OPINION OF ADVOCATE GENERAL TRSTENJAK
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I — Introduction

1. The present case arises from a reference for a preliminary ruling from the Greek Simvoulio tis Epikratias (Council of State; 'the referring court') pursuant to Article 234 EC, [2] by which the Court is asked for an interpretation of First 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. [3]

2. The reference for a preliminary ruling stems from a dispute between Idrima Tipou

2 — In accordance with the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (OJ 2007 C 306, p. 1), the preliminary ruling procedure is now regulated in Article 267 of the Treaty on the Functioning of the European Union.

3 — OJ, English Special Edition 1968 (I), p. 41.

A.E. ('the applicant in the main proceedings'), a public limited company operating in the press and television sector, and the Ipourgos Tipou Kai Meson Mazikis Enimerosis (Minister for the Press and the Mass Media; 'the defendant in the main proceedings') concerning the lawfulness of a fine which was imposed on the applicant in the main proceedings for infringement of legislation and rules of good conduct governing the operation of television stations and for which the applicant, its shareholders and the members of its board of directors were jointly and severally liable.

3. From a legal point of view, this reference essentially raises two legal questions which are interlinked. First of all, it is asked whether in European Union company law there is a sufficiently definite concept of the legal form of public limited company which, like the legal orders of many Member States, recognises a principle that the liability of a company with share capital is limited to the corporate assets. Secondly, the referring court is seeking to ascertain whether, under circumstances like those of the main action, that principle allows the corporate veil to be pierced. Only if such piercing of the corporate veil is compatible with Community law would it be possible to extend the liability of the public limited company to the shareholders' assets.

II — Legislative framework

A — *Community law*

1. Primary law

4. Article 43 EC states:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.'

5. Article 44 EC provides:

'1. In order to attain freedom of establishment as regards a particular activity, the

Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall act by means of directives.

2. The Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular

…

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 with a view to making such safeguards equivalent throughout the Community; ….'

6. Article 48 EC states:

'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.'

7. Article 56 EC provides:

'1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

2. Secondary law

(a) Directive 68/151/EEC

8. Until it was repealed by Directive 2009/101/EC, [4] which entered into force on 21 October 2009, Directive 68/151, which is applicable *ratione temporis*, provided for the coordination of safeguards under company law in the Member States in the interest of members and third parties.

4 — Directive of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third 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 (OJ 2009 L 258, p. 11).

9. According to the recitals in the preamble to that directive, 'the coordination provided for in Article 54(3)(g) [of the Treaty establishing the European Economic Community] and in the General Programme for the abolition of restrictions on freedom of establishment is a matter of urgency, especially in regard to companies limited by shares or otherwise having limited liability, since the activities of such companies often extend beyond the frontiers of national territories'. The recitals in the preamble to that directive also state that 'in these matters Community provisions must be adopted in respect of such companies simultaneously, since the only safeguards they offer to third parties are their assets'.

10. Article 1 of the directive, as amended by the Act of Accession of Greece, [5] provides:

'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, εταιρία περιωρισμένης ευθύνης, ετερόρρυθμη κατά μετοχές εταιρία [which are companies limited by shares or otherwise having limited liability, and the first of which is rendered in this Opinion as "public limited company"].'

11. Directive 68/151 has three sections. Section I deals with disclosure of company documents, Section II contains provisions concerning the validity of obligations entered into by a company, and Section III regulates the possible nullity of the company.

(b) Directive 89/667/EEC

12. In the recitals in its preamble, 12th Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited liability companies [6] states that 'it is important to provide a legal instrument allowing the limitation of liability of the individual entrepreneur throughout the Community, without prejudice to the laws of the Member States which, in exceptional circumstances, require that entrepreneur to be liable for the obligations of his undertaking'.

B — *National law*

13. Article 5(1) of the Greek Constitution establishes the right of all citizens to freely develop their personality and to participate in social, economic and political life, provided

5 — OJ 1979 L 291, p. 89.

6 — OJ 1989 L 395, p. 40.

that they respect the rights of others, the Constitution and moral standards. Article 5(3) stipulates that personal freedom is inviolate.

14. Article 106(2) of the Constitution stipulates that private economic initiative is not to be permitted to develop at the expense of freedom and human dignity, while Article 15(2) of the Constitution stipulated (in the version prior to the constitutional revision in 2001) that radio and television, under the control of the State, was to ensure the transmission of objective information and safeguard broadcasting standards.

15. Law No 2328/1995 regulates the operating framework of private television. Article 1(9) stipulates that shares in public limited companies which operate television stations must be registered. Under Article 1(10), public limited companies can each hold only one licence to found, establish and operate a television station or hold shares in only one company which holds such a licence. Shares held by a natural or legal person in such companies must not exceed 25 % of the share capital. Shareholders who hold more than 2.5 % and members of the board of directors of companies which apply for or which hold a television station operating licence must not have been convicted of the criminal offences which constitute an impediment to appointment as a civil servant. Shareholders are likewise obliged, in accordance with the provisions of the relevant law, to justify how they acquired their assets. Furthermore, Article 1(11) stipulates that a holding in a company which performs public works or public supply contracts is incompatible with a holding in a company which operates a television station. Article 1(13) provides for mandatory notification to the competent minister of all transfers of shares in such a company in excess of 2.5 % of its share capital. Article 3 of Law No 2328/1995 lays down the rules of good conduct which must be complied with by television stations, while Article 4 provides for the administrative penalties which are imposed in the event of infringement of those rules. Specifically, it is provided, in Article 4(3) of Law No 2328/1995, with regard to these penalties, that fines are imposed jointly and severally, not only on the company which holds the licence to found and operate the television station, its legal representatives and the members of its board of directors, but also on all shareholders with a holding of over 2.5 %.

16. Law No 2190/1920 lays down the general rules governing public limited companies. Under Article 1 of the law, a public limited company is a 'company with share capital and

a legal personality, for the debts of which it alone is liable with its assets'.

III — Facts, main proceedings and question referred for a preliminary ruling

17. On 11 May 2001, the defendant in the main proceedings adopted a decision imposing a fine of GRD 10 000 000 jointly and severally on the public limited company Nea Tileorasi, owner of the television station Star Channel, and on its shareholders and the members of its board of directors. The fine was imposed at 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 February 2000 infringed its obligation to respect the character, honour, reputation, family life and presumption of innocence of two singers and a fashion designer.

18. The applicant in the main proceedings, which is a shareholder in the company Nea Tileorasi, applied to the referring court for the annulment of the ministerial decision imposing the fine and the decision by the National Radio and Television Council on which it was based.

19. As is evident from the order for reference, in these proceedings the referring court considered both the constitutionality and the compatibility with Community law of Article 4(3) of Law No 2328/1995.

20. The referring court examined, first of all, whether a rule under which fines are imposed jointly and severally both on the company and on a certain category of shareholders is consistent with the provisions of the Greek Constitution on economic freedom. Secondly, the referring court examined whether the contested provision falls within the scope of Directive 68/151 and whether it is compatible with Article 1 of that directive. In this regard, the members of the competent formation of the court held differing legal opinions.

21. In its order for reference, the referring court expresses doubts in connection with the interpretation of Directive 68/151. It therefore stayed the proceedings and referred the following question to the Court 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 %?'

IV — Procedure before the Court of Justice

22. The order for reference of 17 October 2008 was lodged at the Registry of the Court of Justice on 26 February 2009.

23. Written observations were submitted by the Government of the Hellenic Republic and the Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

24. At the hearing held on 11 March 2010, oral argument was presented by the agents of the Hellenic Republic and of the Commission.

V — Main arguments of the parties

25. In their written observations, the *Greek Government* and the *Commission* agree that Article 1 of Directive 68/151 does not preclude a national provision such as Article 4(3) of Law No 2328/1995.

26. Both the Greek Government and the Commission take the view that Directive 68/151 does not seek to harmonise the concept or the notion of public limited company, but merely lists the forms of company existing in the Member States to which the provisions of the directive apply.

27. Consequently, the Member States are entitled to create new forms of company or to impose further obligations on the companies listed in Article 1 of Directive 68/151. In this connection the *Commission* refers to Directive 89/667, which recognises in its preamble the need to preserve national provisions which, in exceptional circumstances, require the entrepreneur to be liable for the obligations of his undertaking, in derogation from the legal instrument, also mentioned in that preamble, of limiting the company's liability, which should be provided for the individual entrepreneur throughout the Community. Both the *Greek Government* and the *Commission* conclude that Community law does not guarantee members exemption from liability for the commitments of a public limited company.

28. In the alternative, the *Greek Government* claims that Article 4(3) of Law No 2328/1995 does not elevate joint and several liability of members with a holding of over 2.5% to the status of a general rule. Rather, that provision lays down that fines for infringement of legislation and rules of good conduct governing the operation of television stations are imposed on the company which holds the operating licence for a television station and on the members, since the latter play a particular role in the company's formation and workings.

VI — Legal assessment

A — *Introductory remarks*

1. Legal approximation as an instrument of European company law

29. European Union company law is concerned primarily with the framework conditions governing undertakings of national or European origin in the internal market. [7] The specific formulation of those framework conditions is influenced by the efforts to harmonise the national company law systems in the Member States, on the one hand, and the creation of a supranational system of company law enshrined in European Union law, on the other.

30. There are various reasons for the efforts to approximate the company law rules which exist in the individual Member States. A central link is the principle of freedom of establishment laid down in Article 43 EC, which is also applicable to companies under Article 48 EC, and according to which restrictions on the right of establishment of nationals of one Member State in other Member States must be removed. [8] Specifically in the case of companies, however, they can and will in fact exercise their right of establishment only if there is a harmonised legal environment. A further impetus for legal harmonisation is the realisation that decisions on location should be taken in the interest of the European Union economy as a whole, on the basis of rational economic factors, and not according to where the environment is most favourable for undertakings from the point of view of com-

7 — See Behrens, P., 'Gesellschaftsrecht', *Handbuch des EU-Wirtschaftsrechts* (ed. Manfred A. Dauses), E. III, Section 3, p. 3.

8 — See Rondinelli, M., 'Il proceso di armonizzazione del diritto societario europeo', *Percorsi di diritto societario europeo*, Turin, 2000, p. 38, who points out the close connection between the harmonisation of European Union company law and freedom of establishment. See also Grünwald, A., *Europäisches Gesellschaftsrecht*, Vienna, 1999, p. 12, and Mustaki, G. and Engammare, V., *Droit européen des sociétés*, Basle, 2009, p. 105.

pany law. [9] Furthermore, the approximation of national legal orders is intended to ensure that competitive conditions are as equal as possible for undertakings in the European Union. Lastly, the existence of comparable legal environments helps to ensure that cross-border investments by undertakings and members are made for the benefit of economic and social development in the European Union.

