law No 1386/1983; (b) because of the financial difficulties of the company, Mr Diamantis had never been in favour of increasing its capital, and in fact had never exercised the right of pre-emption granted to him at the time of the first increase; (c) it was only following the reorganisation of the company, from which Mr Diamantis had clearly benefited, but which had substantial and irreversible consequences on the distribution of capital and shares, that he had decided to exercise his rights; in fact, the action was only brought five years after the first increase in capital and four years after the second.

15. The national court found that the action was well founded in law, but also considered that the plea raised by the defendants was well founded in law and in fact. It arrived at this conclusion on the basis of an investigation, said to have

shown, on the one hand, that the plaintiff in the main proceedings participated in the request that the company be made subject to the scheme provided by the Law and, on the other, that because of the financial difficulties of the company, he had never wanted to increase the capital, which was why he had never exercised his right of pre-emption under the national legislation. On that basis, the national court held that, taking account of the period of time which had elapsed since the operations increasing and temporarily reducing the capital, the exercise of this right by Mr Diamantis and the possible calling in question of legal situations already established would go beyond the limits imposed by good faith, morality and the social and economic purpose of the law itself.

As the national court considers, however, that it would be useful for the Court of Justice to rule on the application in this case of the principle of abuse of a right — regarded, in the light of the Court's previous case-law, as 'a general principle under the national law of the Member States' — it has referred the following questions to the Court for a preliminary ruling:

'1. In the specific factual circumstances set out in the grounds of this order, does a question arise as to the application, in law and in substance, of Article 281 of the Greek Civil Code in relation to Articles 25(1) and 29(1) of the Second Directive?

2. Should the Court find the above plea well founded in law and in substance, how will that affect the validity of the ministerial decisions increasing and reducing the capital of the company in question, of which the plaintiff happens to be a shareholder, and, by extension, are Articles 8(8) and 10(1) of Law No 1386/1983 compatible with Council Directive 77/91/EEC?'

16. On 20 November 1997 the Court decided to stay proceedings until the judgment in *Kefalas,* cited above. Once that judgment had been delivered, it was communicated to the national court so it could consider whether or not to persist with the questions for preliminary ruling. The Greek court replied to the Court of Justice that it did not have authorisation to reconsider its decision of its own motion and that, in any case, in its opinion, the circumstances of *Kefalas* were not identical to those in *Diamantis.*

The questions before the Court

17. Before dealing with the substance of the questions put by the Greek court, I think it would be helpful to recall briefly the conclusions at which the Court arrived

in its previous judgments, cited above, on the interpretation of Article 25 of the Second Directive and on the compatibility of the Greek legislation on the reorganisation of undertakings in difficulties — the subject of these proceedings — with the provisions of the Directive.

18. Called on to give preliminary rulings in the context of various proceedings brought by shareholders of companies made subject to alterations in their capital by administrative measures, the Court made it clear from the outset that, in accordance with Article 25(1) of the Directive, only the general meeting of shareholders had the power to decide on increases in capital. Having established that that provision has direct effect, [9] the Court affirmed that Article 25 precluded national legislation which, with the object of ensuring the reorganisation of companies in difficulties, provides that their capital may be increased by means of an administrative act, even if the shareholders have the right of pre-emption on the new issue shares. The Court has stated that the principal objective of the Directive, which is to ensure a minimum level of protection for shareholders in all the Member States, would be 'seriously frustrated if the Member States were entitled to derogate from the provisions of the Directive by maintaining in force rules — even rules categorised as special or exceptional — under which it is possible to decide by administrative measure, outside any decision by the general meeting of shareholders, to effect an increase in the company's capital which would have the effect either of obliging the original shareholders to increase their contributions to the capital or of imposing on them the addition of new shareholders, thus reducing their involvement in the decision-taking power of the company'. [10] In other words, the Court made it clear that, even under special rules which have as their object the reorganisation of the company, the general meeting of shareholders could not be deprived of its most 'intimate' power, which it could not relinquish: the power to alter the capital structure of the company, that is to say, its assets, and thereby the composition of its shareholding. [11]

