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Helen Xanthaki

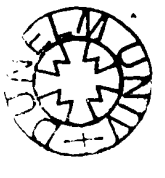
Secondary Establishment of European Union Public Limited Companies in France, Greece and Italy: Breaches of European Community Law and Redress

Abstract

The thesis analyses the secondary establishment of foreign European Union public companies limited by shares in France, Greece and Italy.

The conditions for the establishment of branches, agencies and subsidiaries in the three countries are presented. Their compliance with European Community law is evaluated. Although the formal conditions for the recognition and secondary establishment of foreign companies comply with European Community law, national legislative and administrative practices limit the activities allowed to foreign persons and violate their free establishment, as confirmed by the European Court of Justice. This proves the first hypothesis: the companies' freedom of establishment is still violated. The second hypothesis is that the persistence of France, Greece and Italy to continue these violations is mainly due to the lack of effective judicial protection for foreign companies suffering damages as a result. Judicial protection at the national level, in national judicial proceedings, even where the European Union principle of state liability is raised, is ineffective due to the privileges of the state in actions against it. In view of the currently minimal role that individuals may play in proceedings before the European Court of Justice, the only manner in which protection at the European Union level can be sought is through the *Francovich* scenario, which combines state liability and preliminary rulings from the European Court of Justice. The inefficiencies of national proceedings and the inherent problems of indirect actions before the European Court of Justice render the *Francovich* scenario inadequate for the protection of companies. This proves the second hypothesis.

In the future a possible, yet untested, new interpretation of concurrent liability may allow companies to seek redress before the European Courts on the basis of concurrent liability between the breaching Member State and the Community for failure of the Commission to perform its supervisory duty.



Secondary Establishment of European Union Public Limited Companies in France, Greece and Italy: Breaches of European Community Law and Redress

Helen Xanthaki

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Ph.D.
University of Durham
Department of Law
2000

19 JUN 2001

Table of Contents

Abstract 1

Title Page 2

Table of Contents 3

List of Tables 7

Statement of Copyright 8

Chapter 1: Introduction 9

Table 1: Actions for failure to fulfil obligations 14

Table 2: Transposition of Directives per Member State 15

Graph 1: Breakdown by Member State of the 2029 infringement proceedings 16

Graph 2: Number of open infringement proceedings by Member State 17

Graph 3: Cases before the Court of Justice on 31-12-1998 18

Graph 4: Breakdown by sector of the 2029 open infringement proceedings 19

Graph 5: Number of open infringement proceedings by sector 20

Chapter 2: The Companies' Freedom of Establishment Under EC Law 21

A. Introduction 21

B. Recognition of foreign companies 22

B1. Basic principles on recognition 22

B2. The theory of the *siège réel* as applied in the EU 24

B3. The theory of incorporation 26

B4. The 1956 Hague Conference 27

B5. The EU view on recognition 29

C. Establishment within the EU 34

C1. Definition of establishment 34

C2. Establishment and provision of services 35
C3. The nature of the freedom of establishment 37
C4. Primary and secondary establishment 38
C5. *Ratione Personae* application of the freedom of establishment 40
C6. The issue of EU subsidiaries of non-EU parent companies 43
C7. *Ratione loci* application of the freedom of establishment 47
C8. *Ratione materiae* application of the freedom of establishment 47
C9. Relationship between transport and freedom of establishment 52
C10. Exceptions to the freedom of establishment 54
D. Concluding remarks 58

Chapter 3: Recognition of Foreign Companies in Greece, France and Italy 61
A. Introduction 61
B. Recognition of foreign companies in Greece 61
C. Recognition of foreign companies in France 65
D. Recognition of foreign companies in Italy 70
E. Evaluation of national laws on recognition 76

Chapter 4: Formal Requirements for Secondary Establishment in Greece, France and Italy 82
A. Introduction 82
B. Establishment in Greece 82
B.1. The establishment of branches and agencies (Art.50 of Law 2190/1920) 82
B.2. The establishment of commercial/industrial off-shore units (Law 89/67) 87
B.2.1 Choice of the appropriate establishment law 91
B.3. Subsidiaries 93
C. Establishment in France 96
C1. The establishment of branches or agencies 96
C2. Participation in French companies 102
C3. Subsidiaries 104
D. Establishment in Italy 109
D1. The establishment of branches or agencies 109

D2. The establishment of subsidiary companies in Italy 113
E. Evaluation of Greek, French and Italian law 118

Chapter 5: Substantive Conditions for the Establishment of Foreign Companies in France, Italy and Greece 125
A. Introduction 125
B. Direct violations 128
B1. The Establishment of Private Coaching Schools in Greece 128
C. Indirect violations 134
C1. Pure indirect violations 134
C1.1. Dealing in transferable securities in Italy 134
C1.2. Companies dealing in crude oil and petroleum products in Greece 138
C1.3. Commercial agents in Italy and France 141
C2. Indirect disguised violations 144
C2.1. Tourist guides in France, Italy and Greece 144
C2.2. Restrictions related to the recognition of qualifications for certain professional activities in Greece, Italy and France 147
C2.3. Limits to the free movement of capital in Greece 150
C2.4. Limits in the area of maritime transport in France and Greece 153
D. Evaluation of findings 161
Table 3: Violations used as case-studies 167

Chapter 6: The Protection of Foreign Secondary Units at National Level 168
A. Introduction 168
B. Brief general overview of the selected jurisdictions 169
C. Procedure before the national courts 171
C1. The choice of national court 172
C2. The choice of the suitable remedy before the national courts 180
C3. The evolution of the case before the national courts 182
C4. Miscellaneous procedural issues: enforcement and compliance 188
D. Substantive conditions for achievement of compensation 193
D1. Wrongful act or omission 194
D2. Damage and Causation 198
D3. Restitution 200

D4. Compensation for legislative acts 201
E. Evaluation of protection at national level 204

Chapter 7: The Protection of Foreign Secondary Units at EU Level 209
A. Introduction 209
B. Preliminary References and the State Liability Scenario 211
C. An Innovative Solution based on Concurrent Liability 224
C1. The legal basis of the proposed remedy 227
C2. Admissibility Requirements 234
C3. Substantive requirements 241
D. Evaluation of the Protection of Companies at EU Level 248

Chapter 8: Conclusions 254

Appendix: Conversion Table 260

List of Cases at National Level 269

List of Cases at EU Level 281

Bibliography 290

List of Tables and Graphs

TABLES

Table 1: Actions for failure to fulfil obligations 14

Table 2: Transposition of Directives per Member State 15

Table 3: Violations used as case-studies 167

GRAPHS

Graph 1: Breakdown by Member State of the 2029 infringement proceedings 16

Graph 2: Number of open infringement proceedings by Member State 17

Graph 3: Cases before the Court of Justice on 31-12-1998 18

Graph 4: Breakdown by sector of the 2029 open infringement proceedings 19

Graph 5: Number of open infringement proceedings by sector 20

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CHAPTER 1

Introduction

The thesis tackles the issue of breaches of EC law committed by French, Italian and Greek national authorities in the field of secondary establishment of foreign public companies limited by shares. The examination of this topic revolves around two main hypotheses. First, breaches of EC law in the selected field still take place in the three chosen countries. Second, this is mainly due to the lack of effective judicial protection offered to companies suffering damages as a result of these violations.

In order to prove these hypotheses, the thesis refers to six topics examined in six separate chapters. Chapter 2 places the topic into its legal framework from an EC law perspective. It presents the primary and secondary EC legislation on the freedom of establishment of foreign companies with particular emphasis to the secondary establishment of public limited companies. The information provided in the description of EC law on Arts.39-45 in Chapter 2 is used as a comparative basis for the examination of the compliance of French, Greek and Italian law with EC legislation in Chapters 3,4 and 5.

These Chapters present different areas of national provisions relating to the secondary establishment of foreign public limited companies in order to evaluate the compliance of the relevant national legislation with EC law. Chapter 3 begins with the presentation of the theories of recognition within the three selected countries. The topic of Chapter 3 is of fundamental significance for the development of this analysis. In order to establish within the selected Member States, foreign companies need to be recognised as subjects of rights and obligations by the national legislation of France, Italy and Greece. Lack of recognition signifies lack of legal existence which leads to a practical abolition of the possibility to establish at all. The evaluation of the compliance of the relevant national provisions with EC law on recognition and on the determination of the criterion under which this recognition is made constitutes the aim of Chapter 3.

Chapter 4 presents the formal requirements for the establishment of secondary units by foreign public limited companies in France, Italy and Greece. Recognised foreign companies need to follow a formal procedure in order to acquire the right to func-

tion within the selected Member States. The fulfilment of these formal requirements allows foreign secondary units to exercise their right to establishment presented in Chapter 2. Chapter 4 compares these formal requirements with EC legislation and assesses their compliance under the prism of their possible use as obstacles to the functioning of foreign secondary units within the three selected countries.

Recognised and legally established foreign secondary units exercise their right to free establishment through the national legislative and administrative regulations which delimit the nature of the activities allowed to foreign legal units, the type of products tradable by foreign units and the corollary activities of the right to establishment. Chapter 4 brings into light discriminatory restrictions in the right of foreign companies to establishment. The Chapter focuses on persistent violations of EC law which have been declared as such by the ECJ. This choice reflects the need for a judicially declared violation of EC law in order to allow the evolution of the second hypothesis of the thesis concerning the protection offered to foreign companies suffering damages due to such violations at the national and the EU levels. The discovery of breaches of EC law in the field of company establishment proves the first hypothesis of the thesis, namely that breaches of EC law in this field of EC legislation still occur.

Chapter 6 presents the procedural rules for the submission of a claim for state liability due to violations of EC law within the three selected countries. These rules are evaluated in order to establish whether protection for foreign companies at the national level is adequate. Emphasis is given to the privileges of the state in civil and administrative procedures in France, Italy and Greece as these are the main hurdles to the route of companies to compensation.

Chapter 7 follows on the theme of Chapter 6, but looks at the effectiveness of judicial protection from the point of view of the EU. The feeble position of the individual in EC law is presented and the effectiveness of the *Francovich* scenario, as the current remedy for the achievement of compensation for damages suffered due to violations of EC law by Member States, is assessed. The effectiveness of state liability as a doctrine applied before the national courts is largely affected by the often unsurpassable procedural hurdles of Chapter 6 in cases against the state in all three selected countries at the national level. Chapter 7 analyses the effectiveness of state liability as a means of offering judicial protection at the EU level, namely when combined with a preliminary reference before the ECJ. Particular emphasis is given to the inherent problems of any EU indirect remedy, which mainly derive from the reluctance of French, Greek and Italian judges to recognise the judicial role that ECJ judges may play in the national

system of judicial process. In concluding that the judicial protection currently offered to foreign companies both at national and at the EU levels is ineffective, the thesis looks into a new, possibly futuristic remedy, whose future adoption by the ECJ may offer effective judicial protection to EU companies. The proposed remedy utilises the mechanism of the already existing principle of concurrent liability between Member States and EU institutions, and revives it under the prism of the state liability related case-law of the ECJ. The end result is the proposition that foreign EU companies suffering damages as a result of the breaches of EC law by Member States presented in Chapter 5 may manage to achieve compensation on the basis of concurrent liability between the breaching Member State and the Community for the failure of the Commission to perform its supervisory duties adequately. However, with reference to the current situation, the ineffectiveness of the state liability doctrine proves the second hypothesis of the thesis, that foreign companies suffer from lack of judicial protection, a factor which may be seen to explain the reasons for the existence of so many persistent breaches of EC law within the three selected countries after almost forty years of legal integration.

The research for a topic involving the presentation and comparative analysis of four different legal systems, the EU and the three selected jurisdictions, would be incomplete without regular visits to the countries involved and the European Commission. Annual visits to the libraries of the Universities of *Sapienza* in Rome and the University of Naples, more frequent visits to the *Cujas* library at the Sorbonne in Paris, and regular study at the library of the Athens Bar Association made access to the relevant national legal materials easier. Further research in the library of the Institute of Advanced Legal Studies in London, the library of the European Commission in Brussels, the library of the ECJ and the Internet ensured access to further national materials. Requests for information from the Athens Supreme Court and Council of the State, which even allowed me access to their private libraries, the Italian *Corte Supremo* and *Consiglio dello stato*, and the French *Conseil d'Etat* completed the necessary research for case-law in the three selected jurisdictions where traditionally few cases are published in legal journals. The result of this work is reflected in my use of unreported national cases, easily identified in the list of cases at the national level annexed to this thesis. With reference to EC law, the research to aspects of the freedom of establishment and initial reactions to the proposed remedy of Chapter 7 was possible through close collaboration with Mr. Costas Popotas, the Automation Officer of the library of the ECJ, and frequent communication with Ms Virginie Guennelon and other officials in DG IV of the European Commission.

Before proceeding with the analysis of the chosen topic it is worth noting that

the main reason for the choice of the three selected countries lies with their records in the transposition of EC legislation into national law. According to the latest statistics of the ECJ, the number of open infringement proceedings by Member States (situation on 29 November 1999) indicate that France has the worst record of infringements of EC law with 274 breaches, Italy is the second worst with 202 and Greece is the third worst with 175 breaches [see Graph 1]. In the previous available figures (situation on 25 August 1999) France had again the worst record of infringements with 254 violations, Italy came second with 193 violations and Greece was third with 169 infringements [see Graph 2]. Moreover, the highest number of infringement proceedings initiated between 1953 and 1998 was brought against Italy with 355 actions. The second highest number was against Belgium with 225 actions, whereas France and Greece came third and fourth with 185 and 160 actions accordingly [see Table 1]. Furthermore, the transposition rate for Directives in the three chosen countries are amongst the lowest in the EU with Italy at the lowest position with 1377 Directives transposed so far followed by Greece with 1366, Luxembourg with 1372 and France with 1377 Directives transposed [see Table 2]. It is also worth noting that according to the latest statistics of the ECJ on 31 December 1998 France had the highest number of cases brought against it with 42 cases, followed by Belgium with 34, Italy with 31 and Greece with 28 cases [see Graph 3]. Thus, the three countries selected for analysis in this theses are, at least currently, the worst violators of EC law. Moreover, the three selected countries are civil law jurisdictions, thus presenting a commonality in the structure of their legal systems, in their mercantilist philosophy and in their specific legal provisions. This facilitates comparative work. Furthermore, all three countries are situated in the Mediterranean and have common interests in specific areas of commercial activity, such as maritime transport and tourism. This poses a very interesting question concerning the reasons for the existence of common EC violations, namely whether these occur due to commercial interests shared by the three states chosen here or whether these occur due to the lack of effective protective mechanisms for foreign individuals suffering damages as their result.

The choice of the field of EC law analysed here was again a mixture of scientific interest and record of infringements. According to the latest statistics of the ECJ the number of open infringement proceedings by sector (situation on 29 November 1999) demonstrate that there are 413 cases related to Internal Market, 370 concerning the environment and 343 concerning agriculture [see Graph 4]. The previous figures (situation on 25 August 1999) brought once again Internal Market first with 397 cases, then agriculture with 336 violations, then the environment with 332 breaches and transport with

208 [see Graph 5]. The selection of the companies' freedom of establishment as a specific area of the Internal Market sector derived from the discovery of many such breaches of EC law in my M.Jur. thesis, also submitted at Durham University.

The thesis refers to the establishment of one type of company, namely public companies limited by shares. The examination of the establishment of all possible types of companies within the three selected countries would be impossible for the purposes of a thesis of this length, as each company type within each of the three chosen jurisdictions is regulated by a special set of provisions. The choice of public companies limited by shares was made on the basis of the consideration that public limited companies, usually the most financially robust type of company, would be the most probable form to both desire and be able to expand abroad.[1] This form of company, namely the British public company limited by shares, is considered to correspond to the Greek *Anonimos Eteria*, the French *Société Anonyme* and the Italian *Società per Azioni*.[2] This is now widely accepted amongst legal commentators and is demonstrated beyond doubt by the secondary EC legislative texts on Company Law.[3] Despite some problems in the past, the matter is now considered to be resolved.[4] Without further reference to this issue, therefore, this thesis will proceed with the analysis of the secondary establishment of foreign EU companies of this type in Greece, France and Italy.

In view of the recent guidelines of the ECJ for the correct manner of citation of Articles of the EC Treaty and the Treaty of the European Union, it is exclusively the new numbering which is used in the thesis. For the facilitation of readers with experience in the old numbering, a conversion table is included at the end of the thesis.

Developments after the end of February 2000 have not been taken into account.

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[1] The concept of the public limited company is often introduced "to facilitate the creation of self-supporting and viable businesses that would accumulate large sums for the development and modernisation of the country's commercial and industrial infrastructure". See B. Sheppard, *How to Set up a Company in the EC* (1992, Mercury Books, London), p.95.

[2] See Brebner and Co, *Setting up a Company in the European Community, A Country by Country Guide* (1990, Kogan Page Ltd in association with the London Chamber of Commerce, London), pp.106, 66 and 142 respectively. Also see Karavas, *Commercial Law,* (1952, Sakkoulas, Athens), p. 84: "The public limited by shares company of the Anglo-Saxon legal system correspond to the Greek *Anonimos Eteria,* whereas private companies limited by shares correspond to the Greek *Eteria Periorismenis Efthinis.*"

[3] The Proposal of the Fifth Directive on the structure of public limited companies stipulates that it applies to "public limited companies" in the UK, *Société Anonyme* in France and *Aktiengesellschaft* in Germany. Therefore, it can be stated the Directive treats these three national company forms as analogous. Similar reference is made by Directive 77/91/EC. Analogous company forms in other EU member states are *Societe Aninyme-naamloze vennootschap* in Belgium, a*ktieselkebet* in Denmark, *société anonyme* in Luxembourg, *società per azioni* in Italy, *naamloze venootschap* in the Netherlands, public company limited by shares in Ireland, *sociedad anonima* in Spain and *sociedade anonima de responsibilidade limitada* in Portugal.

[4] See Brebner and Co, *op.cit.*, p.106, where it is noted that "Due to differences in legal tradition, private and public companies in the UK are not completely equivalent or analogous to private and public companies on continental jurisdictions".

Table 1

Actions for failure to fulfil obligations

Brought against	**1998**	**from 1953 to 1998**
Belgium	22	225
Denmark	1	21
Germany	5	122
Greece	17	160
Spain	6	60
France	22	185
Ireland	10	84
Italy	12	355
Luxembourg	8	86
Netherlands	3	59
Austria	4	5
Portugal	5	41
Finland	1	1
Sweden	1	1
United Kingdom	1	41
Total	**118**	**1446**

Source: *Statistical Information on the Court of Justice (1998)* in http://europa.eu.int.