2. Regulatory object of Directive 68/151

31. Directive 68/151, which was adopted on 9 March 1968, 10 years after the entry into force of the Treaties of Rome, was not only the first directive in the field of company law; it was the very first approximation measure in the field of civil law. [10] Founded on the legal basis of Article 54(3)(g) of the EEC Treaty (Article 44(2)(g) EC), [11] it is intended to protect third parties, in particular the company's contracting partners. They are intended to be able not only to obtain the necessary information on the company, but also to rely on the effectiveness of manifestations of intent made on behalf of the company and on the continued existence of the registered company. [12] According to the fourth and sixth recitals in its preamble, the directive is thus aimed at the coordination of national provisions concerning disclosure of basic information on the company, the validity of obligations entered into on behalf of the company, and the nullity of the company. Such rules for the protection of legal relations were known in the legal orders of all the founding States. However, they were far from equivalent. Against the background of the increasing development of cross-border activities of companies, the Member States therefore considered it urgent that national rules should be approximated in order to provide equivalent protection of legal relations in general, and of creditors in particular, throughout the Community.

32. The directive's adoption was preceded by many years of negotiations within the European Economic Community, which at the time still consisted of the six founding States. When the other Member States acceded, including Greece in 1981, they incorporated Directive 68/151 as part of the *acquis communautaire*. Under the respective acts of accession, the provisions of the directive, in particular Article 1 on the companies concerned, were adapted in line with the enlargement of the group of Member States. That provision of the directive, an interpretation of which the referring court requests from

9 — In the view of Rondinelli, M., loc. cit. (footnote 8), p. 38, the approximation of the laws should prevent decisions on location and capital movements from being taken not on the basis of economic factors, but according to where there is the most favourable environment from the point of view of company law.

10 — See Habersack, M., *Europäisches Gesellschaftsrecht*, 3rd edition, Munich, 2006, Section 5, paragraph 1, p. 82.

11 — Corresponds to Article 50(2) of the Treaty on the Functioning of the European Union.

12 — See Hempel, K., in *Kommentar zu EU- und EG-Vertrag* (ed. Heinz Mayer), Article 44, paragraph 19, p. 19; Rondinelli, M., loc. cit. (footnote 8), p. 42.

the Court in its question, defines the scope *ratione personae* of the directive, listing the forms of company to which it applies in each individual Member State. They are without exception companies with share capital, [13] namely companies incorporated with limited liability, which, despite individual differences in the organisation of their respective company form, are characterised in the company law of the Member States by certain common features.

B — *The question referred for a preliminary ruling*

33. One of those common features is the principle, which is relevant in the present case, that liability of a company with share capital for company debts is limited to the corporate assets. The capacity as a debtor and the accompanying liability of a company with stock capital vis-à-vis creditors in respect of the company's debts are based on the fact that it is granted legal capacity under national law. This autonomous legal capacity enjoyed by the company means that the liabilities entered into on behalf of the company are not at the same time debts held by the shareholders. As a palliative for the limitation of liability to the assets of the legal person, a public limited company and a limited liability company must, for example, have a capital base to the subscription and maintenance of which the legal order must pay strict regard for reasons of creditor protection. Despite the fundamental separation of corporate and shareholders' assets in the case of companies with share capital, case-law and legislation in the Member States exceptionally permit personal liability of shareholders in respect of company debts in special circumstances. [14]

34. So far as I can see, aside from individual differences, this principle is recognised in

13 — The system of European company law as a field of law in which there is at least a Community law component covers largely only companies with share capital (see Behrens, P., loc. cit. (footnote 7), paragraph 15, p. 8). Freedom of establishment (Articles 43 EC and 48 EC) and Article 44(2)(g) EC, as the primary rule governing competence in European Union company law, apply to all profit-making companies, even those governed by public law. However, aside from the fundamental freedoms, the regulatory content of European company law for commercial partnerships amounts to nothing more than one legal act: the statute for the European Economic Interest Grouping (see Grundmann, S., *Europäisches Gesellschaftsrecht*, Heidelberg, Section 1, paragraph 12, p. 6). The reason for the legislative emphasis on public limited companies may be that because of its structure this type of company is to be regarded as the optimal form for undertakings operating throughout the Community (see Grünwald, A., loc. cit. (footnote 8), p. 13).

14 — See, with regard to the principle of separation of corporate and shareholders' assets, Kraft, A. and Kreutz, P., *Gesellschaftsrecht*, 10th edition, Berlin, 1997, p. 50 et seq., or, with regard to the separation of corporate and shareholder liability in the case of companies with share capital, Kocbek, M., *Zakon o gospodarskih družbah (ZGD) s komentarjem*, 2nd edition, GV Založba, 2002, Vol. I, p. 127.

all the Member States.[15] Furthermore, the principle was incorporated into Regulation No 2157/2001,[16] on the basis of which the supranational form of the European public limited liability company (Societas Europaea, SE)[17] was created. The question whether and to what extent Community law exceptionally permits liability to be extended to the members' assets in the light of the circumstances of the main action must be determined by way of an interpretation of the relevant provisions of Directive 68/151, with reference to its wording, its schematic context and its spirit and purpose, and having regard to the level of harmonisation which exists at present in the field of European Union company law.

35. In answering the question referred, however, it must be examined, first of all, whether

15 — The national legal orders prescribe a limitation of liability for companies with share capital, although the formulations differ. In some cases creditors may claim only corporate assets in respect of the company's liabilities; other legal orders provide that the members are liable only for a certain contribution or that they are not personally liable. The idea always is that the members are not liable vis-à-vis the company's creditors, that is to say externally (see Schwarz, G.C., *Europäisches Gesellschaftsrecht*, 1st edition, Baden-Baden, 2000, Section 289, p. 187). Germany: Paragraph 1(1) of the Aktiengesetz (Law on public limited companies, AktG) and Paragraph 13(2) of the Gesetz betreffend die Gesellschaften mit beschränkter Haftung (Law on limited liability companies, GmbHG) provide that only the company with its assets is liable in respect of the company's liabilities vis-à-vis its creditors. France: Article L. 223-1(1) of the Code de commerce (Commercial Code) provides that the limited liability company (*société à responsabilité limitée*) is formed by one or more persons who are liable only for losses up to the amount of their shares. Article L. 225-1 of the Code de commerce expressly stipulates that the members of a public limited company (*société anonyme*) are liable only for losses up to the amount of their shares. Austria: Paragraph 48 of the Bundesgesetz über Aktiengesellschaften (Federal Law on public limited companies, AktG) and Paragraph 61(2) of the Gesetz über Gesellschaften mit beschränkter Haftung (Law on limited liability companies, GmbHG) provide that only the company with its assets is liable in respect of the company's liabilities vis-à-vis its creditors. Slovenia: under Article 7(2) of the Zakon o gospodarskih družbah (Commercial Companies Code, ZGD-1), the law defines when and how the members are liable alongside the company. Under Article 168(2) of the ZGD-1, a company with share capital is liable for its obligations vis-à-vis creditors with its entire assets. Under Article 168(3) of the ZGD-1, the shareholders are not liable vis-à-vis creditors for the company's obligations. Similarly, under Article 472 the members are not liable for the obligations of a limited liability company (see Kocbek, M., loc. cit. (footnote 14), Vol. I, pp. 122, 530, and Vol. II, p. 336). United Kingdom: companies with share capital, such as the public company limited by shares and the private company limited by shares, are regulated in the Companies Act 2006. The former is comparable to the German *Aktiengesellschaft*, whilst the latter is comparable to the German *Gesellschaft mit beschränkter Haftung* (see Just, C., *Die englische Limited in der Praxis*, Munich, 2005, p. 4). Article 1(1) of the Companies Act provides that a company is a limited company if the liability of its members is limited by its constitution and that the liability may be limited by shares or limited by guarantee. Spain: Article 1 of Law 2/1995 of 23 March 1995 on limited liability companies (Ley de Sociedades de Responsabilidad Limitada) states that the company's capital is composed of shares, consisting of the members' holdings, and that the members are not liable for the company's obligations. The same provision is made in Article 1 of Law 1564/1989 on public companies (Ley de Sociedades Anónimas).

16 — Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (OJ 2001 L 294, p. 1).

17 — Under Article 1 of Regulation No 2157/2001, the European public limited liability company has autonomous legal personality. As a legal person, the company (and not the totality of its members) has rights and obligations vis-à-vis third parties. Under the second sentence of Article 1(2) of the regulation, the liability of each individual shareholder, that is to say, member, is limited to the nominal amount of the shares he has subscribed. It is not evident from the provisions whether liability in relation to capital contributions is only internal or whether creditors of the European public limited liability company can also take direct action against shareholders. The fact that the company is a legal person does not automatically preclude external liability. However, because a legal person has rights and obligations itself, a special provision is required in principle to establish the external liability of its members. The creditors have a legal relationship only with the company, and not with the members. As Schröder, A., *Europäische Aktiengesellschaft SE* (eds Gerhard Manz, Barbara Mayer and Albert Schröder), Baden-Baden, 2005, Article 1 of the SE Regulation, paragraphs 25 to 29, p. 49 et seq., rightly explains, there is no basis for general external liability of the company's shareholders vis-à-vis the company's creditors. In the view of the writer, the second sentence of Article 1(2) of the regulation does not create such a basis, but limits the shareholder's obligation to contribute his capital to a certain amount without defining whether the obligation applies only internally or also externally. He states that only in exceptional cases can the principle of separation between the company and its members be breached and action be taken against the members, where the interests of creditors cannot be satisfied in some other way.

the contested national provision falls within the scope of Directive 68/151 and, in a next step, whether it is compatible with the requirements laid down by the directive.

1. Secondary law as a criterion for examination

(a) Applicability of Directive 68/151

(i) Existence of a public limited company within the meaning of Article 1 of Directive 68/151

36. Article 1 of Directive 68/151 defines the traditional group of companies with share capital, including the public limited company, which is the form taken by the applicant in the main proceedings in accordance with the relevant Greek provisions. Consequently, on account of this formal link to a specific form of company, the directive applies *ratione personae* at least.

37. It must also be examined whether Directive 68/151 applies *ratione materiae*. For that, the principle of limitation of liability in respect of the obligations of a company with share capital would have to have some sort of recognition.

