# Judgment of the Court of Justice, Pafitis and Others, Case C-441/93 (12 March 1996)

**Caption:** According to the Court of Justice, in its judgment of 12 March 1996, in Case C-441/93, Pafitis and Others, Article 25 of the Directive on coordination of safeguards which are required by Member States of companies, pursuant to which any increase in capital must be determined by the general meeting, precludes national legislation under which the capital of a bank constituted in the form of a public limited liability company which, as a result of its debt burden, is in exceptional circumstances, may be increased by an administrative measure, without a resolution of the general meeting.

**Source:** CVRIA. Case-law: Numerical access to the case-law. [ON-LINE]. [Luxembourg]: Court of Justice of the European Communities, [01.06.2006]. C-441/93. Available on http://curia.eu.int/en/content/juris/index.htm.

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# Judgment of the Court of 12 March 1996
# Panagis Pafitis and others v Trapeza Kentrikis Ellados A.E. and Others

Reference for a preliminary ruling: Polymeles Protodikeio Athinon - Greece

*Company law - Directive 77/91/EEC - Alteration of capital of a bank constituted in the form of a public limited liability company - Direct effect of Articles 25(1) and 29(3) of the directive - Abuse of rights*

Case C-441/9


## Summary

Freedom of movement for persons — Freedom of establishment — Companies — Directive 77/91 — Scope — Inclusion of banks constituted in the form of public limited liability companies — National rules providing for an increase by administrative measure of the capital of a bank which is in financial difficulties — Not permissible — Prevention, by recourse to a national rule prohibiting the abuse of rights, of the exercise of rights conferred on shareholders by the directive — Not permissible — Obligation to give notice in writing to the holders of registered shares in the event of an increase in capital — Information limited to publication of the invitation to subscribe in daily newspapers — Not permissible

(Council Directive 77/91, Arts 25 and 29)

*The Second Directive (77/91), 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, and in particular Articles 25 and 29 thereof, must be interpreted as applying to banks constituted in the form of limited liability companies. The criterion adopted by the Community legislature to define the scope of the Second Directive is that of the legal form of the company, irrespective of its business.*

*Article 25 of the directive, pursuant to which any increase in capital must be decided on by the general meeting, precludes national legislation under which the capital of a bank constituted in the form of a public limited liability company which, as a result of its debt burden, is in exceptional circumstances may be increased by an administrative measure, without a resolution of the general meeting. Although the directive does not preclude the taking of execution measures intended to put an end to the company' s existence and, in particular, does not preclude liquidation measures placing the company under compulsory administration with a view to safeguarding the rights of creditors, it continues to apply where ordinary reorganization measures are taken in order to ensure the survival of the company, even if those measures mean that the shareholders and the normal organs of the company are temporarily divested of their powers.*

*Since the application of a rule of national law such as that prohibiting the abusive exercise of rights must not detract from the full effect and uniform application of Community law in the Member States, an action by a shareholder on the basis of Article 25 cannot, without the scope of that provision being changed, be deemed to be abusive merely because he is a minority shareholder of a company subject to reorganization measures or has benefited from the reorganization of the company.*

*Publication in daily newspapers of an offer of subscription in connection with an increase of capital does not constitute information given in writing to the holders of registered shares within the meaning of the third sentence of Article 29(3) of the directive where the national legislation does not provide for publication in the national gazette appointed for that purpose.*


In Case C-441/93,

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

**Panagis Pafitis and Others,**

supported by

**Investment and Shipping Enterprises Est and Others**

and

**Trapeza Kentrikis Ellados AE and Others,**

supported by

**Trapeza tis Ellados AE and Others**

on the interpretation of Article 25 et seq. and Article 29 of the Second Council Directive, 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),

THE COURT,

composed of: C.N. Kakouris, President of Chamber, acting for the President, D.A.O. Edward and G. Hirsch (Presidents of Chambers), G.F. Mancini, F.A. Schockweiler, J.C. Moitinho de Almeida, P.J.G. Kapteyn (Rapporteur), C. Gulmann, J.L. Murray, H. Ragnemalm and L. Sevón, Judges,

Advocate General: G. Tesauro,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

– Panagis Pafitis and Others, by Sofia Koukouli-Spiliotopoulou, Ioannis Stamoulis, Feidias Doukaris and Georgios Kampitsis, of the Athens Bar,