Table 2

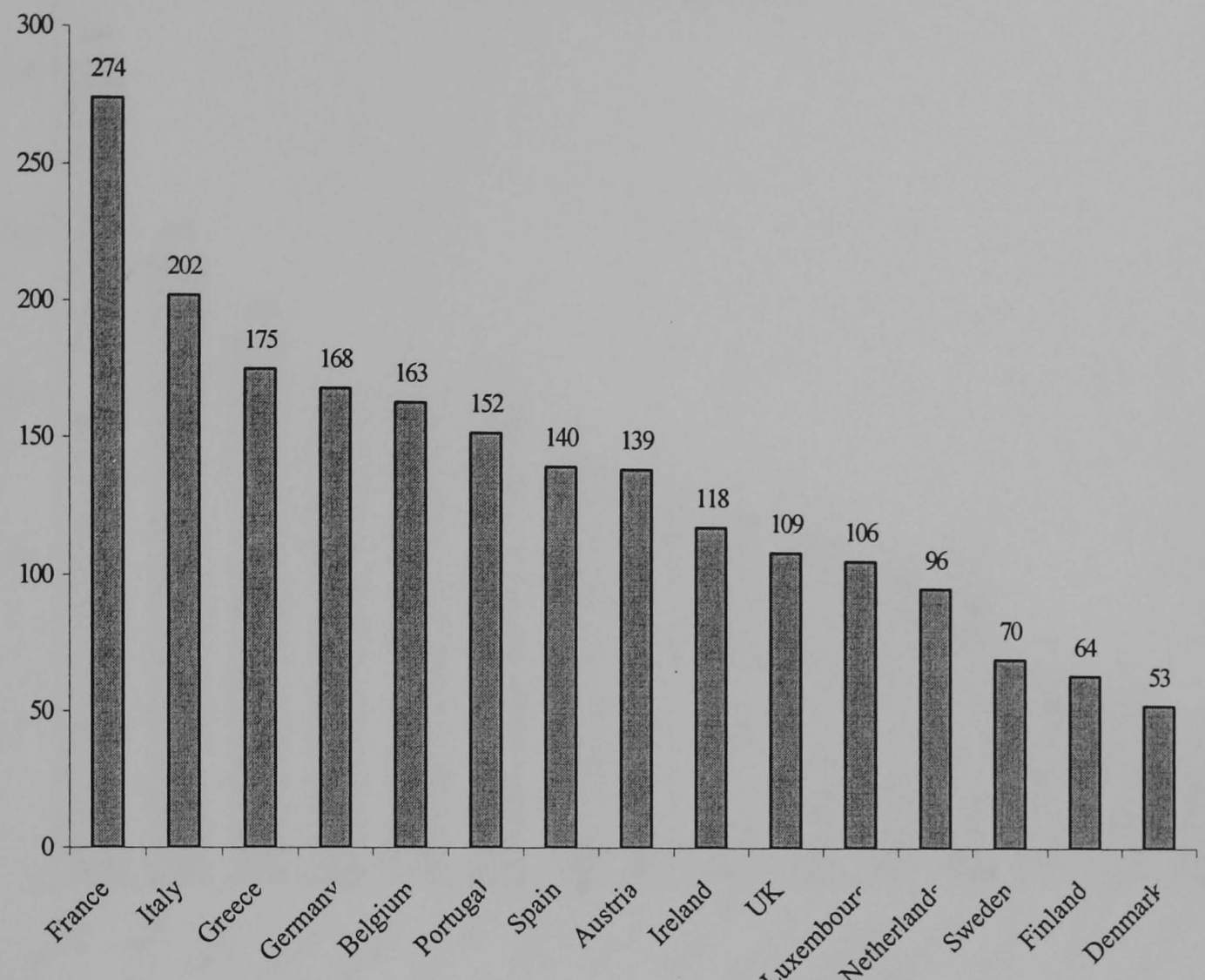
Transposition of Directives per Member State

Member States	Directives Applicable on 31-12-1998	Directives for which implementing measures have been notified	Percentage notification rate on 31-12-1998	Percentage notification rate on 31-12-1997
Denmark	1453	1427	98.21%	*97.00%*
Spain	1458	1420	97.39%	*95.10%*
Finland	1453	1411	97.11%	*96.30%*
Sweden	1454	1411	97.04%	*97.30%*
Germany	1459	1411	96.71%	*93.60%*
Netherlands	1459	1410	96.64%	*96.40%*
United Kingdom	1455	1402	96.36%	*94.70%*
Ireland	1452	1387	95.52%	*94.10%*
Austria	1461	1388	95.00%	*94.30%*
Portugal	1462	1386	94.80%	*93.50%*
Belgium	1459	1382	94.72%	*91.80%*
France	1458	1377	94.44%	*93.60%*
Luxembourg	1457	1372	94.17%	*94.20%*
Greece	1456	1366	93.82%	*92.80%*
Italy	1457	1364	93.62%	*92.50%*
EC average	**1457**	**1394**	**95.70%**	***94%***

Source: European Commission, *Update of the Single Market 1998*, http://europa.eu.int/comm/sg/ sgb/infringements/pdf/text_rap98_en/pdf.

Graph 1

Breakdown by Member State of the 2029 open Infringement proceedings
(situation on 29 November 1999)

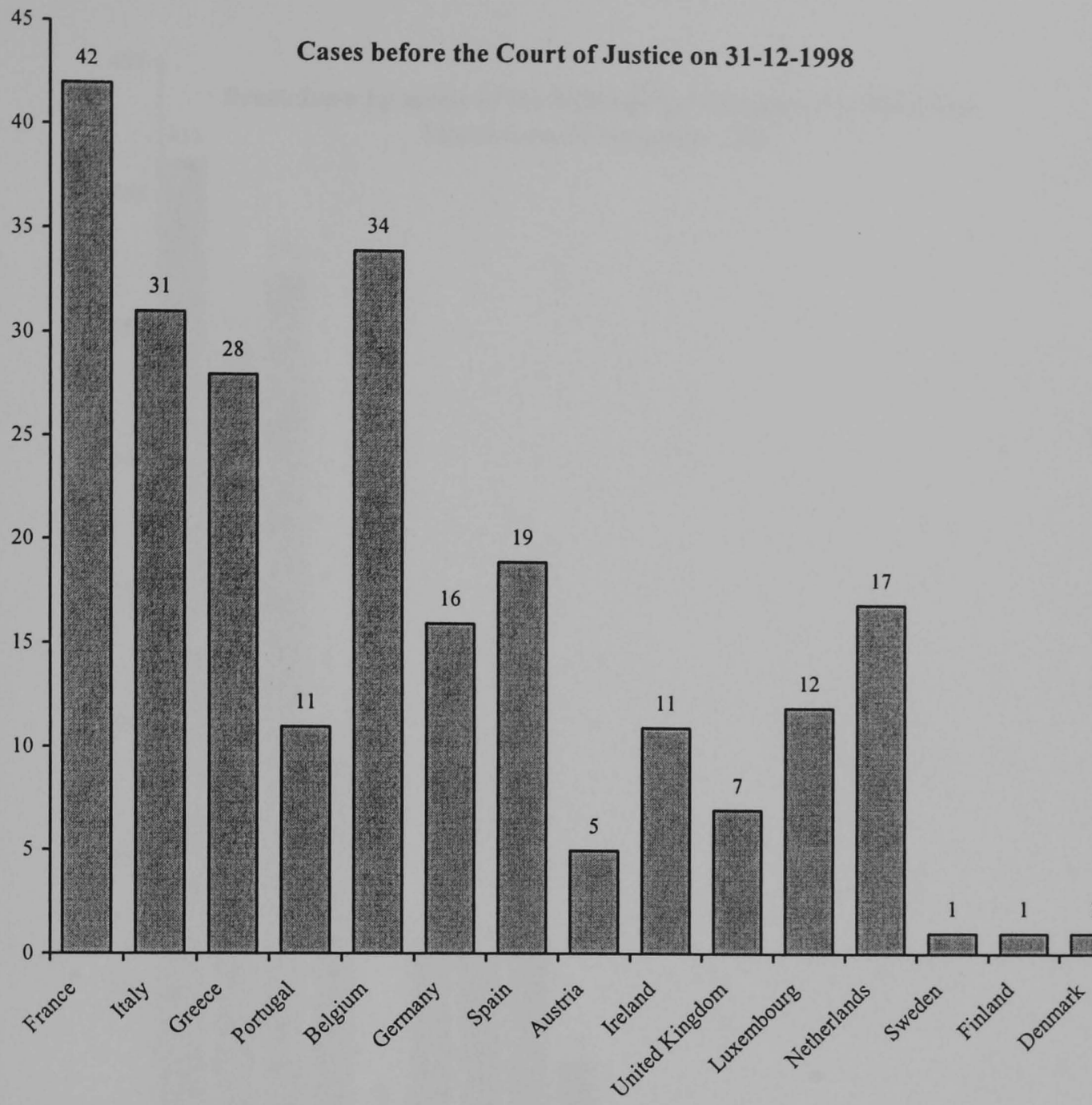


Source: http://europa.eu.int/comm/sg/sgb/infringements/pdf/ms_en.pdf

Graph 2

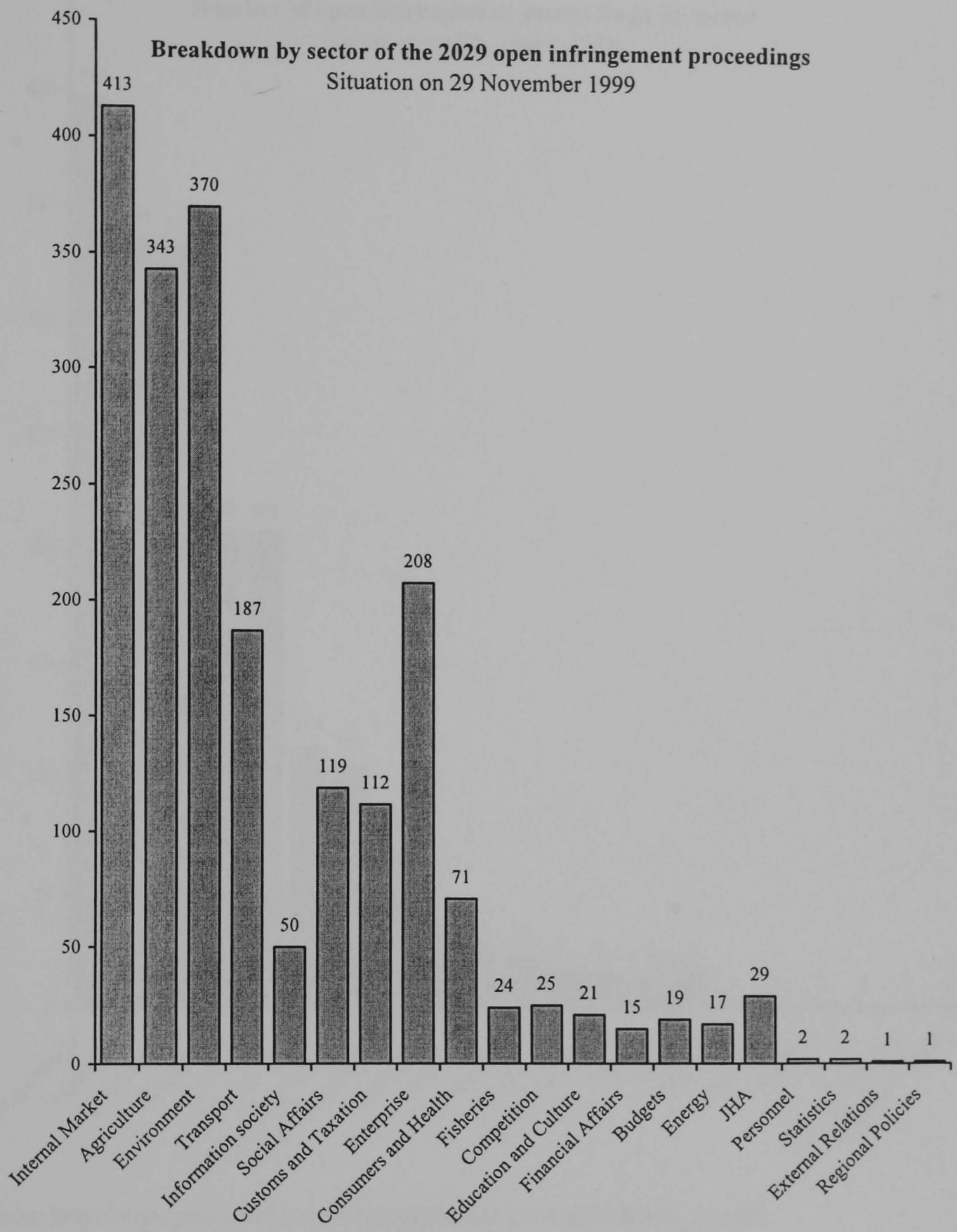
Source: http://europa.eu.int/comm/sg/sgb/infringements/pdf/ms_en.pdf

Graph 3



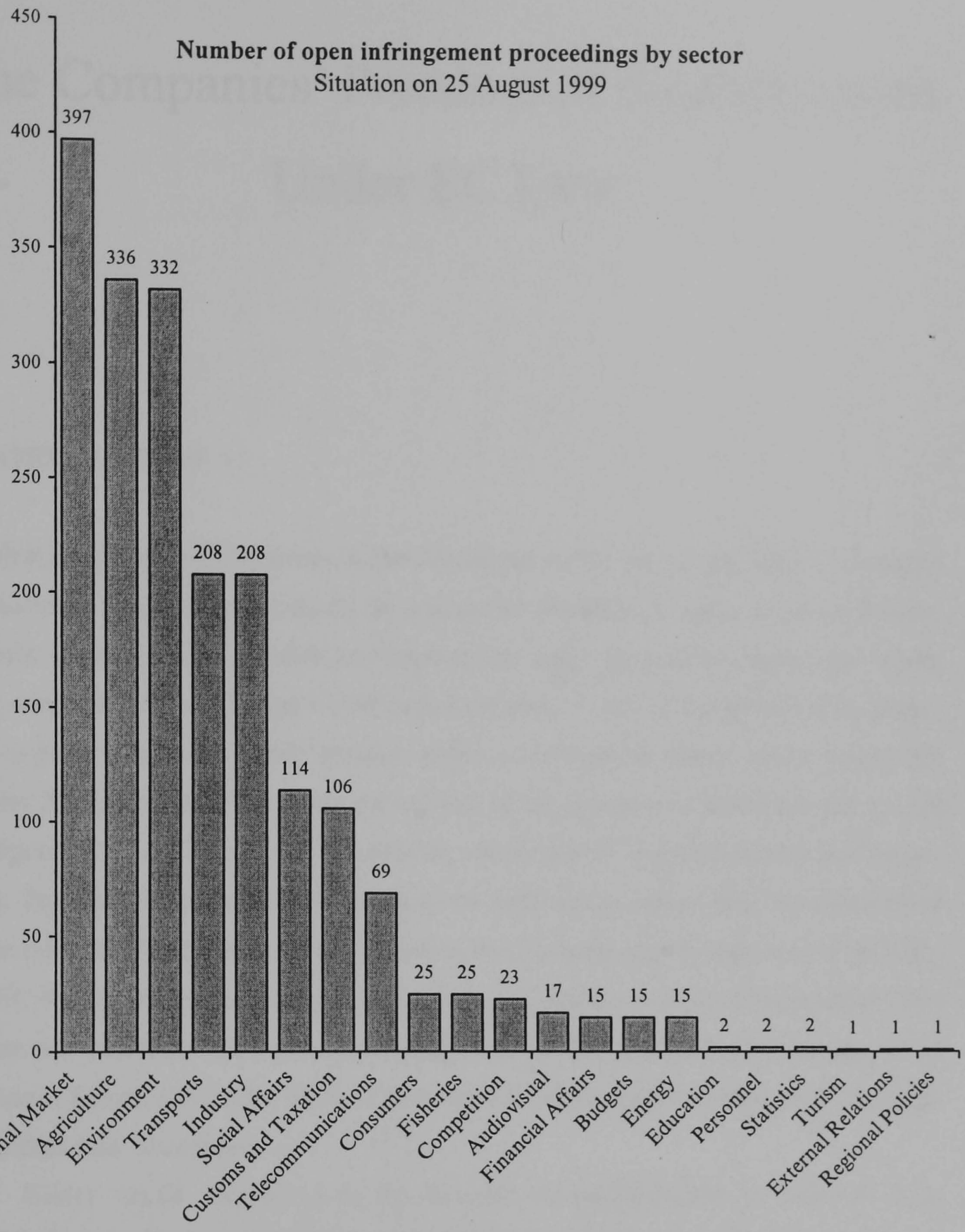
Source: European Commission, *Update of the Single Market 1998*, http://europa.eu.int/comm/sg/ sgb/infringements/pdf/text_rap98_en/pdf.

Graph 4



Source http://europa.eu.int/comm/sg/sgb/infringements/pdf/ms_en.pdf

Graph 5



Source: http://europa.eu.int/comm/sg/sgb/infringements/pdf/ms_en.pdf

CHAPTER 2

The Companies' Freedom of Establishment Under EC Law[1]

A. INTRODUCTION

The first hypothesis of this thesis is that violations of EC law in the field of company establishment still occur within the three selected countries. In order to prove this hypothesis, the thesis will describe and analyse the rights granted to companies which, being considered under EC law to have the nationality of one of the EU Member States, wish to plant a secondary establishment within other Member States under Arts.43-48. Chapter 2 will define and describe the content of the freedom of establishment as it is introduced by Arts.43-48 and interpreted by secondary EC legislation and ECJ judgements. Particular emphasis will be given to the nature of company activities liberalised by the relevant EC legislation. It is intended that, through the clarification of the relevant EC legislation and the consequent provision of a clear measure of comparison, this chapter will constitute the theoretical background for the assessment of the legality of the Greek, French and Italian national laws on the establishment of foreign EU companies within their boundaries.

Under Art.43 restrictions to the freedom of establishment of nationals of a Member State in the territory of another Member State or restrictions in the setting up of agencies, branches, or subsidiaries of foreign legal persons established in the territory of any Member State shall be abolished. It is widely accepted that the legal basis of the freedom of establishment, which according to Art.43 includes the right to pursue activities as a self-employed person, as well as the right to set up and manage undertakings under the same conditions as the nationals of the host Member State, lies in Art.12

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[1] Past versions of this chapter has been published in H. Xanthaki, "The right of legal persons to establish within the EU: An overview" [1996] *Rivista di Diritto Europeo*, pp.641-675; H. Xanthaki, "Secondary Establishment of Companies within the EU: A Real Challenge or Another Missed Opportunity?" [1999] *European Business Law Review*, pp.120-139.

which prohibits any discrimination due to nationality. Insofar as companies are concerned, the scope of the freedom of establishment is to allow the setting up and functioning of the foreign undertakings described in Art.48 under the conditions introduced by national law for the natural and legal persons nationals of the receiving state.[2] It must be accepted therefore that equality in treatment between foreign and domestic companies within the EU should include not only liberalisation of the conditions for the setting up of the company, but also for the recognition of foreign legal entities as legal persons. The reason behind this is self-explanatory: the company's freedom to establish within another Member State would lack practical value if the company is not recognised as a legal entity by the domestic law of the host country. Indeed, a company not recognised as a legal entity by the national law of the receiving country lacks legal personality. It would therefore simply not exist as far as the receiving country's national law is concerned, thus making the renting or purchase of premises, the employment of workers, the participation in any kind of contract or even its procedurally admissible presence before the administrative or judicial authorities of the host state legally impossible. Even if the host state is prepared to recognise the legal personality of foreign legal entities, however, another -possibly more important- issue arises. Under which nationality will the legal entity in question be recognised?[3] In other words, which is the legal system applicable to the company's internal structure and external relationships (*lex fori*).

Since recognition is a prerequisite of the freedom of establishment of foreign companies, without which the right to establishment lacks practical value, the analysis of the freedom of establishment must begin with the exploration of the regime for the recognition of foreign legal entities within the EU.

B. RECOGNITION OF FOREIGN COMPANIES

B1. Basic Principles on Recognition

The basic issue of company recognition, namely whether EU Member States do in principle recognise the legal personality of foreign legal entities, is easily resolved. For the past two decades (at least) all EU Member States follow the liberal theory or theory of *ipso jure* recognition, according to which foreign companies are recognised as legal en-

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[2] See P. Craig and G. de Burca, *EC Law: Texts, Cases and Materials* (1995, Clarendon Press, Oxford), p.744.

[3] The identification of the two aspects of the problem of recognition should be attributed to G. Streit and P. Vallindas, *Private International Law* (1937, Athens, Greece), p.90.

tities without the need for further administrative or legal, substantial or formal requirements, provided that they were legally formed according to their *lex fori*.[4] As Cath notes, the only requirement for "a company to exist and function is a document of incorporation"[5].

