JUDGMENT OF THE COURT (Second Chamber)

21 October 2010 *

In Case C-81/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decision of 17 October 2008, received at the Court on 25 February 2009, in the proceedings

Idrima Tipou AE

v

Ipourgos Tipou kai Meson Mazikis Enimerosis,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas (Rapporteur), U. Lõhmus and P. Lindh, Judges,

* Language of the case: Greek.

Advocate General: V. Trstenjak,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 March 2010,

after considering the observations submitted on behalf of:

— the Greek Government, by P. Milonopoulos, M. Apessos and N. Marioli, acting as Agents,

— the European Commission, by G. Braun and G. Zavvos, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41; 'the First Directive').

2 The reference has been made in proceedings between Idrima Tipou AE, a limited company whose registered office is in Athens (Greece), and the Ipourgos Tipou kai Meson Mazikis Enimerosis (Minister for the Press and the Mass Media) concerning a fine imposed on that company for infringement of the legislation and rules of good conduct governing the operation of television stations.

Legal context

European Union legislation

3 The first three recitals in the preamble to the First Directive are worded as follows:

'… the co-ordination provided for in Article 54(3)(g) [of the EEC Treaty] 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 co-ordination of national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, such companies is of special importance, particularly for the purpose of protecting the interests of third parties;

… 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.'

4 Article 1 of the First Directive, as amended by the Act concerning the conditions of accession of the Hellenic Republic and the adjustments to the Treaties (OJ 1979 L 291, p. 17), provides:

'The co-ordination 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 [broadly equivalent to a public limited company; "public limited company"], εταιρία περιωρισμένης ευθύνης [broadly equivalent to a private limited company], ετερόρρυθμη κατά μετοχές εταιρία [partnership limited by shares].'

5 The First Directive contains three sections. The first section deals with the disclosure of company documents, the second with validity of obligations which a company enters into by acts done by its organs, and the third with nullity of companies.

National legislation

6 Article 15(2) of the Greek Constitution, in the version in force prior to the constitutional revision in 2001, provided that radio and television were to be under the immediate control of the State.

7 Law No 2863/2000 'National Radio and Television Council and other authorities or bodies in the sector providing broadcasting services' (FEK (Official Gazette) A 262) created the National Radio and Television Council (Ethniko Simvoulio Radiotileorasis; 'the ESR').

8 Law No 2328/1995 'Legal regime governing private television and local radio, regulation of issues relating to the broadcasting market and other provisions' (FEK A 159), applicable here in the version following its amendment by Law No 2644/1998 'on the provision of subscription radio and television services' (FEK A 233) ('Law No 2328/1995'), defines the legal regime governing private television and local radio and the framework within which they operate.

9 Law No 2328/1995 regulates inter alia the grant of licences to found, establish and operate private television stations, and shareholdings in public limited companies which apply for such a licence. In principle, such shareholdings must be registered. Various provisions of the Law have the aim of limiting to 25 % the maximum percentage of the share capital that a natural or legal person can hold in a company which has a licence to found, establish and operate a television station. In addition, any transfer of shareholdings exceeding 2.5 % of the share capital must be notified to the ESR.

10 Article 3 of Law No 2328/1995 provides:

> '1. (b) Broadcasts of any kind (including advertisements) which are transmitted by radio and television stations must respect the character, honour, reputation, private and family life and professional, social, scientific, artistic, political or other similar activity of every person whose image appears on the screen or whose name, or information sufficient to identify him, is broadcast.'

11 Article 3(15) of Law No 2328/1995 requires the ESR to draw up codes of good conduct for the profession of journalist. Article 5 of Regulation No 1/1991 of the ESR provides that 'it is not permitted to present persons in a way which may, in the particular circumstances, foster their humiliation, their social isolation or discrimination against them.'