– Investment and Shipping Enterprises Est and Others, by Nikolaos Skandamis, Georgios Kampitsis, Ioannis Stamoulis and Feidias Doukaris, of the Athens Bar,

– Trapeza Kentrikis Ellados AE and Others, by Marios Bachas, Fotis Chatzis, Alexandros Markopoulos and Konstantinos Marvrias, of the Athens Bar,

– Trapeza tis Ellados AE and Others, by Ilias Soufleros and Marios Armaos, of the Athens Bar, and Vasileios Kontolaimos, Deputy Legal Adviser in the State Legal Department, acting as Agent,

– the Greek Government, by Vasilios Kondolaimos, Deputy Legal Adviser in the State Legal Department, acting as Agent,

– the Portuguese Government, by Jorge Santos, of the Legal Department of the Bank of Portugal, and Luis Fernandes, Director of the Legal Department of the Directorate-General for the European Communities, Ministry of Foreign Affairs, acting as Agents,

– the Commission of the European Communities, by Antonio Caeiro and Dimitrios Gouloussis, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Panagis Pafitis and Others, represented by Sofia Koukouli-Spiliotopoulou, Ioannis Stamoulis and Feidias Doukaris, Investment and Shipping Enterprises Est and Others, represented by Feidias Doukaris, Trapeza Kentrikis Ellados AE and Others, represented by Marios

Bachas, Konstantinos Mavrias and Krateros Ioannou, of the Athens Bar, Trapeza tis Ellados AE and Others, represented by Ilias Soufleros and Vasileios Kontolaimos, the Greek Government, represented by Panagiotis Mylonopoulos, Special Legal Assistant in the Department for Community Matters of the Ministry of Foreign Affairs, and Dimitrios Leontokianakos, Legal Assistant in the Independent Office for European Community Affairs of the Ministry of the National Economy, acting as Agents, and the Commission, represented by Dimitrios Gouloussis, at the hearing on 6 June 1995,

after hearing the Opinion of the Advocate General at the sitting on 9 November 1995,

gives the following

**Judgment**

1 By decision of 3 August 1993, received at the Court on 16 November 1993, the Polimeles Protodikio Athinon (Court of First Instance, Athens) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 25 et seq. and Article 29 of the Second Council Directive, 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, hereinafter "the Second Directive").

2 Those questions were raised in the course of proceedings brought against Trapeza Kentrikis Ellados AE, a public limited liability company (hereinafter "TKE Bank"), and its new shareholders, by its old shareholders, Panagis Pafitis and others, who object to the increases in the capital of TKE Bank by Decision No 826 of the Governor of the Bank of Greece of 28 July 1986 (Official Journal of the Hellenic Republic, *EK Edition A 117 of 29 July 1986) and Measure No 71 of the temporary administrator of TKE Bank of 24 September 1986, subsequently ratified by Law No 1682/1987 (Official Journal of the Hellenic Republic, *EK Edition A 14 of 16 February 1987). Those measures were taken pursuant to Presidential Decree No 861/1975.

3 Special Law No 1665/1951 (Official Journal of the Hellenic Republic, *EK Edition A 31 of 27 January 1951), as in force at the material time, provided, in Article 6, that where the capital of a bank was eroded as a result of losses or where the Monetary Commission considered that, for any other reason, a bank' s capital was not commensurate with its needs, that Commission would call on the bank to reinstate the capital lost or to increase the capital within a period of not less than 60 days set by it.

4 Pursuant to Article 8(1) of the abovementioned special law, where a bank is unable, or refuses, to increase its capital, in any way obstructs supervision or infringes any provisions of laws, or of decisions or regulations of the Monetary Commission, the latter may either withdraw the bank’s licence to trade, thereby putting it into liquidation, or appoint an administrator.

5 By Measure No 397 (Official Journal of the Hellenic Republic, *EK Edition A 133 of 13 September 1984), the Governor of the Bank of Greece placed TKE Bank under the supervision of a temporary administrator.