19. In *Pafitis*, cited above, the Court, although no specific question was put on the subject, considered for the first time the possible application of the national rule on abuse of rights to court proceedings brought by shareholders of companies subject to Greek law. Even though it did not consider it necessary to rule on the question whether it is permitted, under Community law, to apply a national rule to see whether a right conferred by the Community provisions is exercised abusively, the Court stated that 'the fact remains that, in any event, the application of such a rule must not detract from the full effect and uniform application of Community law in the Member States'. Given the facts of the case, the Court rejected the arguments advanced by the Greek Government, concluding that 'the uniform application and full effect of Community law would be undermined if a shareholder relying on Article 25(1) of the Second

9 — *Karella*, cited above, paragraph 23; *Syndesmos Melon tis Eleftheras Evangelikis Ekklisias*, cited above, paragraph 43; *Kerafina*, cited above, paragraph 18.

10 — *Karella*, cited above, paragraph 26; *Syndesmos Melon tis Eleftheras Evangelikis Ekklisias*, cited above, paragraph 33; *Kerafina*, cited above, paragraph 26.

11 — See Opinion of Advocate General Tesauro in *Pafitis*, cited above, paragraph 13.

Directive were deemed to be abusing his rights merely because he was a minority shareholder of a company subject to reorganisation measures or had benefited from the reorganisation of the company. Since Article 25(1) applies without distinction to all shareholders, regardless of the outcome of any reorganisation procedure, to treat an action based on Article 25(1) as abusive for such reasons would be tantamount to altering the scope of that provision'.

20. The plea of abuse of a right raised against a plaintiff who invokes the rights conferred by Article 25(1) of the Directive before the Greek courts was the subject of the Court's attention in its judgment in *Kefalas*, delivered recently. On that occasion the Court was specifically requested to rule on whether a Greek court should be able to apply Article 281 of the Civil Code in order to verify whether a right conferred by Community law was abusively exercised by its holder, or whether such an assessment might fall within the scope of a general principle of Community law. The Court held that a national court may apply a national rule in considering whether the exercise of a right deriving from Community law is abusive. Starting from the principle that, according to settled case-law of the Court, individuals must not invoke provisions of Community law for abusive or fraudulent ends, the Court added that, '[C]onsequently 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'. [12] The Court went on to state, as in *Pafitis*, that 'the application of [...] a national rule must not prejudice the full effect and uniform application of Community law in the Member States'. Consequently, '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'. [13]

21. As regards the substance, the Court stated on that occasion that 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. [14] In fact, the Court pointed out, '[B]y 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

12 — *Kefalas*, cited above, paragraph 21.
13 — *Kefalas*, cited above, paragraph 22.
14 — *Kefalas*, cited above, paragraph 26.

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)'. [15]

22. It is clear from *Kefalas* that the Court has accepted that the national court may apply a rule of national law in order to decide whether there has been abusive exercise of a right conferred by Community law, provided always however that recourse to the national rule does not compromise the full effect and uniform application of Community law, and in particular does not entail an amendment of the Community provision nor compromise the objectives pursued by it.

On a proper view, therefore, this is a concession to the national courts which is more apparent than real. Admittedly, the Court preferred to accept that such an assessment be made by applying a national rule rather than a general principle of Community law; however, it was quick to make clear the limits that Community law imposes on the application of that national rule. The same is true — need I add — if application of the national rule is liable — as in this case — to reinforce a legal position which is contrary to Community law.

23. It seems clear then that although, on the one hand, the Court indicated that the rule applicable for the purpose of assessing the abusive conduct was the national rule, on the other hand, it laid down precise criteria which, in the final analysis, refer to the primacy of Community law over national law and which keep within well defined limits the application of a national rule which, far from being classifiable as 'procedural', entails an appraisal relating to the substantive scope of the provision of Community law designed to grant particular rights. The point is that the Court expressly prohibits national courts from applying a national rule on abuse of a right in all cases in which such application would entail a modification of the scope of the Community provision or would compromise its objectives.