12 Article 4 of Law No 2328/1995 provides:

> '1. In every case of infringement (a) of the provisions of national legislation, [of legislation] of the European Union and of international law which govern, directly or indirectly, private television stations and, more generally, the operation of private television, (b) …, (c) of the rules of good conduct as determined in accordance with Article 3 of this Law, the following penalties shall be imposed …: (a) recommendations and warnings, (b) a fine of GDR 5 million to GDR 500 million …, (c) temporary suspension for up to three months or definitive cessation of the broadcasting of a particular programme of the station, (d) temporary suspension for up to three months of the broadcasting of every television programme, (e) revocation of the station's operating licence and (f) penalties of an ethical nature (such as the mandatory broadcasting of an announcement concerning the other penalties imposed). The ESR shall submit its decision promptly to the Minister for the Press and the Mass Media, who shall conduct a review as to legality and adopt the measure imposing the penalty. The type and the level of administrative penalties under this article shall be decided upon in the light of the gravity of the infringement, of the audience for the programme in which the infringement has been committed, of the share of the market for radio and

television services which the licence holder may have acquired, of the amount of the investment which has been made or planned and of the existence of any previous infringements. The decision of the ESR concerning the imposition of penalties under this paragraph shall contain a full and specific statement of reasons and shall in every case be drawn up after the interested parties have been heard during at least one meeting of that body's full membership.

…

3. The fines provided for in the preceding paragraphs shall be imposed jointly and severally on the company and personally on its legal representative or representatives, on all the members of its board of directors and on all its shareholders with a holding of over 2.5 %.

…

5. The foregoing administrative penalties shall be independent of the existence of any criminal or civil liability.'

The dispute in the main proceedings and the question referred for a preliminary ruling

13 The applicant in the main proceedings is a public limited company with a shareholding in Nea Tileorasi AE, the owner of the television station Star Channel.

14 It is challenging before the Simvoulio tis Epikratias (Council of State) (Greece) Decision No 11840/E/11.5.2001 of the Minister for the Press and the Mass Media which imposed a fine of GDR 10 000 000 (approximately EUR 29 347) jointly and severally upon it together with Nea Tileorasi AE and the other shareholders and the members of the board of directors of Nea Tileorasi AE on the ground that, during the main news programme of the Star Channel television station on 14 February 2000, it infringed the obligation to respect the character, honour, reputation, family life and presumption of innocence of various personalities. It is also challenging Decision No 122/91/20.4.2000 of the ESR, on the basis of which the contested ministerial decision was adopted.

15 The Fourth Chamber of the Simvoulio tis Epikratias, which was dealing with the case, referred it to the full court because it was of major importance.

16 The Simvoulio tis Epikratias reviewed the constitutionality of Article 4(3) of Law No 2328/1995 inasmuch as it imposes a penalty on the company's shareholders, in light of the principle of economic freedom which is laid down in Article 5 of the Greek Constitution. It held, essentially, that the national legislature is entitled to adopt rules derogating from the general law on public limited companies, and in particular from the principle that a shareholder is not liable for the debts of the legal person, which is a fundamental and binding principle of the general law on public limited companies but not a constitutional principle. The national legislature a fortiori has this power where specific companies which serve the public interest and are under the immediate control of the State are involved. The referring court observed that, in any event, Article 4(3) of Law No 2328/1995 provides not for joint and several liability of the

shareholders in respect of the legal person's 'debts', but for the imposition of administrative penalties on both the company and the persons referred to in that provision. Finally, that provision does not make it impossible or substantially difficult for business activity to be carried on.

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

18 When examining compliance with the principle of proportionality, the Simvoulio tis Epikratias held that the legislation at issue pursues a legitimate aim and does not constitute a restriction on economic freedom that is manifestly disproportionate to the objectives that it pursues, since it clearly cannot be regarded as making it impossible or substantially difficult for business activity in the field of founding and operating private television stations to be carried on.

19 The Simvoulio tis Epikratias stated, in particular, that the national legislature, which is aware of the conditions and the actual situation obtaining on the country's television scene, considers that a shareholder with a holding above 2.5% is not an ordinary investor but, in essence, a professional person investing who, by reason of that shareholding in the company, is potentially in a position to influence the administration of the legal person and, therefore, the operation of the television station. The referring court held that this substantive assessment by the national legislature cannot be considered manifestly wrong or inappropriate if account is taken of the fact that, under Law No 2328/1995, the maximum percentage of the share capital that a shareholder (a natural or a legal person) may hold cannot exceed 25% and that, consequently, the collaboration of a number of shareholders in the administration of the company is absolutely necessary in order to influence its management.