However, the issue of the determination of the national legal system under which recognition is to be made is still in debate. The matter is of significant theoretical and practical interest, because the company's *lex fori* also regulates the company's validity, legal formation, function and dissolution, internal administration (attorneyship, valid decisions etc.), external relations (representation, entering into legal transactions, liability, etc.) and its nationality.[6] Several criteria have been suggested for the determination of the companies' *lex fori.* Amongst those are the following:[7]

a. the nationality of the company's shareholders;

b. the state where the company's aim is to be achieved (theory of aim);

c. the country where all necessary legal actions for the company's formation took place (theory of formation);

d. the state where the company's main commercial activity takes place;

e. the nationality of the persons controlling the company (theory of control);

f. the state where the company's main activity occurs (*siège d'exploitation*);

g. the state whose legal system applied for the creation of the legal person (state of residence), or, as Goldman puts it, "where the formalities for the creation of the company where completed".[8] Due to the fact that the creation of the company is achieved by its incorporation, this theory is widely known as the "theory of incorporation"; and

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[4] See I. Krispis, *Legal persons and public limited companies in specific in private international law* (1950, Sakkoulas, Athens), p.7, who adds that the main relevant theories are the following:

a. theory of territory (the corporate body exists only within the boundaries of the state where it was created);

b. theory of reciprocity, or best known as *comitas* (due to international *comitas* legal systems implicitly recognise all foreign corporate bodies);

c. theory of action by agents (the legal entity may not emigrate to another legal system; however, it may send its agents around the world and act exclusively through them);

d. liberal or international theory which assimilates legal persons with natural ones: as all natural persons are recognised by all legal systems without any further requirements, legal entities must be recognised *ipso jure* all around the world.

[5] See I. Cath, "Freedom of establishment of companies: A new step towards completion of the internal market" in *Yearbook of European Law* (1986, Clarendon Press, Oxford), p.248.

[6] See S. Megglidou, "On the establishment of foreign companies in Greece" [1971] *Armenopoulos* 200, p.201.

[7] See F. Wooldridge, *Company law in the United Kingdom and the European Community, its Harmonisation and Unification* (1991, The Athlone Press, London), p.137; also see J. Boukouras, *Recognition of companies and the right of establishment in the EC* (1984, Sakkoulas, Athens), p.29-40; E. Perakis, *The Law on Public Limited Companies* (1992, H. Karatzas Legal Library, Athens), p.435; B. Goldman, *EC Law* (1973, Stevens and Sons, London), pp.187-190.

[8] See B. Goldman, *op.cit.*, p.69.

h. the state where the company's seat is located (theory of the seat, which includes two doctrines: the theory of the statutory seat and the *siège réel* doctrine[9]).

Within EU Member States and in international legal theory the last two doctrines prevail, the theory of the *siège réel* and the theory of incorporation.[10] In order to assess which of these prevails in EC law, it is necessary to examine both briefly.

B2. The Theory of the *Siège Réel* as Applied in the EU

The theory of the *siège réel*, which prevails in most Continental jurisdictions,[11] defines the company's *lex fori* as the law of the country where the company's seat or main office is located. For the determination of the company's seat several criteria have been used placing the *siège réel* in the location where:

a. the main decisions on the company's operation and functioning are reached;

b. the basic guidelines and orders for operation are produced;[12] or

c. the management of the company is situated, namely where the meetings of the Board of Directors or of the shareholders take place, or where the single controlling shareholder resides.[13]

Legal experts have attempted to produce one single criterion for the determination of the *siège réel*. Commenting on the futility of such efforts, Krispis notes that the

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[9] See R. Houin, "La regime juridique des sociétés dans la Communauté économique européene [1965] *Revue trimestrielle de droit européen* 20, p.20. The doctrine of the statutory seat uses as its criterion for the determination of the company's *lex fori* the place named in the company's Articles, whereas the theory of the *siège reel* uses as a criterion the true seat of the company. It must be noted that the distinction is not unanimously accepted. I. Krispis, *op.cit.*, p.72 notes that the only acceptable distinction should be one between a true and a fictitious seat, since the company has the legal obligation to declare its true seat as its statutory one.

[10] See I. Krispis, *op.cit.*, p.31; also see F. Wooldridge, *op.cit.*, p.137; J. Boukouras, *op.cit.*, pp.29-40; I. Cath, *op.cit.*, pp.249-252; Jadaud and Plaisant, *Droit de Commerce International* (1991, Dalloz, Paris), pp.39-41; S. F. Goldmann, *The European Community* (1990, Macmillan, London), pp.187-190. Also see H. Xanthaki, *The establishment of foreign companies in Greece with particular reference to the compliance of Greece with the law of the European Union* (1996a, Sakkoulas, Athens), p.15, who notes that underneath the controversy between the theory of the seat and the theory of incorporation lies the issue of the extent of commercial liberalism of the state in question. The theory of incorporation is an expression of liberalism, since it allows the company in question to chose its *lex fori* freely, whereas the theory of the seat aims to preserve this power for the respective state.

[11] The theory of the *siège réel* is widely supported in France, Germany, Italy, Belgium, Luxembourg and Cyprus. See respectively, Jadaud at Plaisant, *op.cit.*, p.35; also Supreme Court, S. 1870.1.373; S. 1901.1.70; German Supreme Court 1882, RGZ 7 68; 1927 RGZ 117 215; Italian Supreme Court, in *Rivista Commerciale* 1938, 225; Belgian Commercial Code, Title IX, Art.197; Luxembourgeois Law on Commercial Companies of 10th August 1915, art.159; A. Irakleous, *Companies and real insurance* (1988, Nicosia), p.96; G. Broggini, "Sulle società nel diritto internazionale privato" [1992] *Rivista di diritto internazionale*, pp.30-40.

[12] These two criteria are introduced by Jadaud et Plaisant, *op.cit.*, p.35.

[13] See 1904 RG DJZ 9 555; BFH NJW 1957 1896; RG JW 1904 21; BFH HFR 1965 170; the same criteria are also used by Pennington, *Companies in the Common Market* (1970, Oxez Publications, Lon-

determination of a company's seat is a matter of fact and not law. Thus, one single criterion applicable in every possible case is impossible to find and each case must be judged according to its particular factual circumstances.[14] It must be noted, however, that recently a new advanced version of the theory of the *siège réel* has emerged in France. The theory of the *siège social* places the company's seat in the location which fulfils a combination of two criteria: the basic criterion of the real seat and the corrective criterion of control. Consequently, the *siège social* of a company is the place where the company's administrative organs meet and all necessary decisions for the achievement of the company's aim are taken.[15] Mayer points to an additional criterion: the company must also have a "financial bond" with the relevant national community.[16] The criterion of the financial bond (the *but lucratif*) is also mentioned in Art.48.

The doctrine of the true seat, either as *siège réel* or as *siège social*, distinguishes between the company's formal and its real seat, namely between the location where the company is registered and the place where legal, financial or other control is exercised. The theory of the seat may lead to total chaos, as it is impossible to predict its application in judicial practice and its interpretation under each national law. Since no precise criterion for the determination of the true seat can -or at least has as yet- been produced, each national law may locate the company's seat in a place different from the one selected by other national laws. Consequently, the company may end up having several different seats depending on the requirements of each national legislation. Even worse, a company incorporated in one state and truly established in another may end up with no seat at all, if it fails to comply with the interpretation of the true seat both in the state of incorporation and the state of true establishment.[17] This could easily occur if the state of the true seat follows the theory of incorporation, while the state of incorporation follows the *siège réel* doctrine. In this case the company would be refused the nationality of both states and would end up being considered non-existent in both countries. The main advantage of this theory lies with its effectiveness in preventing companies from exploiting the beneficial registration regulations of one country by formally registering there and then functioning in another country with favourable establishment conditions. Essentially, it prevents a situation where a company would enjoy the privileges of each

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don), pp.98-99; J. Boukouras, *op.cit.*, pp.32-33; and P.M. North and J.J. Fawcett, *Cheshire and North's Private International Law* (1992, Butterworths, London), p.175.

[14] See I. Krispis, *op.cit.*, p.64.

[15] See Jadaud et Plaisant, *op.cit.*, pp.34-35.

[16] See P. Mayer, *Droit international privé* (1991, Montchréstien, Paris), pp.611.

[17] See H. Xanthaki, 1996a, *op.cit.*, p.47.

system without being submitted to the counterbalancing obligations (taxation etc.) of either of the two.[18]

B3. The Theory of Incorporation

Common law systems adopt the theory of incorporation, according to which the *lex fori* of a legal person derives from the law of the country where the company was incorporated.[19] Since the country of the company's incorporation and the one of its domicile are identical, this theory is also known as the theory of the domicile.[20] It should be made clear from the start that the domicile of the shareholders or directors, or of the company as a legal entity are irrelevant. The theory of incorporation also prevails in Denmark and the Netherlands. It is applied in Greece too, but only in limited circumstances and only if the law expressly provides so.[21] The main advantage of the theory of incorporation (compared with the *siège réel* doctrine) lies in the precision and clarity of the criterion used for the determination of the *lex fori.* Since the incorporation of a company can only take place in a single, easily determinable location, neither the incorporation itself nor the fact that it occurred in the location put forward by the company can be debated. Thus, the phenomenon of foreign companies being considered by other jurisdictions as either non-existent or illegally formed is unknown to legal systems applying the theory of incorporation. Moreover, the company itself is assured about its validity and legal formation in whichever country of the world it wishes to establish. The liberalism of the theory of incorporation is profound. It comes as no surprise to discover that it is applicable in countries with a long-standing commercial maritime tradition, whereas the

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[18] See J. Boukouras, *op.cit.,* p.33; also see G.K. Morse, "Mutual recognition of companies in England and the EEC" [1972] *Journal of Business Law,* p.199.

[19] See P.M. North and J.J. Fawcett, *op.cit.*, p.175; also see *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 497, 498, 501, 505; *A-G v Jewish Colonisation Association* [1901] 1 KG 123 at 135; *Kuenigl v Donnersmarck* [1955] 1 QB 515 at 535, 536, [1955] 1 All ER 46 at 52, 53.

[20] For an extensive analysis of the theory of incorporation, see R. Pennington, *op.cit.,* p.98; also see G.K. Morse, *op.cit.*, p.196; J. Boukouras, *op.cit.*, p.31; also see Newby v. Van Oppen 1872, L.R. 7 Q.B.293; National Bank of Greece v. Metliss 1958 A.C.309.

It should be noted that according to UK law the statutory seat of a company can not be transferred elsewhere. Thus, if a company chooses to declare in its Articles of Association that its seat is located in England, it is to be considered as an English company (even if its *siège réel* is located elsewhere). Since the company shall then be incorporated in England, the company's place of incorporation and its domicile are identical.

[21] Vrellis refers to maritime companies, as one of the few cases where Greek law applies the theory of incorporation. A second case concerns subsidiary companies. See S. Vrellis, *Private International Law* (1988, Sakkoulas, Athens), p.99.

protectionist theory of the seat is mostly encountered in countries with a more mercantilist tradition.[22]

The different theories on the recognition of foreign companies have caused insecurity in international and EU trade. The parallel existence of two contradicting theories, which may result to a company's dual nationality or to a total refusal of recognition, essentially contradicts the very notion of the Internal Market. EU Member States have repeatedly attempted to reach an agreement on the multilateral application of a single criterion for the recognition of foreign companies. This agreement was first sought within the framework of the 1956 Hague Convention on the Mutual recognition of Companies and, later, in the 1968 Brussels Convention of Mutual Recognition of Companies and Legal Entities.

B4. The 1956 Hague Conference

It was in the first post-war session of the Hague Conference on Private International Law in 1951, that the issue of recognition for foreign companies, associations and foundations as legal entities was first discussed.[23] A draft Convention was adopted and finally signed by some of the participants in 1956. Although the Hague Conference is not yet in force[24], the participation of the majority of the then EEC Member States[25] makes a brief analysis of its regulations noteworthy, as they reflect the different views on the recognition of foreign companies within most of the then EEC states. Thus, it is fair to say that the importance of the Hague Convention lies more with the fact that the issue of company recognition was finally put forward, than with the actual results produced.

Under the provisions of the Conference foreign companies, associations and foundations are recognised as legal entities, as long as there are no public policy issues dictating non-recognition (Art.8) and provided that under the law of their *lex fori* they

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[22] See H. Xanthaki, 1996a, *op.cit.*, p.48.

[23] The Hague Conference on Private International Law was founded in 1893 on the initiative of the Dutch Government. In 1925, it took the form of an international organisation with a permanent secretariat. B. Goldman, 1973, *op.cit.*, p.69 notes that the issue of recognition of foreign legal persons as legal entities was on the agenda of the 1928 Conference, but was not discussed. Professor Basdevant (a French representative) suggested that the issue ought to be discussed in the next session. The proposal was accepted and the issue was brought up in the next session, which, however, took place a few decades later in 1951.

[24] Art.11 provides that the Convention shall come into force once all the signatories have ratified it. Five countries have declined to do so and the Convention still remains unratified.

[25] The following countries participated in the Hague Conference: Austria, Finland, Japan, Spain, the UK, Italy, France, Luxembourg, Portugal and the Netherlands. Yugoslavia sent an observer.

can own property, enter into contracts and undertake other legal actions.[26] The Conference determines the company's *lex fori* as the law of the state where the formalities of registration and publication have been completed. Thus, under Art.1 of the Conference the legal personality acquired by a company under the law of the participating state, where the formalities of registration and publication have been complied with and where it has its statutory office, shall be recognised as of right in the other signatory states. At the same time, however, the Conference gives the countries of the *siège réel* doctrine the opportunity to refuse recognition to companies which (complying with the text of the Conference itself) held as their *lex fori* the law of the state of their incorporation, even though they were really seated within the state whose recognition they sought. Art.2 of the Conference states that "personality acquired under the provisions of Article 1 need not be recognised in another contracting state whose law takes the real headquarters into consideration, if these are considered as being on its territory".

From the combination of the two recognition clauses it becomes clear that, in their effort to acquire agreement on a text on recognition, the signatories of the Convention avoided to deal with the substance of this issue. Thus, they ended up in merely acknowledging the existing contradiction between the theories of incorporation and of the *siège réel*, without achieving a viable solution in the problem of the choice between the two. This probably explains why the Conference is still not ratified. It must be accepted, however, that the Convention is far from useless. It is the first international legal text regulating the *ipso jure* recognition of foreign companies, while at the same time regulating that states following the *siège réel* doctrine can not refuse recognition to foreign companies incorporated in a state other than the one where the company's real headquarters are situated, provided that both the state of the incorporation and the one of the real seat adopt the theory of incorporation.[27] Furthermore, the participation of the majority of the then EEC Member States in the Hague Conference smoothed the way towards an agreement on the text of the next relevant international instrument, the 1968 Brussels Convention on the Mutual Recognition of Companies and Legal Entities.

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[26] It must be noted that according to B. Goldman, 1973, *op.cit*, p.70 the Conference is applicable exclusively to private companies. Moreover, Art.1 provides that the Conference is applicable not only to companies, but also to associations and foundations. Since national law regulations in several participating countries do not consider foundations and associations as legal persons, Art.9 stipulates that each country may limit the Convention's field of application. It should be noted that although France had some objections concerning the recognition of foreign foundations, it did not use the limiting power offered by Art.9. As far as companies are concerned, there were no disagreements.

[27] See B. Goldman, 1973, *op.cit.*, p.72, who notes that: "Thus, the upshot is that only if a company set up in one country has its real headquarters in another country which itself adopts the system of incorporation, must all contracting states (including those which take the real headquarters into consideration recognise it".

B5. The EU View on Recognition

Art.293 imposes an obligation on EU Member States to "enter into negotiations with each other" in order to secure the mutual recognition of companies, which some consider a prerequisite[28] and others a course of action[29] towards the freedom of establishment. After the failure of the Hague Conference to meet the needs of the then EEC Member States[30], further agreement on the recognition of companies was sought by the states themselves. This effort resulted in the 1968 Brussels "Convention of Companies and Legal Entities" which, unfortunately, is not yet ratified by the Netherlands and is still not in force.[31] In spite of the improbability of the enforcement of the Convention in the near future,[32] an analysis of its text is necessary for three main reasons. First, it illustrates the general attitude towards the recognition of foreign companies within the EU. Second, it is the only relevant EC legislative text. Third, it can be used as an authentic interpretation of the vague and ambiguous Art.293.[33]

It is widely accepted that the Convention basically adopts the incorporation theory. However (as was the case with the Hague Convention), possible exceptions to the application of the incorporation theory lead to the possibility of a *de facto* abolition of this doctrine in favour of the doctrine of the *siège réel*. The basic concept of the Con-

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[28] J. Boukouras, *op.cit.*, pp.43-44 notes that the refusal for recognition of a company could lead to the refusal of the company's right of establishment within the EU. He also states that the then Art.58 (new 48) indirectly regulates the Member States' obligation to recognise foreign companies as legal entities, since without recognition the content of the freedom of establishment would be "deceptive".

[29] See K. Lipstein, *The Law of the EEC* (1974, Butterworths, London), p.248, who notes that the Treaty's main aim (which is the free movement of persons) can only be accomplished through two courses of action:

a. the recognition of foreign companies; and

b. the adoption of a common system of Company Law.

[30] See B. Goldman and A. Lyon-Caen, A., *Droit Commercial Européen* (1983, Dalloz, Paris), p.192, who note that the Hague Conference (apart from the fact that it was not in force) did not cover the needs of EC Member States, because it left room for non-recognition of companies from the countries following the doctrine of the *siège réel.* At the same time, the then Arts. 52-58 EEC on the freedom of establishment determined the matter in such an abstract way, that the recognition of companies from all EC Member States was far from certain.

[31] Preparations for the Convention began in June 1962, the final text was laid open for signature on 20.1.1966 at Strasbourg and was finally signed in Brussels on 29.2.1968. The Convention was interpreted by the *Protocol concerning the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons*, signed in Luxembourg on 3 June 1971.

[32] F. Wooldridge, *op.cit.*, p.135, notes that it "appears highly unlikely" that the Convention will come into force, because "of the prolonged failure" of the Netherlands to ratify the Convention and the Additional Protocol of 1971 conferring jurisdiction to the European Court of Justice and "of the doubts of the new members, which undertook to accede to the Convention's Art.3 of the respective Acts of Association and to negotiate modifications necessary for this purpose".

[33] For a detailed analysis on the importance of the Convention, see F. Caruso, *La società nella CEE: contributo alla teoria della nazionalità delle società* (1969, Casa Editrice Dott. Eugenio, Napoli), pp.210-213.

vention lies in the statement that all legal entities[34] are *ipso jure* recognised within the EU, provided that under its Arts.1 and 2 of the Convention they:

a. are formed in accordance with the commercial or civil law of their *lex fori*;

b. are formed or incorporated under the law of any EU Member State;

c. are registered, or have their statutory seat anywhere within the EU;

d. are entitled to legal rights and are subject to legal obligations according to their *lex fori*, although under Art.8 they are not required to have legal personality;[35] and

e. aim to exercise economic activity normally for remuneration within the EU.[36]

Three exceptions to the above general rules are provided by the Convention. The first two lead to the application of the theory of the *siège réel*, whereas the third exception refers to the usual notion of "public policy", which is also met in the Treaty of Rome and the Hague Conference, although under different terminology. Thus, the *ipso jure* recognition of legal entities can be refused on the basis that the relevant entity's *siège réel* is located outside of the Convention's territorial field of application and it has no genuine link[37] with the economy of an EU Member State (Art.3). The company's real seat, as defined in Art.5, is the location of the central administration. Moreover, the *ipso jure* recognition may also be refused if the entity's real seat is located in the state, from which recognition is sought. In this case the respective authorities are obliged to offer recognition, but they reserve the right to offer it under the national mandatory[38] provisions applicable to domestic legal entities (Art.4).[39] Furthermore, the regulations of the

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[34] It is accepted that the Convention applies to civil and commercial law companies (Art.1) and public organisations with profit-making object. See B. Goldman, 1973, *op.cit.*, p.74.

[35] According to K. Lipstein, *op.cit.*, p.250, Art.8 aims to expressly include in the Convention's field of application the German *Offene Gesellschaft* and the British partnership (both of which do have rights and obligations, but do not possess a legal personality under their *lex fori*).

[36] See R. Roblot, *Traité elementaire de droit commercial* (1984, Paris), p.1135; also see I. Cath, *op.cit.*, p.252. According to K. Lipstein, *op.cit.*, p.250, the Convention applies to legal entities which "normally" aim to make a profit. Since the Treaty of Rome expressly excludes entities without a *but lucratif* from the application of Art.43, there appears to be a problem concerning the relationship between the two legal texts. If the term "normally" is considered to be a real criterion, then both provisions apply to the same range of activities: Art.48 excludes all non profit-making entities, while the Convention includes these entities, if they can operate with the aim of making a profit. If, however, this criterion is a legal one, then the Convention's field of application is really wider that the Treaty's.

