

European Court of Justice

Case C-213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis, Ipourgos Epikratias*

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INTRODUCTION

The Court's judgment in *Michaniki* has so far mainly triggered the attention of specialists in public procurement law. Unsurprisingly so, as it deals with the question of whether excluding a bidder from a public works contract on the ground that he is linked to a media undertaking is contrary to EC public procurement law. However, this case at the same time has an important constitutional dimension. This is so since the outcome of the Court's reasoning is that a national constitutional provision is in conflict with secondary EC law. The question of supremacy of the latter over the former is therefore raised before the referring court. The most remarkable feature of the present decision is, however, that the Court of Justice completely disregarded the constitutional dimension of the case when adjudicating the matter before it. The Court's failure to acknowledge the importance of national constitutional law is to be criticised, and appears especially controversial in times when the sensitivity of the issue has moved to centre stage.¹

FACTUAL BACKGROUND

The Greek public enterprise Erga OSE announced an invitation to tender for the construction of embankments and technical infrastructure works for a new high-speed railway line between Corinth and Kiato in Greece. Two Greek companies, Michaniki, the applicant in the main proceedings, and KI Sarantopoulos AE, later

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¹ See the *Lisbon Decision* of the German Constitutional Court, BVerfG, 2 BvE 2/08 of 30 June 2009, available at <www.bverfmg.de/entscheidungen/es20090630>, visited 20 Oct. 2009.

taken over by Pantechniki, participated in the procedure, and Pantechniki won the tender. Before Erga OSE entered the contract it applied for a certificate to the Greek National Council for Radio and Television (ESR), the obtainment of which is mandatory under Greek law in order to conclude a valid public contract. The certificate was granted. It finds its legal basis in Law No. 3021/2002, which implements Article 14(9) of the Greek Constitution. That latter provision establishes an incompatibility between the public works sector and the media sector, and the certificate serves to attest that there is no such incompatibility.

Article 14(9) Greek Constitution stipulates that an owner, partner, main shareholder or management executive of a media undertaking cannot also be an owner, partner, main shareholder or management executive of an undertaking entering into a public contract to perform works or to supply services. This incompatibility extends also to intermediaries, such as spouses, relatives or financially dependent persons or companies. Law 3021/2002 does provide, however, that the presumption of incompatibility regarding those intermediaries can be rebutted if financial independence is established. It is this ground that was at issue in the main proceedings, because the main shareholder and vice-chairman of the board of directors of Pantechniki, Mr. K. Sarantopoulos is the father of Mr. G. Sarantopoulos – a member of the board of directors of two Greek companies active in the media field. As the ESR was satisfied that the latter was financially independent of the former, Erga OSE had no problem in obtaining the certificate. Michaniki, however, sought annulment of it before the Greek Council of State (*Simvoulio tis Epikratias*). It argued that the relevant provisions of Law 3021/2002 – the legal basis for issuing the certificate – have the effect of reducing the scope of Article 14(9) of the Greek Constitution.

The Council of State was of the view that the contested Law 3021/2002 is in fact incompatible with the Greek Constitution, to the extent that it allows rebuttal of the presumption by proving financial independence. This condition was considered insufficient. Rather, the contractor has to prove that he has acted independently, on his own account and in his own interest. This could indeed have been the end of the matter. However, as the Greek Council of State was in doubt regarding the compatibility of the national provisions in question with EC law, specifically Directive 93/37/EEC,² it envisaged a reference for a preliminary ruling. The named directive, which regulates the procedures for the awards of public works contracts, contains a list of seven grounds on the basis of which a contractor may be excluded from participation in a public contract. Those do not, how-

² Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts, *OJ* [1993] L 199, 14.6.1993, as amended by European Parliament and Council Directive 97/52/EC *OJ* [1997] L 328, 13.10.1997.

ever, include the grounds named in Article 19(4) Greek Constitution and its implementing Law 3021/2002.

In the interest of procedural economy (if the certificate is to be annulled, the question is likely to arise again) and in light of the above observations, it decided to refer three questions to the European Court of Justice. Those were formulated in the following essential terms: Firstly, is the list of grounds for excluding public works contractors contained in Article 24 of Directive 93/37/EEC exhaustive? Secondly, is a national provision, which establishes an incompatibility between the media sector and the public procurement sector compatible with the principles of Community law? Thirdly, if Article 24 is exhaustive and the second question is answered in the negative, does the directive infringe the general principles of the protection of competition and transparency and the principle of subsidiarity as contained in Article 5(2) EC? Before entering into the substance of these questions, the Court and the Advocate-General had to deal with two further issues; namely, the Court's jurisdiction as well as the admissibility of the question. The Greek government put forth two grounds in this respect. The first regards the fact that the dispute relates to a purely internal situation, i.e., lack of a Community dimension. The second is that an interpretation of Community law is not objectively needed in order to solve the dispute in the main proceedings.