24. The reference made by the Court to the national system, properly understood, is to be seen, therefore, as an indication of an instrument available to the national court for the purpose of ensuring the proper application of Community law and thus preventing a right, albeit conferred by a Community provision, from being exercised where that provision is only 'apparently' the one governing the circumstances of the particular case, or where the situation of the person in whom the right invoked is vested only 'apparently' falls within the terms of the provision in question. [16] In other words, what is concerned is an assessment which takes into account the very scope of the rule, its intrinsic limits. In this perspective, to allow the national court the possibility of applying national rules

15 — *Kefalas*, cited above, paragraph 27.

16 — See Opinion of Advocate General Tesauro in *Kefalas*, paragraphs 24 to 27, and the judgments of the Court cited in that Opinion.

penalising abuse of the right is tantamount to penalising recourse to Community law where those limits have been exceeded, that is to say precisely in those situations where Community law was not intended to be applied.

25. That being so, it inevitably follows that the assessment of the intrinsic limits of a Community provision conferring certain rights is an exercise in the interpretation of Community law which, in the final analysis, is a matter for the Court. In *Kefalas*, cited above, the Court was concerned to provide the national court with the necessary clarification on the objective pursued by Article 25(1) of the Directive. According to the Court, that objective 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'. [17] If the national court is in a position to ascertain that those benefiting from the right conferred by the Community provision — in this case the shareholders, who have the right to oppose the adoption, without their participation, of a decision to increase the capital of the company — have brought an action for annulment of the increase in capital with the sole aim of obtaining, to the detriment of the company, unlawful advantages clearly alien to the objective of Article 25(1) of the Directive, that court will be able to have recourse to the national rule on abuse of a right in order to dismiss the action.

26. Now that the significance which, in my opinion, must be attached to the reference, as formulated by the Court, to the national rule on abuse of a right has be clarified, and moving on, therefore, to the specific circumstances in point in the main proceedings, I would observe at once that the considerations put forward by the Court in *Kefalas* are of assistance in resolving the questions which concern us here, since the circumstances taken into account in *Kefalas* are in part identical to those before this case. Here, too, the national court finds that there is a case of abusive exercise of the right to oppose alterations in the capital of a company decided by an administrative measure, in that the plaintiff had not exercised his right to pre-emption which he enjoyed by virtue of the first increase in the capital. I have shown earlier that, as the Court had already made clear in *Kefalas*, [18] to hold the exercise of such a right for this reason to be abusive would entail an alteration of the provision in that it would amount, paradoxically, to requiring a shareholder to participate in an increase in capital adopted without the approval of the general meeting, in order then to be able to contest the increase before the courts on the ground that it was adopted in breach of Article 25(1) of the Directive. The same is true as regards observation by the national court that through public intervention the company was reorganised to the satisfaction of the creditors and the shareholders themselves. The Court has repeatedly stated that the decision-making power of the general meeting subsists even where the company is experiencing serious financial difficulties. [19] Since it is clear, moreover, that an increase in capital, by definition, is intended to improve the company's financial situation, to consider abusive, for that reason, an action based on

17 — *Kefalas*, cited above, paragraph 28.

18 — *Kefalas*, cited above, paragraphs 26 and 27.

19 — See, finally, *Kefalas*, cited above, paragraph 24.

Article 25(1) of the Directive would be tantamount to penalising the mere exercise of the right conferred by the provision, thus modifying its scope.

27. There remains, therefore, one further fact to be considered which, according to the national court, makes it possible to characterise as 'abusive' the action brought by the plaintiff. It is the fact that the plaintiff, together with 32 other shareholders who constituted the majority of the company's shareholders, had himself asked for the company to be placed under the special scheme established by Law No 1386/1983. Since a number of years had passed since the increase in capital at issue, the exercise of that right on the part of the shareholder and the challenge to established (and, I assume, irrevocable) legal situations constitutes, according to the national court, a failure to observe the limits imposed by good faith, morality and the social and economic purpose of the right in question.