(ii) Recognition of limitation of liability

38. Company law has been the subject of a variety of provisions of European Union law which reveal an essentially complete overall scheme. [18] Under that scheme, the company with share capital is legally autonomous and has a minimum capital broken down into shares. Shareholders are exempted from liability for the company's debts; the subscription and maintenance of the company's capital are ensured by appropriate rules. The company's organisational structure is characterised by the separation of management and the general shareholders' meeting and at management level by the separation of business management and supervision. This holds irrespective of whether provision is made at management level for two separate bodies (dualistic system) or a single body (monistic system); European Union company law offers the choice between both models. In principle, shares are freely transferable and negotiable; shareholders have the same rights (in particular voting rights and dividend entitlements) and duties (capital contribution). There are detailed rules on financial reporting; accounting records are subject to final audit and disclosure. Rules governing groupings of companies are intended to address

18 — This is also the view taken by Behrens, P., loc. cit. (footnote 7), paragraph 15, p. 8, who refers to numerous characteristics distinguishing European Union law on public limited companies.

the particular issue of associated companies. However, this overall conception of company law is disputed among the Member States on important points, such as the structure of the management body, with the result that approximation measures in that regard have not yet been implemented.

39. As regards the relevant aspect of limitation of liability, it should be stated that Directive 68/151 evidently recognises it as a principle of the law governing companies with share capital. [19] Thus, the third recital in the preamble to that directive yields the legislature's statement that in relation to the companies listed in Article 1 'the only safeguards they offer to third parties are their assets'. Furthermore, Article 7 of that directive contains a rule providing for joint and several liability for the company's obligations arising from actions carried out in the name of the company before it has acquired legal personality. This also indicates the recognition of the abovementioned principle of separation between corporate assets and shareholders'assets. Similar wording to the third recital in the preamble to that directive can also be found, with reference to the rules laid down therein, in Directive 78/660, [20] according to which'simultaneous coordination is necessary in these fields for these forms of company because... they offer no safeguards to third parties beyond the amounts of their net assets'. Furthermore, Directive 89/667, which was mentioned by the referring court and by the parties, also clearly proceeds on the basis of the existence of a similar principle, the limitation of liability being described as a necessary'legal instrument'for a 'single-member company'. [21]

40. I therefore conclude that in adopting the directive in question the Community legislature did not expressly provide for the limitation of liability, but clearly proceeded on the basis of such a principle in the national company law systems and relevant unwritten Community law. [22] This certainly does not say anything about the precise normative

19 — See, in this connection, Schwarz, G.C., loc. cit. (footnote 15), paragraph 289, p. 187, according to whom the limitation of liability to corporate assets is regarded in legal literature as a characteristic of the companies covered by Directive 68/151.

20 — Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11).

21 — The single-member company is a company with share capital where all the shares are held by one natural or legal person. In practice, it is therefore a sole trader (individual undertaking), who participates in legal relations through his company with limited liability, but whose liability is limited to the amount of his contributions.

22 — See also Grundmann, S., loc. cit. (footnote 13), Section 9, paragraph 286, p. 127.

content. I will consider this in examining the compatibility of the contested national provision with Directive 68/151.

(iii) Liability for the obligations of a company with share capital

41. Whilst Directive 68/151 recognises a limitation of liability to the company's assets, it is expressly only for 'obligations' entered into by the company, as is clear from the second recital. This raises the question whether this notion also covers fines imposed by the State.

42. The Court has consistently held [23] that the need for uniform application of Community law and the principle of equality require that, where provisions of Community law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, they must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question. However, if the Community legislature makes an implied reference to the national usage in a Community act, it is not for the Court to give a uniform Community definition of the term used. [24]

43. However, the directive does not contain a legal definition of this vague legal notion, nor can any guidance for interpretation be inferred. In this connection, it should be pointed out that European Union company law does not seek to make the Member States' rules on companies fully uniform, but has thus far simply regulated individual aspects of company law by way of approximation of laws using the regulatory technique of the directive, [25] which also explains the use of the expressions 'coordinating' and 'making equivalent' in Article 44(2)(g) EC. This implies a lower degree of harmonisation. It distinguishes the directives based on Article 44(2)(g) EC from the legal

23 — See, inter alia, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26; Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 23; Case C-55/02 *Commission* v *Portugal* [2004] ECR I-9387, paragraph 45; Case C-188/03 *Junk* [2005] ECR I-885, paragraphs 27 to 30; and Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 31.

24 — See *Ekro*, cited above in footnote 23, paragraph 14.

25 — In the view of Jung, P. and Müller-Huschke, W., *EU-Kommentar* (ed. Jürgen Schwarze), 2nd edition, Baden-Baden, 2009, Article 44 EC, paragraph 14, it follows from the wording of Article 44(2)(g) EC ('coordinating', 'making equivalent') and its schematic connection with the rule on competence laid down in Article 44(1) EC, which is restricted to the adoption of directives, that the aim is not to make the law uniform, but only to approximate it. See also Hempel, K., loc. cit. (footnote 12), Article 44, paragraph 13, p. 17. Prats Jané, S., *Evolución del Derecho societario europeo*, Badajoz, 2007, p. 13, emphasises the fundamental difference between approximation of laws and unification of the law. Mustaki, G. and Engammare, V., loc. cit. (footnote 8), p. 105, point out that the EC Treaty lays down only a duty to coordinate the law, not to make it uniform, which allows the Member States to maintain national features in company law.

acts in the field of European Union company law, which were adopted, for example, on the basis of Article 95 EC. The notion of 'approximation of laws' used in Article 95 EC should not be construed technically, since it covers both approximation in the narrower sense and unification of laws. [26] Aside from this, Article 95 EC permits not only directives to be issued, but also regulations and decisions to be adopted, as the other binding measures within the meaning of Article 249 EC.

44. Furthermore, laws are approximated, as is expressly clear from the legal basis of Article 44(2)(g) EC, only *to the necessary extent*. This wording shows that the principle of subsidiarity was already enshrined here before formal provision was made in the second paragraph of Article 5 EC. [27] European Union 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 European Union level. On the basis of the wording and the schematic position of Article 44(2)(g) EC, 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. There is nothing in the directive, however, to indicate that the legislature considered that it was necessary to lay down European Union-wide rules in this field.

45. The absence of a substantive definition of the notion of a company's obligations therefore indicates that the legislature clearly did not intend to harmonise that notion, but instead wished to leave scope for a more precise legal formulation in national law. Since the legislature did not exercise its regulatory competence in this field, but referred implicitly to the Member States' law, the Court is prevented from giving that notion a uniform definition under Community law.

46. It is therefore for the national court to determine, on the basis of its national law, whether fines imposed by the State may be regarded as obligations of a public limited company. According to the order for reference, this question is answered in the negative by the majority of the members of the referring court. However, a minority of the members of the referring court answer it in the affirmative, with reference to the economic freedom protected under the Greek Constitution and to the principles recognised in that Member State's company law.

26 — See also Schwarz, G.C., loc. cit. (footnote 15), paragraph 201, p. 129.

27 — In legal literature, the view is taken that the exercise of this coordination competence is subject to proportionality within the meaning of the third paragraph of Article 5 EC. Some writers are of the opinion that the requirement of necessity in Article 44(2)(g) EC is fleshed out in the principle of subsidiarity (see Behrens, P., loc. cit. (footnote 7), paragraph 6a, p. 4). On the other hand, Schwarz, G.C., loc. cit. (footnote 15), paragraph 198, p. 128, sees it as an early expression of the principle of subsidiarity.

47. If the referring court should conclude that fines cannot be regarded as obligations of a public limited company on the basis of national law, it would have to be assumed in the present case that the contested national provision does not fall within the scope of Directive 68/151. The question of compatibility would accordingly have to be answered to the effect that, in such a case, Directive 68/151 does not preclude a provision such as Article 4(3) of Law No 2328/1995.

(iv) Scope of the liability of a public limited company

49. Since Directive 68/151 also does not make any provision for a restriction of its scope *ratione materiae* by reference to certain categories of company obligations, but covers the form of public limited company in general, a provision such as Article 4(3) of Law No 2328/1995 also falls within the scope of Directive 68/151.

48. In view of the fact that no uniform opinion on this legal question has been reached within the Greek legal order, and in the light of the need to give the referring court a helpful answer to its question, [28] it is necessary, in the alternative, also to examine below the legal position in the event that fines are to be classified as company obligations which trigger the liability of the public limited company and, where applicable, where the corporate veil is pierced, exceptionally also of the shareholders.

(b) Compatibility with Directive 68/151

50. By its question, the referring court is seeking to ascertain whether Article 1 of Directive 68/151 prohibits a national provision such as Article 4(3) of Law No 2328/1995. This inevitably raises the question of the compatibility of such a provision with Community law, in which connection it must be recalled that it is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of national law with Community law or to interpret national law. The Court is, however, competent to give the national court full guidance on the interpretation of Community law in order to enable it

28 — In Case 244/78 *Union laitière normande* [1979] ECR 2663, paragraph 5, the Court stated that whilst Article 234 EC does not permit the Court to evaluate the grounds for making the reference, the need to afford a helpful interpretation of Community law may make it essential to define the legal context in which the interpretation requested should be placed. In the view of Lenaerts, K., Arts, A. and Maselis, I., *Procedural Law of the European Union*, 2nd edition, p. 188, Section 6-021, there is nothing to prevent the Court setting out its understanding of the facts in the main proceedings and of certain aspects of national law as the basis for a helpful interpretation of the applicable Community legislation and principles of Community law.

to determine the issue of compatibility for the purposes of the case before it. [29]

51. It is therefore appropriate for the Court, in the present case, to restrict its analysis, providing an interpretation of Community law which will be of use to the referring court, which will have the task of determining the compatibility of the provisions of national law concerned with Community law, for the purposes of deciding the dispute before it. [30]

52. Article 1 of Directive 68/151 would preclude a national provision such as Article 4(3) of Law No 2328/1995 only if it contained an exhaustive provision governing limitation of liability for a public limited company which would rule out liability being extended to members in the circumstances of the main action.

53. As has already been stated, it is possible to see in Directive 68/151 a recognition of the principle of separation between corporate assets and shareholders' assets, [31] but that does not automatically imply exhaustive provision in that field. As the Commission has rightly stated, Directive 68/151 does not, for example, seek to harmonise the form of the public limited company as such, as it is known in the Member States' legal orders. As has already been explained, [32] its legal basis in Article 44(2)(g) EC serves to approximate laws, but not to make them uniform. That provision also cannot be invoked as the basis for the creation of supranational forms of company. Directives adopted on the basis of that Treaty provision do not seek to regulate company law comprehensively. They do not create uniform law, but only harmonise individual areas, and leave the Member States scope by means of the regulatory technique of directives. The aim of the directives is to introduce substantively equivalent safeguards for members and creditors in the European Union. [33]

54. It is correct that Article 1 of Directive 68/151 simply lays down for each individual Member State the forms of company to which the disclosure duties laid down in Directive 68/151 are intended to apply. That provision neither defines certain forms of company nor refers to specific characteristics. Instead, a simple list is used to refer to the forms of company which already exist in the Member

29 — See, inter alia, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8; Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 24; Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraphs 49 and 50; and Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraph 51.