THE OPINION OF THE ADVOCATE-GENERAL

Advocate-General Maduro dismissed both points of the Greek government's contentions regarding jurisdiction and admissibility. As regards the argument of a lacking Community dimension, the Advocate-General pointed out that the Court has always – with the exception of one case – answered references relating to public procurement or public contracts even in cases of purely internal situations. This has in any case always been true when the interpretation of public procurement directives was at issue. The explanation for this is to be found in the nature of EC public procurement law, and the specific aims it pursues. Those are ensuring as wide an access as possible to those contracts without discrimination on grounds of nationality, as well as stimulating effective and fair competition in the field. Therefore, its '... applicability cannot depend on whether the specific situations at issue have a sufficient connection with the exercise of fundamental freedoms of movement.'³ In relation to the question whether the Court's reply is actually needed for the main proceedings, he agreed with the referring court's argument of procedural economy, as it is likely that the question will come back to the Court if the certificate is to be annulled.

³ Opinion A.G. Maduro of 08.10.2008, ECJ 16 Feb. 2008, Case C-213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis, Ipourgos Epikratias*, para. 16.

With respect to the first substantive question of reference, the Advocate-General's answer was in the negative. The list of grounds for excluding tenderers contained in Article 24 of Directive 93/37/EEC is not exhaustive. He agreed with Greece's submissions that absence of complete harmonisation does not mean that certain provisions, like Article 24 could not be of an exclusive character. The aim of developing competition as well as previous case-law in relation to other EC public procurement measures support this conclusion.⁴ On the other hand, however, the principles of equal treatment and transparency, which underlie the directive, may require the establishment of cases of exclusion, which member states must be allowed to pursue.⁵ Furthermore, member states must be granted a certain discretion regarding the definition of those, because they are best placed to assess what is required in the national context.⁶ This is all the more so in the present case since the national assessment resulted in enshrining the incompatibility between the public procurement sector and the media sector in a constitutional provision. Allowing the member state discretion under these circumstances therefore finds confirmation in the obligation to respect the constitutional identity of the member states. At the same time, the Advocate-General stressed that there is a limitation, namely that this discretion must remain within the limits fixed by the principle of equal treatment, the directive itself, and the principle of proportionality.⁷ As regards the last one, he found it to be obviously breached in view of the fact that the constitutional provision covers all enterprises connected to the media, regardless of the extent, broadcasting or circulation, and because the incompatibility system affects all tenderers who are in any way related to a businessman in the media sector. This, he considered, goes clearly beyond what is necessary to ensure equal treatment and consequently effective competition. In view of this negative answer, there was no need to consider the third question of reference.

THE COURT'S JUDGMENT

The Court of Justice arrived essentially at the same conclusion as the Advocate-General. However, some deviations in the reasoning, even if they seem to be only the result of a 'slight difference in emphasis',⁸ are nonetheless of vital importance.

⁴ Opinion A.G. Maduro, *supra* n. 3, para. 21.

⁵ *Ibid.*, para. 23.

⁶ *Ibid.*, para. 30.

⁷ *Ibid.*, paras. 33-34.

⁸ D. McGowan, 'Exclusion of Bidders on Grounds of Holding Media Interests: *Michaniki AE v Ethniko Simvoulío Radiotileorasis and Ipourgós Epikératias* (C-213/07)', 3 *Public Procurement Law Review* (2009) p. 79 at p. 82.

In answering the questions of jurisdiction and admissibility, the Court followed Advocate-General Maduro. It held that nothing in Directive 93/37/EEC permits the inference that the applicability of the directive's provisions depends on the existence of an actual link with the free movement between the member states. As the contract exceeds the threshold for application of Directive 93/37, it fell within the Court's jurisdiction. The Court also dismissed the second argument, that the preliminary ruling is not needed for resolving the dispute. It considered itself bound to provide for an interpretation of EC law that is needed by the referring court, since the final outcome of the proceedings depends on that question.⁹

In relation to the question whether the list of grounds for exclusion is exhaustive, the Court of Justice considered this to be the case.¹⁰ Nonetheless, it held that this does not prevent member states from maintaining or adopting rules designed to ensure the principles of equal treatment and transparency, which underpin the EC public procurement regime.¹¹ At the same time, the principle of proportionality has to be respected.

