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COMMENT ON IDRYMA TYPOU AE V. YPOURGOS TYPOU KAI MESON MAZIKIS ENIMEROSIS, CASE NO. C-81/09

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1. Introduction

Countless newspapers, radio stations, TV stations and Internet portals fight perpetually to attract attention and audience. To achieve this objective, editorial staff sometimes decide to publish information, photos or movies which have not been properly checked or which are intentionally shocking. In consequence of such actions, the legitimate interests of third persons, including their reputation and good name, may be infringed. There are several ways in which such improper behaviour may be discouraged: civil, penal or administrative sanctions may be provided. Moreover, differences may also exist as regards the circle of persons who may be held liable. It is quite obvious that responsibility should fall on the person who publishes a newspaper or broadcasts TV or radio programme. Certain legal systems also provide for the liability of the authors of texts or editorial staff[1]. Another interesting provision exists in Greek law. According to

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[1] Compare for example Article 38 of the Polish Press Law (ustawa z dnia 26 stycznia 1984 r. – Prawo Prasowe), Polish O.J. No. 5, Item 24.

Article 4(3) of Law No. 2328/1995 (regulating the operating framework for private television) administrative penalties, which are imposed in the event of improper conduct by television stations, are imposed jointly and severally[2], not only on the company holding the licence to found and operate the television station, its legal representatives and members of its board of directors, but also on all shareholders holding more than 2,5% of the company's share capital. The application of this provision has given rise to some legal doubts, in consequence of which the case was brought before a Greek national court, which stayed the proceedings and referred a question to the Court of Justice ("ECJ)" for a preliminary ruling.

2. Facts and main proceedings

On 11.5.2001, Ypourgos Typou kai Meson Mazikis Enimerosis (Minister for the Press and Mass Media) adopted a decision imposing a fine of GRD 10,000,000 (approximately Euro 29,347), jointly and severally on a public limited company, Nea Tileorasi, which owned the television station Star Channel, and on its shareholders and members of its board of directors. The fine was imposed upon the recommendation of the Ethniko Simvoulio Radiotileorasis (National Radio and Television Council), the competent independent authority, because information broadcast during the main news programme of the Star Channel television station on 14.2.2000 breached the obligation to respect the character, honour, reputation, family life and presumption of innocence of two singers and a fashion designer.

A Greek public company, Idryma Typou, which was a shareholder in Nea Tileorasi and held 5% of its share capital, contested the decision to impose this fine. Accordingly, it applied to the Greek Simvoulio tis Epikratias (Council of State, which is the highest administrative court in Greece) for annulment of the ministerial decision imposing the fine and the decision by the Ethniko Simvoulio Radiotileorasis (National Radio and Television Council) upon which it was based.

[2] It seems strange that both joint and several administrative liability exist. This means that a fine could be imposed on a single shareholder and not on the TV company itself. Joint and several liability is much more adequate in civil law.

The Simvoulio tis Epikratias (Council of State) reviewed the constitutionality of Article 4(3) of Law No 2328/1995 insofar as it imposes a penalty on the company's shareholders, in light of the principle of economic freedom laid down in Article 5 of the Greek Constitution and its compliance with EU secondary law, especially *vis-à-vis* the First Council Directive 68/151/EEC of 9.3.1968 on the co-ordination 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[3] ("First Directive").

Insofar as concerned compatibility with the Greek Constitution, the Simvoulio tis Epikratias (Council of State) held, essentially, that the national legislature was entitled to adopt rules derogating from the general law on public limited companies and, in at particular, from the principle that a shareholder is not liable for the debts of the legal person, which constitutes a fundamental and binding principle of the general law on public limited companies but is not a constitutional principle. Consequently, the national legislature *a fortiori* enjoyed such a power in relation to specific companies which serve the public interest and are under the immediate control of the State. The Simvoulio tis Epikratias (Council of State) observed that, in any event, Article 4(3) of Law No 2328/1995 does not provide for joint and several liability of shareholders in respect of the legal person's "debts" but, rather, for the imposition of administrative penalties on both the company and the persons referred to in that provision. Finally, that provision does not make it impossible or substantially difficult for business activity to be carried on[4]. Whilst examining compliance with the principle of

[3] O.J. 14.3.1968, L-65, at pp. 8–12. English special edition: Series I Chapter 1968(I), at p. 41. This was repealed by Directive 2009/101/EC of the European At parliament and of the Council of 16.9.2009 on coordination of safeguards which, for the protection of the interests of members and third at parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (O.J. 1.10.2009, L-258, at pp. 11–19). The new directive is simply a codified version of the First Directive and repeats its provisions.

[4] However, it must be pointed that this was not a unanimous opinion. According to a minority of the judges, the provision at issue requires the shareholders of public limited companies in the television sector to pay an administrative fine imposed on the company

proportionality, the Simvoulio tis Epikratias (Council of State) held that the legislation at issue pursued a legitimate aim and does not constitute a restriction on economic freedom that is manifestly disproportionate to the objectives it pursues, since it clearly cannot be regarded as making it impossible or substantially difficult to undertake business activity in the field of founding and operating private television stations. The Simvoulio tis Epikratias (Council of State) stated, in particular, that the national legislature, which is aware of the conditions and the factual situation pertaining on the country's television market, considers that a shareholder owning in excess of 2,5% of the company's shares is not an ordinary investor but, rather, a professional investor who, by reason of such shareholding, is potentially in a position to influence the company's administration and, therefore, the operation of the television station. The Simvoulio tis Epikratias (Council of State) held that this substantive assessment by the national legislature cannot be considered manifestly wrong or inappropriate if account is taken of the fact that, pursuant to Law No 2328/1995, the maximum percentage of the share capital that a shareholder (a natural or a legal person) is entitled to own may not exceed 25% and that, consequently, the collaboration of a number of shareholders in the administration of the company is absolutely necessary in order to influence the management thereof[5].