[37] The interpretation of the "genuine link" is still debatable. According to Stein, *Harmonisation of European Company Law* (1971, Bobbs and Merril, UK), p.397, note 202, this term is vague and unclear, but was included to prevent companies from non-EU Member States from demanding recognition on the grounds of possessing "a PO Box within the Community".

[38] G.K. Morse, *op.cit.*, pp. 202-203 notes that Art.5 "represents the major concession to the real seat theory of recognition". He then interprets the "mandatory rules" as: "...all those provisions in the Companies and other acts and decisions of the courts by which English companies are bound". According to J. Boukouras, *op.cit.*, p.51, if the Convention is ratified, the ECJ shall have to determine and interpret these "mandatory rules".

[39] K. Lipstein, *op.cit.*, p.251 and J. Boukouras, *op.cit.*, p.53, state that non-mandatory rules are applicable only if there is no contradicting provision in the companies' Articles of Association (Art.4, par.2.i) and if the company can prove that it has operated for a substantial period of time within the state of its

Brussels Convention may not apply if the entity's recognition may lead to harm in the host state's *ordre public* (Arts.9 and 10).[40] It must be noted that the first exception to the theory of incorporation is phrased in such a vague and general manner, that "it leaves very little room to the theory of incorporation".[41] The second exception actually regulates the duality of the company's *lex fori*, since the company under recognition is compelled to submit to the obligations imposed by the law of the state of its incorporation and by the mandatory provisions of the host state. As Stein notes, this duality forces the company to transfer its seat to the country where it was incorporated.[42]

The role of the host country's law is described in Arts.6, 7 and 8 of the Convention. The company's *lex fori* (namely, the law of incorporation or of the *siège réel*) determines its capacity. However, the host country may deny the company specific rights (even those granted by the company's *lex fori*), if the latter are not accorded to domestic companies of a corresponding type.[43] It may only do so, if this denial is not in breach of private international law[44] and does not diminish the company's capacity to have rights and obligations, to enter into contracts, to undertake other legal acts, or to take part in legal proceedings (Art.7). Such denial, however, can not be used by the recognised companies as a defence in law, as this right is reserved to domestic companies only.[45] Moreover, the capacity, rights and powers awarded to companies by the Convention may not be denied (wholly or partially) solely on the basis that the entity in question lacks legal personality under its *lex fori* (Art.8).

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incorporation (Art.4, par.2.ii). E. Cerexhe, *Le Droit Européen: La libre circulation des personnes et des entreprises* (1991, Nauwelaerts, Brussels), p.349 notes that the regulation of Art.4 derives from art.197 of the *lois coordonées belges sur les sociétés* and art.2505 of the Italian Code of Companies.

[40] The *ordre public* or public policy of the host state may be an obstacle to the recognition of legal entities within the EU. However, due to the vagueness of this provision Arts.9 and 10 also delineate the application of "public policy". Public policy must therefore be interpreted within the meaning of private international law. This view is supported by K. Lipstein, *op.cit.*, p.253; J. Boukouras, *op.cit.*, p.58; B. Goldman, 1973, *op.cit.*, p.76; G.K. Morse, *op.cit.*, p.202; B.Goldman and A. Lyon-Caen, *op.cit.*, p.200; and F. Wooldridge, *op.cit.*, p.140. It is argued that such a justification for exclusion applies only in the cases of the one-man company, of rules contradicting the Treaties, of entities whose aim is believed to be other than profit-making (namely, purely political or propagandist), or of entities whose object, aim or activity may harm the host states' public health, morality or other vital interests. See B. Goldman, 1973, *op.cit.*, p.76; also see B. Goldman and A. Lyon-Caen, *op.cit.*, p.200.

[41] See I. Cath, *op.cit.*, p.253.

[42] See Stein, *op.cit.*, pp.411-412.

[43] I. Cath, *op.cit.*, p.252, notes that the then Art. 7 (now repealed) must be considered as another exception to the general prevalence of the incorporation theory.

[44] K. Lipstein, *op.cit.*, p.252, notes that Art.7 EEC is clearly an extension of the new Art.7.

[45] I. Cath, *op.cit.*, p.253 notes that "Here again, the classical argument in favour of the *siège réel* has crept in, i.e. that domestic companies should not be discriminated *vis-a-vis* foreign companies, subject to more lenient laws in relation to stricter domestic rules".

J.Boukouras, *op.cit.*, p.55 adds that in this manner foreign companies are denied rights that are conferred upon them by the law of their *lex fori*, but which are also denied to domestic companies of the host state. Thus, foreign companies are not privileged *vis-a-vis* domestic companies.

Arts.6-8 of the Convention demonstrate the sincere efforts of all signatories for a compromise doctrine on recognition. However, due to the reluctance of the participating states to concede parts of their sovereignty, namely the imposition of national mandatory rules applicable to both domestic and foreign companies, the product of these efforts is a rather vague legislative text full of contradictory regulations. Once again, there are so many extensive exceptions to the general rules that the basic provision is practically undermined. However, despite the Convention's failure to meet the needs of EU Member States concerning the recognition of foreign companies as legal entities, the Convention being the first of its kind within the EU constitutes an important step towards the future adoption of common legislative measures in the field of the mutual recognition of companies. It can also be argued that due to the continuing harmonisation of company law, the need for the Convention "may perhaps have been lessened".[46]

It is evident, therefore, that EC law follows the theory of *ipso jure* recognition of foreign legal entities. Such entities have legal personality provided that they have been awarded this right under the law of their *lex fori*, namely under the law of the country where these companies have their registered office, central administration or principle place of business. The latter also "serve as the connecting factor with the legal system of that particular state, like nationality in the case of natural persons".[47] It would seem therefore that no single theory for recognition of foreign companies is supported in the EU. The Treaty has taken into account the variety of relevant theories present in the laws of the Member States and has accepted both theories of incorporation and of *siège réel*. Since no agreements amongst Member States have been reached under Art.293, it seems that the established EC law position is the acceptance of both theories equally.[48]

It must be noted, however, that a recent judgement of the ECJ may signify a change in the position of the EU in the field of recognition of foreign legal entities. In a request for a preliminary ruling the Court was called to rule whether the refusal of the Danish Trade and Companies Board to allow Centros Ltd, a private limited company registered on 18 May 1992 in England and Wales, to establish a branch in Denmark was in compliance with EC law. The legal basis of the refusal was the firm belief of the Board that the establishment of the company in Britain by its Danish owners was merely

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[46] See F. Wooldridge, *op.cit.*, p.134; also see A. Papagiannidis and A. Christogiannopoulos, *Clarification of the Treaty of Rome* (1981, Sakkoulas, Athens), p.558.

[47] See case 270/83 *Commission* v *France* [1986] ECR 273, con.18; also see case C-330/91 *The Queen* v *Inland Revenue Commissioners ex parte Commerzbank ag.* [1993] ECR I-4017, con.13; Opinion of Advocate General Lenz in case C-1/93 *Hallibarton Services* v *Statssecretaris van Financien* [1994] ECR I-1137, con.12.

a means of circumventing the Danish provision for the paying-up of a minimum share capital, as demonstrated by the fact that Centros never traded in the UK. The Board felt that the Danish branch would constitute a primary establishment and that Centros was obliged to comply with the relevant Danish provisions. The ECJ ruled that Member States may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office, although Member States may adopt appropriate measures for preventing or penalising fraud either in relation to the company itself or in relation to its members, where it has been established that they are in fact attempting by means of the formation of a company to evade their obligations towards creditors within the state of reception.[49]

Leaving the issue of fraud aside, *Centros* seems to be a clear sign of ECJ support to the use of the criterion of incorporation for the determination of the company's *lex fori* to the detriment of the legal orders of countries following the true seat doctrine. It is interesting to note that the application of the Hague Conference and the Brussels Convention to the *Centros* facts would lead to different rulings. Signatory states of the Conference are allowed to refuse recognition to companies using their state of incorporation as their *lex fori* when their seat is located elsewhere, provided that both states involved follow the theory of incorporation. Thus, Denmark could refuse recognition, since Centros considers itself a British company even through its real seat is in Denmark. However, if the state of the seat was France, Greece or Italy, recognition could not have been avoided. If the Brussels Convention were to be applied, Denmark could not have refused recognition, but it could have insisted that Danish laws on primary establishment are applied on the basis that the real seat is in Denmark, from which recognition is sought, and that the company has not functioned in the UK for a substantive period of time. Although neither the Conference nor the Convention are in force, they are indicative of the intention of their signatories to accept both theories equally. This is reflected in the maintenance of both criteria in the Treaties and the past case-law of the ECJ. It would therefore be premature to state that the EU no longer values the theory of the seat. In fact, Centros did not address the question of the companies' *lex fori* directly. Moreover, the ruling of ECJ judges was reached in the light of the prevalence of the theory of incorporation in Denmark, which based its defense on other legal bases, such as the need for the protection of debtors and public order. In view of this, *Centros* cannot be adequate for a change in the parallel prevalence of both theories in EC law.

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[48] See case 81/87 *The Queen* v *H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483; C-264/96 *ICI* v *Kolmer* [1998] ECR I-4675, con.20.

C. ESTABLISHMENT WITHIN THE EU

C1. Definition of Establishment

The freedom of establishment of foreign legal entities is not synonymous to their recognition. A state may recognise foreign companies, but set limitations or prohibit their establishment and functioning within its boundaries.[50] The freedom of establishment within the EU is regulated by Arts.39-48, according to which restrictions set by national laws for the establishment of companies owned or controlled by companies or persons from other Member States must be abolished.[51] This is clearly an expression of the basic non-discrimination principle of Art.12 which is considered *lex generalis* compared to Art.39[52], as well as of the general aim of the EU to achieve "the abolition of obstacles to freedom of movement and persons".[53] Such is the importance assigned to the right of establishment by the legislator, that all rights awarded under Art.43 are unconditional and may not constitute the subject of agreements between states.[54]

The definition of the term "establishment" can be drawn from the Treaty itself. Art.43 stipulates that legal or natural persons, beneficiaries of the freedom of establishment within the EU with the ability to conduct business on their own are considered to be established, when by commercially conducting an independent and profit-aiming activity in a fixed base or bases[55] they are settled in a material arrangement or have a

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[49] See case C-212/97 *Centros Ltd* v *Erhvervs-og Selskabsstyrelsen*, 16 July 1999, unreported.

[50] However, the opposite can not happen. Establishment without recognition is therefore not possible. See E. Cerehxe, *op.cit.*, p.337.

[51] See 107/83 *Klopp* [1984] ECR 2971; [1985] 1 CMLR 99; 270/83 *Commission* v *French Republic* [1986] ECR 273; [1987] 1 CMLR 401; 197/84 *Steinhauser* [1985] ECR 1819; [1986] 1 CMLR 53; 221/85 *Commission* v *Belgium* [1987] ECR 719; [1988] 1 CMLR 151; C-311/97 *Royal Bank of Scotland plc* v *Elliniko Dimosio* [1999] ECR I-2651.

[52] See A. Papagiannidis and A. Christogiannopoulos, *op.cit.*, p.137; also see cases 2/74 *Jean Reyners* v *Belgium* [1974] ECR 631; 90/76 *Van Ameyde* v *UCI* [1977] ECR 1091; [1977] 2 CMLR 478; C-330/91 *The Queen* v *Inland Revenue Commissioners ex parte Commerzbank AG.* [1993] ECR I-4017, con.21.

The fact that the freedom of establishment must be viewed as an aspect of the non-discrimination principle is also suggested by E. Strauss, *European reckoning, the six and Britain's future* (1962, George Allen and Unwin Ltd, London), p.37; also see G. Alexiou, *EC: Critical analysis* (Sakkoulas, Athens), p.372; G. Bournous, *Freedom of establishment of enterprises and banks within the EC* (1981, Sakkoulas, Athens) pp.27-30; J. Boukouras, *op.cit.*, p.71.

[53] See Art.3; case 71/76 *Jean Thieffry* v *Conseil de l' ordre des avocats à la cour de Paris* [1977] ECR 765.

[54] See case 270/83 *Commission* v *France* [1986] ECR 273, con.26.

[55] See P. Clarotti, "Progress and Future development of establishment and services in the EC in relation to banking" [1983-84] JCMS 199, p.203. Clarotti refers to the case of branches on wheels in the form of converted buses, noting that: "...when one of these vehicles crosses the frontier and opens its doors for business in another member-state, is it then established? My view would be that it was established, at least so long as it made stops at regular times at a given place or places".

"steady and permanent residence"[56] in the host country,[57] and their financial activity is integrated in the financial life of the host country.[58] Thus, establishment within the meaning of the Treaty seems to involve "the actual pursuit of an economic activity through a fixed establishment".[59] In other words, two factors must be present: physical location and the exercise of economic activity, both, if not on a permanent basis, at least on a durable one. The exercise of economic activity means "integration into a national economy",[60] whereas physical location covers exclusively the pursuit of effective and genuine activities to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. The physical presence in the territory of the country of establishment must therefore be such as to enable effective and genuine activities to be pursued on or from the territory of the country of establishment.[61] It seems therefore that the freedom of establishment covers the installation of foreign companies within other Member States, as long as it is permanent and financially genuine.

C2. Establishment and provision of services

It is the permanence of the base set up in other Member States which seems to distinguish between the freedom of establishment and the freedom to provide services.[62] Thus, in the case of a person providing services entirely or principally in the territory of another Member State it is the provisions of the chapter relating to the right of estab-

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[56] See C. Maestrepieri, "Freedom of establishment and freedom to supply services", (1973) 10: CML Rev., pp.150-173, at 150; also see G. Bournous, *op.cit.*, p.40; J. Boukouras, *op.cit.*, p.71; also see case C-55/94 *Reinhard Gebhard* v *Consiglio nazionale Forense* [1995] ECR I-4165; case C-221/89 *The Queen* v *Secretary of State ex parte Factortame* [1991] ECR I-3905.

[57] F. Burrows, *Free movement in European Community Law* (1987, Clarendon Press, Oxford), pp.186-187 notes that the permanence of the arrangement, where a legal or natural person is settled, cannot be a satisfactory criterion for its establishment. "Nor does it seem right in principle to regard only what is permanent as a form of establishment, and only what is ephemeral as a form of services".

[58] This definition is a synthesis of relevant elements found in G. Bournous, *op.cit.*, p.40; G. Alexiou, *op.cit.*, p.371; C. Maestrepieri, *op.cit.*, p.150; J. Boukouras, *op.cit.*, p.71; and F. Burrows, *op.cit.*, p.186.

[59] See case C-246/89 *Commission* v *UK* [1991] ECR I-4585, con.21.

[60] See Opinion of Advocate General Darmon in case 81/87 *The Queen* v *H. M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc.* [1988] ECR 5500, con.3; also see Opinion of Advocate General Légèr in case C-55/94 *Reinhard Gebhard* v *Consiglio nazionale Forense* [1995] ECR I-4165, con.19.

[61] See Opinion of Advocate General Darmon in case 81/87 *The Queen* v *H. M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc.* [1988] ECR 5500, con.44.

[62] See F. G. Jacobs, "The basic freedoms of the EEC Treaty and Company Law", 13 (1992) The Company Lawyer, p.4, who notes that "there is obviously a very fine distinction between the freedom of establishment and the freedom to provide services, depending essentially on the permanence of any base set up in another Member State. In other circumstances, the freedom to provide services may involve no presence at all in the host state". Also see Opinion of Advocate General Lenz in case C-1/93 Hallibarton Services v *Statssecretaris van Financien* [1994] ECR I-1137, con.18; C. and L. Belmont, *European Company Law* (1989, FT Business Information Ltd, London), p.12; and L. and J. Vogel, *Le droit européen des affaires* (1992, Dalloz, Paris), p.23.

lishment and not that on the provisions of services which are applicable.[63] The lack of a widely accepted criterion for the distinction between establishment and provision of services has been the source of confusion, which was mainly based on the fact that the same persons pursuing the same activities may be subject both to Art.49 on the provision of services and to Arts.43-48 on the freedom of establishment.[64] At the same time the ECJ sought a clear solution by stressing that establishment and provision of services are two separate branches of EC law, which are mutually exclusive, since on the basis of Art.50 the provisions on freedom to provide services are applicable only when the provisions on the freedom of establishment are not applicable.[65] The clarification of this issue is extremely important for the evolution of this thesis. It is only after the clear distinction between establishment and provision of services that the first hypothesis (namely the existence of violations of the freedom of establishment in France, Italy and Greece) can be correctly analysed and effectively proven. The solution to this issue is found in the recent *Gebhard* case where the ECJ held that for the distinction between establishment and services two main criteria should be applied, a temporal and a geographical one.[66] The provision of services is temporary, whereas the nature of establishment is permanent.[67] Moreover, economic operators established in a Member State are chiefly directed towards the market in that state which is where they concentrate their activities, whereas economic operators providing services carry out their activity in the host state only on a secondary or ancillary basis.[68]

Thus, the distinction between establishment and services does not lie with the nature of the activities exercised, but with the permanence and scale of economic operation with which natural or legal persons choose to conduct these activities.

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[63] Thus, an insurance undertaking of another Member State which maintains a permanent establishment in the Member State in question comes within the scope of the provisions on the right of establishment. See case 205/84 *Commission* v *Germany* [1986] ECR 3755, cons.21 and 22; also see case 205/84 *Commission* v *Germany* [1986] ECR 3755, con.18.

[64] See cases 147/86 *Commission* v *Hellenic Republic* [1988] ECR 1637, cons.17 and 18., on the setting up of private educational institutes in Greece; 305/87 *Commission* v *Hellenic Republic* [1989] ECR 1461, cons.27, 28 and 29 on the acquisition by nationals of other Member States of immovable property from which or in which a service is provided; also see Joined Opinion of Advocate General Mischo on cases C-221/89 *Queen* v *Secretary of State ex parte Factortame Ltd. and others* and C-246/89 *Commission* v *UK* [1991] ECR I-3905, con.26 (2) on fishing activities.

[65] See case C-55/94 *Reinhard Gebhard* v *Consiglio nazionale Forense* [1995] ECR I-4165, cons.18 and 21.

[66] See case C-55/94 *Reinhard Gebhard* v *Consiglio nazionale Forense* [1995] ECR I-4165, con.31.

[67] See case 196/87 *Steymann* [1988] ECR 6159, con.16; case C-53/95 *Inasti* v *Kemmler* [1996] ECR I-703; also see case C-205/84 *Commission* v *Germany* [1986] ECR 3755, which clarifies that a permanent establishment should not necessarily take the form of a branch or agency.

[68] See Opinion of Advocate General Légère in case C-5/94 *Reinhard Gebhard* v *Consiglio nazionale Forense* [1995] ECR I-4165, con.31.

C3. The nature of the freedom of establishment

Having clarified "establishment" and the distinction between establishment and provision of services, the nature of the freedom of establishment needs to be determined. The issue is still in debate. The use of different terms in the text of the Treaty as translated in each official language[69] leads to several different interpretations. Three basic theories have been produced for the determination of the nature of the freedom of establishment.[70] Some argue that it is a personal right,[71] others that it is a *Programmsatz*, a general guideline,[72] and others a basic freedom of EC law.[73] The practical significance of this debate lies in the fact that the first two theories link the implementation of Art.43 to further express regulation on its content and the penalties for its breach by EU or national authorities. Under the third theory, however, Art.43 must be implemented even if no relevant specific provisions are made. The third theory takes into account the teleological interpretation of the legal text (whose aim, is clearly the direct abolition of all discriminations) and the practical lack of specific regulations on the freedom of establishment. The theory is also supported by the direct effect of Art.43 which is considered to be self-sufficient and self executing.[74]

The compromising solution to this dilemma is provided in *Klopp*, where the freedom of establishment is described as "a fundamental right" which exists regardless

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[69] The English text uses the term "freedom of establishment". So does the German (*Niederlassungsfreiheit*) and the Greek text (*eleftheria egatastaseos*). On the contrary, the Italian, French and Dutch texts use the term "right" (*droit d' établissement, diritto di stabilimento, recht van vestiging*).