The Court turned then to the second question. The assessment whether the Greek provision establishing an incompatibility between the media sector and the public procurement sector is actually in line with EC law. It started its analysis by taking the aim and purpose of Directive 93/37/EEC into account, which is to open up public works contracts to Community competition, and to avoid the risk of the public authorities indulging in favouritism.¹² Like the Advocate-General, it considered that the member states enjoy discretion in adopting measures intended to safeguard equal treatment and transparency.¹³ In the present case Greece perceived a risk of interference of the media in procedures for the award of public contracts,¹⁴ and was therefore entitled to adopt the incompatibility provision with a view to eliminating that risk. The interests that are thereby sought to be safeguarded – maintaining pluralism and independence of the media, as well as fighting against fraud and corruption – are public interest objectives, which are recognised under EC law. In light of this, the Court arrived at the conclusion that EC law does not preclude a national measure such as that at issue.

Having established that, the Court turned to examining proportionality. Like the Advocate-General, it held the measure to be clearly disproportionate in that it went beyond what is required to achieve transparency and equal treatment. First, the Greek measure excluded an entire category of public works contractors 'on

⁹ *Michaniki*, *supra* n. 3, para. 34.

¹⁰ *Ibid.*, para. 43.

¹¹ *Ibid.*, para. 44.

¹² *Ibid.*, para. 53.

¹³ *Ibid.*, para. 55.

¹⁴ *Ibid.*, para. 59.

the basis of an irrebuttable presumption that the presence amongst the tenderers of a contractor who is also involved in the media sector is necessarily such as to impair competition to the detriment of the other tenderers.¹⁵ The measure is thus considered to be of an ‘automatic and absolute nature’.¹⁶ This is not altered by the possibility of an intermediary to rebut the presumption if it is proven that she or he is acting autonomously and exclusively in his or her own interest. Furthermore, any public works contractor who acts as an intermediary of a media undertaking or of a person owning or running such an undertaking is excluded without having the possibility to show ‘that that action is not liable to influence competition between the tenderers.’¹⁷ Finally, the finding that the measure is disproportionate is reinforced by the ‘very broad meaning’ of the concepts of main shareholder and intermediaries. The Court concluded that EC law precludes a national provision such as that at issue, and consequently, there was no need to reply to the third question.

COMMENTARY

Central to this case is the problem of a potential conflict between an internal market directive, on the one hand, and a national constitutional provision on the other. This becomes immediately evident when taking into account the statements of the referring court in its contemplations to make a preliminary reference to the Court of Justice, and the latter Court’s explicit recollection of those.¹⁸ This very obvious observation is of no small significance here, as the Court chose to ignore the constitutional dimension of the case before it entirely.¹⁹ Evidence for this is to be found not only in the fact that the Court of Justice mentions the word ‘constitutional’ when referring to the national provisions only once in its entire reasoning, but also, and more importantly so, in the methodology which it employs in order to provide an answer to the questions referred. This is not the first time that the Court adopts this approach. It has previously done so in *Kreil*,²⁰ as well as in *Connect Austria*.²¹ The reason is presumably a very simple one. Since for

¹⁵ *Ibid.*, para. 63.

¹⁶ *Ibid.*, para. 66.

¹⁷ *Ibid.*, para. 67.

¹⁸ *Ibid.*, para. 21 ‘... the referring court (...) reviews now the compatibility with Community law of that constitutional provision ...’ [emphasis added].

¹⁹ Note that it is exactly this dimension of the present case as well as previous domestic case-law on the ‘main shareholder’ issue, which had triggered, at the time, a big domestic debate on the question of the relationship between the Greek Constitution and EC law.

²⁰ ECJ 11 Jan. 2000, Case C-285/98, *Tanja Kreil v. Bundesrepublik Deutschland*.

²¹ ECJ 22 May 2003, Case C-462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH v. Telekom-Control-Kommission*.

the Court, EC law is supreme over *any* conflicting national law, including constitutional law, by not mentioning the (constitutional) status or nature of that conflicting rule the Court only underlines exactly that attitude – the irrelevance of the rule’s status for the application of the doctrine of supremacy.²² That is understandable from the point of view that the Court needs to act according to its supremacy claim, and that is so irrespective of whether this authority has been accepted by the national legal order at issue. On the other hand however, by adopting this stance, the Court fails to prove that it takes respect for the constitutional identity of the member states seriously. This is problematic in light of the obligation contained in Article 6(3) TEU as well as Article 4(2) TEU as amended by the Treaty of Lisbon. The latter provides that the EU respects the ‘national identities [of Member States], inherent in their fundamental structures, political and *constitutional* [emphasis added]. The Court’s approach appears even more problematic in light of the German Constitutional Court’s recent *Lisbon Decision*, in which the latter has demonstrated how serious this obligation can be taken by a national constitutional court. The German Constitutional Court has expressed considerable distrust towards the EU in that respect, by reserving for itself the right to review whether the obligation to respect the constitutional identity has been violated and to make the application of EU law in the German legal order contingent on respect of that obligation.²³ A judgment, such the Court’s in *Michaniki*, where no attention is paid to the fact that a national constitution is involved, only serves to enhance such distrust.