6 Article 1(3) of Presidential Decree No 861/1975 concerning the supervision of banks by temporary administrators ° the text of which is repeated in its entirety in Article 1 of Law No 236/1975 (Official Journal of the Hellenic Republic, *EK Edition A 275 of 5 December 1975) provides that, upon publication of the decision appointing a temporary administrator in the Official Journal of the Hellenic Republic, all the powers and competencies of the organs of the bank are to lapse automatically and are to be vested, together with the management of the bank, in the temporary administrator or the temporary administrators acting jointly.

7  The plaintiffs in the main proceedings have been shareholders of TKE Bank since before 1984, at which time its capital was DR 670 000 000.

8  By the abovementioned Decision No 826 of 28 July 1986, the Governor of the Bank of Greece called on TKE Bank, pursuant to Article 6 of Special Law No 1665/1951, to increase its capital to DR 1 500 000 000 in order to stabilize the conduct of its business. Acting in the stead of the general meeting, the temporary administrator decided, by Measure No 71 of 24 September 1986, to amend Article 6 of the statutes of TKE Bank to show its capital as DR 1 700 000 000.

9  In order to give effect to that increase, the temporary administrator invited the shareholders of TKE Bank, by notice published in the political and financial press, to exercise their pre-emptive rights in relation to the increase within a period of 30 days and invited any interested third parties to participate in the increase on the expiry of that period. Since the plaintiffs had not exercised their pre-emptive rights by the end of that period, the new shares were ultimately allotted to third parties. Subsequently, the capital was increased on three further occasions in 1987, 1989 and 1990 by the general meeting of TKE Bank, with its new shareholders, the appropriate amendments being made to its statutes.

10  Article 24(2) of Greek Law No 1682/1987 ratified, with effect from the dates of their adoption, the decision to appoint a temporary administrator to manage TKE Bank and the measure by which the latter ordered that the shares representing the increase in the capital of TKE Bank should be allotted to the shareholders.

11  The plaintiffs in the main proceedings first challenged, before the national court, the amendment to the statutes of TKE Bank, whereby the capital was increased to DR 1 700 000 000 on the ground that that amendment gave effect to a decision taken by the temporary administrator without the general meeting of shareholders having been convened to decide upon any increase of capital, and that the mandate of the temporary administrator had lapsed automatically upon the expiry of a reasonable period. They also objected to the allotment of the shares and sought a declaration that the other defendants in the main proceedings, purporting to be new shareholders of the bank following the increase of capital, had acquired neither the status of shareholders nor the right to participate in the general meeting of shareholders of TKE Bank. Finally, they sought the annulment of the decisions concerning the three subsequent increases of capital and the corresponding amendments to the statutes.

12  In its decision, the national court questions whether the case-law of the Court which, in relation to ordinary public limited liability companies, upholds the principle that the general meeting of shareholders has the authority to decide upon increases of capital, extends also to banks constituted in the form of public limited companies since, under Greek law, there is banking legislation (the abovementioned Law No 236/1975) which applies specifically to such banks. The aim of that legislation is to provide for the reorganization of banks, by reason of their particular importance in relation to credit facilities, the guarantee of deposits and the proper operation of the national economy, such matters constituting objectives relating to the public interest.

13  In those circumstances, the national court stayed the proceedings pending a preliminary ruling from the Court of Justice on the following questions:

"(1) Does the direct effect within the Hellenic Republic of the Second Council Directive of 13 December 1976 (77/91/EEC) and in particular of the provisions concerning the maintenance and alteration of the capital of public limited liability companies (Articles 25 et seq. and 29) extend so far as to mean that the Greek courts are automatically obliged to apply those provisions to banks which take the form of public limited liability companies?

(2) Are the above provisions incompatible with the contrary provisions of Presidential Decree No 861/1975, confirmed by Law No 236/1975, and of Article 24 of Law No 1682/1987, which derogate from the other provisions governing the general functioning of public limited liability companies in order more effectively to achieve reform of banks constituted in the form of public limited liability companies on the ground of the

special social-economic purpose which they fulfil, which constitutes an aim of general interest, so that application of those contrary provisions is precluded?

(3) May publication of the invitation in the daily newspapers be deemed to satisfy the requirement laid down in the third sentence of Article 29(3) of the directive in question that the holders of registered shares must be informed in writing?"

**The first and second questions**

14  By its first and second questions, which it is appropriate to consider together, the national court raises three problems concerning the scope of the Second Directive, in particular Articles 25 and 29 thereof.