As regards the influence of EU company law directives on the issue at hand, a majority of the judges in the Simvoulio tis Epikratias (Council of State) held that the field of application of Article 4(3) of Law No 2328/1995 and that of the provisions of the directives relating to companies do not

as such, by reason of an infringement of the legislation in the course of its business, and the fine therefore constitutes a debt forming part of the company's liabilities. In the opinion of those judges, the provision infringes the fundamental principles of the law governing public limited companies – in particular, the principle that the risk incurred by a shareholder should be limited – and therefore economic freedom as protected by Article 5 of the Greek Constitution, which includes the right to set up commercial companies, since the free market economy cannot function without such companies. The principle that the public limited company alone is liable for company debts is the fundamental manifestation of a capital company's nature, which is possessed by public limited companies. It is of little importance that the company carries on an activity in the public interest or that it is subject to State control.

[5] A minority of judges dissented.

intersect. The latter contain no rule concerning or, *a fortiori*, prohibiting the attribution of liability to the shareholders of a public limited company who hold a certain percentage of shares for payment, jointly and severally with the legal person that is the company, of fines imposed for infringement of legislation by reason, generally, of the activity of that legal person but also, in particular, in the present instance, by reason of the activity of the legal person that is the public limited company holding a licence to found and operate a television station. Moreover, even if the view were taken that the fields of application of the First Directive and of Article 4(3) of Law No 2328/1995 coincided, the latter provision would not be contrary to Article 1 of the First Directive because Article 1 provides no definition of a public limited company and merely lists the types of company to which the directive applies. Certain judges of the Simvoulio tis Epikratias (Council of State) expressed a dissenting minority opinion, however, and took the view that the term "ανώνυμη εταιρία" [public limited company] used in Article 1 of the First Directive has a mandatory minimum meaning. In their opinion, the fundamental characteristics of a public limited company, from which the national legislature is unable to derogate, are the strict distinction between the company's assets and those of the shareholders, and the absence of personal liability of shareholders for the company debts, since shareholders are required merely to pay their capital contribution corresponding to the *ratio* of their equity at participation in the company's total capital.

3. Question referred for a preliminary ruling

The Simvoulio tis Epikratias (Council of State) decided, pursuant to Article 234(3) TEC [now Article 267(3) TFEU] to stay the proceedings and refer the following question to the ECJ for a preliminary ruling:

> "Does Directive 68/151/EEC, which provides in Article 1 that 'the coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the following types of company: ... – In Greece: *ανώνυμη εταιρία*...', contain a rule prohibiting the adoption of a national provision such as Article 4(3) of Law No 2328/1995, in so far as it specifies that the fines provided for

in the preceding paragraphs of that article for infringement of legislation and rules of good conduct governing the operation of television stations are imposed jointly and severally, not only on the company which holds the licence to found and operate the television station but also on all shareholders with a holding of over 2,5%?"

Therefore, it is clear that the referring court asked for an interpretation of secondary law and did not consider whether or not the national provision was in compliance with primary law, nor did it request an interpretation of the Treaty provisions governing the fundamental freedoms.

4. Observations submitted to the ECJ

Written observations were submitted by the Government of the Hellenic Republic and the Commission, while no other Member State, nor Idryma Typou, a party to the main proceedings, made use of the right enshrined in the Article 23 of the Statute of the Court of Justice to do so.

Both the Greek Government and the Commission took the view that Article 1 of the First Directive does not preclude a national provision such as Article 4(3) of Law No 2328/1995. In their opinions they stressed that the First Directive did not seek to harmonise the concept or notion of a public limited company but, rather, merely lists the forms of company existing in the Member States to which the provisions of the First Directive apply and that EU law does not guarantee the members of a company exemption from liability arising from the obligations of a public limited company.

5. Opinion of the Advocate General

The opinion of the Advocate General, V. Trstenjak, was delivered on 2.6.2010 and is extremely complex. The main part of the opinion (VI – Legal assessment) is divided into several subsections. It is worth noticing that the Advocate General, having made some introductory remarks on legal approximation as an instrument of European company law and having interpreted the provisions of the First Directive, considers the

influence of primary law on the case. Accordingly, the opinion deals with, firstly (and in relatively more detail) the Treaty provisions governing the freedom of establishment (Articles 43 TEC and 48 TEC, now Articles 49 TFEU and 54 TFEU) and, subsequently, the free movement of capital (Article 56 EC, now Article 63 TFEU)[6].