In essence, the conundrum that has to be solved is how to uphold the supremacy claim over national constitutional law and at the same time afford due respect to the constitutional identities of the member states. The answer cannot lie in either of the extremes. It cannot lie in the absolute disregard of the constitutional status of the rules, nor in the absolute deference to those. If the latter approach was adopted it could lead to national constitutions ‘... becoming instruments allowing Member States to avoid Community law in given fields’,²⁴ or to ‘discrimination between Member States based on the contents of their respective national constitutions.’²⁵ The solution must therefore be to subject the constitu-

²² A. Posch, ‘Community Law and Austrian Constitutional law’, 24 *Vienna Online Journal on International Constitutional Law* (2008), p. 272 at p. 276, available at <www.icl-journal.com>, visited 25 Oct. 2009.

²³ See the *Lisbon Decision*, *supra* n. 1, para. 240, ‘the guarantee of national constitutional identity under constitutional and the one under Union law go hand in hand in the European legal area’ and para. 241 ‘The *ultra vires* as well as the [constitutional] identity review [to be applied by the German Constitutional Court] can result in Community law or Union law being declared inapplicable in Germany’.

²⁴ Opinion A.G. Maduro, *supra* n. 3, para 33.

²⁵ *Ibid.*

tional rule in question to the EC law tests, but to acknowledge at the same time the sensitivity of the issue in the application of those tests, and particularly in the application of proportionality, as will be discussed below.

The non-exhaustive nature of Article 24 of Directive 93/37/EEC

The Greek Council of State was of the opinion that Article 24 in fact provides for an exhaustive list. It is a consequence of this finding that it perceived a conflict between national law and EC law, which eventually gave rise to the questions for a preliminary ruling.²⁶

The Court's appraisal – and disagreement with the referring court – on this question is a well-reasoned application of the Court's previous finding in *Fabricom*.²⁷ Even though that case did not concern Article 24 of the directive (but Article 6(6)), it did establish that bidders could be excluded from tender procedures in public contracts in situations where conflicts of interests are liable to arise, in order to ensure equal treatment if the rule laying down the exclusion is proportionate.

Against this background, the reasoning in the present case follows logically. Even though the grounds for excluding candidates from procurement procedures have to be exclusively those contained in the relevant instrument, so as to encourage as wide a participation as possible in those procedures, additional grounds may be established in order to comply with the principles of equal treatment and transparency, which form the basis of the Community directives on public contracts. This rationale makes perfect sense as the added exclusionary ground serves to further the purpose of the directive, rather than undermining it.

Objective and nature of the national measure

The Court of Justice, like its Advocate-General, established that member states enjoy discretion in identifying what might bring about breaches of the principles of transparency and equal treatment in the national context. In the present case, the measure was held to be in line with the public interest objectives of preventing fraud and corruption as well as maintaining the pluralism and independence of the media. However, the Court did not go into further details as to the relative importance that these objectives enjoy in EC law and in the national legal order at issue.

²⁶ The minority, perceiving Art. 24 of Directive 93/37/EEC as non-exhaustive, found no conflict between EC law and national law since the aims of Art. 14(9) were viewed as being obviously in line with EC law. Judgment Nr. 3670 of 2006 of the Greek Council of State (Simvoulio tis Epikratias), para. 27.

²⁷ ECJ 3 March 2005 C-34/03, *Fabricom SA v. État belge*, para. 26. McGowan, *supra* n. 8, finds the decision in this respect also 'unsurprising'.

With respect to combating fraud and corruption, the importance attached to it in EC law, and specifically in the public procurement context, is evidenced by the fact that the later Public Sector Directive 2004/18/EC²⁸ lays down an *obligation* to exclude from the tender procedures those tenderers/candidates that are convicted of corruption or fraud. Regarding media pluralism, it is noteworthy that '[t]he European Union is committed to [its protection] as an essential pillar of the right to information and freedom of expression enshrined in Article 11 of the Charter of Fundamental Rights'²⁹ as the Commission has noted. Notably, the Court of Justice did not mention this link with fundamental rights. This link was expressly acknowledged in *Familiapress*³⁰ and *United Pan Europe Communications*,³¹ the two cases that the Court relied on in order to recognise it as a legitimate public interest objective.

These considerations should arguably carry weight in the overall assessment, and more specifically in the application of the principle of proportionality. Yet the Court did not take them into account when assessing the legitimacy of the national measure.

The most striking feature of this case, however, is the fact that the Court did not take into contemplation the weight that the national measure carries under Greek law. It omitted a discussion on the relevance of the fact that what was put forward here, as a further ground of exclusion, is what resulted from a 'national constitutional assessment'.³² This should have clearly preceded the proportionality analysis.