28. Let me say at once that I am not in agreement with this conclusion. To accept this point of view of the Greek court would, in fact, mean interpreting Article 25(1) of the Directive in such a way as to exclude from its scope shareholders who, as it were, had demonstrated their acquiescence in the breach of their right to decide what was to happen to the capital of the company, entrusting the management of the company to a body other than the general meeting. In other words, this would mean penalising, by means of the general principle of abuse of a right, contradictory behaviour on the part of a shareholder who initially accepted being divested of a right, albeit one guaranteed to him by Community law, but subsequently contested decisions which constitute nothing more than concrete application of the scheme which he himself had asked to be applied, albeit that it was contrary to the Directive.

29. I do not consider that it is necessary to attribute to the behaviour of the shareholder the significance which the national court, together with the Greek Government, seek to attribute to it. To request the application of the Law does not necessarily signify, for the shareholder, accepting that decisions on the increase of capital should be transferred to a body external to the general meeting. The subjection of the company to the scheme provided for by the Law in fact opens up a wide range of solutions with respect to the fate of the company, and it would therefore be going too far to attribute particular significance to the behaviour of the shareholder, all the more so since, as the national court states, the plaintiff in the main proceedings never wished for an increase in the capital, which was why he did not exercise his right to pre-emption, to which, however, he was entitled. It may thus be assumed that in taking part in the request for the company to be made subject to the special law, the shareholder was in fact seeking a result other than the liquidation of the company, with the benefits granted from that Law. This appears entirely plausible given that the financial situation of the company at the time of the request was so fragile as to suggest to the Advisory Committee established under the Law that they should

proceed to liquidation, with the advantages, in terms of repayment of debts, set out in Articles 7 and 9 of the Law.

30. In the result, although it is true that by requesting that the company be placed under the scheme provided by the Law the shareholders could not automatically rule out that, if the request were upheld, the consequence would be an external body being granted powers to decide alterations in the capital of the company, I consider that the link between the wishes of the shareholders and the decisions of the administrative organs is too vague and indirect for it to be possible to maintain that, by bringing an action for annulment of the decisions taken in breach of the Directive, the shareholders were attempting to obtain, to the detriment of the company, unlawful advantages clearly alien to the purpose of the provision.

31. But that is not all. I would recall that the main argument — which, in fact, in the light of *Kefalas*, becomes the sole argument — which the defendants in the main proceedings are putting forward to characterise as 'abusive' the exercise of a right on the part of the shareholder is linked to the delay in his bringing the action to obtain a declaration that the resolutions of the general meeting made in breach of the Directive were invalid. In other words, they claim, the shareholder exceeded the limits imposed by good faith, morality and the social and economic purpose in relation to the right since he exercised it some years after the operations in question, whereas initially, by requesting the operations of the scheme provided by the Special Law, he had tacitly and a priori acquiesced in the breach of his rights. This, so the argument runs, demonstrates that the real objective of the shareholder in bringing the action before the national court, was to obtain unlawful advantages, never specified, let it be said, either by the defendants in the main proceedings or by the national court, to the detriment of the company.

32. Such an argument cannot be accepted. As support for this point of view, it is sufficient to take due account of the fact that the right which it is claimed the shareholder exercised 'too late' is a legal position conferred by a Community directive which was not implemented within the prescribed period by the Hellenic Republic. The directive alleged to have been infringed should have been implemented in Greece by the date indicated in the Act of Accession (1 January 1981). As we know, this did not happen; indeed, two years after that date, Greece adopted a national law providing for a scheme for increasing the capital of companies which runs counter to Article 25 of the Directive.

33. In these circumstances, where there is a clear, continuing failure to fulfil Community obligations on the part of that Member State, I do not consider that any negative conclusions may be drawn as against an

individual from his failure to exercise in good time a right [20] conferred by a directive which has not been transposed, or from apparently contradictory or negligent conduct with respect to the options offered by the Directive. On the contrary, there would appear to be every justification for holding that the individual was not in a position to be aware of his right before the Directive was transposed into national law. A directive, it should be recalled, is a measure addressed exclusively to the Member States; until the amendments made by the Maastricht Treaty, all directives came into force only after notification to the States to which they were addressed. Furthermore, the directive now under consideration was published in the *Official Journal of the European Communities*, Series C, under the section for measures whose publication is not a condition of their application; its publication, for information purposes only, could not at that point, I believe, imply any presumption *erga omnes* that citizens should be aware of its contents.