Insofar as regarding secondary law the Advocate General took the view that, in adopting the First Directive, the Community legislature does not expressly provide for the limitation of liability, but clearly proceeds on the basis that such a principle exists in the Member States' national company law regimes and in relevant unwritten Community law[7]. Furthermore, in the Advocate General's opinion, there is no substantive definition of the notion of a company's obligations in the Company Law Directives (it is unclear whether fines imposed by the State may be regarded as obligations of a public limited company). Since the legislature did not exercise its regulatory competence in this field, but referred implicitly to the Member States' laws, it was not for the ECJ to provide a uniform definition of that concept under Community law[8]. Even supposing that fines are regarded as obligations of a public limited company on the basis of national law[9], in the absence of express provision in the First Directive, the power to prescribe the exceptional extension of liability to shareholders of public limited companies falls within the competence of the national legislature. In the absence of harmonization, it is for the Member States, in principle, to decide to what extent they wish to take account of the protection of the interest in question in relation to extending liability to the shareholders of a public limited company[10]. As

[6] The fact that more attention was paid to the freedom of establishment follows from the fact that, in the order for reference, a majority of the referring court took the view that, since special rules that apply to public limited companies operating radio and television stations, such as registration of shares and so forth, it must be assumed that shareholders of such companies with a holding of more than 2,5% in their share capital are not ordinary investors; they are investors active professionally who are in a position to influence the administration of the body corporate and, therefore, the operation of the television station. See Opinion, at para. 67.

[7] See Opinion, at para. 40.

[8] See Opinion, at para. 45.

[9] It seems that this was unclear for the referring Greek court. See Opinion, at para. 46.

[10] See Opinion, at para. 57.

a result the Advocate General's conclusion as regards this part of opinion is that Directive 68/151 does not preclude a national provision such as Article 4(3) of Law No. 2328/1995, which specifies that the fines provided for in the preceding paragraphs of that article for infringement of legislation and rules of good conduct governing the operation of television stations are imposed jointly and severally, not only on the company which holds the licence to found and operate the television station but also on all shareholders with a holding of over 2,5%.

Technically, this conclusion constituted an answer to the national court's question. However, taking into consideration that it is for the Court to provide the national court with all the guidance on points of interpretation of EU law which may enable it to rule on the case before it, whether or not reference is made to those points in the questions referred, the Advocate General decided that it was essential to consider the relevance of primary law provisions. An analysis of the freedom of establishment and free movement of capital regulations led her to conclusion that Articles 43, 48 and 56 TEC (now Articles 49, 54 and 63 TFEU) preclude a national provision which specifies that the fines for infringement of legislation and rules of good conduct governing the operation of television stations are imposed jointly and severally, not only on the company which holds the licence to found and operate the television station but also on all shareholders with a holding of over 2,5%. According to the Advocate General, such a provision constitutes a non-discriminatory restriction which could be justified by the protection of individual personality rights and family and private life. However, the contested national provision could not be regarded as necessary for achieving the aim pursued, nor as reasonable.

6. The ECJ Judgment

The ECJ generally followed the legal reasoning of the Advocate General and reached the same ultimate conclusion[11].

[11] The ECJ's concluded that: "1) First Council Directive 68/151/EEC of 9.3.1968 on co-ordination 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

Insofar as concerns the First Directive the ECJ noted that, although the third recital in the preamble to the First Directive implies that a principle exists that only companies are required to pay, out of their assets, company debts to third parties, that directive does not prescribe a uniform concept of companies limited by shares or otherwise having limited liability on the basis of such a principle. The First Directive does not prescribe what a company limited by shares or otherwise having limited liability must be, but merely lays down rules which must be applied to certain types of companies identified by the European legislature as companies limited by shares or otherwise having limited liability. Although, in the majority of cases, shareholders of companies listed in Article 1 of the First Directive are not required to be personally liable for the debts of a company limited by shares or otherwise having limited liability, it cannot be concluded that this is a general principle of company law applicable in all circumstances and without exception.

Insofar as concerned EU primary law, the ECJ was more precise than the Advocate General and stressed that, depending on the manner in which the remainder of a company's capital is distributed, in particular if it is distributed amongst a large number of shareholders, a holding of 2,5% may be sufficient to have control of a company or, at least, to exert a definite influence on the company's decisions and determine its activities. The Greek legislation was, therefore, capable of falling within the scope of Article 49 TFEU. Inasmuch as that legislation applies to shareholders whose shareholding exceeds 2,5% but is insufficient to allow them to control or exert a definite influence on the company's decisions,

second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, must be interpreted as not precluding national legislation such as Article 4(3) of Law No 2328/1995 'Legal regime governing private television and local radio, regulation of issues relating to the broadcasting market and other provisions', as amended by Law No 2644/1998 'on the provision of subscription radio and television services', according to which the fines provided for in the preceding paragraphs of that article for infringement of the legislation and rules of good conduct governing the operation of television stations are imposed jointly and severally, not only on the company which holds the licence to found and operate the television station but also on all shareholders with a holding of over 2,5%".

2) Articles 49 TFEU and 63 TFEU must be interpreted as precluding such national legislation.

it could also fall within the scope of Article 63 TFEU. Consequently, the ECJ analysed those provisions jointly (in comparison to the Advocate General, who analysed them separately and focused more on the freedom of establishment). The ECJ paid greater attention to illustrating that the contested national provision constituted a restriction to the Treaty freedoms and had a deterrent effect on investors from other Member States, thereby affecting their access to the market. Inasmuch as the objective of the contested Law was to induce shareholders to ally themselves with other shareholders in order to be able to influence the decisions of the company's management, even though this option is applicable to all shareholders, it is indisputably much more difficult for this to be utilized by investors from other Member States who know less about the realities of media life in Greece and are not necessarily acquainted with the various groups or alliances represented amongst the shareholders of a company holding a licence to found, establish and operate a television station[12].