Advocate-General Maduro was not oblivious to this, and rightly so. His starting point on that question was that '... the European Union is obliged to respect the constitutional identity of the Member States',³³ which he derives from Article 6(3) TEU. It results out of this obligation in the Advocate-General's analysis that the member states must enjoy discretion regarding the assessment that they put forward, which is subject to the principle of proportionality. The fact that the ground of exclusion results from a national constitutional assessment has however, according to Advocate-General Maduro, an impact on the way this proportionality principle is applied. Discretion is thereby granted to the member state 'to

²⁸ Directive of the European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ* [2004] L 134/114, 30.4.2004, Art. 45(1).

²⁹ Commission Staff Working Document – Media Pluralism in the Member States of the European Union, Brussels, 16 Jan. 2007 SEC(2007) 32.

³⁰ 26 June 1997, Case C-368/95, *Vereinigte Familiapress Zeitungsverlag- und vertriebs GmbH v. Heinrich Bauer Verlag*.

³¹ 13 Dec. 2007, Case C-250/06, *United Pan-Europe Communications Belgium and Others v. État belge*.

³² Opinion A.G. Maduro, *supra* n. 3, para. 30

³³ *Ibid.*, para. 31.

establish the extent of incompatibility which appears to it in the national context, to satisfy the requirement of proportionality.⁷ Furthermore, it is conceded that the need as well as proportionality of the measure can vary across the member states. These are important conditions placed on the application of the principle by the Advocate-General, which the Court's reasoning was lacking.

Proportionality

Despite this important difference in the reasoning, the Court and the Advocate-General arrived at the same conclusion on the question of proportionality by failing the Greek measure under this test. Given its starting point, the Court's answer is hardly surprising; that of the Advocate-General is more so, especially the fact that he chose to apply that test himself.

The Court of Justice found the measure to be disproportionate in view of its absolute and automatic nature in that it establishes a system of general incompatibility between the public works sector and the media sector with an irrebuttable presumption. This finding is in line with *Fabricom*, which has been relied on in the judgment³⁴ as well as with the recent *Assitur*³⁵ decision. In both of these cases the Court has demonstrated its unwillingness to accept automatic exclusions of tenderers in cases where these rules seek to prevent conflicts of interests. In *Fabricom*, Belgian law contained an automatic prohibition for persons to submit a tender for a contract in relation to which they had been instructed to carry out research, experiments, studies or development before. This was considered disproportionate because the rule did not afford any possibility of showing that there is no conflict of interest, despite the involvement of the bidder in the preparatory work of the object of contract. Similarly, in *Assitur*, at issue was Italian legislation, which does not allow companies that are linked by a relationship of control or significant influence to participate as competing tenderers in the same procedure for the award of a public contract. Again, the Court of Justice found the measure to be disproportionate by virtue of the fact that the provision 'lays down an absolute prohibition (...) without allowing [the undertakings linked by a relationship of control] an opportunity to demonstrate that that relationship did not influence their conduct in the course of the tendering procedure.'³⁶

The reason *Michaniki* can be distinguished from these two other decisions is of course that those did not involve a constitutional provision. Acknowledgment of such – and therefore also of the sensitivity of the issue – would, one would assume, imply two things.

³⁴ *Michaniki*, *supra* n. 3, para. 62.

³⁵ ECJ 19 May 2009, Case C-538/07, *Assitur Srl v. Camera di Commercio, Industria, Artigianato e Agricoltura di Milano*.

³⁶ Operative part of the judgment, para. 2.

The first one relates to the fact that more discretion should be granted to the member state. The considerations of Advocate-General Maduro above apply. In addition to those, a further argument in support of deference could be advanced. That is related to the wide scope of the directive. It will be recalled that the Court held that applicability of the provisions of the directive do not depend on the existence of an actual link with free movement between member states. This is unsurprising in light of previous public procurement case-law. However, the fact that they have such a wide reach may imply that deference should be granted when constitutional provisions are at issue. The argument can be derived from observations of Advocate-General Kokott in *Satamedia*.³⁷ The Advocate-General reviewed the Court's case-law on conflicts between fundamental rights and fundamental freedoms, and observed that the Court has been sometimes reluctant to spell out detailed guidance on how the reconciliation exercise between the conflicting interests has to be resolved.³⁸ However in other instances it has offered strict scrutiny.³⁹ According to the Advocate-General, the Court adopts the latter approach in cases concerning predominantly transnational activities; and when active union citizens in transnational situations are concerned, the Court's scrutiny will be particularly intensive. The decisive consideration for establishing which approach should prevail when assessing what form of fundamental rights protection should be held to be compatible with the directive (here it was a question of balancing colliding fundamental rights within the context of the data protection directive) is therefore the question of scope. A wide scope of the directive, covering purely internal situations implies a wide margin of appreciation to the member states when fundamental rights are at issue. This argument can be applied by analogy to the present situation, where a provision of constitutional status is at issue.