30 — See, inter alia, *Michaniki*, cited above in footnote 29, paragraph 52.

31 — See point 39 of this Opinion.

32 — See point 43 of this Opinion.

33 — See Hempel, K., loc. cit. (footnote 12), Article 44, paragraph 13, p. 17.

States' legal orders. [34] The Member States cannot therefore be prevented from imposing additional duties on the types of company listed, provided they are not contrary to the directive or other provisions of Community law.

55. For example, it is not possible to cite any single provision of a directive which instructs the Member State to prescribe in their national company law that the liability of a public limited company is to be limited to the corporate assets, even though many national legal orders lay down such provisions. [35] Rather, the opposite appears to be the case, especially since in its fifth recital Directive 89/667 cites the principle of limitation of liability as a necessary 'legal instrument' of a single-member company, but at the same time this is without prejudice to the laws of the Member States 'which, in exceptional circumstances, require that entrepreneur to be liable for the obligations of his undertaking'. This suggests that piercing the corporate veil is perfectly lawful under Community law. However, the Community legislature does not regulate this itself. As is shown by Directive 89/667, however, the Community legislature does permit it, [36] explicitly for some clearly defined categories (for example, Article 2(2) of Directive 89/667) and less explicitly and as open, general clauses for others (fifth recital: 'in exceptional circumstances'). Whilst, according to the sixth recital in the preamble, Article 2(2) of Directive 89/667 is to be regarded as definitive, extending liability to shareholders on the basis of 'exceptional circumstances' within the meaning of the fifth recital must be justified by the circumstances of the individual case.

56. With regard to the cited provisions, however, it should be borne in mind that they apply solely to single-member companies. On the other hand, there is no comparable provision in Directive 68/151, which is applicable in the present case. Nor can any exceptions

34 — See also Grünwald, A., loc. cit. (footnote 8), p. 13, who points out that the European Union's directives in the field of company law relate only to the formal criterion of legal form. In view of this fact and in the light of the different distribution of public limited companies, there is in fact a very different level of harmonisation in the Member States. Schwarz, G.C., loc. cit. (footnote 15), paragraph 282, p. 182, states that the European Union's directives in the field of company law do not cover all companies which also enjoy freedom of establishment. Rather, the scope of the directives covers only certain, specifically listed forms of company in the individual Member States. Preference is, he states, therefore given to the regulatory technique of enumeration, rather than general notions requiring interpretation. In Article 1 of the relevant directive or proposal for a directive, mention is made of the legal forms of company for which the coordination measures are intended to apply.

35 — See Werlauff, E., *EU-Company Law*, 2nd edition, Copenhagen, 2003, p. 40. The author states, first of all, that the provisions of the directives in the field of company law do not require the Member States, as an essential element of their definition of public limited company, to stipulate that the company's liability is limited to the corporate assets, even though such provisions do exist in many national legal orders. Secondly, the author points out that the existing provisions of the directives will not prevent the Member States from retaining, either by operation of law or through case-law, provisions which in certain cases impose on members direct liability for company debts in accordance with the principle of piercing the corporate veil (German: 'Haftungsdurchgriff'; Danish: 'ansvarsgenombrott').

36 — See also Grundmann, S., loc. cit. (footnote 13), Section 9, paragraph 288, p. 128.

be found which permit the corporate veil to be pierced on the grounds cited by the Greek Government. According to the Greek Government, the contested national provision is justified on grounds in the public and social interest. The penalty, which was conceived as a restriction on the economic activity of the members, is justified given that the members, through their participation in the general shareholders' meeting and in appointing the management bodies, are in a position to ensure that legislation and rules of good conduct governing the operation of television stations are observed. [37]

57. In the absence of express provision in Directive 68/151, for the abovementioned reasons the power to prescribe the exceptional extension of liability to shareholders of public limited companies falls within the competence of the national legislature. [38] In the absence of harmonisation, 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.

58. In the light of the foregoing, the answer to the question referred must be 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 %.

2. Compatibility with primary law

(a) Permissibility of reliance on primary law

59. As has already been intimated, the fundamental power of the national legislature to impose additional duties on the types of company listed in Article 1 of Directive 68/151 is restricted by the further requirements of

37 — See paragraphs 9 and 10 of the written observations submitted by the Greek Government.

38 — See Case C-104/96 *Coöperatieve Rabobank* [1997] ECR I-7219, paragraphs 22 to 24, in which the Court recognised the regulatory competence of the national legislature in the absence of express provision in Directive 68/151. That case concerned the question whether national law may also lay down restrictions on the power to represent the organs for individual cases where a third party was not positively aware of an infringement. The Court answered that question in the affirmative on the ground that the Community legislature did not intend to regulate such cases (of conflicts of interest and self-dealing) and there was a loophole. The loophole had to be closed by national law.

Community law, [39] including the provisions of primary law on freedom of establishment. [40] First of all, the abovementioned directives are specifically intended to help to attain that fundamental freedom, as is expressly stated in Article 44(1) EC. Secondly, in *Daihatsu*, [41] which concerned the interpretation of Directive 68/151, the Court made clear that Article 44(2)(g) EC must be read in the light of the other provisions of primary law. [42]

60. Although a request for an interpretation of those provisions is not explicitly apparent in the question referred for a preliminary ruling, the referring court nevertheless refers to them in places in its order for reference, [43] which suggests that it is aware of the relevance of those provisions to the decision in the main proceedings. Furthermore, in its written observations the Commission briefly commented on the question of the compatibility of the contested national provision with Articles 43 EC and 48 EC.

61. It is for the Court to provide the national court with all the guidance on points of interpretation of Community 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. [44] In view of the effects which a preliminary ruling will have on Greece's legal order, it would seem essential to consider the abovementioned provisions in the context of an examination of the present case.

(b) Freedom of establishment

(i) Applicability of Articles 43 EC and 48 EC

62. Under the second paragraph of Article 43 EC, freedom of establishment includes the right to take up and pursue activities as

39 — See point 54 of this Opinion.

40 — See Grundmann, S., loc. cit. (footnote 13), Section 9, paragraph 311, p. 136, who apparently adopts this approach. The author considers whether the Member States have the power to define exceptions to the principle of limitation of the liability of companies with share capital. The author takes the view that it would also be conceivable to argue that there is no power to prohibit the national legislature from extending liability further and the directive should be interpreted in that manner (in conformity with primary law). The author would appear to propose an examination having regard to the rules of primary law on freedom of establishment. Habersack, M., loc. cit. (footnote 10), Section 1, paragraph 3, p. 1, points out that the fundamental freedoms impose limits on the national legislature's organisational freedom irrespective of the creation of secondary law.

41 — Case C-97/96 [1997] ECR I-6843

42 — Ibid., paragraph 18. The Court stated: 'It must be pointed out that Article 54(3)(g) must be read in the light not only of Articles 52 and 54 of the EC Treaty, which clearly show that the coordination of systems of company law forms part of the general programme for the abolition of restrictions on freedom of establishment, but also of Article 3(h) of that Treaty, which provides that the activities of the Community are to include the approximation of national laws to the extent required for the functioning of the common market.'

43 — See pages 5 and 7 of the order for reference.

44 — See Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8; Case C-315/92 *Verband Sozialer Wettbewerb* [1994] ECR I-317 ('*Clinique*'), paragraph 7; Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, paragraph 16; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 38; and Case C-215/03 *Oulane* [2005] ECR I-1215, paragraph 47.

self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48 EC, under the conditions laid down for its own nationals by the law of the country where such establishment is effected. It is therefore first and foremost traders who fall within the scope *ratione personae* of this fundamental freedom.

63. In addition, according to settled case-law, national provisions which apply to holdings by nationals of a Member State in the capital of a company established in another Member State, giving them definite influence on the company's decisions and allowing them to determine its activities, come within the substantive scope of the provisions of the EC Treaty on freedom of establishment. [45] In principle, the first paragraph of Article 43 EC therefore also protects the members of a public limited company, provided they hold a suitably influential position in that company. [46]

64. This condition is in turn crucial for making a delimitation vis-à-vis free movement of capital. If a holding is not sufficient to exert a definite influence on a company's decisions, the relevant fundamental freedom is not freedom of establishment, but free movement of capital. [47]

65. The Court has not defined in general when precisely there is a definite influence falling within the scope of freedom of establishment and, according to its case-law, this is determined on the basis of the factual

45 — See, inter alia, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 37; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 31; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 27; Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraph 13; Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 29; the judgment of 17 July 2008 in Case C-207/07 *Commission* v *Spain*, paragraph 60; Case C-282/07 *Truck Center* [2008] ECR I-10767, paragraph 25; Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I-5145, paragraph 34; and Case C-311/08 *SGI* [2010] ECR I-487, paragraph 27. Order in Joined Cases C-439/07 and C-499/07 *KBC Bank and Others* [2009] ECR I-4409, paragraph 70.

46 — See, for example, *Baars*, cited above in footnote 45, paragraph 22. The case concerned a national of a Member State who resided in that State and owned all the shares in a company having its seat in another Member State. The Court held that a 100 % holding in the capital of a company having its seat in another Member State undoubtedly brings such a taxpayer within the scope of application of the Treaty provisions on the right of establishment.

47 — See Randelzhofer and Forsthoff, *Das Recht der Europäischen Union* (eds Grabitz and Hilf), Article 43, paragraph 115, p. 31, and Ress and Ukrow, Article 56, paragraph 156, p. 68. See also the Opinion of Advocate General Alber in Case C-251/98 *Baars* [2000] ECR I-2787, point 33, in which the Advocate General explained that the border between the simple investment of capital in shares in an undertaking established in another Member State and actual establishment in that Member State should probably be set at the point where a shareholder ceases to confine himself to the mere provision of capital in support of a particular business activity carried on by another person, and begins to become involved himself in conducting the business. Such involvement requires the shareholder to go beyond simply exercising his voting rights, and to participate in a way which will enable him to exercise real influence over the company's business decisions. In determining whether such is the case, regard should be had to the rules of company law in the State in which the undertaking is established. See, most recently, *SGI*, cited above in footnote 45, paragraphs 36 and 37, and *Aberdeen Property Fininvest Alpha*, cited above in footnote 45, paragraphs 34 and 35.

circumstances and the relevant company law. [48] The judgment in *Baars*, [49] to which this settled case-law dates back, would in any event appear to suggest that this is the case where, according to the facts of the case, there is a possibility of 'control or management of the company', which is not necessarily the case where there is a substantial holding.