20 The Simvoulio tis Epikratias referred, however, to minority opinions of its members that call into question this form of shareholder liability without fault, which is stated to discourage the acquisition of shares in public limited companies in the television sector. According to those members, the measure is not such as to further attainment of the objective pursued, since a shareholding slightly above 2.5% is too small to be capable of influencing the management of the company's affairs and of preventing the company from acting contrary to the rules of professional conduct. The measure is, in actual fact, equivalent to the imposition of a penalty on a shareholder of a public limited company in the television sector who holds a limited percentage of the share capital solely because he is a shareholder of a public limited company of that kind.

21 In this context, the referring court raised the question of the compatibility of Article 4(3) of Law No 2328/1995 with the various European Union directives relating to companies, which it sets out.

22 It held that the field of application of Article 4(3) of Law No 2328/1995 and that of the provisions of the directives relating to companies do not intersect. The latter do not contain any rule concerning or, a fortiori, prohibiting the attribution of liability to the shareholders of a public limited company who hold a certain percentage of shares for payment, jointly and severally with the legal person that is the company, of fines imposed for infringement of legislation by reason, generally, of the activity of that legal person but also, in particular, in the present instance, by reason of the activity of the legal person that is the public limited company holding a licence to found and operate a television station. Such a prohibition cannot be inferred from Article 1 of the First Directive, where the European Union legislature merely lists the types of company which are already in existence in the Member States and to which the provisions of the directive apply.

23 According to the referring court, even if the view were to be taken that the fields of application of the First Directive and of Article 4(3) of Law No 2328/1995 meet, the latter provision would not be contrary to Article 1 of that directive. Article 1 does not provide a definition of public limited company and merely lists the types of company to which the directive applies. Consequently, European Union law does not prevent the national legislature either from introducing new types of companies which do not fall within the field of application of the directives relating to companies or from establishing (special) public limited companies to which provisions diverging from European Union law on public limited companies will apply, in so far, of course, as those divergent provisions are not contrary to specific provisions of the directives relating to companies or of European Union law generally, as is true of Article 4(3) of Law No 2328/1995.

24 According to the Simvoulio tis Epikratias, the fact that European Union law does not guarantee that the shareholders of a public limited company will not be liable for the legal person's debts is apparent from the fact that the principle of lifting the

corporate veil, which results under certain conditions in liability being attributed to the shareholder for the obligations of a public limited company, has been established for decades in the legal systems of numerous Member States, above all through case-law, without the question of that principle conflicting with European Union law being raised, and also from the fact that no steps have been taken to harmonise the conditions for such lifting of the corporate veil.

25 Certain judges expressed a minority opinion, however, taking the view that the term 'ανώνυμη εταιρία [public limited company]' used in Article 1 of the First Directive has a mandatory minimum meaning. According to them, the fundamental characteristics of a public limited company, from which the national legislature cannot derogate, are:

(a) the strict distinction between the company's assets and those of the shareholders, and

(b) the absence of personal liability of shareholders for company debts, given that the shareholders are required only to pay their capital contribution, which corresponds to the ratio of their equity participation in the total company capital.

26 These judges also observed that in no legal system of a Member State of the European Union has legislation or case-law accepted blunting of the principle that shareholders are not liable to pay the debts of the public limited company from their own assets. All that has been accepted in case-law is that, where the assets of a public limited company and of a shareholder have been totally confused and that shareholder has, by his personal acts or omissions, administered what is now a single set of assets in a manner contrary to good faith, he can no longer rely on the principle of independence

of the two sets of assets (his personal one and that of the company) against the company's creditors.

27 The Simvoulio tis Epikratias consequently established that views diverged, first, as to whether the fields of application of Article 1 of the First Directive and Article 4(3) of Law No 2328/1995 intersect and, second, as to the compatibility of the national legislation with Article 1 of the First Directive.