[70] According to H. Smit and P. Herzog the Treaty rejects two other techniques, the reciprocity rule and the most-favoured-nation clause. See H. Smit and P. Herzog, *The Law of the EEC: a commentary on the EC Treaty* (1976-1992, Mathew Bender and Co, London), p.537.

[71] See J. Boukouras, *op.cit.*, p.70); also see V. Everling, *Das Niederlassungsfreiheit in GM* (1963, Berlin-Frankfurt), p.15; A. Cassese, "*Il diritto di stabilimento nel trattato insitutivo della CEE*", [1959] RTDP, p.316; Arduini, "*Limiti deriventi de trattato CEE agli ordinamenti interni degli stati membri*", [1961] RDE, p.277; W. van Gerven, *Le droit d'établissement et la libre prestation des services,* (1969, Bruxelles); P. Clarotti, *op.cit.*, p.201; H. Smit and P. Herzog, *op. cit.*, p.537; M. Chrysomallis, *Elements of European Law* (1991, Sakkoulas, Komotini), p.101.

[72] This view is adopted by J. Baumann, "*Die Harmonisierung des Niederlassungsrecht in verschiedenen Staatengruppen*", in *Deutshe Landesreferarte zum VI. Internationalen Kongress für Rechtsgleichung in Hamburg,* (1962, Hamburg), p. 166; also see E. Schlachter, "*Das Recht der freien Niederlassung in CM", in Persönlichkeitsrechtliche Fragen des internationalen Rechts* (1962), p.61; G.E. Kalavros, *The right of establishment under the Treaty of Rome* (1983, Sakkoulas, Athens), p.119.

[73] See S. Froelich, *Niederlassungsfreiheit und Freizugigkeit in der EWG und EFTA*, (1965, Zürich) p.42; also see P. Moehring, *Aktuelle Wirkungen des EWG auf des Kartellrecht, das Niederlassungsrecht und das Agrarrecht,* (1965), p.1638.

[74] The direct effect of Art.43 is also supported by G.E. Kalavros, *op.cit.*, p.221; F. Burrows, *op.cit.*, pp. 210-212; also see cases 6/64 *Costa* v *ENEL* [1964] ECR 585, [1964] CMLR 425; 2/74 *Reyners* v *Belgian State* [1974] ECR 631, [1974] 2 CMLR 395; 33/74 *Van Binsbergen* [1974] ECR 1299, [1975] 1 CMLR 298; 48/75 *Procurateur du Roi* v *Royer* [1976] ECR 497, [1976] 2 CMLR 619; 197/84 *Steinhauser* [1985] ECR 1819, [1986] 1 CMLR 53.

of whether the directives provided for by Art.47 have been adopted.[75] Thus, within the EU establishment is neither a right nor a freedom in the classical sense of the terms adopted by national legal theories. The freedom of establishment is a particular EU legal right which exists even if no relevant specific regulations on its imposition are passed[76] and produces direct effect from the end of the transitional period.[77]

C4. Primary and secondary establishment

One last term that must be clarified before proceeding with the analysis of the content of the freedom of establishment is secondary establishment, which constitutes the subject of this thesis. The freedom of establishment in its commercial aspect[78] may take the form of primary or secondary establishment.[79] Primary establishment takes place, when (through the purchase, foundation, formation, re-opening, administration or transfer of an industrial unit, a commercial base or an agricultural productive activity) the main administrative centre or registered office of a legal entity is transferred from one country to another, namely from the country of origin to the host country.[80] Secondary establishment takes place, when a legal entity retains its home office in one country and establishes a form "of financial activity dependent from the main office" in another.[81] The choice of the particular form of establishment to be used belongs solely to the company.[82] Vogel believes that in relation to companies "in practice the freedom of estab-

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[75] See case 107/83 *Klopp* [1984] ECR 2971; [1985] 1 CMLR 99.

[76] See cases 71/76 *Jean Thieffry* v *Conseil de l' ordre des avocats a la cour de Paris* [1977] ECR 765, con.17; 107/83 *L' ordre des avocats au barraeu de Paris* v *Onno Klopp* [1984] ECR 2971, con.10.

[77] See case 270/83 *Commission* v *France* [1986] ECR 273.

[78] It is accepted that the right of establishment has two separate aspects, a personal and a commercial one. The personal implies the right of setting up in a trade or profession, whereas commercially it means the right of companies to set up branch organisations.

[79] See cases 198/86 *Erwin Conrad and others* v *Direction de la concurrence et des prix des hauts de Seine* and *Ministere Public* [1987] ECR 4469, con.9; 143/87 *Christopher Stanton and others* v *INASTI* [1988] ECR 3877, con.11; Joined cases 154 and 155/87 *INASTI* v *Heinrich Wolf and others* [1988] ECR 3897, con.11.

[80] See J. Molinier, *Droit du marché intérieur européen* (1995, LGDJ, Paris), p.120; also see case 81/87 *The Queen* v *Treasury and Commissioners of Inland Revenue ex partle Daily Mail and General Trust plc* [1988] ECR 5483.

[81] The elements of these definitions were found in G.E. Kalavros, *op.cit.*, p.125; G. Alexiou, *op.cit.*, p.373; M. Egana, *La comunidad economica europea* (1967, Caracas), p.89; P. Leleux, "The establishment of foreign subsidiaries in the European Community" in *Ten Years of European Integration* (1968, Montreal), p.2; B. Goldman, 1973, *op.cit.*, p.57; and J. Molinier, *op.cit.*, p.121. Also see case C-1/93 *Hallibarton Services* v *Staatsecretaris van Financiën* [1994] ECR I-1137; Opinion of Advocate General Saggio in Joined cases C-400/97, C-401/97 and C-402/97 *Administración del Estado* v *Juntas Generales de Guipúzcoa and Others*, 1 July 1999, unreported.

[82] See Opinion of Advocate General Mischo in Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland* v *Finanzamt Aachen-Innerstadt*, 2 March 1999, unreported.

lishment can only be exercised through secondary establishment".[83] This is particularly valid in jurisdictions of the *siège réel* doctrine. Since primary establishment in a foreign country is defined as the transfer of the managerial and decision-making unit of the company from one country to another, in countries following the *siège réel* doctrine this would signify the dissolution of the company and the creation of a new company with its *siège réel* in a different country. This position has been found to be in compliance with EC law.[84] Thus, secondary establishment is the only legal form of establishment under French, Italian and Greek law, which follow the *siège réel* doctrine.

In EC law an office or agency is a secondary establishment without separate legal personality. It is exploited by an agent or a *mandataire* and deals with sales, correspondence with prospect clients of the parent company, and administration. A branch (defined as a secondary establishment without legal personality whose proprietor is the parent company) has more independence from the main office and can form agencies. A subsidiary is a legal entity, separate from the foreign parent company, set up under the law of the host country (at least in countries following the *siège réel* doctrine)[85], controlled by the foreign company mainly through ownership of a substantial part of its capital, or of the whole company (in jurisdictions where one-man companies are legal). Although authoritative definitions of these three concepts have not been provided, the ECJ describes subsidiaries, agencies and other establishments as operational centres with the power, authority and means to conduct business with third parties who, assuming the link of these establishments with the parent company and not being able to enter into negotiations or contracts with the foreign company itself, prefer to deal with its extension,[86] namely with its agency, branch, office[87] or subsidiary.[88] What distin-

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[83] See L. and J. Vogel, *op.cit.*, pp.24-25.

[84] See case C-81/87 *Daily Mail* [1988] ECR 5483.

[85] R. Pennington, *op.cit.*, p.110, notes that "the locally formed subsidiary will usually have its central direction or *siège* in the country where it is formed, and unlike its foreign parent company, will be subject to the company law of that country".

[86] The Court held that "the concept of a branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties, so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension". See cases 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 935; 14/76 *De Bloos* v *Boyer* [1976] ECR 1510. It should be noted that this definition was provided to clarify the terms used in Art.5 of the Convention of 5 September 1968. There is no doubt, however, that it provides a definition of the above terms from the aspect of EC law and that it can also be used for the clarification of Art.43.

[87] In the German Insurance case the ECJ suggested that "an enterprise would fall within the concept of establishment even if its presence is not in the form of a branch or agency but consists merely of an office managed by the enterprise's own staff or by a person who is independent but is authorised to act on a permanent basis for the enterprise". See case 205/84 *Commission* v *Germany* [1986] ECR 3755, [1987] 2 CMLR 69.

guishes between subsidiaries and branches is that subsidiaries are judicially independent from the parent company which controls them, whereas branches lack autonomous legal personality thus serving companies wishing to exercise full control over their decentralised organisation. As a result, subsidiaries may enter into contacts independently, provided that the quality of the signatory is approved by the parent company, whereas branches may only enter into contracts on behalf of the approving parent company. Moreover, the debts and property acquired from the business activity of a branch belong to the parent company, whereas the subsidiary has the right to owe and be owed independently from the parent company.[89]

C5. *Ratione Personae* Application of the Freedom of Establishment

According to Art.48 foreign companies or firms (English version) *associations* (French version) or *Gesellschaften* (German version) enjoy the same privileges as natural persons. *Ratione personae* the above terms include companies nationals of other Member States,[90] constituted under civil or commercial law, including public limited companies,[91] co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit making.[92] The aim of the legislator is clearly to include as many forms of legal entities as possible.[93] The conditions under which entities

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[88] For further analysis of the definitions of branches, agencies and subsidiaries under EC law, see B. Goldman and A. Lyon Caen, *op.cit.*, p.143; also see B. Goldman, 1973, *op.cit.*, p.60; G.E. Kalavros, *op.cit.*, 127; A. Clarotti, *op.cit.*, p.200; H. Smit and P. Herzog, *op.cit.*, p.540.

[89] See Opinion of Advocate General La Pergola in case C-212/97 *Centros Ltd* v *Erhvervs-og Selskabsstyrelsen*, 16 July 1998, unreported.

[90] See case 115/78 *J. Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399, con.16; also see case 136/78 *Ministére public* v *Vincent Auer* [1979] ECR 437, con.20.

[91] See W. Fikentscher, "The proposed directive on company law" (1964-1965) 2 CMLR, p.259; C. Maestripieri, *op.cit.*, p.162; Y. Lousouarn, "*Le droit d'établissement des sociétés*" [1990] 26 RTDE, p.237; K. Lipstein, *op.cit.*, p.232; R. Plender, *Plender and Usher's Cases and Materials on the Law of the European Community* (1989, Butterworth, London) p.360; G.A. Zaphiriou, *European Business Law* (1970, Sweet and Maxwell, London), p.18; K. Lipstein, *op.cit.*, p.136; W. van Gerven, *op.cit.*, p.350; G. Alexiou, *op.cit.*, p.381; B. Goldman and A. Lyon-Caen, *op.cit.*, p.157; B. Goldman, *op.cit.*, pp.85-87; J. Boukouras, *op.cit.*, p.780; F. Wooldridge, *op. cit.*, p.2; G. Bournous, *op.cit.*, p.42.

[92] See E. Pennacchini, R. Monaco, L. Ferrari Bravo and S. Puglisi, *Manuale di Diritto Comunitario* (1984, UTET, Torino), p.123.

[93] See P. Papanagiotou, "The right of establishment of foreign companies in Greece in view of the status quo in the European Community" [1964] *Epitheorisi Ellinikou Dikaiou* 301, p.309; also see K. Lipstein, *op.cit.*, p.231. According to F. Wooldridge, *op.cit.*, p.2, beneficiaries of the freedom of establishment are: partnerships, limited and unlimited companies, co-operative societies, building societies, mutual assurance clubs and legal entities governed by public law which pursue the objective of making a profit, such as nationalised industries. According to G.E. Kalavros, 1983, *op.cit.*, p.165, the following French companies are included: *sociétés civiles, sociétés en nom collectif, sociétés en commendite simple, sociétés en commendités par action, sociétés anonymes, sociétés d' assurance en forme limités, sociétés mutuelles d'assurance, sociétés d'économie mixte, établissements publics de charactère industriel et commerciel.* In Germany the following legal entities are beneficiaries of the freedom of establishment: *Aktiengesellschaften, Kommanditgesellschaften auf Aktien, Gesellschaften mit beschränkten Haftung, Reed-*

classified as companies or associations under Art.48 may be benefit from the freedom of establishment are the following three.[94] First, the company must be profit-aiming. Second, the company must have been formed under the law of a Member State and have its registered office, central administration or principal place of business within the EU.[95] Third, insofar as non-EU companies are concerned, the company must have an effective and continuous link with the economy of a Member State.[96]

The first condition has lead to much debate, since the meaning of the term "profit-making" is not clear. The determination of "profit-aiming" companies has theoretical and practical interest, as a strict interpretation would exclude from the application of the freedom of establishment nationalised enterprises which make profit without having this aim, unions which under some national laws can not conduct financial activity, or even companies dealing with financial activities but not making profit.[97] Since the aim of the legislator was clearly to include within the scope of Art.48 as many types of legal entities as possible, the term profit-aiming should have a broad meaning. According to Wooldridge the phrase profit making means that "they have as their object, under their constitutions, the making of profit, whether they actually succeed in making one or not".[98] Thus, only organisations whose objectives are mainly gratuitous,[99] namely organisations with purely humanistic, religious, or cultural aims, as well as public law organisations dealing with activities not falling within the scope of the Treaty are excluded from the application of Art.48. The failure of the legislator to avoid the use of a clearer term should be noted. Instead of referring to companies aiming to profit (which may vary in each legal system), the legislator could have delineated the scope of the regulations on the freedom of establishment by reference to legal entities that participate in financial and commercial activity.

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ereien, offenen Handgesellschaften, Kommanditgesellschaften, Gesellschaften des bürgerliches Rechts, Versicherungsvereine auf Gegenseitigkeit, begrechtlichen Gewerkschaften, Genoßenschaften, Stiftungen, Körperschaften, Anstalte des öeffentliches Rechts mit Aufgaben gewerblicher Art. See Gide-Lourette-Nouel, *Dictionnaire du Marché Commune* (1975, Dictionnaires du Andre Jolly, Paris).

[94] See I. Cath, *op.cit.*, p.252; G. Bournous, *op.cit.*, p.41; and H. Smit and P. Herzog, *op.cit.*, p.641-642.

[95] See case 79/85 Segers v *Bestuur van de bedrijfsvereniging voor bank - en verzekeringswezen, groothandel en vrije beroepen* [1986] ECR 2375, con.

[96] The condition is only applicable to non-EU companies; see Opinion of Advocate General La Pergola in case C-212/97 *Centros Ltd* v *Erhvervs-og Selskabsstyrelsen*, 16 July 1999, unreported.

[97] See G. Bournous, *op.cit.*, p.42; G.E. Kalavros, *op.cit.*, pp.164-165; and J. Boukouras, *op.cit.*, p.85.

[98] See F. Wooldridge, *op.cit.*, p.2.

[99] See case C-196/87 *Steymann* v *Staatsecretaris van Justitie* [1988] ECR 6159; for an opposite example of a sports company being characterised as profit-aiming, see case C-415/93 *URBSFA and Others* v *Bosman and Others* [1995] ECR I-4921; also see cases 13/76 *Dona* v *Mantero* [1976] ECR 1333; 36/74 *Walrave and Koch* v *AUCI* [1974] ECR 1405.

The second condition imposed by Art.48 comprises two elements.[100] The company must be formed under the law of a Member State, and its registered office, central administration or principal place of business must be located within the EU.[101] These conditions clearly refer to the company's *lex fori* and to the issue of recognition. It should be noted that the Treaty (applying the non-discrimination principle) rejects the theory of control (according to which the company's *lex fori* derives from the law of the nationality of its members).[102] At the same time, in an attempt to avoid problems in the application of Art.48 by Member States following another system for the determination of *lex fori*, the Treaty avoids the choice between one of the two prevailing international legal theories, namely of incorporation and of the *siège réel*.[103] In fact, it must be accepted that the Treaty chooses the most liberal solution, since it "enables companies that have a mere legal tie within the Community" to enjoy the privilege of free establishment.[104] The ECJ has held with regard to companies that it is their prescribed seat or registered office that serves as the connecting factor with the legal system of a particular state. Thus, the company must be regarded as established in a Member State if its central administration, main establishment or registered office is situated in it.

However, it is stated that "in the absence of either of the above links", the activity of the company must "show a real and continuous link with the economy of a Member State.[105] This leads to the third condition for the establishment of legal persons within the EU: the effective and continuous link with the economy of a Member State. A real economic link is evidenced by either the amount of gross business done within

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[100] See Y. Loussouarn, *op.cit.*, p.236, who notes that these two conditions are practically one, since companies are always formed according to the law of their statutory seat; see Opinion of Avocate General La Pergola in case C-212/97 *Centros Ltd* v *Erhvervs-og Selskabsstyrelsen*, 16 July 1998, unreported.

[101] See case 270/83 *Commission* v *France* [1986] ECR 273; C-330/91 *The Queen and Inland Revenue Commissioners ex parte Commerzbank* [1993] ECR I-4017; C-264/96 *ICI* v *Kolmer* [1998] ECR I-4695; C-212/97 *Centros Ltd* v *Erhvervs-og Selskabsstyrelsen*, judgement of 9 March 1999, unreported. The registered office of a company is located at "the place designated as such in the incorporation papers" of the company. The executive office is located "where the company's organs issue the decisions that are essential for the company's operation". The principal place of business is the place "where the company has its principal operational facilities". See H. Smit and P. Herzog, *op.cit.*, p.644.

[102] The theory of control was rejected, because it was felt that companies fulfilling the conditions set by Article 58 should have the necessary link to the Community. The nationality of their shareholders was considered to be irrelevant.

[103] P. Leleux, *op.cit.*, p.3, notes that: "In fact, in all our countries there is always a statutory head office of the country of incorporation. H. Smit and P. Herzog, *op.cit.*, p.643 say that this requirement "seeks to ensure that companies benefiting from the right of establishment in the Community have a direct link to the legal system of one of the Member States". It is also noted that "if in one Member State the company is considered established even though some formality, such as the filing of the incorporation papers, has been omitted, the company must be considered to have been formed, for the purposes of the Treaty, even though that particular step is considered essential in the country of establishment". See H. Smit and P. Herzog, *op.cit.*, p.644.

[104] See B. Goldmann, *op.cit.*, p.88.

the EU or by the permanent nature of the investments in the EU.[106] A "continuous" link is to be viewed as "the opposite of occasional"[107] and is defined as "a history of commerce or production" in one of the Member States.[108] It would seem therefore that what is required by the Treaty for non-EU companies is a real, continuous link with the economy of a Member State, which exists when the company "already maintains a secondary establishment" in the EU or when the EU is its "primary field of action.[109]

C6. The issue of EU subsidiaries of non-EU parent companies

The third condition, imposed by The General Program on the Suppression of Restrictions on the Freedom of Establishment of 18 December 1961,[110] has been criticised as giving the benefit of free establishment to subsidiaries of non-EU companies with a registered office within the EU.[111]

Thus, a situation has developed where a non-EU company can maintain a fictitious, non-productive office within the EU and demand to import in terms of taxes and dumping[112] regulations its non-EU products under the same conditions stipulated for EU products. The problem is acute in countries following the incorporation theory, because it is only there that a registered office suffices for the characterisation of a subsidiary company as domestic. Countries following the *siège réel* doctrine however would demand that the subsidiary has autonomy from the parent company. In the past the danger of third countries penetrating the EU through the formation of subsidiaries seemed only theoretical[113] and it was thought that the demand of an efficient economic link of the company with the economy of an EU Member State would diminish all possibilities of

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[105] See case 270/83 Commission v French Republic [1986] ECR 273; 1 CMLR 401; also see case 81/87 *ex parte Daily Mail and General Trust plc* [1988] ECR 5483; [1988] 3 CMLR 713.