66. It is in principle for the referring court to find, [50] on the basis of the specific circumstances of the main action and the relevant company law, whether a 2.5% share of the company's capital is actually sufficient to exercise definite influence on the company's decisions and to determine its activities. At this point, there must be certain doubts as to whether that condition is met. On the other hand, it should be borne in mind that that percentage represents only a minimum threshold. The contested national provision thus also covers much larger shares in the company's capital which would be capable, in theory, of giving the members in question definite influence on the company's decisions and allowing them to determine its activities within the meaning of the Court's case-law.

67. It is in any case clear from the order for reference [51] that the majority of the members of the referring court take the view that, because of the 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. Assuming that those statements are correct, it must be presumed that the members of the company in question are also protected by the freedom of establishment.

48 — See Randelzhofer and Forsthoff, loc. cit. (footnote 47), Article 43, paragraph 115, p. 31, and Ress and Ukrow, Article 56, paragraph 156, p. 68. The latter point out that, according to the Court's case-law, an interest of less than 25% may possibly be sufficient for a determinative influence if the owner of the shares in some other way obtains a dominant influence in the holding company in which he is involved with other shareholders. They state, however, that the Court has held that a holding of only 10% of the voting rights is not sufficient as a rule to give them definite influence on the company's decisions and allow them to determine its activities.

49 — Cited above in footnote 45, paragraph 19.

50 — See *X and Y*, cited above in footnote 45, paragraph 37; *Commission* v *Germany*, cited above in footnote 45, paragraph 14; *Commission* v *Spain*, cited above in footnote 45, paragraphs 35 to 39 and 61; and Case C-326/07 *Commission* v *Italy* [2009] ECR I-2291, paragraphs 38 and 39.

51 — See page 4 of the order for reference.

68. Article 48 EC in turn establishes the applicability of the chapter on the right of establishment to companies and associations governed by private and public law, treating them under certain conditions in the same way as natural persons. [52]

(ii) Restriction of freedom of establishment

69. Because there is nothing to suggest that the contested provision is applied any differently to domestic and foreign public limited companies, it must be assumed hereinafter that that provision is not discriminatory.

— Article 43 EC as a comprehensive prohibition on restrictions

70. It must therefore be further examined whether it constitutes a restriction on freedom of establishment within the meaning of Article 43 EC and whether such a restriction can possibly be justified. According to settled case-law, [53] Article 43 EC precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of the freedom of establishment that is guaranteed by the Treaty.

71. In accordance with this case-law, Article 43 EC contains not only a prohibition of open and covert discrimination, but can also be construed as a comprehensive prohibition on restrictions. Restrictions within the meaning of Article 43 EC are therefore not only discriminatory, but possibly also non-discriminatory rules, that is to say, measures which do not as a rule place foreign nationals at a

52 — See Troberg and Tiedje, in *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (eds Hans von der Groeben and Jürgen Schwarze), Article 48, paragraph 1, p. 1596.

53 — See, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 34; Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 26; Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 26; Case C-299/02 *Commission* v *Netherlands* [2004] ECR I-9761, paragraph 15; Case C-167/01 *Inspire* [2003] ECR I-10155, paragraph 133; Case C-140/03 *Commission* v *Greece* [2005] ECR I-3177, paragraph 27; and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 33.
Article 43 EC is substantively identical to Article 31 of the EEA Agreement, for the interpretation of which the EFTA Court has jurisdiction (in relation to the EFTA/EEA States). In accordance with the requirement of uniform case-law within the European Economic Area, the EFTA Court has applied the abovementioned case-law of the Court of Justice to that provision of the agreement. See, inter alia, Case E-2/06 *ESA* v *Norway* [2007] EFTA Court Report 163, paragraph 64, and Case E-7/07 *Seabrokers* v *Norway* [2008] EFTA Court Report 171, paragraph 50. With regard to the requirement of uniformity and the need for dialogue between the Court of Justice and the EFTA Court, see Baudenbacher, C., 'The EFTA Court, the ECJ, and the latter's Advocates General: a tale of judicial dialogue', *Continuity and change in EU law: essays in honour of Sir Francis Jacobs*, 2008, p. 120 et seq.

disadvantage intentionally or in their actual effect. [54] Article 43 EC essentially precludes any national rule which is liable to hinder or 'render less attractive' the exercise of freedom of establishment. [55] Through its case-law on free movement of goods and freedom to provide services, the Court has set in motion the development of the fundamental freedoms from a prohibition on discrimination commensurate with the notion of the 'structural identity of the fundamental freedoms' to a general prohibition on restrictions. [56]

72. In my opinion, the starting point for examining the restrictive character of the contested provision must be the hypothetical scenario where a company established in the European Union either moves its registered office to Greece (primary freedom of establishment) or sets up a branch there (secondary freedom of establishment). [57] It cannot be ruled out that the prospect of the public limited company's corporate veil being pierced and therefore the risk of joint personal liability of members for infringement of legislation and rules of good conduct governing the operation of television stations may have a deterrent effect on undertakings which wish either to relocate from another Member State to Greece or to set up an establishment there. The imposition of a penalty involving a financial loss against its members too is likely to deter that company and its shareholders from operating in the Greek media sector. As the referring court explains, extending liability to the members also makes the purchase of shares in such companies unattractive. [58] The contested provision is therefore liable in principle to render less attractive the exercise by foreign companies of the freedom of establishment that is guaranteed by the Treaty.

73. In accordance with the general definition of restriction within the meaning of Article 43

54 — See Schwarz, G.C., loc. cit. (footnote 15), paragraph 136, p. 89.

55 — See Mustaki, G. and Engammare, V., loc. cit. (footnote 8), p. 40; Prats Jané, S., loc. cit. (footnote 25), p. 94, and Forsthoff, U. and Schulz, M., 'Gläubigerschutz bei EU-Auslandsgesellschaften', *Grenzüberschreitende Gesellschaften* (eds Heribert Hirte and Thomas Bücker), 2nd edition, Berlin, 2006, paragraph 38, p. 82, with reference to the Court's case-law. As a traditional example of a restriction on freedom of establishment within the meaning of the first paragraph of Article 43 EC, Jung, P, *EU-Kommentar* (ed. Jürgen Schwarze), 2nd edition, Baden-Baden, 2009, Article 48 EC, paragraph 21, mentions charges for entering companies or their branches in the commercial register.

56 — Ulmer, P., 'Schutzinstrumente gegen die Gefahren einer Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandssitz', *Juristenzeitung* 1999, p. 665, points out that the *Cassis de Dijon* formula, developed for free movement of goods, also applies in relation to freedom of establishment, as is recognised in the Court's more recent case-law. See also Habersack, M., loc. cit. (footnote 10), Section 3, paragraph 4, p. 4, who points out the breadth of the notion of restriction on establishment developed by the Court in the judgments in *Kraus* and *Gebhard*, both cited above in footnote 53.

57 — Regard should be had in this connection to the Court's judgment in Case 81/87 *Daily Mail* [1988] ECR 5483, paragraph 25, according to which in the present state of Community law Articles 43 EC and 48 EC, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State. On the other hand, in *Centros*, cited above in footnote 53, the Court recognised the right of companies to set up a branch in another Member State. See Maranelli, K., 'Il diritto comunitario di stabilimento delle società', *Percorsi di diritto societario europeo*, Turin, 2000, p. 122 et seq.

58 — See page 4 of the order for reference.

EC, which has been adopted in case-law thus far, a restriction of freedom of establishment would have to be taken to exist in the main proceedings. [59]

— Possibility of a teleological delimitation of the prohibition on restrictions

74. As has already been seen, the Court clearly assumes a convergence of the fundamental freedoms also in the case of freedom of establishment, giving an appropriately broad interpretation of the notion of restriction under Article 43 EC. [60] Nevertheless, it has not yet given a clear position on the scope of the first paragraph of Article 43 EC. Given that in the *Keck and Mithouard* ruling [61] free movement of goods under Article 28 EC was narrowed, the question arises whether a dogmatic delimitation of the notion of restriction in the field of freedom of establishment would also be reasonable. This might be suggested by the purpose of that fundamental freedom, which is to allow a free choice of location, but not to be an instrument for economic operators to modify conditions applying locally vis-à-vis national competitors. [62]

75. In accordance with the spirit and purpose of freedom of establishment, which is to remove restrictions on companies from other Member States becoming resident, and the aim of European Union company law, to ensure the continued existence and the identity of a company in the event of a cross-border change of location, [63] it would be conceivable

59 — See Grundmann, S., loc. cit. (footnote 13), Section 9, paragraph 311, p. 137, who likewise considers an extension of liability to shareholders prescribed by law to be a restriction, but puts it another way. In his view, freedom of establishment is certainly encouraged, in cross-border situations at least, if there is no fear of the corporate veil being pierced abroad. Müller-Graff, P.-C., *EUV/EGV-Kommentar* (ed. Rudolf Streinz), Article 48, paragraph 22, p. 692, addresses the rules on piercing the corporate veil for the sake of protection of creditors in examining whether restrictions on a company becoming resident in another Member State are compatible with Article 43 EC. In his opinion, these can be justified in individual cases. Thus, the author evidently takes the view that rules on piercing the corporate veil are restrictions on freedom of establishment within the meaning of Article 43 EC. Ulmer, P., loc. cit. (footnote 56), p. 665, also clearly considers there to be a restriction on freedom of establishment where liability is extended to shareholders, but it would probably stand up to the proportionality test.

60 — See Skouris, V., 'Das Verhältnis von Grundfreiheiten und Grundrechten im europäischen Gemeinschaftsrecht', *Die Öffentliche Verwaltung*, 2006, p. 94, who points out that in the interrelationship between the fundamental freedoms there is a parallel trend ('uniform dogmatism of basic rights'). In examining the limits, this allows the specific limits provided for in relation to each fundamental freedom to be combined with the general notion of imperative requirements in the general interest. He adds that the '*Gebhard* formula' which has been used on many occasions (see point 70 of this Opinion) is not applicable specifically in relation to one fundamental freedom, but to all fundamental freedoms.

61 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

62 — See Forsthoff, U., 'Mobilität von Gesellschaften im Binnenmarkt — Spielraum für Erstreckung deutschen Rechts auf EU-Auslandsgesellschaften', *Grenzüberschreitende Gesellschaften* (eds Heribert Hirte and Thomas Bücker), 2nd edition, Berlin, 2006, paragraphs 38 and 39, p. 82 et seq.