15  The first is whether banks constituted in the form of public limited liability companies fall, as such, within the scope of the Second Directive, in particular Articles 25 and 29 thereof.

16  The second concerns the applicability of the directive, having regard to the specific nature of the national rules at issue which, in pursuit of the public interest and by way of derogation from the rules of the general law on public limited liability companies, seek to secure more effective recovery of banks constituted in the form of public limited liability companies which, as a result of their burden of debt, find themselves in exceptional circumstances. The national court asks essentially whether, taking account of that special feature, Article 25 of the Second Directive precludes national legislation which provides that the capital of a bank which is constituted in the form of a public limited liability company and finds itself in the exceptional circumstances referred to above may be increased by administrative measure and without discussion by the general meeting.

17  The third problem is concerned more particularly with the conditions for the application of Article 25.

**The applicability of the Second Directive to banks constituted in the form of public limited liability companies**

18  It is clear from the title and Article 1 of the Second Directive that it applies to the companies referred to in the second paragraph of Article 58 of the EC Treaty constituted in the form of public limited liability companies.

19  The criterion adopted by the Community legislature to define the scope of the Second Directive is therefore that of the legal form of the company, irrespective of its business.

20  There is only one exception to that general rule, namely that provided for in Article 1(2) which authorizes the Member States not to apply the directive to investment companies with variable capital or cooperatives in the form of public limited liability companies.

21  Since banks constituted in the form of public limited liability companies do not come within that exception they are covered by the Second Directive.

22  That conclusion is also borne out by the fact that the Second Directive, in for example Articles 20(1)(c), 23(2) and 24(2), expressly takes account of the particular features of banking by providing that certain provisions do not apply, or need not be applied by the Member States, to banks and other financial institutions constituted in the form of public limited liability companies.

23  Articles 25 and 29 of the Second Directive allow for no such derogation.

24  It must therefore be held that the Second Directive, and in particular Articles 25 and 29 thereof, apply to banks constituted in the form of public limited liability companies.

**The applicability of Article 25 of the Second Directive to measures for the reorganization of banks**

25 The defendants in the main proceedings contend that the increase in capital at issue constitutes a measure for the reorganization of a credit institution which falls outside the scope of Article 25 of the Second Directive.

26 In support of that contention, they put forward a number of arguments to show that rules on the reorganization of credit institutions are, at both Community and national level, in the nature of a lex specialis as compared with ordinary company law.

27 They maintain, first, that the Second Directive is not concerned with the reorganization, liquidation and dissolution of public limited liability companies or, a fortiori, of credit institutions. Those are matters covered by other legislative measures adopted or envisaged by the Community.

28 They refer in particular to the amended proposal for a Council Directive concerning the reorganization and the winding-up of credit institutions and deposit-guarantee schemes (OJ 1988 C 36, p. 1, hereinafter "the amended proposal for a directive").

29 The defendants in the main proceedings submit that the main purpose of that amended proposal for a directive was specifically to avoid the winding-up and dissolution of credit institutions, because of the importance attached to maintaining their ability to operate on a sound basis. Even though it is intended to deal with their liquidation, it was inspired by the need for rigorous application of the supervisory rules and by the concept of the public interest.

30 They state that all the contested rules on reorganization, with the exception of certain provisions concerned simply with interpretation of the measures adopted, are included in the list of national measures appended to the amended proposal for a directive, which sets out the measures that would be reciprocally recognized by the Member States as being intended to maintain or restore the financial stability of a credit institution.

31 According to the defendants in the main proceedings, the fact that, according to the amended proposal for a directive, the application of those measures is not dependent on compliance with the provisions of the Second Directive and, in particular, with Article 25 thereof, shows that the objective of reorganization, even by means of a compulsory increase of capital, as provided for in the Greek rules, takes precedence over the more specific conditions for such increases which are necessarily accorded secondary importance and are subordinate to that primary objective.

32 They thus consider that the amended proposal for a directive shows that the matter of increasing the capital of a credit institution falls within the ambit of the wider, overriding objective of reorganizing a credit institution and is ultimately subsumed into that objective.