The second implication would be a more careful consideration of proportionality and the question of who is best placed to apply it, instead of from the outset negating the national mechanism of automatic exclusion in any event.

³⁷ Opinion A.G. Kokott of 08.05.2008 in Case C-73/07, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy, Satamedia Oy*, paras. 46-53.

³⁸ Reference is made to the cases ECJ 29 Jan. 2008, Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*; ECJ 20 May 2003, Joined Cases C-465/00 C-138/01 and C-139/01, *Österreichischer Rundfunk; Familiapress*, *supra* n. 30; ECJ 14 Oct. 2004, Case C-36/02, *Omega Spielballen- und Automatenaufstellung v. Oberbürgermeisterin der Bundesstadt Bonn*; ECJ 14 Feb. 2008, Case C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*; ECJ 12 June 2003, Case C-112/00, *Eugen Schmidberge Internationale Transporte und Planzüge v. Republic of Austria*.

³⁹ ECJ 18 Dec. 2007, Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others*; ECJ 11 Dec. 2007, Case C-438/05, *The International Transport Workers' Federation and the Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eest* and ECJ 9 Dec. 1997, Case C-265/95, *Commission v. France* are cited.

Advocate-General Maduro did not merely condemn the measure by invoking its automatic and absolute nature, but elaborated more on why he considered it to be disproportionate. He advanced two arguments, although it is to be noted that those are made in the absence of any reference to the Greek context.

Firstly, he objected that the system of incompatibility does not take the extent of broadcasting or circulation of the media undertaking into account. On the basis of that he argued that ‘it seems difficult to maintain that a regional media undertaking has media power which would allow it to exert pressure on a contracting authority located in a different region or, conversely, that the latter would be inclined to exert pressure on such a business.’⁴⁰ In this respect, the measure goes beyond what is necessary. This is a fair observation, although it fails to take into account the problems that may be present within the regions themselves, i.e., the degree to which there are regional media undertakings that do exert such pressure on the contracting authorities located in the same region, and thereby effectively impeding competition to the detriment of tenderers located within and outside the region. An assessment of the situation requires knowledge of the particular Greek situation, and specifically on the way local clientelistic networks are or could possibly operate in this respect – something that was not taken into account in the Advocate-General’s argumentation. It is in any event interesting to note that the present case involves media undertakings that do have significant media power on a national scale. Mr. G. Sarantopoulos, the son of Mr. K. Sarantopoulos, is sitting on the board of directors of the undertakings ‘Ekdoseis Apogevmatini AE’ and ‘Epikinonies Ekdotikes kai Radiotileoptikes Epiheiriseis AE’, which publish the Athens based evening newspaper ‘Apogevmatini’ as well as the Sunday newspaper ‘Apogevmatini tis Kyriakis’. Neither of the two newspapers is regional – quite on the contrary. In terms of circulation, the former mentioned ranks sixth out of thirteen national evening newspapers in Greece.⁴¹

The Advocate-General also condemned the broad meaning of intermediaries along the following lines: ‘It does seem unlikely that a contracting authority could exert pressure on a businessman in the media sector who is distantly related to a works contractor or, conversely, that such a businessman would exert pressure on the contracting authority.’⁴² Yet the question of whether this generally valid statement can also be applied to the specific context at issue is not debated. However, national insights might be crucial. For example, some members of the Greek Council of State in the referring judgment highlighted the special nature of parental relationships in Greece, characterised by close ties and a form of interde-

⁴⁰ Opinion A.G. Maduro, *supra* n. 34, para. 35.

⁴¹ Data are available from the Athens Daily Newspaper Publishers Association, at <www.eihea.gr>, visited 25 Oct. 2009.

⁴² Opinion A.G. Maduro, *supra* n. 40.

pendence which is not only of an economic but also of a social and psychological nature;⁴³ in the absence of knowledge regarding those relationships, it is difficult to assess when a person is so distantly related that he cannot be considered as interconnected. Lastly, it should be pointed out that the one member of the referring court, who commented on the question of proportionality, found that there are no other means available in order to achieve the constitutional objectives of the provision in view of the fact that previous legislative regulations failed to do so.⁴⁴

These observations serve to illustrate that the application of the test might have been better left to the referring court, which is capable of taking into account the specifics of the peculiar national situation that led to the adoption of this peculiar constitutional provision.