28 In those circumstances, the Simvoulio tis Epikratias held that, in accordance with the third paragraph of Article 234 EC and the judgment in Case 283/81 *Cilfit and Others* [1982] ECR 3415, it was obliged to stay the proceedings and refer the following question to the Court of Justice 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 %?'

29 The Court requested the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union which wished to participate in the hearing to express their views inter alia on the relevance of Article 49 TFEU, relating to freedom of establishment, and Article 63 TFEU, relating to the free movement of capital, to the answer to the question asked by the Simvoulio tis Epikratias.

Consideration of the question referred

30 The question asked by the referring court relates to the interpretation of the First Directive.

31 However, the fact that a national court has, formally speaking, worded the question referred for a preliminary ruling with reference to certain provisions of European Union law does not preclude the Court from providing to the national court all the guidance on points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to the points in its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of European Union law which require interpretation, having regard to the subject-matter of the dispute (see Case C-115/08 *ČEZ* [2009] ECR I-10265, paragraph 81).

32 In light of the facts of the main proceedings and the applicable Greek legislation, not only the First Directive but also Articles 49 TFEU and 63 TFEU must be interpreted.

The First Directive

33 By its question, the referring court asks whether the First Directive must be interpreted as precluding national legislation such as Article 4(3) of Law No 2328/1995, according to which the fines provided for in the preceding paragraphs of that article for infringement of the legislation and rules of good conduct governing the operation of television stations are imposed jointly and severally, not only on the company

which holds the licence to found and operate the television station but also on all shareholders with a holding of over 2.5 %.

34 The Greek Government observes that Article 4(3) of Law No 2328/1995 provides not that the company's shareholders who hold more than 2.5 % of the shares have joint and several liability generally for the legal person's debts, but that administrative fines for infringement of the legislation and operating rules governing the exploitation of television stations are imposed both on the company which holds the licence to found and operate a television station and on those shareholders, who are of particular importance for the founding and operation of the legal person.

35 It should, however, be recalled that, as is apparent from settled case-law, the procedure laid down in Article 267 TFEU is based on a clear separation of functions between national courts and tribunals and the Court of Justice, and the latter is empowered only to rule on the interpretation or the validity of the acts of European Union law referred to in that article. In that context, it is not for the Court to rule on the interpretation of national laws or regulations or to decide whether the referring court's interpretation of them is correct (see Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 25).

36 The Court must accordingly confine itself to the interpretation of Greek legislation as summarised in paragraph 17 of the present judgment, which constitutes the premiss for the question referred to it.

37 The First Directive was adopted on the basis of Article 54(3)(g) of the EEC Treaty, which has become Article 50(2)(g) TFEU.

38 Article 50(2)(g) TFEU provides that, in order to attain freedom of establishment, the European Union legislature is to adopt directives to coordinate 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 54 TFEU with a view to making such safeguards equivalent throughout the Community. Under the second paragraph of Article 54 TFEU, '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.

39 As is apparent from the first two recitals in its preamble, the First Directive has the aim of co-ordinating national provisions concerning disclosure by, the validity of obligations entered into by, and the nullity of, companies limited by shares or otherwise having limited liability. The rules which should be set out in each Member State's national law are described in Articles 2 to 12 of the First Directive.

40 Although the third recital in the preamble to the First Directive implies that a principle exists that only companies are required to pay, out of their assets, company debts to third parties, that directive does not prescribe a uniform concept of companies limited by shares or otherwise having limited liability that is based on such a principle. Article 1 of the First Directive lists, on the other hand, for each Member State, the different types of company under the law of that Member State to which the rules laid down in Articles 2 to 12 will have to be applied.

41 It follows that the First Directive does not prescribe what a company limited by shares or otherwise having limited liability must be, but merely lays down rules which must be applied to certain types of companies identified by the European legislature as companies limited by shares or otherwise having limited liability.

42 Furthermore, while it is apparent from an examination of the law of the Member States, such as that conducted by the Advocate General in point 34 of her Opinion, that in the majority of cases shareholders of the companies listed in Article 1 of the First Directive are not required to be personally answerable for the debts of a company limited by shares or otherwise having limited liability, it cannot be concluded therefrom that this is a general principle of company law applicable in all circumstances and without exception.