The ECJ assumed that the measure at issue in the main proceedings had the objective of securing compliance by television companies with legislation and journalists' rules of professional conduct in order, *inter alia*, to prevent the honour or the private life of persons whose image appears on the screen or whose name is referred to from being adversely affected. However, it did not conclude that the contested national provision was incapable of being regarded as necessary for achieving that aim pursued or reasonable. The proceedings before the ECJ revealed that the *ratio legis* of the contested Greek provisions is that any journalist owning shares in a television station could be fined (a statistical correlation existed between shareholder with a holding of 2,5% in a television company and the profession of journalist). Therefore the ECJ noted that, whilst the profession of journalist may be considered to be an appropriate criterion for identifying the persons liable to influence the management of a television company, the same may not be said by virtue of a person merely being a shareholder who possesses a holding of slightly more than 2,5% or even sufficient shares to enable them exert a definite influence, for the purposes of the judgment in case C-351/98 *C. Baars v. Inspecteur der Belastingen/ Ondernemingen Gorinchem*, on the organs of the television

[12] See Judgment, at para. 59.

company. If the objective of the measure is that journalists comply with legislation and the rules of professional conduct, it could be appropriate for them to be punished personally for the infringements that they commit, rather than imposing penalties on shareholders who are not necessarily journalists. The ECJ noted that that the Greek legislation contains other possible penalties that are more appropriate to the objective pursued, in the sense that they are imposed in respect of television operations and not the mere holding of share capital, such as the suspension or cessation of broadcasting a particular programme; the temporary suspension (for a period up to three months) of the broadcasting of any television programme; revocation of the station's operating licence or penalties of an ethical nature. Moreover, the ECJ stressed that the assumption that all shareholders of a public limited company are engaged professionally in the sector within which the company's objects fall represents the very negation of the free movement of capital, which applies *inter alia* to portfolio investments, that is to say, the acquisition of securities on the capital market with the sole intention of making a financial investment and no intention to influence the management or control of the undertaking. It is precisely this type of investment that investors from other Member States, seeking to diversify their investments, are likely to make.

7. Remarks

There are numerous threads in this very interesting case. Therefore only certain selected issues are dealt with herein. In particular the role and importance of company law will be discussed, before attention is turned to interpretation of the Treaty provisions governing the freedom of establishment and free movement of capital.

7.1. Character of company law harmonization and the manner in which the terms employed in directives should be interpreted

There is a detailed description of the role of the company law harmonization in the opinion of the Advocate General. She stressed that EU company law is concerned with the framework conditions governing

undertakings of national or European origin in the internal market and she outlined various reasons for the efforts to approximate the company law rules which exist in the individual Member States[13]. Moreover, in the Opinion there are some general remarks on the character of company law approximation. The Advocate General pointed out that EU company law does not seek to make the Member States' rules on companies fully uniform, but had simply regulates individual aspects of company law by way of approximation of laws using the regulatory technique of the directive. The use of the expressions "coordinating" and "making equivalent" in Article 44(2)(g) TEC (now Article 50(2)(g) TFEU) implies a lower degree of harmonization. EU action therefore requires that the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at EU level. Only legal approximation measures which effectively remove or at least reduce the barriers to the exercise of freedom of establishment for companies resulting from the differences between the Member States' rules on company law are necessary in the law on freedom of establishment[14].

Analysis whether the notion "company's obligations" covers fines imposed by the State led the Advocate General to a partial conclusion of general character and therefore is worth mentioning even though it was not crucial for the final conclusion[15]. A lower degree of company law harmonization combined with the absence of a substantive definition of the notion of a company's obligations or any guidance for interpretation be inferred, implies that the Court is prevented from giving that notion a uniform definition under EU law[16]. As a result, the Advocate General not only denied explicitly that term "company's obligations" used in the First Directive had a uniform definition under EU law, but she moreover implicitly questioned uniform definition of any other term used (and not defined) in any of company law directives adopted on the basis of Article 44(2)(g) TEC (now Article 50(2)(g) TFEU). Such an opinion (if followed strictly without careful reflection) might however endanger the uniform application of EU law.

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[13] See Opinion, at para. 29–30.

[14] See Opinion, at para. 43–44.

[15] *Nota bene* this issue is not discussed in the ECJ judgment.

[16] See Opinion, at para. 43 and 45.

7.2. Company law directives and the nature of companies listed in their texts

EU directives in the field of company law relate only to the formal criterion of legal form – the scope of the directives covers only certain, specifically listed forms of company in the individual Member States[17]. Therefore, undoubtedly, both the Advocate General and the ECJ are correct in stating that the mere fact that the Member States are obliged by the First Directive to co-ordinate certain legal provisions governing particular types of national law companies, does not imply that the Member States must also provide that those types of national law companies must possess specific characteristics (complying with the unwritten definition of a company in the First Directive)[18], especially that the Member States should adopt provisions governing the limited liability of public limited companies, which would preclude liability being extended to members.