It is indeed important to pose the question as to the circumstances that have led to the inclusion of such a unique provision in the Greek Constitution. Article 14(9) was inserted into the Constitution when the latter was extensively revised in 2001. The wording of this Article makes clear that the underlying aims are to guarantee transparency and plurality in information. The amendment debates in Parliament further reveal that the actual concern in relation to transparency is that of illegitimate political influence⁴⁵ and more specifically, the political influence which private undertakings may exert through the media in order to obtain public works contracts. That influence can be exercised ‘by holding out (...) a supportive mass information campaign’⁴⁶ if the contract awarding decision was favourable, or a campaign of a critical nature if it was unfavourable.⁴⁷ Most importantly, this was not perceived as a hypothetical risk but something that was already a strongly present practice, violating the public interest and leading to ‘economic and social decline’.⁴⁸ Furthermore, a concern was expressed for the provision to be effective, even in case the ordinary legislator failed to adopt an adequate implementing law.⁴⁹ Hence its severe, far-reaching and relatively detailed character (such as the inclusion of intermediaries) articulated in the constitutional text and not left for the implementing legislation. In this regard, former Prime Minister Mitsotakis expressed his support for the measure along the following lines:

⁴³ Judgment of the Greek Council of State, *supra* n. 26, minority opinion, para. 15.

⁴⁴ *Ibid.*, majority opinion, para. 29.

⁴⁵ P. Eleftheriadis, ‘Constitutional Reform and the Rule of Law in Greece’, 28 *West European Politics* (2005) p. 317 at p. 326.

⁴⁶ *Michaniki*, *supra* n. 3, para. 58.

⁴⁷ *Ibid.*

⁴⁸ E. Venizelos, Parliamentary Record of 07.02.2001, morning session, cited in Eleftheriadis, *supra* n. 45, p. 326.

⁴⁹ E. Venizelos, Parliamentary Record of 13.9.2000, p. 197.

The tough reality in Greece teaches us that a vague provision with a broad formulation, such as a provision on competition, might work elsewhere, but in Greece it would certainly be evaded.⁵⁰

On the other hand, Article 14(9) has also been criticised as being exaggerated,⁵¹ not much more effective than previous legislative attempts⁵² and perplexing. Perplexing in the sense that neither the problem of transparency in public procurement is really dealt with, since this provision is limited to illegitimate influence that may be exercised by media undertakings and does not extend to other powerful private entities which could wield a similar kind of influence. Nor is it viewed as adequately addressing the problem of excessive media power and corruption, as those owners of media undertakings can continue to exert pressure on politicians and civil servants in order to obtain other kind of favours.⁵³ The suggestion has been made that it was rather targeted at a specific group of very powerful media conglomerates,⁵⁴ which also control 'construction and other companies [and] appear to enjoy the lion's share of public procurement contracts.'⁵⁵ Those businessmen should be prevented from exercising their power at that point in time.⁵⁶ Be that as it may, the important thing to bear in mind is that the problem appears to have been so grave as to lead both major political parties to vote for this new Article in the revised Constitution and entrench the rule for the future.

To be sure, the above observations are not to say that the measure *should necessarily* pass the proportionality test. The point is, rather, that the question of what 'might work' in this context can only be answered when one has intrinsic knowledge of the national reality.

CONCLUSION

The Court's ruling in this situation reveals a direct conflict between the Greek Constitution and EC law. Those conflicts are to be resolved, according to Article

⁵⁰ K. Mitsotakis, 'Ο Κ. Μητσούκης για το Σύνταγμα και τα διαπλεκόμενα', *Ta Néa*, 27 Sept. 2000, available at <<http://digital.tanea.gr>>, visited 23 Oct. 2009, cited in this translated form in Eleftheriadis, *supra* n. 45, p. 326.

⁵¹ N. Alivizatos, 'Το Σύνταγμα ως άλλοθι. Αναθεώρηση και διαπλοκή', *Ta Néa*, 25 Sept. 2000, available at <<http://digital.tanea.gr>>, visited 23 Oct. 2009

⁵² N. Alivizatos and P. Eleftheriadis, 'The Greek Constitutional Amendments of 2001', 7 *South European Society & Politics* (2007) p. 63 at p. 67.

⁵³ Both arguments have been advanced by Eleftheriadis, *supra* n. 45, p. 327.

⁵⁴ In Greece, 'a few leading players dominate the scene and account for about 70% of the television and national newspaper market', N. Leandros, 'Structural Media Pluralism: The Greek Case', p. 15 <www.ecrea2008barcelona.org/guide/download/1588.pdf>, visited 1 Aug. 2009.

⁵⁵ Eleftheriadis, *supra* n. 45, p. 325.

⁵⁶ *Ibid.*, p. 327.