43 Similarly, with regard to obligations entered into by a company, no general principle can be inferred from Articles 7 to 9 of the First Directive, which merely lay down a number of rules in this regard.

44 It therefore follows neither from the wording of the First Directive nor from interpreting it in the light of its aim or of the law of the Member States that it imposes a rule that a shareholder can never be liable for a fine imposed on a company, including where the fine is imposed jointly and severally on a public limited company and on the shareholder.

45 Nor would the existence of such a rule in national law undermine the First Directive's aim, given the limited nature of the latter.

46 Consequently, the answer to the question referred for a preliminary ruling is that the First Directive must be interpreted as not precluding national legislation such as Article 4(3) of Law No 2328/1995, according to which the fines provided for in the preceding paragraphs of that article for infringement of the legislation and rules of good conduct governing the operation of television stations are imposed jointly and

severally, not only on the company which holds the licence to found and operate the television station but also on all shareholders with a holding of over 2.5 %.

Freedom of establishment and free movement of capital

47 Provisions of national law which apply to the possession by nationals of one Member State of holdings in the capital of a company established in another Member State allowing them to exert a definite influence on the company's decisions and to determine its activities fall within the ambit *ratione materiae* of Article 49 TFEU on freedom of establishment (see to this effect, in particular, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22; Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraph 13; and Case C-326/07 *Commission* v *Italy* [2009] ECR I-2291, paragraph 34).

48 Article 63 TFEU on the free movement of capital covers 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, and also portfolio investments, that is to say, 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 (see, to this effect, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 40).

49 National legislation not intended to apply only to those shareholdings which enable the holder to have a definite influence on a company's decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the ambit of both Article 49 TFEU and Article 63 TFEU (see Case C-326/07 *Commission* v *Italy*, paragraph 36).

50 In the main proceedings, Greek legislation limits to 25 % the maximum holding that a natural or legal person can have in the share capital of a company which holds a licence to found, establish and operate a television station. Also, Article 4(3) of Law No 2328/1995 provides that a fine may be imposed on a shareholder once he holds more than 2.5 % of the shares in such a company.

51 Depending on the manner in which the remainder of a company's capital is distributed, in particular if it is spread among a large number of shareholders, a holding of 25 % may be sufficient to have control of a company or at least to exert a definite influence on the company's decisions and determine its activities for the purposes of the case-law established in *Baars* set out in paragraph 47 of the present judgment (see, to this effect, Case C-326/07 *Commission* v *Italy*, paragraph 38). The Greek legislation can therefore fall within the scope of Article 49 TFEU.

52 In addition, inasmuch as that legislation applies to shareholders whose holding exceeds 2.5 % but is not sufficient to allow them to control or exert a definite influence on the company's decisions, it can also fall within the scope of Article 63 TFEU.

53 Both those provisions must therefore be interpreted.

54 It is settled case-law that the term 'restriction' within the meaning of Article 49 TFEU covers measures which prohibit or impede the exercise of freedom of establishment or render it less attractive (Case C-518/06 *Commission* v *Italy* [2009] ECR I-3491, paragraph 62).

55 Also, national measures must be regarded as 'restrictions' within the meaning of Article 63(1) TFEU 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 (*Commission* v *Germany*, paragraph 19).

56 In the circumstances of the main proceedings, the national measure at issue has a deterrent effect on investors and thereby affects their access to the equity market.

57 The national measure allows shareholders of a public limited company in the television sector to be held liable for fines imposed on that company in order that they see to it that the company observes Greek legislation and rules of good conduct, whereas the powers accorded to those shareholders by the rules applicable to the operation of public limited companies' organs do not actually give them a possibility of so doing.

58 Furthermore, although the measure is applicable without distinction to Greek investors and investors from other Member States, its deterrent effect is greater for investors from other Member States than for Greek investors.