63 — National provisions which concern the identity of the company in any case act as obstacles to access. That identity should not be affected by crossing a border. Provisions which encroach on the company's identity cannot be construed as part of the conditions applying locally, since they are not brought to the economic operator from outside, but change the form of the beneficiary of freedom of establishment, the company, from within, as it were. The idea of protecting identity can be found in the Court's case-law (see Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 80 et seq.)

in principle to determine the scope of the prohibition on restrictions according to whether the national provision in question establishes 'specific obstacles to access' or merely defines the 'conditions applying locally'. In the former case, the prohibition of restrictions would apply, and otherwise only the prohibition of direct and indirect discrimination covered by freedom of establishment. [64] Individual judgments in the field of freedom to provide services [65] and free movement of capital [66] show that the Court understands the fundamental freedoms primarily as instruments for opening up markets and therefore, in examining whether a restriction on fundamental freedoms exists in an individual case, assesses national provisions according to whether or not they impede market access.

64 — See Forsthoff, U., loc. cit. (footnote 62), paragraphs 73 and 74, p. 544 et seq. Habersack, M., loc. cit. (footnote 10), Section 3, paragraph 7, p. 13, takes the view that Articles 43 EC and 48 EC contain a prohibition on restrictions in so far as market access and thus establishment as such are concerned. As regards the exercise of a trade by the company once established in the territory of another Member State, on the other hand, it is subject to the general national rules. In particular, the obstacles connected with the mandatory, but non-discriminatory rules of national commercial, competition and employment law do not therefore fall within the protective scope of freedom of establishment. They are in fact simple 'selling arrangements' within the meaning of the *Keck and Mithouard* ruling. A review of national law having regard to the principle of proportionality cannot therefore take place. National law may be applied as against the companies resident in other Member States provided it is not discriminatory.

65 — See Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 37. The judgment concerned a national prohibition on 'cold calling' which, in the view of the Court, directly *affected access to the market in services in the other Member States*. The Court therefore concluded that it was capable of hindering intra-Community trade in services. This shows that the Court understands the fundamental freedoms primarily as instruments for opening up markets. See also Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 60 et seq.

66 — See Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 61, in connection with free movement of capital. In that judgment, the Court regarded national provisions which restrict investments as a restriction on the movement of capital within the meaning of Article 56 EC. In the view of the Court, although the relevant restrictions on investment operations applied without distinction to both residents and non-residents, it none the less had to be held that they affected the position of a person acquiring a shareholding as such and were thus liable to deter investors from other Member States from making such investments and, consequently, *affected access to the market* (see also the judgment of the same date in Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641, paragraph 47).

76. On closer analysis, the contested national provision is not a rule intended specifically to regulate 'access' by public limited companies to the Greek media sector, nor does it act as an 'obstacle' for someone seeking access to that particular sector. Rather, it forms part of a general legal framework governing the operation of television stations. It is intended to ensure the observance of legislation and rules of good conduct governing the operation of television stations. From the perspective of an objective observer, these are the framework conditions governing the media which should always be observed by the operator of a television station. From a legal point of view, the duty to observe these framework conditions governing the media is structured as the imposition of a duty connected with the operation of a television station and not,

for example, as a condition. [67] This means that it does not determine 'if' or 'when', but only 'how' a television station must be operated. Only the 'arrangements' for the operation of a television station are thus regulated. Furthermore, compliance does not affect either the continued existence or the identity of the public limited company.

77. In so far as the Court should support a teleological delimitation of the prohibition on restrictions, the contested national provision would have to be classified in the category of 'conditions applying locally' which, on this interpretation, would not be construed as restrictions within the meaning of the first paragraph of Article 43 EC. In the absence of a restriction of freedom of establishment, a further examination having regard to Articles 43 EC and 48 EC might in principle be unnecessary.

78. In this connection, however, I believe that it is vital to point out that in the Court's case-law there is some evidence to suggest that it is prepared, in isolated cases, to agree to a stricter interpretation, but that this certainly cannot be construed as meaning that the Court has abandoned its existing broad interpretation of the notion of restriction. Rather, a broad understanding of that notion must be assumed in principle. The following considerations are therefore based on the concept of a comprehensive prohibition on restrictions. [68]

79. There is therefore a restriction of freedom of establishment.

(iii) Justification of a restriction of freedom of establishment

80. It follows from the Court's case-law [69] that national measures liable to restrict the exercise of fundamental freedoms guaranteed by the Treaty must fulfil the following conditions: they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it. Furthermore, the protection

67 — In general administrative law, a condition is distinguished by the fact that it makes the onset or the end of the effectiveness of an administrative act dependent on a certain event, whose occurrence is uncertain. It may be uncertain not only 'when' the event occurs, but also 'if' it actually occurs. The imposition of a duty, on the other hand, unlike a condition, contains its own substantive provision, namely the obligation of the party to whom the administrative act is addressed regarding a specific act, toleration or omission. The administrative act connected with the imposition of the duty is immediately legally effective, irrespective of whether or not the duty is performed. The conditional administrative act, on the other hand, becomes effective only when the condition is met. The imposition of the duty lays down an obligation and is enforceable. The suspensive condition is not binding and therefore not enforceable either. See Maurer, H., *Allgemeines Verwaltungsrecht*, 11th edition, Munich, 1997, paragraph 6 et seq., p. 315 et seq.

68 — See points 70 to 73 of this Opinion.

69 — See *Kraus*, cited above in footnote 53, paragraph 32, and *Gebhard*, cited above in footnote 53, paragraph 37.

of fundamental rights is a legitimate interest which, in principle, justifies a restriction of a fundamental freedom guaranteed by the EC Treaty. [70]

— Protection of fundamental rights as a legitimate interest

81. As has already been explained, [71] the Greek Government considers the contested national provision to be justified on grounds in the public and social interest. An overview of the relevant national provisions reveals that the fines provided for in Article 4(3) of Law No 2328/1995 are intended to penalise failures to respect certain constitutionally protected basic values, including the protection of individual personality rights and family and private life. The fine for which the applicant in the main proceedings is jointly and severally liable was imposed as a result of such failure to respect the abovementioned basic values, as is clear from the factual findings contained in the order for reference. On a sound appraisal, the argument put forward by the Greek Government is to be understood as relying clearly on the protection of constitutionally enshrined fundamental rights.

82. It should be borne in mind in this respect that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR') has special significance in that respect. [72] The principles established by that case-law were reaffirmed in Article 6(2) EU. That provision states that 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. Furthermore, on several occasions, the Court has relied on the Charter of Fundamental Rights of the European Union

70 — See Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74.

71 — See point 56 of this Opinion.

72 — See, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; *Schmidberger*, cited above in footnote 70, paragraph 71; Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 35; and Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 76.

proclaimed in Nice on 7 December 2000 [73] in order to confirm the existence of certain general principles of law. [74]

83. As the Court has stated on many occasions, [75] the Community cannot accept measures which are incompatible with observance of the human rights thus recognised and guaranteed. In the view of the Court, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty. [76]

84. In this connection, it should be pointed out that, according to the Court's case-law, the right to respect for private life, which the contested provision seeks to protect according to the Greek Government, is also a fundamental right protected in the European Union legal order. [77] Furthermore, that fundamental right is enshrined in Article 8(1) of the ECHR [78] and in Article 7 of the Charter of Fundamental Rights. [79]

85. In this respect, the contested national provision pursues an aim which is recognised by the European Union legal order and is therefore legitimate.

— Proportionality test

86. As I have already explained in my Opinion of 14 April 2010 in Case C-271/08 *Commission* v *Germany*, it must be assumed that fundamental rights and fundamental

73 — OJ 2000 C 364, p. 1.

74 — See Case C-244/06 *Dynamic Medien* [2008] ECR I-505, paragraph 42; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraph 43; and *Parliament* v *Council*, cited above in footnote 72, paragraph 38.

75 — See, in particular, *ERT*, cited above in footnote 72, paragraph 41; Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 284.

76 — See *Schmidberger*, cited above in footnote 70, paragraph 74, in connection with a restriction of free movement of goods. See also Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 41 (cultural policy and freedom of expression as restrictions of freedom to provide services); *Dynamic Medien*, cited above in footnote 74, paragraph 42; and Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35 (human dignity as a restriction of freedom to provide services).

77 — Expressly recognised in Case C-62/90 *Commission v Germany* [1992] ECR I-2601, paragraph 23. See also Case C-200/02 *Chen* [2004] ECR I-9925, paragraph 16, and Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 79.

78 — Under Article 8(1) ('Right to respect for private and family life') of the ECHR, everyone has the right to respect for his private and family life, his home and his correspondence.

79 — Under Article 7 ('Respect for private and family life') of the Charter of Fundamental Rights, everyone has the right to respect for his or her private and family life, home and communications.

freedoms rank equally. [80] This means that if, in an individual case, as a result of exercising a fundamental right, a fundamental freedom is restricted, a fair balance between both of those legal positions must be sought. In that regard, it must be presumed that the realisation of a fundamental freedom constitutes a legitimate objective which may limit a fundamental right. Conversely, however, the realisation of a fundamental right must be recognised also as a legitimate objective which may restrict a fundamental freedom. For the purposes of drawing an exact boundary between fundamental freedoms and fundamental rights, the principle of proportionality is of particular importance. In that context, for the purposes of evaluating proportionality, in particular, a three-stage scheme of analysis must be deployed where the appropriateness, the necessity and the reasonableness of the measure in question must be reviewed. [81]

87. It is evident from the above considerations that even though the protection of the fundamental right to respect for private life is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the EC Treaty, such as freedom of establishment, the fact remains that such restrictions may be justified only if they are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary in order to attain it. [82]

88. The decision on proportionality calls for an analysis of the circumstances of law and of fact which characterise the situation in the Member State concerned, for the examination of which the referring court has jurisdiction. [83] In the present case, the Court has sufficient information about the factual and legal situation to give an abstract assessment of the case submitted to it in light of the principle of proportionality. It is for the referring court to take account of the interpretation criteria provided by the Court when it applies Community law in the main proceedings. [84]

80 — See my Opinion of 14 April 2010 in pending Case C-271/08 *Commission* v *Germany*, points 187 and 188. Skouris, V., loc. cit. (footnote 60), p. 93, does not therefore consider that there is a hierarchical relationship between fundamental freedoms and basic rights. He cites various factors in support of the idea that they are essentially equally ranking, such as the character of basic rights which is similar to that of fundamental freedoms and the convergence of fundamental freedoms and basic rights in the Court's case-law.