The limited liability of company members might be argued to be inherent in the third recital to the preamble of the First Directive

> "[...] Community provisions must be adopted in respect of such companies simultaneously, since the only safeguards they offer to third at parties are their assets"

but, significantly, this recital was not repeated in Directive 2009/101/EC.

Moreover it was surprising that, when discussing the nature of public limited companies, neither the AG's opinion nor the Court's judgment noted that the First Directive (and now Directive 2009/101/EC) also deals with such forms of corporate organizations which by definition have two different types of members – at least one partner having unlimited liability and at least one at partner having limited liability. For example, the First

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[17] See A. Grünwald, *Europäisches Gesellschaftsrecht*, Wien 1999, at p. 13.

[18] Contrary argument may be made here. The absence of a general definition of the term "company" in the Company Law Directives means that the status of directors of companies in such directives is not obvious. It is controversial that the national legislature should have regard to the provisions of the directives while creating new types of companies. For details compare A. Gawrysiak-Zabłocka, *Pojęcie spółki w prawie europejskim* [The notion of a company in the European law], 'Studia Prawnicze' 2003, No. 4, at p. 159.

Directive applies to a Polish "spółka komandytowo-akcyjna" which is defined by Article 125 of the Polish Code of Commercial Companies as a at partnership whose purpose is to conduct business enterprise under its own name and in which at least one at partner (*komplementariusz*) has unlimited liability towards the creditors for obligations of the at partnership and at least one at partner is a shareholder[19]. Another example of a corporation in which at least one member is, by definition, fully liable is the German *Kommanditgesellschaft auf Aktien*[20]. Accordingly, *a fortiori*, the First Directive may not be considered as precluding national provisions that extend liability to the members of companies only in certain specific situations.

Since neither the Advocate General nor the ECJ appear to have appreciated this aspect of the case, and consequently did not follow such *a fortiori* reasoning, they instead concentrate on another issue[21], which in their opinion was crucial, namely on piercing the corporate veil (German *Duchgriffhaftung*). Accordingly they stressed that despite the seat separation of corporate and shareholders' assets in companies possessing a share capital, the case-law and legislation of the Member States exceptionally provide for the personal liability of shareholders for company debts in special circumstances and, in certain cases, hold members directly liable for company debts. The Greek provisions under discussion were treated as falling within the scope of such an exception and were, therefore, not incompatible with EU secondary law.

7.3. Forgotten cross-border character of fundamental freedoms

This author submits that it is no coincidence that the Greek court asked the ECJ merely to interpret the First Directive, since there was no need to interpret primary Treaty provisions in the present case because

[19] Furthermore, the Polish *spółka komandytowo-akcyjna* is not even a legal person as defined by Polish civil code! However, according to Article 8 of *Kodeks spółek handlowych* (the Code of Commercial Companies) it may, in its own name, acquire rights, including the ownership of real property and other property rights, assume obligations and sue and be sued. This has led to problems with implementation of the First Directive in the Polish legal system.

[20] See Article 278 *et seq. Aktiengesetz*.

[21] See Opinion, at paras. 33–34 and footnote 35, as well as Judgment, at para. 42.

neither the freedom of establishment nor the free movement of capital were capable of being applied to the facts! Contrary to what is stated in the Advocate General's opinion and the ECJ judgment, the interpretation of fundamental freedoms is unhelpful in resolving the present case. Why? It must be borne in mind that, on the one hand, the reference was made during proceedings between Idrima Tipou AE, a limited company whose registered office is in Athens (Greece)[22] and the Ipourgos Tipou kai Meson Mazikis Enimerosis (Greek Minister for the Press and Mass Media). On the other hand, fundamental freedoms are, by definition, inapplicable to situations in which all the facts are confined to a single Member State[23].

In *Robert Fearon & Company Limited v. Irish Land Commission* case[24], the ECJ's conclusion that no cross-border aspect existed (as regards a decision of the Irish Land Commission to compulsorily acquire land owned by an Irish company) meant that the Irish company was not entitled to rely upon the right of establishment in Ireland, despite the fact that this freedom could be relied upon by companies formed under the laws of other Member States[25]. Accordingly, it is submitted that the

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[22] See Judgment, at para. 2.

[23] See D. Ehlers, *The Fundamental Freedoms of the European Communities. General Principles*, [in:] D. Ehlers (ed.), 'European Fundamental Rights and Freedoms', Berlin 2007, at p. 184.

[24] Robert Fearon and Company Limited v. The Irish Land Commission, Case No. C-182/83, Judgment of 6.11.1984, E.C.R. 1984, at p. 3678 ("Fearon").

[25] See Fearon, at para. 8. The ECJ also analysed whether the rights of company members being nationals of other Member States (here British citizens) who have excised their right of establishment in Ireland by at participating in the formation of a company were not infringed. The ECJ held that the Treaty does not prohibit a Member State from making an exemption from compulsory acquisition measures adopted under legislation governing the ownership of rural land, subject to a requirement that nationals of other Member States who have taken part in the formation of a land-owning company reside on or near the land, if that residence requirement also applies to nationals of that Member State and if the powers of compulsory acquisition are not exercised in a discriminatory manner; See *Ibidem*, at para. 11. However, there is a cross-border element when a company has already set up an agency, branch or subsidiary in any other Member State. Treaty provisions prohibit the State of origin from hindering the establishment in another Member State of a company incorporated under its legislation which comes within the definition contained in Article 54 TFEU. Therefore, in *AMID v. Belgische Staat* case, the ECJ held that Treaty provisions preclude legislation of a Member State under which a company incorporated under national law, having its seat

Greek company, Idryma Typou, was equally ineligible to claim the benefit of the right of establishment.