33 That conclusion is supported, in their view, by the existence, not only nationally but in the Community as a whole, of a set of special rules applicable to credit institutions, a fact which brings to the fore the wholly exceptional nature of credit institutions. It is very revealing in that connection that the directives concerning financial institutions are more numerous than those concerning companies in general.

34 The Portuguese Government also considers that, in the event of a financial crisis, the situation of a bank differs fundamentally from that of a public limited liability company in general in that, first, the liabilities of banks are essentially represented by their depositors' funds and, secondly, the care and management of public savings are an essential function of banks. When a bank is in financial crisis, it is necessary both to protect the interests of its depositors by taking all possible action to make certain that their assets will be returned to them and to ensure that the depositors are not seized by panic, which would spread to the public at large, precipitating widespread withdrawals of funds throughout the banking system.

35 That is why, according to the Portuguese Government, the legislation both of the Member States and of the Community recognizes the special nature of banks by adopting provisions which depart from those

applicable to companies in general.

36 As far as Community legislation is concerned, the Portuguese Government refers not only to the amended proposal for a directive but, as do the plaintiffs in the main proceedings, also to the Second Directive, Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1977 L 386, p. 1).

37 Derogating from Article 17 of the Second Directive, Article 10(1) of Directive 89/646 lays down the rule that a credit institution’s own funds may not fall below the amount of initial capital required and Article 10(5) provides that the competent authorities may, where the circumstances so justify, allow an institution a limited period in which to rectify its situation.

38 In response to those arguments, it must be pointed out, first, that the Second Directive is intended, in accordance with Article 54(3)(g) of the EC Treaty, to coordinate the safeguards which are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 of the Treaty with a view to making such safeguards equivalent and protecting the interests of members and others. The Second Directive thus seeks to ensure a minimum level of protection for shareholders in all the Member States.

39 That objective 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 categorized as special or exceptional ° under which it is possible to decide by administrative measure, separately from any decision by the general meeting of shareholders, to effect an increase in the company' s capital (see the judgments in Joined Cases C-19/90 and C-20/90 Karella and Karellas [1991] ECR I-2691, paragraphs 25 and 26, and Case C-381/89 Syndesmos Melon tis Eleftheras Evangelikis Ekklisias and Others [1992] ECR I-2111, paragraphs 32 and 33).

40 For those reasons, the Court has thus already held that Article 25(1) of the Second Directive precludes the application of rules which, being designed to ensure the reorganization and continued trading of undertakings that are of particular importance to the national economy and are in an exceptional situation by reason of their debt burden, allow an increase in capital to be decided upon by administrative measure, without any resolution being passed by the general meeting (judgments in Karella and Karellas, paragraph 31, Syndesmos Melon tis Eleftheras Evangelikis Ekklisias and Others, paragraph 37, and Joined Cases C-134/91 and C-135/91 Kerafina-Keramische und Finanz-Holding and Vioktimatiki [1992] ECR I-5699, paragraph 18, hereinafter "the Karella and Syndesmos Melon line of cases").

41 Although the Second Directive does not specifically refer to the reorganization of credit institutions or to public limited liability companies in general and although those matters have not yet been the subject of Community harmonization, it does not follow that it is open to the Member States to adopt reorganization measures in that field which run counter to the provisions of the Second Directive, which, as stated in paragraph 24, apply to banks.

42 As far as reorganization measures are concerned, Article 25, which, in accordance with the objective of the Second Directive, provides a minimum level of protection for shareholders in all the Member States, applies, in the absence of any express exception, to credit institutions under the same conditions as to any other undertaking which is of special importance to the national economy and, by reason of its debt burden, is in exceptional circumstances.

43 As regards the arguments based on the amended proposal for a directive, it must be pointed out that that proposal does not form part of positive Community law and, in any event, the mere fact that the legislation at issue in the main proceedings appears on the list annexed to that proposal, which, as the Commission correctly pointed out at the hearing, identifies those national measures which, according to the information provided by each of the Member States at its request, should be regarded as reorganization measures, in no way prejudges the question whether such legislation is in conformity with the Second Directive.