81 — See my Opinion in *Commission* v *Germany*, cited above in footnote 80, point 189.

82 — See *Omega*, cited above in footnote 76, paragraph 36; *International Transport Workers' Federation and Finnish Seamen's Union*, cited above in footnote 74, paragraph 75; and *Dynamic Medien*, cited above in footnote 74, paragraph 42.

83 — See Case C-405/98 *Gourmet International* [2001] ECR I-1795, paragraph 33; Case C-220/98 *Estée Lauder* [2000] ECR I-117, paragraph 30 et seq.; and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 28 et seq.

84 — According to Craig, P. and De Búrca, G., *EU Law*, 4th edition, Oxford, 2008, p. 492, although Article 234 EC confers upon the Court power to interpret the Treaty, it does not expressly confer power to apply the Treaty to the case in the main proceedings. They state that the demarcation between interpretation and application marks the distribution of powers as between the Court of Justice and the national courts. Consequently, the Court interprets the Treaty and the national courts apply that interpretation to the particular case.

Appropriateness

89. As the Greek Government confirmed in response to the Court's question at the hearing, it must be assumed that the contested provision is essentially based on a presumption of the Greek legislature that a shareholder with a share of more than 2.5 % in the capital of a public limited company has the possibility to influence the management of the company. This presumption of the national legislature is taken up and examined more closely by both the referring court and the Greek Government in their respective written statements. Thus, the referring court points out [85] that shareholders of such companies with a holding of more than 2.5 % in their share capital are not ordinary common 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. The Greek Government [86] states that the members in that category, through their participation in the general shareholders' meeting and in selecting the members of the company's management bodies, can help to ensure that clear guidelines are adopted with regard to programming and the position of the television station on current issues.

90. Irrespective of whether that statutory presumption applies to the main proceedings, in other words, whether, as the Greek Government clarified at the hearing, the applicant in the main proceedings, with a share of only 5 % of the capital of the 'Nea Tileorasi' company, really has a definite influence on that company's decision-making processes, which would have to be established specifically by the referring court, [87] it is in any case highly doubtful whether the influence can be regarded as sufficient to affect the television station's programming in such a purposeful way that there are absolutely no infringements of legislation and rules of good conduct governing the operation of television stations.

91. It is necessary, first of all, to examine the position of a shareholder within a public limited company. A shareholder's rights can in general be broken down into property rights, rights of participation and protection rights. [88] Unlike a member of the management body of

85 — See page 4 of the order for reference.

86 — See paragraph 10 of the written observations submitted by the Greek Government.

87 — See point 66 of this Opinion.

88 — Property rights: rights to dividends; the right to allocation of new shares; the right to liquidation dividends; the right to interest for building finance (that is interest for the period required for the preparation and construction until the beginning of full operation of the undertaking, the right to use company facilities). Rights of participation: the right of invitation and notification of agenda; the right of request and the right to state an opinion; the right to be represented at the general meeting; the right to vote and to elect at the general meeting; the right to challenge decisions which are contrary to legislation or statutes. Protection rights: information rights, including the right of inspection and the right to demand information; the collective right to representation on the board of directors; the minority protection rights of the action for dissolution and the special audit and the right to convene a general meeting; the other rights to take action, including the right of rescission, annulment of decisions of the general meeting, and liability claims.

a public limited company – who would tend to have a greater possibility of influencing the television station owned by the company – an average member exercises his rights of participation, as a rule, in the general shareholders' meeting, at which he is entitled to vote. [89] Depending on the legal order and statutes, these rights of participation include the appointment and the dismissal of the management and supervisory bodies. [90] It should be borne in mind in this connection that in the latter case the individual shareholder's influence on the management of the company is weaker, especially since it is only indirect. [91] Furthermore, the detailed substantive rules governing the appointment and dismissal of the bodies vary according to the legal order and statutes. Whilst the appointment of the bodies is characterised by the general principle that the majority of the general shareholders' meeting appoints all the members, it nevertheless depends on the relevant provisions of the statutes whether there is proportional representation, or individual shareholders or bodies are granted a right of appointment for a seat. This variety of circumstances means that, on closer analysis, the presumed possibilities for individual shareholders to influence the management of the company would seem less marked than assumed.

92. A distinction must be drawn between the company's structure and the television station's own structure, in which the programme director, as the head of the entire editorial team of a television station, plays a particular role. Subordinate to him, there are editors-in-chief who are responsible for individual departments. In addition, there are station staff responsible for creating individual programmes. They act more or less independently within their own areas of responsibility.

93. The individual shareholder is therefore at the end of a long chain of decision-makers whose behaviour he can influence only to a limited extent. Nor can he predict whether one of the television station's staff, whether intentionally or only negligently, will infringe the legislation and rules of good conduct governing the operation of television stations. These considerations show that the influence which the shareholder has *within a company* says little about his actual influence on the *internal processes of a television station*. The referring court should, if necessary, examine whether the individual shareholder's possibility of influence, which the contested national

89 — See Mustaki, G. and Engammare, V., loc. cit. (footnote 8), p. 189. As Schmidt, K., *Gesellschaftsrecht*, 4th edition, Cologne/Berlin/Bonn/Munich, 2002, p. 837, rightly states, the general shareholders'meeting is the'seat of shareholders' democracy' in which the shareholders exercise their rights in the company's business.

90 — Thus Grundmann, S., loc. cit. (footnote 13), Section 11, paragraph 394, p. 180, highlights the differences in the individual Member States in the appointment and dismissal of the bodies. There are differences, first of all, in the power to appoint members of the management body, simply because in some cases a one-part management body is appointed and in others a two-part body. Nevertheless, in the former case the power of the general meeting to appoint and dismiss members of the body is not protected in all Member States. In the latter case, the general meeting typically has the power only to appoint the supervisory body, and the influence is therefore only indirect.

91 — See Grundmann, S., loc. cit. (footnote 13), Section 11, paragraph 394, p. 180.

provision considers to be self-evident, is in fact purely theoretical.

94. On the other hand, as the Greek Government rightly observes, the individual shareholder could exercise his rights of participation in order to ensure that clear guidelines are adopted with regard to programming. A possible example could be the drafting of a code of conduct for television station staff, requiring respect for certain legal interests with constitutional status, such as the protection of individual personality rights and the right to family and private life. Requiring the management body to ensure that the company-owned television station and its staff observe certain ethical standards could at least reduce the risk of infringements.

95. This would probably require concerted action by several shareholders, especially since the general shareholders' meeting would have to decide on the matter. However, according to the company law systems of the Member States, the right to convene the general meeting and to request the drawing-up of the agenda normally depends on the proportion of interested shareholders in relation to the company's subscribed capital reaching a certain percentage. Under Article 55(1) of Regulation No 2157/2001, that proportion is at least 10 % in the case of a European company. However, even if that threshold were exceeded, it would be doubtful whether such a preventive measure would be capable of ruling out infringements by individual members of television station staff entirely.

96. In examining the appropriateness of a measure, however, it is important whether, having regard to aspects of causality and probability, the measure can lead the course of events in the direction intended by the Member State; the Member States must be granted a certain forecasting scope in this regard. A national measure would therefore be classified as inappropriate only if it did not have any effects on the aim pursued. [92] In my view, the legislature's considerations on which the contested national provision is based are rather theoretical. The threat of a fine could cause the shareholders to take preventive measures to avert infringements. However, it cannot rule out such infringements entirely. Such a provision to protect individual personality rights and the right to family and private life must be considered appropriate, however, in so far as it encourages the protection of those legal interests.

92 — See Schroeder, W., *EUV/EGV – Kommentar* (ed. Rudolf Streinz), Article 30 EC, Article 52, p. 476.

Necessity

97. Furthermore, the principle of proportionality requires that when there is a choice between several appropriate measures recourse must be had to the least onerous. [93]

98. A possible alternative measure to imposing a fine in the media sector, as the Greek Government rightly stated at the hearing, would be the withdrawal of the television station's operating licence by the competent media supervisory body. However, the withdrawal of a television operating licence represents the most severe penalty in the media sector, [94] especially since it is linked to a prohibition on operating a television station. [95] In comparison, a one-off fine for infringement of legislation and rules of good conduct clearly constitutes a less onerous measure.

99. The question nevertheless arises whether a less onerous solution would be conceivable even in the context of this kind of penalty.

100. The threat of fines against a public limited company alone – without piercing the corporate veil – would, in principle, also be capable of enjoining the company to respect legislation and rules of good conduct governing the operation of television stations. However, it is doubtful whether it would have the same deterrent effect, especially since it would entail only financial loss for the company. Depending on the company's financial situation, it could absorb such a loss without having to modify its behaviour substantially. The effect of such a penalty could not be estimated with any certainty. The situation is

93 — See, inter alia, Case 137/85 *Maizena and Others* [1987] ECR 4587, paragraph 15; Case C-339/92 *ADM Ölmühlen* [1993] ECR I-6473, paragraph 15; Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59; Case C-310/04 *Spain* v *Council* [2006] ECR I-7285, paragraph 97; and Case C-380/03 *Germany* v *Parliament and Council* [2006] ECR I-11573, paragraph 144.

94 — The media laws vary from one State to the next. Nevertheless, they have obvious common features. The withdrawal of a broadcasting licence is generally ordered as the most severe penalty only in the case of a repeat offence. In the case of a first infringement, a warning is given. In addition to the cancellation of the licence, another possibility is a temporary suspension of the licence or the imposition of subsequent conditions. Some media laws grant the media bodies which oversee private broadcasters the option to impose fines (see Kühn, F., *Rundfunkrecht in Indien und Deutschland*, Berlin, 2006, p. 208; Bayer, J. and Ricke, T., 'Die Medienaufsicht in Ungarn', *Medien und Recht International*, 2009, p. 32 et seq.; Kieserling, H., *Das Fernsehrecht Spaniens*, Frankfurt am Main, 2002, p. 159; Ruhle, E.-O., Freund, N., Kronegger, D. and Schwarz, M., *Das neue österreichische Telekommunikations- und Rundfunkrecht*, Vienna, 2004, p. 268).

95 — This in turn has human rights implications, above all as regards respect for freedom of the media. The third sentence of Article 10(1) of the ECHR gives the Contracting States the option to require a licence in order to monitor radio and television broadcasting in their territory, for example. Licences and other restrictions must be assessed on the basis of the requirements of Article 10(2), however. That provision states that media diversity may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

clearly different in the case of joint and several liability of members, where each individual is separately liable in respect of his entire assets. The members would tend to do something to escape liability. In this respect, both approaches cannot be regarded as equally effective.