34. I would point out, next, that Article 189 of the EC Treaty (now Article 249 EC), in conjunction with the general principle of good faith referred to in Article 5 of the EC Treaty (now Article 10 EC) and with the general clause inserted in the text of directives, [21] requires the Member States to adopt the laws, regulations and administrative provisions necessary to comply with the directive and to remove from their own legal order any provisions of domestic law that are not in conformity with it. If this does not happen, as was so in this case, the Member State is in breach of its obligations and is not entitled to criticise an individual who holds rights under the directive for not having reacted in good time to a breach of those rights. The same is true as regards the alleged acquiescence in the infringement of the Directive, which is said to be inherent in the request for the company to be placed under the scheme under the Law on the reorganisation of undertakings. Indeed, it is not inconceivable that the behaviour of the individual was dictated by the fact that, in his eyes, the special scheme under the Law did not demonstrate any incompatibility with Community law. That conviction, which was certainly mistaken, was brought about exclusively by the unlawful conduct of the Greek State which, at the time of the request, had still not implemented the Directive and thus enabled its citizens to become fully aware of the rights conferred on them under the Directive.

35. That being so, I think it would be wrong to claim that it was the individual's duty to be aware of his right, failing which the exercise of that right, based on the Directive, which had not been implemented, would be qualified as 'abusive' in all circumstances where his behaviour was in some way or other inconsistent with the provisions of the Directive. To adopt any other view would allow the State, responsible for the infringement, and therefore directly responsible for the difficulties encountered by the individual in being informed of his right, to gain advantage

20 — It may be added that it appears the action was brought by the shareholder within the prescribed limitation period.

21 — Article 43 of the Directive requires Member States to bring it into force within two years of its notification. As mentioned above, in Greece's case, in accordance with Article 143 of the Act of Accession, the time-limit was 1 January 1981.

from its breach by invoking the rule of abuse of a right in order to dismiss an action brought by a shareholder. This would require the individual to undertake an investigation, without any certainty as to the result, as to whether the provisions of the directive concerned which had not been transposed conform to the necessary requirements of clarity and precision to enable them to be invoked against the State responsible for the breach of obligation.

36. The circumstances which gave rise to this dispute confirm the conclusions I have reached. It is apparent from the order for reference and the observations submitted by the parties that the plaintiff in the main proceedings brought the action in February 1991, some years after the adoption of the measures at issue (but having complied with the relevant limitation period) and immediately after the Advocate General's Opinion in *Karella and Karellas* was delivered in this Court. [22] The plaintiff's counsel stated at the hearing before the Court that it was only on reading that Opinion, which was followed by the Court, that it was possible to obtain some clarity in Greece as to the legal position of shareholders, the direct effect of the Directive, and therefore the possibility of invoking the rights conferred on them by the Directive which had recently been transposed into national law by non-retroactive provisions. It was therefore only as from that point that the shareholder was able to become aware of his right to oppose an increase in the capital of his company effected by an administrative measure. Before then, the administration and the courts tended to consider that the application of a provision of domestic law authorising this kind of increase was legitimate. To classify as abusive the fact of bringing an action based on the Directive for the sole reason that, before the action taken by the Member State to implement it and therefore while the State was in breach of its obligations, the individual engaged in conduct wholly legitimate with respect to national law but not compatible with the Directive, would be tantamount to requiring the individual to be aware of the rights conferred by a Community directive, since failure to exercise those rights or behaviour incompatible with the Directive would result in negative consequences for him. This would amount, therefore, to weakening, first, the principle according to which the 'vertical' direct effect of directives is a means made available to individuals to enable them to react against breaches of Community law by a Member State, and, second, the deterrent effect of such means in respect of breaches of the obligation to implement Directives properly, and within the prescribed period. On the other hand, in my opinion, ignorance on the part of an individual of the rights conferred by a directive which has not been implemented must not be considered as in any way reprehensible, as it is merely the inevitable consequence of the (reprehensible) behaviour of the Member State in breach of its obligation. In other words, having regard to the circumstances surrounding publication, to the fact that a directive is addressed to the Member States, to the obligation upon them to transpose it into their