In such circumstances it is interesting to consider the extent, if any, to which the Greek court will follow[26] the interpretation of the Treaty provisions provided in the ECJ's judgment. One possible solution to avoid conflict may be, for example, for the Greek court to interpret its national constitution, and more specifically the provisions therein governing the freedom to conduct business (freedom of economic activity), in conformity with EU law[27].

Should this possible approach be pursued by the Greek court, its reasoning might be similar to that of the Constitutional Tribunal of the Republic of Poland in the so-called bio-components in gasoline and diesel case (judgment of 21.4.2004, case K 33/03). The Polish case, in contrast to the Greek proceedings, was one involving abstract review proceedings[28].

in that Member State, may, for the purposes of corporation tax, deduct a loss incurred the previous year from the taxable profit for the current year only on the condition that that loss was not capable of being set off against the profit made during that same previous year by one of its permanent establishments situated in another Member State, when the loss, although set off, cannot be deducted from taxable income in either of the Member States concerned, whereas it would be deductible if the establishments of that company were situated exclusively in the Member State in which it has its seat; See Algemene Maatschappij voor Investering en Dienstverlening NV (AMID) v. Belgische Staat, Case no. C-141/99, Judgment of 14.12.2000, E.C.R. 2000, at p. I-11632.

[26] So far (July 2011) there seems to be no decision of the Council of State on the matter to date.

[27] Article 5(1) of the Greek Constitution establishes the right of all citizens to freely develop their personality and to at participate in social, economic and political life, provided that they respect the rights of others, the Constitution and moral standards. Article 106(2) of the Greek Constitution stipulates that private economic initiative is not to be permitted to develop at the expense of freedom and human dignity. See Opinion, at para. 13–14.

[28] The Polish Ombudsman (Rzecznik Praw Obywatelskich) asked if provisions of the Bio-components used in Liquid Fuels and Liquid Bio-fuels Act 2003 (ustawa z dnia 2.10.2003 r. o biokomponentach stosowanych w paliwach ciekłych i biopaliwach ciekłych) are in conformity with the Polish Constitution. Under review were following regulations: Ariticle 12(1) and (6) [Obligation for fuel manufacturers to add bio-components in quantities prescribed in the appropriate Council of Ministers' Regulation], Article 14(1) [Exclusion of liquid fuels distributors from the obligation to indicate the percentage level of bio-components] and Article 17(1)(3) [Fiscal penalties for undertakings failing to market bio-components or marketing them in lower quantities than prescribed in the

The Constitutional Tribunal interpreted the constitutional freedom of economic activity in the light of the free movement of goods (but not the freedom of establishment or the free movement of capital). The Tribunal held that, since these provisions do not contain any inherent obligation to use biofuels in any other EU Member State, the application of the challenged Polish provisions to all manufacturers (sellers), regardless of nationality, would violate the country of origin principle[29] and thereby constitute a restriction on the free movement of goods between Member States in contravention of EU law. Conversely, if the reviewed provisions were applicable only to Polish manufacturers (sellers), this would lead to a situation of reverse discrimination. The Constitutional Tribunal emphasised that, whilst discrimination against a Member State's own nationals is not unlawful from the perspective of EU law, it remains the constitutional duty of the Polish national authorities to protect against such discrimination. The scope of freedom enjoyed by the Polish legislator when enacting provisions that restrict economic freedom, the delimitation of such freedom and the interpretation of the concept "important public reasons", as contained in Article 22 of the Polish Constitution, must be assessed in light of Poland's participation in the European Economic Area. Consequently, the Constitutional Tribunal held that acts of national authorities which impose restrictions on business entities (in this case, sellers of fuels) on the grounds of "important public reasons", must not lead to the differentiation of the legal and factual treatment of national and foreign persons.

Per analogiam the Greek Court might hold that, although the fundamental freedoms merely prohibit fines being imposed in respect of investors from other Member States, the Greek Constitution (in particular the provision governing the freedom of economic activity) also protects Greek citizens and companies which would otherwise be the victims of reverse discrimination. In such a case, no fine could be imposed on

appropriate Regulation] and the basis of review were Article 20 [Freedom of economic activity], Article 22 [Limitations upon the freedom of economic activity], Article 31(3) [Principle of proportionality], Article 54(1) [Freedom to acquire information] and Article 76 [Protection of consumers]).

[29] Compare Articles 28 and 30 of the TEC, now Articles 34 and 36 TFEU; See Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, Case no. 120/78, Judgment of 20.2.1979, E.C.R. 1979, at p. 650.

Idryma Typou. Such an interpretation might be achieved relatively easily since, as the proceedings before the ECJ revealed, some of the Greek judges considered (even prior to the ECJ's judgment) that the contested national provision was unconstitutional.

Certainly, the Greek law should be changed in consequence of the ECJ's ruling in the *Idryma Typou* case[30]. It is a curious paradox that the Commission, which seemed to see nothing wrong in the contested regulation (*vide* its observations submitted to the ECJ), can now initiate infringement proceedings against Greece (Article 258 TFEU).