28(2) and (3) of the Greek Constitution and the interpretative declaration of Parliament attached to it,⁵⁷ on the basis of interpreting the former, as far as possible, in line with the latter. However, when taking into account the holdings in the referring judgment of the Greek Council of State on Article 14(9) of the Greek Constitution on the one hand, and the Court's ruling on the other, there does not seem to be much room left for such a conforming interpretation. The referring Court reasoned that the term 'incompatible status' contained in Article 14(9) is deliberate and means an absolute exclusion.⁵⁸ Thus, the ordinary legislator is not free to alter that meaning by means of an implementing law. He has only limited discretion as to regulating the details of the constitutional provision, such as the definition of the term 'main shareholder' or the degree that qualifies a parent as an 'intermediary', etc., as well as the type and degree of sanction, which may go so far as to declaring a public works contract void or prohibiting the conclusion thereof. The sanction, however, must in any case be obligatory and should effectively prevent undertakings active in both sectors from violating or undermining the constitutional prohibition. A finding to the opposite, i.e., that the prohibition contained in the constitution is not absolute, would imply that Article 14(9) does not provide for a specific constitutional regulation, but that it is merely expressing a 'programmatic' wish towards the legislator. The legislator, in turn, would be free to overturn it through statutory regulation, which is constitutionally guaranteed. That would be an untenable conclusion.

One should note in this respect the opinion of one of the members of the referring court who considered that the Council of State should not refer the question of whether Article 14(9) is in line with EC law, but only with respect to the implementing law 3021/2002.⁵⁹ His starting point is that EC law is supreme to national law, irrespective of whether it is of a constitutional nature or not. Thus, in light of the obligation of conform interpretation derived from Article 28(2) and (3) of the Greek Constitution, the Council of State should provide an interpretation of Article 14(9) – which it does in this case for the first time – only after the Court has replied to the question regarding law 3021/2002. The dissenting judge opined that it is in any event possible to interpret Article 14(9) in line with EC law, mainly because of the – as he considers – wide discretion which the ordinary legislator enjoys in the formulation of the implementing legislation. In relation to this he drew attention to the latest of the laws implementing Article 14(9), namely Law 3414/2005 (amending Law 3310/2205), which provides that the incompatibility status and the prohibition of entering a public works contract

⁵⁷ Parliamentary Record of 14.02.2001, morning session, p. 4851 et seq. and especially p. 4857-4859.

⁵⁸ Judgment of the Greek Council of State, *supra* n. 26, para. 14.

⁵⁹ *Ibid.*

is only valid in case of a final condemnatory court decision regarding the offence of active corruption as specified by Article 45(1)(b) of Directive 2004/18/EC.⁶⁰ Law 3414/2005 was introduced after negotiations with the European Commission, in order to ensure compliance with EC law⁶¹ and at the same time uphold the guarantees in the Greek Constitution. The Court did not, however, follow the dissenting judge's opinion and decided to provide the interpretation of Article 14(9) described above before referring its questions to the Court of Justice.⁶²

Against this background, a smooth resolution of the problem is unlikely to prove an easy task. It is true that on the one hand, EC supremacy over the constitutional provision could be seen to already *de facto* be acknowledged here. This is so by virtue of the referring court's concession that if the Court of Justice found the system of incompatibility to infringe EC law, it would have no other choice but to refrain from applying it. On the other hand however, it is also important to point to the opinion of three members of the Greek Council of State, who in a long reasoning denied EC supremacy of both primary and secondary law over the Greek Constitution.⁶³

In light of the above, it will be interesting to see how the Greek Council of State will react to the Court's preliminary ruling. At stake is a 'core constitutional question',⁶⁴ namely, whether to accept the Court's claim that EC law, including secondary law, is supreme over national constitutional law – a matter that is far from being settled.⁶⁵



⁶⁰ See *supra* n. 28.

⁶¹ Note that the Commission had nonetheless decided to take legal action against Greece with regard to the Greek Ministerial Decision 24014/2005 on the evidence required under Law 3414/2005. However as Greece has subsequently accepted the Commission's observations regarding the enforcement of the law (in particular by adopting Ministerial Decision 20977/23.08.2007), it decided to withdraw its infringement proceedings.

⁶² In light of this interpretation it is questionable whether Law 3424/2005 is in line with Art. 14(9) of the Greek Constitution.

⁶³ Judgment of the Greek Council of State, minority opinion, *supra* n. 26, para. 21. Note that on the basis of this negation they rejected a reference to the ECJ as to the compatibility between the constitutional provision and EC law.

⁶⁴ M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005) p. 262 at p. 262.

⁶⁵ For diverging opinions in scholarly debates triggered by the 'main shareholder issue', see, e.g., A. Maniatis, 'Ευρωσύνταγμα και βασικός μέτοχος', *ΕΛΕΥΘΕΡΟΤΥΠΙΑ*, 16 March 2005 available at <www.cecl2.gr/html/ent/416/ent.4416.2.asp>, visited 25 Oct. 2009 and G. Papadimitriou, 'Συνταγματικά ανάδελφοι;', *Το Βήμα*, 3 April 2005, p. 47 available at <www.gpapadimitriou.gr/publications/newspapers/newsp06.html>, visited 25 Oct. 2009.