[106] For further analysis on the third condition for the establishment of foreign companies see H. Smit and P. Herzog, *op.cit.*, p.646; B. Goldmann, *op.cit.*, p.89.

[107] See H. Smit and P. Herzog, *op.cit.*, p.646.

[108] See J. Boukouras, *op.cit.*, p.123.

[109] See G.E. Kalavros, *op.cit.*, p.173.

[110] See OJ 1962, pp.32-62.

[111] C. Maestripieri, *op.cit.*, p.163, notes that "some people feel that the Community has thus stripped itself of all defence against an invasion of capital from third countries and that its most important sectors are likely to come under their control which will eventually, more or less in the long term, lead to technical underdevelopment."

[112] In its original sense "dumping" refers to a manufacturer selling an identical commodity abroad for less than in he would in his home market. "Dumping" has been common practice for Japanese companies and has been the subject of multilateral negotiations between the EU-US and Japan. See K. Flamm, "Semi-conductors" in Hufbauer, *Europe 1992: An American Perspective* (1990, The Brukings Institution, Washington D.C.), p.273, note 69. For an example of this see Opinion of Advocate General La Pergola in case C-212/97 *Centros Ltd* v *Erhvervs-og Selskabsstyrelsen*, 16 July 1998, unreported.

circumvention.[114] Maestripieri notes that "what really counts is that the company should belong to the economic life of the Community. Furthermore it is almost impossible to discover who is really in control of the company".[115] However, despite the application of the third corrective criterion, and following the signing of the GATT agreements by the EU, companies from third countries were still able to penetrate the EU by establishing EU subsidiaries. For Member States with traditionally protective economic regimes, such as France and Italy, this was a blatant circumvention of the freedom of establishment. For other Member States such as the UK and Ireland which enjoyed both a more liberal economic regime and benefits from this development (as many US and Japanese subsidiaries established there), the prevention of European subsidiaries from freely circulating their products in the EU contradicted the freedom of establishment.[116]

Despite UK opposition the "protectionist" majority within the EU pressed on to establish a fourth criterion based on local content.[117] In 1988 the Nissan case triggered a controversy within the EU concerning the extent of local content.[118] Based on the provisions of the Kyoto Convention,[119] the then EC passed Regulation 2423/88[120] (widely

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[113] See A. Papagiannidis and A. Christogiannopoulos, *op.cit.*, p.152; P. Papanagiotou, *op.cit.*, pp.308-309; B. Goldman, *op.cit.*, p.89; and G. Alexiou, *op.cit.*, pp.372-372.

[114] G. Bournous, *op.cit.*, p.44 notes that companies with only a constitutional seat within the EU are not benefited, because the General Program for the abolition of the relevant limits has set a third corrective condition; also see I. Cath, *op.cit.*, p.254; Y. Loussouarn, *op.cit.*, p.236; W. van Gerven, *op.cit.*, p.351; Opinion of Advocate General La Pergola in case C-212/97 *Centros Ltd* v *Erhvervs-og Selskabsstyrelsen*, 16 July 1998, unreported.

[115] See C. Maestripieri, *op.cit.*, p.163.

[116] S. Micossi and G. Viesti note that "actually, the choice of locating many companies in the United Kingdom seems to be explained, inter alia, by the climate of industrial relations, which is very favourable to the introduction of its system". See S. Micossi and G. Vesti, "Japanese direct manufacturing investment in Europe" in Winters and Venables, *European Integration: Trade and Industry* (1991, Cambridge University Press, Cambridge) 209, p.216.

[117] The issue of local content started in 1982, when BL launched export production of its Triumph Acclaim under the licence of Honda. Italy impeded imports claiming that the car was non European, as the British content was only 60%.

[118] In the autumn of 1988 Nissan Motor started to export its British built Bluebird cars in the other EU member-states. A dispute arose when France banned imports. Later on France permitted the import of Bluebird cars, but allegedly counted them as part of the quasi-annual quota for Japanese cars. France's example was then followed by Italy and Spain. See K. Ishikawa, *Japan and the challenge of Europe*, (1990, Pinters Publishers, London), pp.77-79; also see R. Eccles, "When a British car is not a British car? Issues raised by Nissan", [1989] ECR, pp.1-3. The conflict between Japan and the EU was not limited to the Nissan case. Recently Japan insisted that the EU has violated the GATT in six instances and the USA in nine. For further reports on the issue, see *Naftemboriki,* 17.7.1992, p.96.

[119] The International Convention on the Simplification and Harmonisation of Custom Procedures was adopted in 1975 and states that "the substantial transformation which is economically justifiable should take place locally for a product to count as local, but it gives no specific percentage". See K. Ishikawa, *op.cit.*, p.80.

[120] On 29 March 1988 the Commission sent the Council a proposal [COM (88) 112 final] for a Regulation amending the Regulation of 23 July 1984 on protection against dumped or subsidised imports from countries which are not members of the EU. "The aim is to make certain technical amendments in order to clarify the existing provisions (determination and comparison of normal value and export prices, procedural rules for investigations) and to make Community action more effective while upholding the principle of legal certainty". See *Bulletin of the European Communities,* Commission, no 3, 1988, p.86, para-

known as "anti-screwdriver" Regulation) according to which a product is not subject to dumping penalties (namely, it is considered European), if at least 50% of its value originates from within the EU.[121] This Regulation has led to numerous debates between EU and third countries, centring on the method for the determination of the percentage of local content and on the legality of such discrimination in view of GATT.[122] Although this debate has not yet been resolved, the EU has proceeded to draft "rules of origin" for specific categories of products.[123] A general definition of "originating products" and a final determination of the criteria that must be used for the identification of a product's country of origin can be drawn from Protocol 1 of the 1989 Lomé Convention.[124] The

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graph 2.2.3. According to the Proposal of the Commission [COM (88) 112 final], the modernisation of EC law on the issue was necessary due to the following situations:

a. the character of antidumping procedures had changed enormously;

b. the number of investigation has risen considerably;

c. there is doubt concerning vague points of the interpretation of existing legislation, which sufficed in making reference to "certain vague principles"; and

d. specific clarification is required in the determination of normal value, the determination of export price, the comparison between normal value and export price and the procedure of the investigations.

[121] According to K. Ishikawa, *op.cit.*, p.82, anti-dumping duty is imposed where the value of parts or materials in the assembly or production operation, originating from countries whose products are subject to anti-dumping duty, exceed by at least 50% of the value of all other parts or materials used.

[122] The percentage of local content given by British authorities as far as Nissan-Bluebird cars were concerned was 60%, whereas Fiat suggested a mere 21%. K. Flamm, *op.cit.*, p.274, notes that "it is alleged that the frequent practice of European customs officials has been to assign origin to the country with the largest single share of components in number of value". Mr Yutaka Kume, President of Nissan Motor Co Ltd announced that further development of their British subsidiary shall take place. The creation of new department dealing with design and product control is a clear attempt by the company to increase the percentage of local content of the Nissan cars. For further details on the matter, see *Eleftheros Typos*, 22.7.1992, p.33.

K. Ishikawa, *op.cit.*, p.83, refers to the view of Otto Grolig and Peter Bogaert, who note that "they have to import these components from a manufacturer in a non-member country in the same way and increase production when the finished products imported from a manufacturer in a non-member country are subjected to anti-dumping duties. Then, an independent company, merely because it is not related to or associated with a manufacturer of finished products in a non-member country can escape from the imposition of an anti-dumping duty".

Japan argues that the imposition of local content requirements is inconsistent with Article 2a and 6 of the GATT, as well as with its Anti-dumping Code, whereas the Commission has repeatedly explained that its attitude is based on Article 20 of the GATT. Flamm, *op.cit.*, p.274, presenting the American perspective agrees that the anti-screwdriver regulation violates he GATT's "equal national treatment" stipulation as well as its Antidumping Code. However, both the proposal of the Commission COM(88)112 final, as well as the text of the Regulation [*OJ L 209*, 2.8.88, pp.1-17] mention that the Regulation is adopted in accordance with the GATT (Art.12 in particular) and the 1979 GATT Anti-dumping Code.

[123] In February 1989 the Commission passed new rules of origin, according to which non-EU companies must conduct key manufacturing of the front-end process in the EU. This rule was followed by a proposal from the Commission to the Council for the definition of origin of photocopiers, according to which the product is considered European only if major parts are constructed within the EU. See K. Ishikawa, *op.cit.*, p.91.

[124] See Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, Protocol 1 concerning the definition of the concept of "originating products", *OJ L 229*, 17/08/1991, p.3-280; as amended by Decision No 5/95 of the ACP-EC Council of Ministers of 3 November 1995 updating the list of least- developed ACP States in Article 330 (1) of the fourth Lomé Convention, *OJ L 327*, 30.12.1995, p.31. Protocol 1 was amended by Decision No 2/97 of the ACP-EC Council of Ministers of 24 April 1997 amending Protocol 1 to the fourth ACP-EC Convention of Lomé to take account of changes to the harmonised commodity description and coding system and the adoption of rules of origin for petroleum products, *OJ L 220* , 11.8.1997, pp.6-57. For a fuller understanding of the rules of origin, also see Commission Regu-

Convention distinguishes between wholly and partially originating products. Wholly originating are products which were wholly obtained, or sufficiently worked or processed with the country of origin or on vessels flying the flag of this country and owned by nationals of this country to a percentage of at least 50%. Partially originating products have to follow a complicated procedure for the determination of their country of origin which, for EU products, is certified in an E form.

Consequently, it can be stated that companies wishing to benefit from the freedom of establishment must also fulfil a fourth condition set indirectly by EC secondary legislation, namely they must manufacture their products according to the rules of origin or the special anti-dumping regulations of the EU. In terms of the legality of local content requirements, it must be stated that GATT does not oblige the EU to treat third countries equally to its members.[125] Moreover, breaches of the freedom of establishment (initially meant to apply to companies with an effective and continuous link to the economy of one of the Member States, which is hardly the case with companies with merely an assembly unit within the EU) can not be legalised by any kind of international treaty. In terms of expediency, however, the prevention of non-EU companies from establishing in Europe is a conservative measure, which only helps widen the gap between EU, US and Japanese manufacturers.[126] Thus, the EU must limit the local content requirements to a percentage economically suitable for creating the necessary, effective link between the subsidiary and the economy of its receiving state. It should be noted that an infra-EU agreement on the issue must be achieved as soon as possible, because the circulation of a product within one Member State automatically leads to its free circulation in all EU Member States.[127]

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lation (EC) No 12/97 of 18 December 1996 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, *OJ L 009*, 13.01.1997, pp.1-177; 97/162/EC: Commission Decision of 18 February 1997 on the initiation of international consultation and dispute settlement procedures concerning changes to United States rules of origin for textile products resulting in the non-conferral of Community origin on certain products processed in the European Community, *OJ L 062*, 4.3.1997, pp.43-45; Uruguay Round of Multilateral Trade Negotiations (1986- 1994), *OJ L 336*, 23.12.1994, pp.273-289;Uruguay Round of Multilateral Trade Negotiations (1986- 1994), *OJ L 336*, 23.12.1994, pp.144-150.

[125] See C. Karatzas, *GATT and its Code for Export Subsidies: their function and influence in the legal order of the EC* (1991, Sakkoulas, Athens), p.18.

[126] See S. Micossi and G. Viesti, *op.cit.*, p.222.

[127] The theoretical problem deriving from the Nissan case is whether the restrictive recognition theory of the *siège réel* can lead to the prohibition of import of products with at least 50% local content. On this issue, R. Eccles, *op.cit.*, p.2, notes that this is impossible, because "if such cars or products were lawfully placed on the market in one EC Member State, then as a fundamental principle of the EEC free movement of goods rules, they should arguably be allowed to circulate without quota or other restrictions between Member States".

C7. *Ratione loci* application of the Freedom of Establishment

The territorial limits of the freedom of establishment are set in Art.299, which determines the *ratione loci* implementation of the Treaty. Since Art.48(1) relates the companies' free establishment with the location of their statutory seat or centre of administration in a Member State, the determination of these countries becomes necessary. The Treaty (and consequently the freedom of establishment) applies to the fifteen Member States of the EU.[128] Under Arts.299, 183(3) and 182(1), the Treaty also applies to countries and territories with a special relationship with France, Italy and The Netherlands. This category includes the French Guadeloupe, Guiana, Martinique and Reinon.[129]

Another issue on the *ratione loci* application of the freedom of establishment concerns the continental shelf of EU Member States. Based on Art.299, EU officials have repeatedly insisted that the application of the freedom of establishment should include the Member States' continental shelves. The issue is still in debate. However, there is no doubt that companies dealing with submarine wealth are beneficiaries of the freedom of establishment. Moreover, the freedom of establishment "also includes that part of the continental shelf which is controlled by the Member States".[130] The issue is of extreme interest in legal theory. However, because of the sensitive nature of the activities that companies may undertake on the continental shelf, its still unsure extent under international law and its special status, further analysis on this issue does not fall within the scope of this thesis.

C8. *Ratione materiae* application of the freedom of establishment

The determination of the nature and type of activities liberalised under Arts.43-48 is of particular importance for the critique of the activities prohibited to foreign companies in France, Italy and Greece and the evaluation of this prohibition under EC law. In an attempt to avoid a -possibly restrictive- reference to the precise activities covered by the freedom of establishment, the Treaty of Rome mentions only activities which are ex-

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[128] The Treaty does not apply to the dominion of Agion Oros (The Holy Mountain), which is located in Macedonia (Northern Greece) and is inhabited by Orthodox monks only.

[129] The Treaty does not apply to Algeria (which became an independent state in 1962), to Monaco, San Marino, Andorra and the Vatican (because these states exercise their external relations independently under Art.299, par.4). However, the customs' union applies to Monaco (which is united with France since 1861) as well as San Marino (which has signed with Italian Treaties of Friendship and Co-operation in 1939 and 1953). See E. Pennacchini, R. Monaco, L. Ferrari Bravo and S. Puglisi, *op.cit.*, p.125.

[130] See W. van Gerven, "The right of establishment and free supply of services within the Common Market", (1965-1966) 3 CMLR 351; also see G.E. Kalavros, *op.cit.*, p.151.

cluded from its field of application. The basic principles for the determination of liberalised activities are set via the classification of persons in three categories[131] among which only the self-employed may benefit from the right to establishment, as well as from the application of the non-discrimination principle of Art.12 to all independent activities and services that can be characterised financial or commercial.[132] Since the Single Market covers all such activities, the freedom of establishment is applicable to all possible types of financial or commercial independent activities.[133]

The right of establishment embraces all sectors of economic life, including commerce (wholesale and retail trade),[134] industry,[135] finance, agriculture,[136] cinematography,[137] crafts and the professions, coal and steel, atomic energy, fishery,[138] mining and

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[131] The Treaty of Rome divides persons into three categories: workers, self-employed and providers of services.

[132] See D. O'Keeffe, "The free movement of persons and the Single Market" [1992] ELR 3, p.4.; also see E. Pennacchini, R. Monaco, L. Ferrari Bravo and S. Puglisi, *op.cit.*, p.130; C. Maestripieri, *op.cit.*, p.151; A.T.S. Leenen, "Recent case law of the Court of Justice of the European Communities on the freedom of establishment and the freedom to provide services" [1980] CMLR 320, pp.262-263; Papanagiotou, *op.cit.*, pp.309-310; A. Dashwood and R. Wyatt, *European Community Law* (1993, Sweet and Maxwell, London), p.298-299; also see cases 36/74 *Walrave et autres* v *Association Cyclistes et autres* [1974] ECR 1405; 90/76 *van Ameyde* v *U.C.I.* [1977] ECR 1091; 221/85 *Commission* v *Belgium* [1987] ECR 719.

[133] See B. Goldman and A. Lyon Caen, *op.cit.*, p.306; J. Boukouras, op. cit., p.76; also see case 167/73 *Commission* v *French Republic* [1974] ECR 359, [1974] 2 CMLR 216. It has been suggested that "the differentiation between wage-earning and independent activities has lost interest". See Zontanos, P., *Champ d' application ratione materiae des règles du Traité CEE relatives à la libre circulation des personnes, des services et des capitaux* (1987, Sakkouls, Athens), p.33.

[134] See Directives 64/223 of 25.2.1964 *OJ*, no 56, 4.4.1964, p.863; 64/224 of 25.2.1964 *OJ*, no 56, 4.4.1964, p.869; 68/363 of 15.10.1968 *OJ*, no L260, 22.20.1968, p.1; 70/522 of 30.11.1970 *OJ*, no L267, 10.12.1970, p.14; 74/557 of 4.6.1974 *OJ*, no L307, 18.11.1974, p.5; 75/369 of 16.6.1975 *OJ*, no L167, 30.6.1975, p.19; Council Directive 74/557/EEC of 4 June 1974 on the attainment of freedom of establishment and freedom to provide services in respect of activities of self- employed persons and of intermediaries engaging in the trade and distribution of toxic products, *OJ L 307*, 18.11.74, p.5, as amended; Council Directive 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents, *OJ L 382*, 31.12.86, p.17.

[135] See Directives 64/428 of 7.7.1964 *OJ*, no 117, 23.7.1964, p.1871; 64/429 of 7.7.1964 *OJ*, no 117, 23.7.1964, p.1880; 68/365 of 15.10.1968 *OJ*, no L260, 22.10.1968, p.9; 69/82 of 13.3.1969 *OJ*, L68, 19.3.1969, p.4.

[136] See Directives 63/261 of 2 April 1963 *OJ*, no 62, 20.4.1963, p.1323; 63/262 of 2 April 1963 *OJ*, no 62, 20.4.1963, p.1326; 65/1 of 14.12.1964 *OJ*, no 1, 8.1.1965, p.1; 67/654 of 24.11.1967 *OJ*, no 263, 30.11.1967, p.6; 71/18 of 16.12.1967 *OJ*, no L8, 11.1.1971, p.24; 67/530 of 25.7.1967 *OJ*, no 190, 10.8.1968, p.1; 67/531 of 25.7.1967 *OJ*, no 190, 10.8.1967, p.3; 67/532 of 25.7.1967 *OJ*, no 190, 10.8.1967, p.5; 68/192 of 5.4.1968 *OJ*, no L93, 17.4.1968, p.13; 68/415 of 20.12.1968 *OJ*, no L308, 23.12.1968, p.17.

[137] See Directives 63/607 of 15.10.1963 *OJ*, no 159, 2.11.1963, p.2661; 65/264 of 13.5.1965 *OJ*, no 85, 19.5.1965, p.1437; 68/369 of 15.10.1968 *OJ*, L260, 22.10.1968, p.22; 70/451 of 29.9.1970 *OJ*, no L218, 3.10.1970, p.37; also see C. Degrand, "Le marché commun, le cinéma et les syndicats" [1972] *Revue du marché commun,* 663.

[138] See Opinions of Advocate General Mischo on case C-221/89 *The Queen* v *Secretary of State ex parte Factortame* [1991] ECR I-3905, con.10; also see C.A. Fleischer, "L'accès aux lieux de pêche et le Traité de Rome" [1971] *Revue du marché commun* 148; J.J. Lavenue, *L'organisation du secteur de la pêche dans le marché commun* (1974, Thesis, University of Montpellier); G. Olmi, "Agriculture and fisheries in the Treaty of Rome" [1972] CMLR 293.

quarrying, telecommunications, electricity,[139] gas and sanitary services,[140] food and beverages,[141] public contracts,[142] manufacturing and proceeding industries, real estate and business, leisure services,[143] the distribution sector,[144] banks,[145] as well as personal services (restaurants and the like)[146], as long as they aim to financial activity in its broadest

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[139] According to the Commission the liberalisation of these sectors are essential for the Single Market to be fully effective. See *Special Supplement of the Report on the Operation of the Single Market 1995*, 9.5.1996, http:/www.cec.lu/ en/comm/dg15/smn/296/s1296.html.

[140] See Directive 66/162 of 28.2.1966 *OJ*, no 42, 8.3.1966, p.584.

[141] See Directive 68/367 of 15.11.1968 *OJ*, no L260, 22.10.1968, p.16.