7.4. Blurred distinction between the freedom of establishment and the free movement of capital

The idea that the situation in the *Idryma Typou* case may also be influenced by EU primary law probably originated as a result of the fact that the First Directive, and many other EU company law directives, was specifically intended to help its beneficiaries to attain the freedom of establishment, pursuant to Article 44(1) TEC (now Article 50(1) TFEU)[31]. This may also explain why the Advocate General paid more attention to the freedom of establishment then to the free movement of capital. Such focus appears misplaced when one recalls the facts of the case pending before the national court. Idryma Typou was a mere 5% shareholder in the Nea Tileorasi and, significantly, there were at least two more shareholders who held more than 2,5% of Nea Tileorasi's share capital (this may be deduced from the fact that a fine was imposed jointly and severally upon Idryma Typou together with Nea Tileorasi AE and the other shareholders and members of the board of directors of Nea Tileorasi[32]). Therefore, even if Idryma Typou held the biggest shareholding in Nea Tileorasi's share capital, other shareholders also influenced Nea Tileorasi's decisions in a similar manner. Moreover, nothing in the facts indicates that Idryma Typou enjoyed special privileges such as, for example, special rights to appoint the board members of Nea Tileorasi.

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[30] As of July 2011 this has not yet occurred.

[31] See Opinion, at para. 59.

[32] See Judgment, at para. 14.

Whilst no settled case-law exists to clarify the relationship between the freedom of establishment and the free movement of capital (in particular as regards whether, in situations where both freedoms are applicable, the national measure must satisfy the requirements of both)[33], it seems that commentators have generally adopted the view expressed in the ECJ's judgment in *C. Baars v. Inspecteur der Belastingen/ Ondernemingen Gorinchem* case. This judgment states that in situations where a national of a Member State holds the capital of a company established in another Member State and such holding gives him definite influence over the company's decisions and allows him to determine its activities, he is exercising his right of establishment; conversely, when such a holding is insufficient to create such practical control over the company, the facts point towards the free movement of capital as the relevant primary law. Therefore, the Advocate General expressed certain doubts as to whether freedom of establishment provisions represent the appropriate pattern of control, but left this unanswered and conditional upon the factual question, for the referring court to decide, as to whether or not shareholders holding in excess of 2,5% in share capital are ordinary investors or whether they are capable of exercising definite influence over the company's decisions. The order of reference clearly indicated that a majority of the members of the referring court took the view that, given the special rules applicable to public limited companies operating radio and television stations (governing the registration of shares etc.), it must be assumed that shareholders in such companies who hold more than 2,5% in share capital are not ordinary investors but are, rather, investors who are professionally active and are in a position to influence the administration of the body corporate and, therefore, the operations of the television station. Accordingly the Advocate General, assuming those

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[33] There was a clear proposal to define the relationship between these freedoms in the opinion of the Advocate General presented in *Baars* case; See C. Baars v. Inspecteur der Belastingdienst Particulieren/ Ondernemingen Gorinchem, Case no. C-251/98, Judgment of 13.4.2000, E.C.R. 2000, at p. I-2805. For more about the relationship between freedom of establishment and free movement of capital see under *Free movement of capital*, section VI in Toth A. G. (ed.), 'The Oxford Encyclopaedia of European Community law. Vol. 2, The law of the internal market,' Oxford 2005; M. Dahlberg, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital*, The Hague 2005, p. 286–290.

conclusions to be correct, presumed that the members of the company in question were also protected by the freedom of establishment[34]. Interestingly, however, although ECJ more emphatically raised its doubts as to this conclusion[35], it did not vigorously distance itself from the opinion that a mere 5% holding in company's share capital (without any other special circumstances) may mean that such a shareholder falls within the scope of the freedom of establishment provisions. This did not prevent the ECJ from concluding that not only Article 63 TFEU, but also Article 49 TFEU must be interpreted as precluding the contested Greek legislation. It should be noted here that the ECJ responded to the preliminary reference and its answer is intended to constitute useful guidance for the referring national court as to how to interpret the law so as to decide on the case pending before it, *i.e.*, a case in which a shareholder held only 5% of the company's share capital.

Simultaneously, the operative part of judgment would not have proven controversial if it had been delivered during infringement proceedings brought by the Commission against Greece, for then the Greek provision would indeed infringe the freedom of establishment in certain cases whilst also infringing the free movement of capital in other cases[36].

For the present case, the qualification of the facts and their examination in the light of the freedom of establishment or free movement of capital is a matter of secondary importance, since the ECJ held that, in either case, EU law precludes the relevant national law[37]. However, one may imagine that this judgment will also be cited in cases where one party is interested in aspects of the decision relating to the freedom of establishment whilst another party wishes to focus on the free movement of capital. While it remains fairly insignificant to conclude which Treaty provisions are applicable in cases involving companies from other Member States, this becomes a crucial factor in cases involving

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[34] See Opinion, at paras. 66–67.

[35] See Judgment at paras. 51–52 and 66.

[36] It seems that the ECJ in the *Idryma Typou* judgment expresses the view that the freedom of establishment and the free movement of capital provisions are incapable of cumulative application.