22 — Opinion delivered on 30 January 1991 (ECR I-2704). In his Opinion, Advocate General Tesauro proposed to the Court for the first time that the questions referred by the Greek Council of State should be answered as follows: (1) Article 25 is unconditional and sufficiently precise, with the result that individuals may rely upon them before national courts as against the administration, claiming that rules set out in a legal provision are incompatible with them; (2) Article 25 must be interpreted as meaning that it precludes the application of national rules which, in order to regulate the administration of certain undertakings in crisis situations, provide for the adoption by administrative act, without a vote by the general meeting, of a decision to increase the company capital, without prejudice to the right of pre-emption of the original shareholders.

national law, to the requirement for the full and uniform implementation of directives in the Member States and, in the final analysis, to the application of the general principle of good faith referred to in Article 5 of the EC Treaty, it cannot be considered that, as Community law stands at present, there is a presumption of knowledge of the rights conferred by a directive which has not been implemented. Consequently, apparently inconsistent behaviour on the part of an individual — such as that in point in this case — cannot in any event be penalised by the application of the general principle which prohibits abuse of a right. [23]

37. I consider, therefore, that the first question submitted by the national court can be answered to the effect that the full effect and uniform application of Article 25 of the Directive would be jeopardised if it were open to the national court to characterise as abusive the exercise of a right by a shareholder by reason of the fact that he did not exercise his right to pre-emption in respect of shares issued following an increase in capital effected in a manner incompatible with Article 25 of the Directive, or because he requested that the company concerned be made subject to the application of a national law incompatible with the Directive at a time when, in consequence of the infringement by the Member State invoking abuse of the right, the shareholder could legitimately have been unaware of the right conferred on him by the Directive, which had not been implemented.

38. In its second question, the national court wishes to know the consequences that a decision upholding a plea of abuse of a right may entail as regards the validity of the ministerial decisions altering the capital of a company. In view of the reply to the first question, I do not believe it necessary to dwell on the second. If, however, the Court were to hold that the factual circumstances cited by the national court justify the application of the plea of abuse of a right, and in the absence of further information from the national court, I believe the Court should confine itself to replying that it is for the national court to decide whether, notwithstanding the dismissal of the action brought by the shareholder, the resolutions of the general meeting on altering the capital, which were adopted in breach of the Directive, should stand or whether they should, on the contrary, be disapplied on the ground that they are incompatible with Community law.

23 — Or, one might add, by applying limitation periods in respect of an action based on a right conferred by a directive which has not been implemented, lest a Member State guilty of failing to fulfil obligations gains advantage from such failure. For this reason I am in agreement with the Court's position in *Emmott* (Case C-208/90 [1991] ECR I-4269) where it stated that, 'until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time' (point 23), and I have doubts about the solution adopted in subsequent judgments, which confine the scope of the principle mentioned above to only those cases where a time bar completely removes the right of the applicant party in the main proceedings to assert his rights before the national court (see, for these judgments, Case C-260/96 *Ministero delle Finanze* v *Spac* [1998] ECR I-4997, paragraphs 28 to 31).

Conclusion

39. In the light of the foregoing considerations, I suggest that the Court answer the questions put by the Polymeles Protodikio Athinon as follows:

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 must be interpreted as meaning that a national court may not characterise as abusive the conduct of a shareholder who requests that an increase in capital which took place in a manner prohibited by the Directive be declared unlawful on the ground that he did not exercise his right of pre-emption in respect of the shares issued following the increase in capital, or on the ground that his company is subject to the national law incompatible with the Directive at a time when, in consequence of the failure on the part of the Member State claiming the exercise of that right to be abusive to fulfil its obligations, the shareholder might not have been unaware of the right conferred on him by the Directive, which had not been implemented.