[142] See Directives 64/427 *OJ*, no 117, 23.7.1964, p.1863; 64/429 *OJ*, no 117, 23.7.1964, p.1880; 71/304 *OJ*, no L185, 16.8.1971, p.1.

[143] See 64/242/EEC Commission Recommendation of 8 April 1964 to the Member States on the certificate attesting to the nationality of a film as provided for in Article 11 of the first Directive on the film industry, *OJ, 063, 18.04.64, p.1025*; Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, *OJ L 298, 17.10.89, p.23*; Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals, *OJ L 281, 23.11.95, p.51*; Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, *OJ L 320, 28.11.98, p.54.*

[144] See case 198/86 *Erwin Conradi and others* v *Direction de la concurrence et des prix des hauts de seine and others* [1987] ECR 4469, con.10.

[145] Council Directive 73/183/EEC of 28 June 1973 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self- employed activities of banks and other financial institutions, *OJ L 194*, 16.07.73, p.1; First Council Directive 77/780/EEC of 12 December 1977 on the co-ordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, *OJ L 322,* 17.12.77 p.30, as amended; Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions, *OJ L 372*, 31.12.86, p.1; 87/62/EEC: Commission Recommendation of 22 December 1986 on monitoring and controlling large exposures of credit institutions, *OJ L 033*, 04.02.87, p.10; 87/63/EEC: Commission Recommendation of 22 December 1986 concerning the introduction of deposit-guarantee schemes in the Community, *OJ L 033*, 04.02.87, p.16; Council Directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents, *OJ L 044*, 16.02.89, p.40; Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions, *OJ L 124*, 05.05.89, p.16, as amended; Second Council Directive 89/646/EEC of 15 December 1989 on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, *OJ L 386*, 30.12.89, p.1 as amended; Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions, *OJ L 386*, 30.12.89, p.14, as amended; 90/109/EEC: Commission Recommendation of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions, *OJ L 067*, 15.03.90, p.39; Commission Directive 91/31/EEC of 19 December 1990 adapting the technical definition of 'multilateral development banks' in Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions, *OJ L 017*, 23.01.91 p.20; Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis, *OJ L 110*, 28.04.92, p.52, as amended; Council Directive 92/121/EEC of 21 December 1992 on the monitoring and control of large exposures of credit institutions, *OJ L 029*, 05.02.93, p.1, as amended; Commission Directive 94/7/EC of 15 March 1994 adapting Council Directive 89/647/EEC on a solvency ratio for credit institutions as regards the technical definition of 'multilateral development banks' (Text with EEA relevance), *OJ L 089*, 06.04.94, p.17; Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, *OJ L 135*, 31.05.94, p.5; Commission Directive 95/67/EC of 15 December 1995 making a technical amendment to Council Directive 89/647/EEC on a solvency ratio for credit institutions as regards the definition of 'multilateral development banks' (Text with EEA relevance), *OJ L 314*, 28.12.95, p.72; Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, *OJ L 043*, 14.02.97, p.25.

[146] See A. Papagiannidis and A. Christogiannopoulos, *op.cit.*, p.139; H. Smit and P. Herzog, *op.cit.*, p.538; H. Bronkhorst, "Freedom of establishment and freedom to provide services under the EEC Treaty,

sense, namely to "business or professional activity pursued for profit or remuneration".[147] These activities fall within the scope of the right of establishment, even if secondary EC legislation does not expressly subject them to the scope of Arts.43-48.[148] In connection to companies, the right of establishment covers their setting up under any form considered suitable by their founders (branch, agency, office or subsidiary), their administration and their management.[149] Any restrictions concerning the acquisition of shares and the participation in existing companies under the same conditions as nationals are prohibited.[150] These restrictions may take the form of a prohibition to foreign companies to carry on certain kinds of businesses,[151] "a requirement that they shall obtain government consent" before establishing in the receiving state,[152] or even a requirement of residence for the natural persons that participate in the company.[153]

The freedom of establishment also covers the corollary activities of the above,[154] namely these activities which are of assistance in the pursuit of a liberalised occupation or company activity.[155] Thus, prohibited are restrictions in exemptions from taxation,[156] restrictions in the selling,[157] renting or in accessing the tendering procedure for the allocation of public property,[158] in the right to obtain loans,[159] as well as limitations in the free movement of capital, since the latter is considered a pre-condition for the effective

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three judgements of the Court of Justice" [1975] CMLR 245, p.246; D. Lasok and J.W. Bridge, *Law and Institutions of the European Community* (1987, Butterworths, London), p.408.

[147] See J. Steiner, *EC Law* (1995, Blackstone Press Ltd, London), p.185; also see B. Goldman and A. Lyon Caen, *op.cit.*, p.308; H. Smit and P.Herzog, *op.cit.*, p.539.

[148] Indeed, the Commission has no intention of proposing new relevant legislation, although it has the intention to fill the gaps. See Commissioner Monti's comment in *Positive effects of the single market are already felt in the marketplace*, 27.9.1995, http://www.cec.lu/en/comm/dg15/smn/conf.html.

[149] See case 79/85 *Segers* v *Bestuur van de bedrijfsvereniging voor bank* [1986] ECR 2375, con.12.

[150] See case 81/87 *The Queen* v *H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc* [1988] ECR 5483, con.17.

[151] See case 147/86 *Commission* v *Hellenic Republic* [1988] ECR 1637, con.17 on the right to set up private teaching institutions in Greece; also see case 221/85 *Commission* v *Belgium* [1987] ECR 719, con.4 on the right to set up a clinical biological laboratory.

[152] See R. Pennington, *op.cit.*, p.104; also see H. Smit and P. Herzog, *op.cit.*, p. 539; M. Egana, *op.cit.*, p.89; G.Alexiou, *op.cit.*, p.371; A. Papagiannidis and A. Christogiannopoulos, *op.cit.*, p.140; Y. Loussouarn, *op.cit.*, p.237; cases 197/84 *Steinhauser* v *City of Biarritz* [1985] ECR 1819; 221/85 *Commission* v *Belgium* [1987] ECR 719.

[153] See case 182/83 *Robert Fearon and Company Limited* v *Irish Land Commission* [1984] ECR 3677, cons.9 and 10.

[154] See case C-302/97 *Klaus Konle* v *Austria*, judgement of 1 June 1999, unreported.

[155] See cases 63/86 Commission v Italy [1988] ECR 29, con.14; 305/87 Commission v Hellenic Republic [1989] ECR 1461, con.21; C-330/91 The Queen v Inland Revenue Commissioners ex parte Commerzbank ag. [1993] ECR I-4017; C-1/93 Hallibarton Services v Statssecretaris van Financien [1994] ECR I-1137.

[156] See case C-330/91 *The Queen* v *Inland Revenue Commissioners ex parte Commerzbank Ag.* [1993] ECR I-4017, con.19.

[157] See Opinion of Advocate General Lenz in case C-1/93 *Hallibarton Services* v *Staatssecretaris van Financiën* [1994] ECR I-1137, con.18.

[158] See case 197/84 *P. Steinhauser* v *City of Biarritz* [1985] ECR 1819, con.16.

[159] See case 63/86 *Commission* v *Italy* [1988] ECR 29, con.15.

exercise of the freedom of establishment.[160] Such is the width of activities that may be considered as indirect hinders to the exercise of the freedom of establishment of foreign legal entities, that the Council's *General Program for the Abolition of Restrictions on the Freedom of Establishment* considers prohibited restrictions to the right of establishment even administrative practices which deny or restrict the right of foreign persons to participate in transactions, obtain licenses governed by public law, participate in a social security schemes, or to acquire, use or dispose of movable or immovable property.[161]

However, even such measures, which do prevent the effective exercise of the freedom of establishment, may be considered legal under EC law, provided that they fulfil the following four criteria:

a. they are applied in a non-discriminatory manner;[162]

b. they are justified by imperative requirements in the general interest;[163]

c. they are suitable for securing the attainment of the objective which they pursue; and

d. they do not go beyond what is necessary for the attainment of their aim.[164]

The question is what constitutes a discriminatory manner. From the text of the provisions on the freedom of establishment it is clear that their aim is equality of treatment between domestic and foreign persons.[165] Thus, any national provisions, resulting from national rules of whatever kind (public or other) which seek to govern collectively the exercise of the activities liberalised by primary and secondary EC legislation by restricting access to them on the basis of nationality, must be considered discriminatory and therefore illegal.[166] It must be noted, however, that not only direct, but also indirect or disguised discrimination is prohibited. Such discrimination occurs in the case of national provisions which, while applicable without distinction to nationals of all the Member States, in fact hinder or disadvantage primarily nationals of other Member

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[160] See case 203/80 *Criminal proceedings against Guerrino Casati* [1981] ECR 2595, con. 8.

[161] See Council's General Program of 18 December 1961, *OJ*, English Special Edition, Second Series ix, p.7; also see case 305/87 *Commission* v *Greece* [1989] ECR 1461; case C-302/97 *Klaus Konle* v *Austria*, judgement of 1 June 1999, unreported.

[162] See Opinion of Advocate General Alber in case C-311/97 *Royal Bank of Scotland plc* v *Elliniko Dimosio* [1991] ECR I-2651.

[163] See case C-250/95 *Futura Participations SA* [1997] ECR I-2471.

[164] See cases C-19/92 *Kraus* v *Land Baden-Wuerttemberg* [1993] ECR I-1662, con.32; C-55/94 *Reinhard Gerhard* v *Consiglio dell' ordine degli avvocati e procuratori di Milano* [1995] ECR I-4165, cons.37 and 39.

[165] See case 221/85 *Commission* v *Belgium* [1987] ECR 719, con.9.

[166] See case 90/76 *Ufficio Henry van Ameyde* v *Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale* [1977] ECR 1091, con.28; also see V. Guizzi, *Manuale di diritto e politica dell' Unione Europea* (1994, Editoriale Scientifica, Milano), p.422.

States.[167] Consequently, discriminatory application of national law involves the implementation of domestic provisions promoting or facilitating, directly or indirectly, formally or *de facto*,[168] the domestic companies in the exercise of activities falling within the scope of Arts.43-48. The nature of such provisions can be very wide, covering material, technical and fiscal discriminatory measures.[169]

C9. Relationship Between Transport and Freedom of Establishment

A very important question is whether the provisions of the Treaty of Rome concerning the freedom of establishment are applicable to maritime companies, which (due to the nature of their activities) are also covered by the provisions of the Treaty of Rome on transport (Arts.70-80). The issue is of considerable importance. If the freedom of establishment is applicable to maritime companies, this thesis will have the opportunity to explore the Greek, Italian and French provisions on the access of foreign natural and legal persons to maritime activities. This would be of great practical value, as all three states are countries with long, maritime tradition.

The theoretical basis of the view that Arts.43-48 EC are not applicable on the establishment of foreign maritime companies lies with an erroneous interpretation of Art.80(2), which states that the Council shall decide whether the Articles of the Treaty related to transport apply to sea transport. Those who support the view that transport and establishment do not mix argue that, since the Council has not introduced relevant legislation, shipping is excluded from the scope of the Treaty.[170] Despite the lack of measures implementing Art.80, however, it is now widely accepted that sea transport falls within the scope of Arts.43-48 on the freedom of establishment.[171] According to the

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[167] See Opinion of Advocate General Mischo in case 3/88 *Commission* v *Italy* [1989] ECR 4035, con.13; also see cases 3/88 *Commission* v *Italy* [1989] ECR 4035, con.9; C-250/95 *Futura Participations SA* [1997] ECR I-2471; C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225; C-80/94 *Wielcockx* v *Inspecteur der directe belastingen* [1995] ECR I-2493; C-107/94 *Assher* v *Staatsecretaris van Financiën* [1996] ECR I-3089; also see Cerehxe, *op.cit.*, pp.72-78 .

[168] Formal discrimination derives from legislative texts, whereas *de facto* discrimination derives from administrative or customary procedures and practices. See E. Cerehxe, *op.cit.*, p.80.

[169] See G. Usai and D. Velo, *Le imprese e il mercato unico europeo* (1990, Pirola Editore, Milano), pp.60-63; also see C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Opinion of Advocate General Pergola in case C-302/97 *Klaus Konle* v *Austria*, 23 February 1999, unreported.

[170] See G. Close, "Article 84 EEC: the development of transport policy in the sea and air sectors" [1980] 5 *European Law Review* 188, p.9, who states that according to the restrictive view "air and sea transport were excluded not only from the application of the rest of the Treaty". However, P. Mendes de Leon in "*Le cabotage aérien dans les Communautés Européennes*" [1992] *Revue de Marché Commun et de l'Union Européenne* 631, p.632 supports the positive view.

[171] A large number of Commission proposals have been made concerning the enactment of measures under Art.80. Smit & Herzog, *op.cit.*, p.833-834, refer to the Seventh General Report No 46 [1974];

positive, so-called extensive, view adopted by the Commission and most legal commentators "even if the transport provisions were inapplicable for the time being, the rest of the Treaty provisions did apply".[172] The main argument supporting this view is that the application of basic principles on sea transport is not categorically excluded by the text of the Treaty. The validity of this argument is emphasised by the fact that par.1, Art.51 expressly excludes the freedom to provide services from the sea transport sector. A second argument derives from the General Program of 18.12.1961 on the Abolition of Restrictions concerning the Freedom of Establishment, which includes measures clearly related to sea transport. The ECJ has stated that the general principles of the Treaty are both implemented and completed by the Common Transport Policy, indicating further support for the extensive view.[173] Moreover, due to a general feeling that the rules on the application of the general principles in the field of transport remained "general to the point of being vague and imprecise",[174] the Legal Service of the Commission issued a relevant internal document, according to which the freedom of establishment of legal entities is indeed applicable in sea transport.[175]

Thus, the current EC law position on maritime transport accepts that the activities of foreign maritime companies fall within the scope of Arts.43-48 on the right to establishment. Member States must respect this right, which includes the "equality of treatment between enterprises and means of transport on the one hand and users on the other" along with "freedom of action for the enterprises in fixing rates and in access to the various transport markets".[176] When national provisions restrict the right of establishment of foreign maritime companies *vis-à-vis* national companies, infringements can also be brought before national courts.[177]

Eighth General Report No 355 [1975]; also see case 167/73 *Commission* v *France* [1974] ECR 359; also see Commission of the European Communities, *European Community and Transport policy in the approach to 1992* (1990, Commission of the EC, Luxembourg), pp.5-6.

[172] See Bredimas-Tzoannos, "In search of a Common Shipping Policy for the EC" [1981] *Journal of Common Market Studies,* p.99; also see Bernitsas, P., *Transport and Accession* (1985, Sakkoulas, Athens), p.95; Cerehxe, *op.cit.*, p.181.

[173] See case 16/78 *Criminal Proceedings* v *Choquet* [1978] ECR 2293. The case dealt with the question of compatibility with EC law of a Member State's requirement from citizens of other Member States to obtain a driving licence issued by the receiving state, although the citizens in question had already acquired valid driving licenses in their countries of origin. The issue arising at this point was whether the provisions on the free movement of persons were applicable in this case of road transport. Although the ECJ did not accept that this requirement restricted the person's freedom of movement, establishment and the freedom to provide services, it did accept that the measures taken by Member States in transport must comply with the basic freedoms of the Treaty of Rome.

[174] See K. Lipstein, *op.cit.*, p.177.

[175] See Note jur/133874-MS/RGB/21.5.74.

[176] See E. Strauss, *op.cit.*, p.40.

[177] See Bredimas-Tzoannos, *op.cit.*, p.103.

C10. Exceptions to the Freedom of Establishment

The Treaty of Rome (following the example of almost all international treaties) includes a number of exclusive[178] reservation clauses, namely provisions which allow the Member States to breach legally their obligation to follow the stipulations of the Treaty.[179] The most important exception to the application of the freedom of establishment concerns administrative or legislative measures imposing identical legal restraints on both nationals and foreigners. Even if their freedom of establishment is limited by these stipulations, EU nationals cannot claim that a breach of EC law has taken place, because foreign natural or legal persons exercise their activities under the same conditions and restrictions imposed upon nationals of the host country. Thus, the freedom of establishment is not applicable in situations of an exclusively internal nature,[180] although restrictions on the establishment of domestic companies in other Member States were found illegal by the ECJ.[181]

In an attempt to prevent foreigners from exercising activities connected with the *imperium* of the host country,[182] the Treaty of Rome introduces the second exception to the freedom of establishment, which concerns activities connected, either permanently

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[178] See cases 352/85 *Bond van Adverteerders and Others* v *The Netherlands* [1988] ECR 2085; C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others* v *Commisariaat voor de Media* [1991] ECR I-4007; C-311/97 *Royal Bank of Scotland* v *Elliniko Dimosio* [1999] ECR I-2651.

[179] A reservation clause referring to public policy is also included in the text of the Hague Convention on the recognition of foreign companies, associations and foundations. See B. Goldman, *op.cit.*, p.74.

[180] See cases 20/87 *Ministère Public* v *André Gauchard* [1987] ECR 4879, con.13; 204/87 *Criminal Proceedings against Guy Bakaert* [1988] ECR 2029, con.12; Opinion of Advocate General Darmon in Joined cases 54/88, 91/88 and C-14/89 *Criminal proceedings against Nino and Others* [1990] ECR I-3537, cons.5 and 11.

Art.43 refers to establishment in "another member-state". This may be interpreted in three ways:

a. a Member State "other than the one under whose laws the company is formed, and other than the one where it has its registered office, central administration, or principle place of business within the Community"; or

b. "a Member State other than the one of which it is to be regarded as a national"; or

c. a third possibility would be to interpret the term "in the territory of another Member State" as referring "to a territory other than the one in which it has hitherto been established".

In view of the problems in the determination of the nationality of companies (the existence of two theories, the lack of unanimity in the application of tone of the doctrines of incorporation or of the *siège réel)*, a broad "communautaire" approach should prevail. This approach "would suggest that for the purpose of applying Art.43 to companies, Art.48 either replaces all considerations as to nationality or spells out the sole test of nationality which is to be applied for the purpose of both Articles". See F. Burrows, *op.cit.*, p.182.

[181] See case C-379/92 *Criminal Proceedings against Matteo Peralta* [1994] ECR I-3453, con.31; also see case 292/86 *Claude Gullung* v *Conseil de l'ordre des avocats du barreau de Colmar* and others [1988] ECR 111, con.12.

[182] See the Resolution of the European Parliament of 17.1.1972, *OJ,* no C 10, 5.2.1972, p.4; also see the Opinion of the Commission of 16.6.1980, *OJ*, no L176, 10.7.1980, p.39; M. Vilaras and G. Papadimitriou, *Access of Community Citizens to Greek Administration* (1993, Sakkoulas, Athens/Komotini); L. and J. Vogel, *Le Droit Européen des Affaires* (1994, Dalloz, Paris), at 28.

or occasionally[183] with the exercise of official authority, namely the execution of any action involving the exercise of rights and duties normally enjoyed by, or imposed upon, the acting person in a private capacity.[184] Only if a person, by exercising an activity with a direct and special bond with public authority, acquires exceptional authority (not common to all citizens) is there exercise of official authority. As far as the natural or legal person in question is concerned, it must be vested "with sovereign power" and must act in that capacity.[185] This exception refers to specific activities[186] and not to entire professions.[187] The implementation of this exception may not lead to the destruction of the *effet utile* of the freedom of establishment.[188]

Art.46(1) provides the third set of exceptions (also found in most international conventions) which permit special treatment for foreign natural or legal persons[189] on grounds of public policy,[190] public security and public health.[191] These exceptions, imposed by legislative, administrative or other regulations, must be based on a serious and real threat to domestic society. The term public policy, as defined in EC law, refers to

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[183] See H. Smit and P. Herzog, *op.cit.*, p.539; P. Papanagiotou, *op. cit.*, p.311; P. Mathijsen, *A guide to EC Law* (1975, Sweet and Maxwell, London), p.70; C. Maestripieri, *op.cit.*, p.164; G. Bournous, op. cit., p.92. H. Smit and P. Herzog, *op.cit.*, p.607, note that since the Treaty refers to activities and not entire professions, the term "occasionally" seems "redundant". However, even an activity may involve the exercise of public authority. If this is the case, the activity must be excluded from free establishment. An example is presented by construction companies, "which may receive a kind of franchise to construct a super highway and in return are authorised to levy a toll on the highway connected by them"; also see case C-42/92 *Thijssen* v *Controledienst voor de verzekeringen* [1993] ECR I-4047.