[37] As submitted above, such a conclusion is incorrect since clearly the domestic situation is not taken into consideration.

companies from non-Member States, since such companies are entitled to rely on the free movement of capital provisions whilst remaining outside the scope of the freedom of establishment provisions. Referring to the *Idryma Typou* case, the tax authorities of the Member States may seek to justify the maintenance of legal provisions concerning the taxation of dividends which are less favourable for non-Member State nationals holding a relatively small percentage (such as 5%) of a company's share capital.

7.5. Justification of restriction – the key role of the proportionality test

Indisputably, where national law provides that a fine may be imposed on a shareholder, this leads to a strong deterrent effect. Bearing in mind the aforementioned critical comments, it must be admitted that both the Advocate General and the ECJ were correct to note that such a national measure restricts the Treaty freedoms.

However, a restriction on the freedom of establishment and the free movement of capital may be deemed acceptable only if certain conditions of EU law are met (taking into account the Treaty provisions and case-law). The ECJ's reasoning has been presented above. Let us remember that it was held that the Greek legislation did not fulfil the necessary criteria.

It should be also recalled that the proportionality of the restrictive legislation providing for shareholder's liability for fines was analysed – admittedly, in a different context – by the referring court. When examining compliance with the Greek Constitution, the Simvoulio tis Epikratias (Council of State) concluded that the legislation in question pursued a legitimate aim and did not constitute a restriction on economic freedom that was manifestly disproportionate to the objectives it pursued, since it clearly cannot be regarded as making it impossible or substantially difficult to conduct business activity in the field of founding and operating private television stations[38]. The objectives justifying a restriction of the Treaty freedoms and the freedom of economic activity under national law were identical (securing compliance by television companies with legislation and journalists' rules of professional conduct, protecting an

[38] See judgment, at para. 18.

individual's honour or private life) and the restricting measure was also identical. Nevertheless, the test transpired to provide varying results.

This demonstrates how application of the proportionality test may often prove difficult and ambiguous[39]. In all likelihood, if the referring Greek court had offered a conclusion as to whether the contested Greek provisions conformed with the Treaty freedoms, it would have concluded that "the end justifies the means". Such a possibility might have influenced the formulation of the ECJ judgment: the ECJ does not simply put forward suggestions for the national court[40] but expresses its opinion on the proportionality of the measure constituting a restriction of the freedom of establishment and the free movement of capital explicitly and unequivocally.

8. Conclusions

In summary, the Greek Court must surely have been surprised by the complex answer provided by the ECJ. It sought advice only insofar as how to interpret the First Directive and not EU primary law. Moreover, as submitted above, the ECJ held that the contested Greek regulation was incompatible with the Treaty freedoms. Consequently, the Greek Court is now faced with a dilemma as to how to make use of this interpretation of EU primary law in a clearly domestic situation such as the *Idryma Typou* case. No doubt, the first paragraph of the ECJ's judgment (interpretation of EU company law) should be approved, but it is submitted that the second paragraph (interpretation of the primary law) is questionable. On the one hand, it remains unclear whether the ECJ judgment will

[39] For more about the principle of proportionality and problems with its application, see F. Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law*, [in:] E. Ellis (ed.), 'The Principle of Proportionality in the Laws of Europe', Hart, Oxford–Portland 1999, at pp. 1–21.

[40] As was the case in several ECJ judgments. Compare for example: Attanasio Group Srl v. Comune di Carbognano, Case no. C-384/08, Judgment of 11.3.2010, E.C.R. 2010, at p. I-2055; Janko Rottmann v. Freistaat Bayern, Case no. C-135/08, Judgment of 2.3.2010, E.C.R. 2010, at p. I-1449; Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v. Gheorghe Jipie, Case no. C-33/07, ECJ Judgment of 10.7.2008, E.C.R. 2008, at p. I-5157.

prove helpful for the Greek Court. On the other hand, the casual approach adopted towards the relationship between the freedom of establishment and the free movement of capital tends to obfuscate this question further, rather than elucidating this tricky legal question.

In any case, the *Idryma Typou* judgment may be viewed as a new element in an already complicated picture concerning the influence of EU law on the mass media[41]. Certain rules, intended for application in the event that legitimate interests are infringed, in particular the right to protect reputation and good name from assertions of incorrect facts in television programmes, are laid down in Directive 2010/13/EU of the European Parliament and of the Council of 10.3.2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)[42]. According to Article 28(1) of the Directive, without prejudice to other provisions adopted by the Member States within their civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.

[41] For other aspects compare for example the following books: C. Mik, *Media masowe w europejskim prawie wspólnotowym* [Mass Media in Europan Community Law], Toruń 1999; I. Katsirea, *Public Broadcasting and European Law. A Comat para.ative Examination of Public Service Obligations in Six Member States*, The Hague 2008.

[42] O.J. 15.4.2010, L-95, at p. 1-24. Directive 2010/13/EU is a codified version of Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 17.10.1989, L-298, at p. 23. The original title of that document was: Council Directive 89/552/EEC of 3.10.1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities).

In the *Idryma Typou* judgment, the ECJ offered its conclusions on Greek national law which provided that all shareholders possessing in excess of 2,5% of the shares in a company which holds a licence to found and operate a television station may be fined jointly and severally responsible in the event that the company infringes the legitimate interests of other persons. Moreover, it follows from this judgment that EU law would be breached not only in the event that legal regulations imposing such a fine on an individual (solely on the basis that he is a shareholder) but also where such provisions led to the administrative, civil or criminal liability of such an individual.