101. Consideration should instead be given to a differentiated approach, taking account as far as possible of the circumstances of the individual case. Accordingly, provision could be made, for example, only for liability of those shareholders to whom a specific infringement can be attributed. In view of the fact that a fine is classified as a penalty, this necessarily requires attributable unlawful behaviour on the part of the party concerned. Such a modification would prevent punishment for shareholders who may be willing, but are not able, to enforce measures to prevent the infringement on their own or as part of a joint initiative. The currently applicable rule also covers such shareholders on account of its broad scope. A differentiated approach would not only restrict freedom of establishment to a lesser degree, but it would also have the same effect as the currently applicable rule. The precise formulation of that provision falls within the competence of the national legislature.

102. The contested national provision is therefore to be regarded as unnecessary for achieving the aim pursued.

Reasonableness

103. Lastly, care must be taken to ensure that the burdens imposed are not unreasonable in relation to the aims pursued. [96]

104. In connection with the protection of legal interests with constitutional status, such as the individual personality right and the right to family and private life, in my opinion the national legislature should be granted a certain margin of discretion. [97] Nevertheless, that margin of discretion cannot be so broad that shareholders are made liable for infringements which are not attributable to them. In addition, because of the particular structures within a company and a television station, such infringements cannot be completely ruled out. In this case, freedom of establishment is limited more than is necessary for the protection of the abovementioned legal interests.

105. In so far as it may be assumed that the contested national provision essentially seeks to lead the shareholders to take preventive measures, it would be more reasonable to make liable only the shareholders who have

96 — See, inter alia, *Maizena and Others*, cited above in footnote 93, paragraph 15; *ADM Ölmühlen*, cited above in footnote 93, paragraph 15; *Käserei Champignon Hofmeister*, cited above in footnote 93, paragraph 59; *Spain* v *Council*, cited above in footnote 93, paragraph 97; and *Germany* v *Parliament and Council*, cited above in footnote 93, paragraph 144.

97 — The Court has recognised that the Member States enjoy a margin of discretion in determining what measures are most appropriate to eliminate breaches of fundamental freedoms on the ground that they retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security (see Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 33).

a definite influence not only on the company, but on the company's management body and thus indirectly on the television station's decision-makers. There must be doubts over this in the case of a share of only 2.5 % of the company's capital. As was stated above, it is doubtful whether an individual member on his own is in a position to enforce measures to prevent infringements of legislation and rules of good conduct governing the operation of television stations.

106. Consequently, the burdens imposed on shareholders are unreasonable in relation to the aims pursued.

107. In the light of the foregoing, I conclude that the contested national provision cannot be regarded as proportionate. It is based on a balance between freedom of establishment as a fundamental freedom and the fundamental right to respect for private and family life which is not consistent with Community law.

(iv) Interim conclusion

108. In summary, it can be stated that Articles 43 EC and 48 EC preclude a national provision such as Article 4(3) of Law No 2328/1995.

(c) Free movement of capital

(i) Applicability of Article 56 EC

109. The question of compatibility with the Treaty provisions on free movement of capital need be considered only to the extent that, in the light of those provisions, the contested national provision is such as to involve a separate restriction and the Treaty provisions concerning freedom of establishment do not apply. [98]

110. Having regard to my statements in points 63 to 66 of this Opinion regarding the scope of Articles 43 EC and 48 EC, it would appear necessary to conduct an examination on the basis of Article 56 EC only for members who have a share of more than 2.5 % of the company's capital, but nevertheless do not have a holding which would enable them to exercise definite influence on the company's decisions and to determine its activities. [99]

98 — See *X and Y*, cited above in footnote 45, paragraph 66.

99 — See *X and Y*, cited above in footnote 45, paragraph 68, and *Commission* v *Spain*, cited above in footnote 45, paragraphs 35 to 39.

(ii) Restriction of free movement of capital

111. According to consistent case-law, [100] Article 56(1) EC generally prohibits restrictions on movements of capital between Member States.

112. In the absence of a definition in the EC Treaty of 'movements of capital' for the purposes of Article 56(1) EC, the Court has recognised the nomenclature annexed to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (an article repealed by the Treaty of Amsterdam) as having indicative value. [101] Movements of capital for the purposes of Article 56(1) EC thus include in particular direct investments in the form of participation in an undertaking through the holding of shares which confers the possibility of participating effectively in its management and control ('direct' investments) and the acquisition of securities on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking ('portfolio' investments). [102]

— Article 56 EC as a comprehensive prohibition on restrictions

113. With respect to both these forms of investment, the Court has stated that national measures must be regarded as 'restrictions' within the meaning of Article 56(1) EC if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing in their capital. [103]

100 — See, inter alia, *Commission* v *Germany*, cited above in footnote 45, paragraph 17; Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141, paragraph 18; *Commission* v *United Kingdom*, cited above in footnote 66, paragraphs 38 and 43; Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraphs 35 and 40. The same should also apply to Article 40 of the EEA Agreement, which is substantively the same as Article 56 EC. As the EFTA Court found in Case E-1/04 *Fokus Bank* [2004] EFTA Court Report 11, paragraphs 22 and 23, with reference to the judgment of the Court of Justice in Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 28, and the Opinion of Advocate General Jacobs in the same case (points 72 and 73), the provisions on free movement of capital in the EC Treaty and in the EEA Agreement are essentially identical.

101 — OJ 1988 L 178, p. 5.

102 — See Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; *Commission* v *France*, cited above in footnote 100, paragraphs 36 and 37; *Commission* v *United Kingdom*, cited above in footnote 66, paragraphs 39 and 40; and *Commission* v *Netherlands*, cited above in footnote 100, paragraph 19.

103 — See Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraph 45; *Commission* v *France*, cited above in footnote 100, paragraph 41; Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, paragraphs 30 and 31; Case C-265/04 *Bouanich* [2006] ECR I-923, paragraphs 34 and 35; *Commission* v *Netherlands*, cited above in footnote 100, paragraph 20; and *Commission* v *Germany*, cited above in footnote 45, paragraph 19.

114. As has already been explained,[104] the risk of joint personal liability of members may deter potential investors, especially since participation in such an undertaking involves an additional financial risk which goes beyond the normal commercial risk. In this connection, reference is made again to the findings of the referring court, according to which extending liability to the members makes the purchase of shares in these particular companies unattractive, as in the case of the applicant in the main proceedings.

115. According to this broad definition, which has been adopted by the Court thus far, a restriction within the meaning of Article 56(1) EC would have to be taken to exist in the present case.

— Possibility of a teleological delimitation of the prohibition on restrictions

116. As with freedom to provide services, the Court has intimated in its previous case-law the possibility of a teleological delimitation of the prohibition on restrictions for free movement of capital too.[105] With a view to the furthest possible convergence of fundamental freedoms it would therefore be perfectly conceivable also to effect a teleological delimitation of the prohibition of restrictions in the field of free movement of capital and to distinguish according to whether the national provision in question establishes 'specific obstacles to access' or merely defines the 'conditions applying locally'. A different interpretation of the two fundamental freedoms would inevitably lead to a discrepancy in the treatment of large and small shareholders, since while large shareholders would be prevented from relying on freedom of establishment, small shareholders would be permitted to take action against the contested national provision on the ground that there is a restriction on free movement of capital. If large shareholders may not derive from the fundamental freedoms any right to the approximation of conditions applying locally,[106] this should certainly not be possible for small shareholders. In addition, there is no reason for a difference in treatment, since both categories of shareholder are in precisely the same position.

117. As regards the contested national provision itself, it should be stated that it does not in itself restrict the possibility of shareholders participating in the company with a view to establishing or maintaining lasting and direct

104 — See point 68 of this Opinion.

105 — See footnote 66 to this Opinion.

106 — In point 74 of this Opinion, I stated, in connection with freedom of establishment, that that fundamental freedom is not intended to be an instrument for economic operators to modify conditions applying locally vis-à-vis national competitors. This must also apply to free movement of capital.

economic links with it such as to enable them to participate effectively in the management of that company or in its control. There are neither de jure nor de facto obstacles to the influx of direct investments. Nor does the provision specifically regulate the nature of and the arrangements for investments in companies in the Greek media sector. Rather, in accordance with my above statements, [107] the contested national provision should really be classified in the category of 'conditions applying locally' which, in so far as a narrow teleological interpretation is accepted, would not be construed as a restriction within the meaning of Article 56(1) EC.

118. As I have already explained, [108] however, aside from isolated cases, there is nothing to suggest that the Court would be prepared to abandon its existing broad interpretation of the notion of restriction. The following considerations are therefore based on the concept of a comprehensive prohibition on restrictions.

119. There is consequently a restriction of free movement of capital. It must also be examined whether this may be justified and whether it stands up to a proportionality test.

(iii) Justification

— Protection of fundamental rights as a legitimate interest

120. In so far as the national provision in question seeks to protect the fundamental right to respect for private life, it pursues an aim which is recognised by the European Union legal order, is therefore legitimate and can in principle justify a restriction. [109]

— Proportionality test

121. In so far as under that provision members who have no definite influence on the company's decisions are also liable, the following provision would not appear to be capable of protecting the abovementioned legal interests, especially since that category of members can do less to prevent infringements of legislation and rules of good conduct governing the operation of television stations.

107 — See point 76 of this Opinion.
108 — See point 78 of this Opinion.
109 — See point 85 of this Opinion.

122. Since less onerous measures are conceivable which offer the same prospect of success, above all liability for members who actually exercise influence on the company's management body and the television station's decision-making structures or to whom an infringement can actually be attributed, liability on the part of the group of members relevant in this instance cannot be regarded as necessary.

123. The doubts which were expressed in connection with a restriction of freedom of establishment apply all the more to free movement of capital. A restriction of that fundamental freedom, without it being beneficial for the protection of the fundamental right, does not satisfy the requirement of reasonableness. Free movement of capital protects only members who are not in a position to exercise definite influence on the company's decisions and to determine its activities. The fact that a fine may nevertheless be imposed on them proves to be an unreasonable restriction of that fundamental freedom.

124. Consequently, the contested national provision cannot be regarded, all in all, as proportionate. It is based on a balance between free movement of capital as a fundamental freedom and the fundamental right to respect for private and family life which is not consistent with Community law.

(iv) Interim conclusion

125. In summary, it can be stated that Article 56(1) EC precludes a national provision such as Article 4(3) of Law No 2328/1995.

VII — Conclusion

126. In the light of the above considerations, I propose that the Court answer the question referred by the Simvoulio tis Epikratias as follows:

'(1) First 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, 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 %.

(2) On the other hand, Articles 43 EC, 48 EC and 56 EC preclude a national provision such as that described in (1) above.'