44 As regards the Community legislation on the banking sector, it should be observed, as has been pointed out by the Advocate General in point 19 of his Opinion, that the majority of those directives seek to uphold and extend the right of establishment and the freedom to provide services in the banking sector, by means of specific provisions applicable to banks. Moreover, the numerous provisions concerning supervision, which confer on the competent authorities, in certain circumstances, the power to require a credit institution to remedy within a specified period an insufficiency of assets, do not affect the powers of the organs of the credit institution in question to make their own arrangements to rectify matters.

45 The arguments which the defendants in the main proceedings and the Portuguese Government deduce from the amended proposal for a directive and the Community legislation in the banking sector cannot therefore be accepted.

46 The defendants in the main proceedings contend, secondly, that the lex specialis status of banking legislation is closely linked to the fact that supervisory rules are provisions dictated by the public interest. The rules on the supervision of credit institutions, they maintain, constitute a closed system of provisions designed, first, to protect the financial structure and preserve public confidence in it, and, secondly, to protect depositors. They consider that measures for the reorganization of credit institutions, which form an integral part of the supervisory rules, pursue the same objectives. Under the Greek legislation in force, those measures include increases in company capital by decision of a temporary administrator.

47 They maintain in that connection that the Court has already recognized that the cohesion of such a closed system is such that it must not be upset by the operation of other provisions of national law or Community law (see Case C-204/90 Bachmann v Belgium [1992] ECR I-249 and Case C-300/90 Commission v Belgium [1992] ECR I-305). In their view, the fundamental reasons which prompted the Court so to hold should also apply to the present case, which displays considerable similarities to Bachmann.

48 That argument likewise cannot be upheld.

49 It is true that considerations concerning the need to protect the interests of savers and, more generally, the equilibrium of the savings system, require strict supervisory rules in order to ensure the continuing stability of the banking system.

50 However, it does not follow that national rules of that kind must necessarily provide for measures which deprive the organs of a credit institution of the powers vested in them, as organs of a public limited liability company, by Article 25 of the Second Directive.

51 The interests at issue can, as the Advocate General has rightly pointed out in point 18 of his Opinion, be given equal and appropriate protection by other means, such as for example the creation of a generalized system to guarantee deposits, which seek to achieve the same result but do not impede attainment of the objective pursued by the Second Directive of providing a minimum level of protection for shareholders in all the Member States.

52 Accordingly, the Member States could, in the event of their supervisory rules for credit institutions not meeting the requirements laid down by the Second Directive, adopt the measures needed to bring them into line with those requirements within the prescribed period and establish a system which, whilst observing the provisions of the directive, protects the interests concerned.

53 It is also apparent from the documents before the Court that the Hellenic Republic has in the meantime adopted legislative measures which introduce a system of deposit guarantees and dispense with the office of temporary administrator provided for by the legislation at issue in this case, thereby eliminating the powers attached to that office, including that of deciding, in the stead of the general meeting, to increase a bank’s capital.

**The conditions for the application of Article 25 of the Second Directive**

54 The defendants in the main proceedings contend that, in any event, the conditions for the application of Article 25(1) of the Second Directive are not satisfied. They refer in that connection to Karella (paragraph 30) and Syndesmos Melon (paragraph 27).

55 They maintain that, unlike the national provisions at issue in the Karella and Syndesmos Melon line of cases, which merely brought to an end the powers of the management of the undertaking, whilst the general meeting continued to exist, the legislation at issue in this case provides for a temporary administrator whose appointment causes all the powers and competencies of the organs of the company, including the general meeting, to lapse and to become vested in him. Appointments of that kind constitute measures wholly analogous to execution measures, in particular rules on liquidation of the kind in point in Karella and Syndesmos Melon, and, in addition, mean that, owing to the removal of powers from the shareholders and the normal organs of the company, the company does not continue to exist within its own structures, within the meaning of those judgments.

56 That argument cannot be upheld.

57 In Karella (paragraph 30) and Syndesmos Melon (paragraph 27), the Court pointed out that the Second Directive is intended to ensure that members' and third parties' rights are safeguarded, in particular in the operations for setting up companies and increasing and reducing their capital. The directive does not, admittedly, preclude the taking of execution measures intended to put an end to the company's existence and, in particular, does not preclude liquidation measures placing the company under compulsory administration with a view to safeguarding the rights of creditors. However, the directive continues to apply where ordinary reorganization measures are taken in order to ensure the survival of the company, even if those measures mean that the shareholders and the normal organs of the company are temporarily divested of their powers.