59 Inasmuch as the objective of the Law is to induce shareholders to ally themselves with other shareholders in order to be able to influence the decisions of the company's management, even though this option is applicable to all shareholders it is indisputably much more difficult for use to be made of it in the case of investors from other Member States who know less about the realities of media life in Greece and are not

necessarily acquainted with the various groups or alliances represented amongst the shareholders of a company holding a licence to found, establish and operate a television station.

60 It follows that a national measure such as that at issue in the main proceedings restricts both freedom of establishment and the free movement of capital.

61 That would be so even if such a measure were interpreted in the manner indicated by the Greek Government, set out in paragraph 34 of the present judgment.

62 A restriction on freedom of establishment and the free movement of capital can be accepted where it serves overriding requirements in the public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (for freedom of establishment, see, to this effect, Case C-518/06 *Commission* v *Italy*, paragraph 72, and for the free movement of capital, see, to this effect, *Commission* v *Germany*, paragraphs 72 and 73).

63 As the referring court has set out, the measure at issue in the main proceedings has the objective of securing compliance by television companies with legislation and journalists' rules of professional conduct in order, inter alia, to prevent the honour or the private life of persons whose image appears on the screen or whose name is referred to from being adversely affected. This is unquestionably a legitimate objective.

64 At the hearing, the Commission submitted that none of the material in the file explained why a shareholder possessing a holding of more than 2.5 % in a television company should be regarded as being in a position to influence the company's administration. When asked about this, the Greek Government stated that, at the time when Law No 2328/1995 was adopted, numerous journalists were such shareholders

and that the objective of that Law was, first, to fragment the capital of television companies in order to prevent a single shareholder having too much power and, second, to encourage the shareholders to come together to adopt decisions relating to programmes.

65 Even if, at the time when Law No 2328/1995 was adopted, a statistical correlation existed between being a shareholder with a holding of 2.5 % in a television company and the profession of journalist, such a link does not appear sufficient to hold that the measure at issue is suitable for securing the attainment of the objective which it pursues or, above all, that it does not go beyond what is necessary in order to attain it.

66 Whilst the profession of journalist may be considered an appropriate criterion for identifying the persons liable to influence the management of a television company, that is not true of merely being a shareholder possessing a holding of slightly more than 2.5 % or even enough shares to exert a definite influence, for the purposes of the judgment in *Baars*, in the organs of the television company.

67 If the objective of the measure is that journalists comply with legislation and their rules of professional conduct, it could be appropriate for them to be punished personally for the infringements that they commit, rather than imposing penalties on shareholders who are not necessarily journalists.

68 In this context, it is to be noted that the Greek legislation contains other possible penalties more appropriate to the objective that it pursues, in that they are imposed in respect of television operations and not the mere holding of share capital, such

as the suspension or cessation of the broadcasting of a particular programme, the temporary suspension for up to three months of the broadcasting of every television programme, the revocation of the station's operating licence or penalties of an ethical nature.

69 Furthermore, to assume that all the shareholders of a public limited company are engaged professionally in the sector within which the company objects fall is the very negation of the free movement of capital, which applies inter alia to portfolio investments, that is to say, the acquisition of securities on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking (Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141, paragraph 19). It is precisely this type of investment that investors from other Member States who are seeking to diversify their investments would be liable to make.

70 It follows from all the foregoing that Articles 49 TFEU and 63 TFEU must be interpreted as precluding national legislation such as Article 4(3) of Law No 2328/1995, according to which the fines provided for in the preceding paragraphs of that article for infringement of the legislation and rules of good conduct governing the operation of television stations are imposed jointly and severally, not only on the company which holds the licence to found and operate the television station but also on all shareholders with a holding of over 2.5 %.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, must be interpreted as not precluding national legislation such as Article 4(3) of Law No 2328/1995 'Legal regime governing private television and local radio, regulation of issues relating to the broadcasting market and other provisions', as amended by Law No 2644/1998 'on the provision of subscription radio and television services', according to which the fines provided for in the preceding paragraphs of that article for infringement of the legislation and rules of good conduct governing the operation of television stations are imposed jointly and severally, not only on the company which holds the licence to found and operate the television station but also on all shareholders with a holding of over 2.5 %.**

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

[Signatures]