58 In this case, the appointment of a temporary administrator does not resemble an execution measure, or, in particular, a liquidation measure, even though all the powers and competencies of the organs of the company are transferred to that administrator. As the defendants in the main proceedings themselves have stated, Article 8(1) of Special Law No 1665/1951 draws a distinction, as regards the measures to be taken by the Monetary Commission, between the withdrawal of the bank's licence to trade, entailing its liquidation, and the appointment of an administrator. Moreover, as the defendants in the main proceedings have also emphasized, the specific purpose of the appointment of the temporary administrator is to ensure the survival of the company concerned, so that it is clearly a reorganization measure.

59 It cannot therefore be considered that the company does not continue to exist, and in this case that is borne out by the fact that the organs of the company have been divested of their powers and competencies only temporarily and that all the increases in capital subsequent to that decided on by the temporary administrator were, once again, the subject of a resolution of the general meeting of shareholders.

60 Accordingly, the answer to the first and second questions must be that Article 25 of the Second Directive precludes national legislation under which the capital of a bank constituted in the form of a public limited liability company which, as a result of its debt burden, is in exceptional circumstances may be increased by an administrative measure, without a resolution of the general meeting.

**The third question**

61 Article 29(3) of the Second Directive concerns the procedures for an offer of subscription on a pre-emptive basis which, by virtue of Article 29(1), must be made to the shareholders of a public limited liability company whenever the capital is increased by consideration in cash.

62 It follows from that provision that the legislation of a Member State need not provide for publication of such offers of subscription in the national gazette appointed in accordance with Council Directive 68/151/EEC of 9 March 1968 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 with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41), where all the shares in the company are registered shares. In such cases, pursuant to the third sentence of Article 29(3) of the Second Directive, the "shareholders must be informed in writing".

63 It is common ground that, at the material time, the Greek legislation did not provide, in accordance with the requirements of that provision, for the publication of information in the national gazette appointed for that purpose.

64 It is in that context that the national court asks whether publishing a notice in daily newspapers is to be regarded, for the purposes of the third sentence of Article 29(3) of the Second Directive, as informing the shareholders in writing.

65 In order to answer that question, it must be borne in mind that Article 29(3) seeks to ensure that, in the absence of publication in the national gazette appointed for that purpose, all owners of registered shares are given information addressed to them individually by name concerning the procedures for exercising their pre-emptive rights.

66 The answer to that question must therefore be that publication of an offer of subscription in daily newspapers does not constitute information given in writing to the holders of registered shares within the meaning of the third sentence of Article 29(3) of the Second Directive.

**Abuse of rights**

67 It is apparent from the decision of the national court that the defendants and the interveners in the main proceedings put forward, before that court, an argument based on Article 281 of the Greek Civil Code, pursuant to which "the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith or morality or the economic or social purpose of that right". The national court emphasizes that that provision allows objection to be made against the exercise of rights conferred by Community law if, in a particular case, those rights are exercised abusively.

68 Although, since the national court has submitted no question on the matter, it is unnecessary to rule as to whether it is permissible, under the Community legal order, to apply a national rule in determining whether a right conferred by the provisions of Community law at issue is being exercised abusively, 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.

69 It must be borne in mind in that connection that it is settled case-law that it is for the Court of Justice, in relation to rights relied on by an individual on the basis of Community provisions, to verify whether the judicial protection available under national law is appropriate.

70 In this case, the uniform application and full effect of Community law would be undermined if a shareholder relying on Article 25(1) of the Second Directive were deemed to be abusing his rights merely because he was a minority shareholder of a company subject to reorganization measures or had benefited from the reorganization of the company. Since Article 25(1) applies without distinction to all shareholders, regardless of the outcome of any reorganization 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.

**Costs**

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Polimeles Protodikio Athinon, by decision of 3 August 1993, hereby rules:

**1. 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 precludes national legislation under which the capital of a bank constituted in the form of a public limited liability company which, as a result of its debt burden, is in exceptional circumstances may be increased by an administrative measure, without a resolution of the general meeting.**

**2. Publication of an offer of subscription in daily newspapers does not constitute information given in writing to the holders of registered shares within the meaning of the third sentence of Article 29(3) of Directive 77/91.**