[184] According to P. Zontanos, *op.cit.*, p. 113, the importance of this exception has been reduced considerably due to the fact that independent (non wage-earning) activities involved with the exercise of official authority are nowadays "very rare". Art.44 on exemptions due to official authority has never been interpreted by the ECJ. See Opinion of Advocate General Mischo in case 3/88 *Commission* v *Italy* [1989] ECR 4035, con.27.

[185] This is the criterion distinguishing the exercise of official authority from matters of public interest, which "should be the aim of every manifestation of official authority" without it being able to determine "what amounts to official authority". See H. Smit and P. Herzog, *op.cit.*, p.605.

[186] Even if the person's general activity does not involve the exercise of public authority, certain activities may be prohibited. For example, a person may pursue commercial activities in Greece, but cannot become President of the Greek Chamber of Commerce. See C. Simitis, "The effect of the participation to the EEC on Company Law" [1962] *Nomiko Vima* 545, p.549.

[187] The state can not monopolise a profession related to public authority, unless the activities related to the *imperium* are obligatory for the exercise of this profession. See G.E. Kalavros, *op.cit.*, p.179; also see K. Zontanos, *op.cit.*, p.116.

[188] See case 152/73 *Sotgiu* v *Deutshe Bundespost* [1974] ECR 153.

[189] K. Zontanos, *op.cit.*, pp.127-128, notes that these can not be characterised as exceptions to the freedom of establishment, "since they do not permit the exclusion of certain activities from the freedom of establishment". Also see D. O'Keeffe, *op.cit.*, pp.4-5; P. Papanagiotou, *op.cit.*, p.310.

[190] Difficulties arose to the translation of the term *ordre publique* in English. The English version of the Treaty refers to public policy, but certain authors prefer the use of the term "pubic good", which is broader and comprises all basic principles of the ethical, political and economic order of a state. See H. Smit and P. Herzog, *op.cit.*, p.617.

[191] G.E. Kalavros, *op.cit.*, p.182, notes that the issue of the proper definition of the three terms was resolved after the passing of Directive 64/221, which co-ordinates the legislations of Member States in the public policy, security and health sectors; also see G. Alexiou, *op.cit.*, p.378; cases 36/75 *Roland Rutili* v *Ministere de l' Interieure* [1975] ECR 1219; 30/77 *Regina* v *Pierre Bouchereau* [1977] ECR 1999.

all basic (and not only essential) principles of the ethical, political and economic order of the state and includes basic principles of state organisation.[192] The term public security (usually confused with public policy) refers to the very foundation of society, the freedom and security of persons. The grounds for justifying such measures may not be invoked to serve economic ends. Derogation must be based on the personal behaviour of the person in question and may not exceed the limits of what is necessary for the protection of a democratic society. Public health refers to the "protection of health and life of humans" of Art.30. In the context of Art.48 public health includes all establishments whose activities cause pollution or produce commodities hazardous to health.[193]

The fourth exception to the freedom of establishment (restrictions concerning commerce and production of weapons and war materials) derives from Art.296(1)(b), according to which Member States may take necessary measures to protect basic interests of national security concerning the production, purchase and sale of weapons, ammunition and war materials. These measures must be necessary for the host country's well being and their implementation must not harm competition on products not intended to serve exclusively military activities.[194] The term weapons, ammunition and war materials refers to "any kind of material that can be used in war or for the preparation of war", whereas material -which can be used both in military action and for other purposes- is not subject *eo jure* to the above exception.[195] A *sticto sensu* interpretation of this relation is also indicated by Directive 68/363, which liberalises retail trade for certain kinds of weapons destructively mentioned in its text.[196]

According to Art.53(2) the Council may follow the relevant proposal of the Commission and exclude certain activities from the freedom of establishment. These exclusions -if passed- would apply to all Member States.[197] As the Council has never

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[192] A violation of public policy is defined as "the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society". See case 30/77 *Regina* v *Pierre Bouchereau* [1977] ECR 1999.

[193] My analysis of the three exceptions was based on elements found in I. Cath, *op.cit.*, p.254; H. Smit and P. Herzog, *op.cit.*, p.617; C. Maestripieri, *op.cit.*, p.166; P. Zontanos, *op.cit.*, p.142; G.E. Kalavros, *op.cit.*, p.183; F. Burrows, *op.cit.*, p.208.

[194] Attention should be drawn to the fact that the interested country may avoid judicial control on the necessity and validity of these restrictions based on its right of secrecy regulated by par.1a of article 223. See Zontanos, *op.cit.*, p.122.

[195] See Papagiannidis-Christogiannopoulos, *op.cit.*, p.564; also see Zontanos, *op.cit.*, p.123.

[196] See Directive 68/363 of 15.10.1968, *OJ*, no L260, 22.10.1968. Alse see L.F. de la Gandara, and A. Caravaca, *Libertad de establecimiento y derecho de societades en la Comunidad Economica Europea* (1988, Tecnos, Madrid), p.32.

[197] Until the present day the Council has never used the authority conferred by this regulation. P. Zontanos, *op.cit.*, pp.124-125, refers to the view of B. Goldman, A. Lyon Caen and E. Cerehxe, who believe that after the completion of the transitional period, the Council has lost this authorisation. According to

used this power, the question, "what type of measures can the Council utilise?", is purely hypothetical. Smit and Herzog mention Regulations (which are considered "more appropriate" in view of the "scope of the whole paragraph") and Directives.[198]

Art.43(2) introduces the sixth (often considered "practically non-existent") exception to the freedom of establishment, which refers to the free movement of capital.[199] The Treaty, recognising the close relationship between the two freedoms and the possibility of indirect violations of the freedom of establishment under the form of restrictions to the free movement of capital, states that the freedom of establishment shall be implemented "subject to the provisions of the Chapter relating to capital". Since EU companies wishing to establish in other Member States obviously need to import and export capital, freedom of establishment can not be exercised if the relevant EU companies are not allowed to freely import and export capital.[200]

The last exception to the freedom of establishment concerns state monopolies. Under Art.31 monopolies of a commercial character must be abolished.[201] Moreover, Art.86 (which applies to pre-existing monopolies) forbids all Member States to enact or maintain in force any measure contrary to the Treaty, concerning public enterprises or enterprises with special or exclusive rights, namely companies which are closely connected to the state or municipal organisations.[202] State monopoly is defined as "the exclusive possession of the trade in some commodity", or better as "every organisation with whom the Member State legally or practically controls, directs or substantially influences directly or indirectly *de jure* or *de facto* imports or exports from Member

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them "the Council has no authority to limit the content of this liberalisation since such a measure would turn against the regulations of the Treaty, which are now directly applicable".

[198] See H. Smit and P. Herzog, *op.cit.*, p.613; also see A. Papagiannidis and A. Christogiannopoulos, *op.cit.*, p.147.

[199] F. Burrows, *op.cit.*, p.206 notes that the phrase "subject to the provisions of the Chapter relating to capital" indicates the will of the legislator to ensure the free movement of capital with actions based on Arts. 67-73 rather than Arts.52-58 EC. However, since the movement of capital "for this purpose was liberalised by the First Directive for the implementation of Article 67, ... for practical purposes Article 52(2) need no longer be regarded as making any exception in this respect".

[200] P. Zontanos, *op.cit.*, p.169, expresses the view that certain states implement restrictions to the freedom of establishment not for reasons of exchange policy, but as a means to control and limit the freedom of establishment in their territory. Also see Opinion of Avocate General Pergola in case C-35/98 *Staatssecretaries van Financiën* v *B.G.M. Verkooijen*, 24 June 1999, unreported.

[201] Two principle methods of interpretation of Article 37 have been advanced. First, a literal interpretation leading to the conclusion that "the abolition of a monopoly's exclusive rights is necessary only when such rights lead to discrimination in the production and marketing of goods between the nationals of the Member States"; and second, a teleological interpretation, according to which "the *a priori* abolition of exclusive rights is discriminatory *per se*. See F. Christoforou, "The rules governing state monopolies of a commercial character under EEC law" [1981] EED, p.535.

[202] The relationship between public enterprises and the state may take the form of participation in the company's capital, control of the selection of the company's basic organs, or close supervision of the company from the state or other public enterprises. See A. Papagiannidis and A. Christogiannopoulos, *op.cit.*, p.235.

States.[203] However, enterprises entrusted with the operation of services of general economic interest are granted a limited exemption from the application of the Treaty. This economic interest must be general, namely it must not serve a limited number of persons and must pursue social, educational or cultural aims.

D. CONCLUDING REMARKS

The purpose of this chapter was to present EC legislation on the freedom of establishment, so as to define and delimit the legal framework within which the comparative analysis of EC and French, Italian and Greek legislation is to be made. The recognition of foreign legal entities is a prerequisite of the freedom of establishment without which the latter would lack practical value. The issue of recognition is twofold. First, does EC law recognise foreign legal entities at all? Second, which is the nationality awarded to foreign legal entities? EC law follows the theory of *ipso jure* recognition of foreign legal entities, which are recognised as having legal personality without the need to fulfil legal or administrative prerequisites. However, on the matter of the choice of the company's *lex fori* EC law lacks a clear position. Two international instruments, the 1956 Hague Conference on the Mutual Recognition of Companies and the 1968 Brussels Convention of Mutual Recognition of Companies and Legal Entities, have not yet been ratified. The main reason behind this is the parallel prevalence of the theories of incorporation, which determines the company's *lex fori* as the law of the company's incorporation, and of *siège réel*, which uses the location of the company's administration and management as its criterion. In an attempt to compromise both positions, and on the basis of Art.293, EC law accepts the recognition of foreign companies under the law of the country of either their incorporation or of their *siège réel.*

Establishment is defined as the actual pursuit of economic activity through a fixed establishment. Thus, establishment comprises physical location in a Member State on a permanent basis and integration into its national economy. The first factor distinguishes establishment from the provision of services. In *Gebhard* the ECJ held that the distinction between the two concepts lies with the nature and extent of the exercised activities. If these are conducted on a permanent basis and are primarily directed to the market of the host state, the company is established within the host state. If the activities

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[203] See respectively F. Burrows, *op.cit.*, p.89; Nestor, Papastamkos, *Public Enterprises of Financial Aim* (1991, Thessaloniki), p.64; also see F. Christoforou, *op.cit.*, p.505; A. Papagiannidis and A. Christogiannopoulos, *op.cit.*, p.84; G.E. Kalavros, *op.cit.*, p.144.

are conducted on a temporary basis and are primarily directed to the market of another state, the company is merely providing services within the host state.

The nature of the freedom of establishment is still under debate due to the different terms used in various official languages in which the Treaty has been issued. The freedom of establishment is neither a freedom nor a right in the sense awarded to these terms by domestic legal terminology. It is a fundamental EC law right which exists irrespective of whether any concrete relevant secondary legislation has been issued. Thus, for the purposes of this thesis both the terms freedom and right are equally acceptable.

"Secondary" establishment refers to the situation when a company retains its main office and extends its activities in other Member States by creating branches, agencies, offices or subsidiary companies. Under the national laws of countries following the *siège réel* doctrine, secondary establishment is the only legal form of establishment within their boundaries, since the transfer of the company's main office (seat) in another state would signify the dissolution of the existing company and the creation of a new entity with a new seat and a new nationality. Thus, primary establishment within France, Italy or Greece would be inconceivable, as companies would lose their foreign nationality on installation of their *siège réel* within them. The thesis will refer exclusively to secondary establishment.

The field of application of the freedom of establishment extends to any type of national legal entities, as long as they are profit-aiming, they have been legally formed under the law of their country of incorporation or of their *siège réel* and have an effective and continuous link with the economy of the receiving state. Due to the problem of EU subsidiaries of non-EU parent companies, non-EU entities must also comply with a fourth criterion: their products must comply with the rules of origin or the special anti-dumping regulations on that specific type of product.

Under Art.299 *ratione loci* the freedom of establishment is exclusively applicable to companies originating from the fifteen Member States and territories with a special relationship with these states. It does not apply to companies originating from the *Agion Oros* in Macedonia, Algeria, Monaco, San Marino, Andorra and the Vatican.

Ratione materiae the freedom of establishment is applicable to all forms of financial and commercial independent activities, irrespective of whether they have been expressly subjected to the freedom of establishment under secondary EC legislation. Such activities include industry, finance, commerce, fishery, electricity, telecommunications, agriculture, cinematography, crafts and the professions, mining, manufacturing, as well as their corollary activities. Maritime transport also falls within the scope of

Arts.43-48. However, the freedom of establishment is not applicable to situations of a purely internal nature, activities that tackle the *imperium* of the host state, or activities that should be prohibited on grounds of public policy, security and health. Moreover, activities relating to the commerce and production of weapons or activities excluded from the application of the freedom of establishment by the Council are also outside the scope of Arts.43-48. Furthermore, the freedom of establishment is applied subject to the provisions on capital movement and on state monopolies.

National administrative or legal measures restricting or prohibiting such activities for foreign companies contradict EC law. It is only when such measures are applied in a non-discriminatory manner (directly or indirectly), are suitable for the attainment of their goal, do not go beyond the necessary for the attainment of this goal and are justified by general interest, that they may be considered legal under EC law.

CHAPTER 3

Recognition of Foreign Companies in Greece, France and Italy

A. INTRODUCTION

As concluded in Chapter 2, company establishment involves actual establishment in the EU and recognition. The right to establishment lacks practical value for companies which, not being recognised, can not be subjects of rights and obligations under the law of the host state, thus being unable to function there. Recognition itself is twofold and involves the recognition of foreign legal entities by the host state and the determination of the national law which qualifies as the companies' *lex fori* in the host state.

Chapter 3 aims to assess whether French, Italian and Greek law comply with EC provisions on the recognition of foreign companies. For the attainment of this aim, the legal and administrative conditions for the recognition of foreign EU companies in the three selected countries will be presented and comparatively analysed with EC law already presented in Chapter 2. Should this comparative analysis prove that the national requirements for recognition of foreign EU companies breach EC law, the first hypothesis of the thesis, that breaches of the companies' right to establishment occur, will be proven. Should this not be the case, further analysis on the requirements for the secondary establishment[1] of such companies in Greece, France and Italy will be necessary.

B. RECOGNITION OF FOREIGN COMPANIES IN GREECE

In Greece the law regulating domestic and foreign public companies limited by shares is Law 2190/1920, according to which companies wishing to establish in Greece must have the right to function legally within the boundaries of the Greek state. In other

words, these companies must be the subject of legal obligations and rights, namely they must have legal personality under Greek law. Thus, in order to establish in Greece foreign companies must be recognised by the Greek state.[2] Before the introduction of the 1946 New Civil Code the problem of the recognition of foreign companies as legal entities was the subject of much debate prompt to Laws ΧΠΑ of 10.9.1861 and ΚΑ of 13.3.1881, which awarded to French companies the right to establish in Greece without the need of further official recognition by the Greek legal and administrative authorities. In view of Law's exclusive reference to French companies, some legal analysts and judges expressed the opinion that *ipso jure* recognition applied exclusively to French companies. Others supported the view that the reference to French companies was merely indicative of the will of the legislator to introduce *ipso jure* recognition for legal entities of all nationalities.[3] It is noteworthy that the theory of *ipso jure* recognition existed in Greece even before 1946, but was only applicable to foreign natural persons.[4] After 1946, however, and the introduction of the New Civil Code Greece has been consistent in the prevalence of the liberal theory of recognition, according to which foreign companies are recognised as legal entities provided that they were legally formed according to the regulations of their *lex fori*.[5] Art.10 of the New Civil Code (CC) regulates that "the legal capacity of the legal entity is ruled by the law of its seat".[6] Consequently, the conditions set by Greek law for the establishment of Greek public companies are not

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[1] Only this form is conceivable in these countries; see D. Tzouganatos, "Freedom of establishment of legal entities under Arts.52, 58 EC and International Company Law" in *In memoriam of Alkis Argyriadis* (1996, Sakkoulas, Athens), pp.1005-1028, at 1007.

[2] See Streit-Vallindas, *op.cit.*, p.90; also see H. Xanthaki, "The Enforcement Mechanisms of Community Law in the Field of Company Establishment in Member States and Greece", *EFARMOGES* [1993] pp.257-286, at 258.

[3] See E. Perakis, 1992, *op.cit.*, p.439; also see Thessaloniki Court of Appeal 400/36; ΑΠ 234/38.

[4] Megglidou notes that the *ipso jure* recognition was a theory based on certain regulations of Greek law such as Art.13 Civil Law of 1856, Art.28 of the Code of Civil Procedure, which were applicable to natural persons. However, they were considered to apply to some legal entities and especially commercial companies as well. In that respect "...regulations ΧΠΑ'/10.9.1861 and ΚΑ'/13.3.1881 violated the rules of the Greek legal system concerning foreign companies". See S. Megglidou, *op.cit.*, p.202.

[5] See Thessaloniki Court of First Instance 4911/65; Thessaloniki Court of First Instance 4868/60; ΣτΕ 3395/71; ΟλΣτΕ 722/54; and ΑΠ 406/67.

[6] See Spiropoulos, *Private International Law,* (1938, Sakkoulas, Athens), p.187; also see Fragistas, *Representation of foreign companies limited by shares,* (1940, Athens), p.281. For relevant court decisions, see Athens Court of Appeal 1002/1892, 1137/1898, 1416/1911 and Patras Court of Appeal 789/1896.

applicable in the case of foreign companies.[7] Thus, Greek courts cannot declare a foreign company invalid for its failure to fulfil the Greek provisions on its formation.[8]

The question is which is the legal system which serves as the company's *lex fori*. The matter is of significant theoretical and practical interest, as the company's *lex fori* regulates its validity, legal formation, functioning and dissolution, internal administration (attorneyship, valid decisions etc.), external relationships with third parties (legal transaction signing, liability, representation, etc.) and nationality.[9] Art.10 CC, jurisprudence[10] and Greek academic opinion confirm that the *lex fori* of legal persons derives from the law of their seat.[11] The main problem concerning the interpretation of this doctrine derives from the failure of Greek laws to clarify whether the *lex fori* of a company is linked to its statutory seat (the one declared in its constitutive instruments) or its true seat. Some commentators fail to see the point in distinguishing between the statutory and the true seat altogether on the basis that Greek law demands an accurate declaration of the company's true seat in its articles. Krispis notes that "one should not distinguish between the true and the statutory seat of a company, but between the true and a fictitious or circumvented -*in fraudem legis agere*- seat".[12] The main argument of those denying the distinction is that, as under most laws the transfer of the company's seat is allowed, companies have no reason to violate the requirement of sincere declaration of their seat. Although this seems logical, there are reasons forcing a company to maintain its seat in another country, even when transferring its seat is legal, such as taxation,

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[7] Introductory Report of Pireus Court of First Instance 1152/1969: "The combination of Arts.37, 40 of the Commercial Law and Art.4 of Law 2190/1920 indicates that as far as companies truly seated in Greece are concerned ... Greek law is applicable; therefore, the conditions for its establishment are the ones regulated by the Greek law, even if in its Articles of Association the company is stipulated to be foreign."

[8] Athens Court of Appeal 511/1912 regulates: "Even if Greek law requires supplementary or different actions, foreign companies formed legally according to the law of their true seat can not be asked to adopt the legal actions required by Greek law in addition to the ones stipulated by the law of the company's seat". Also see Dizis, *Precedents of Commercial Law* 1845-1933 (1933, Athens), p.133.

[9] See Megglidou, *op.cit.*, 201.

[10] See ΑΠ 461/1978 which declares that the nationality of a public company limited by shares is determined by the law of the state, where it is seated. See also Athens Court of Appeal 262/1935, which states that the nationality derives by the state, where a company is seated; see also Athens Court of Appeal 117/1982; ΑΠ 1627/1986; Introductory Report of Pireus Court of First Instance 1152/1969; Athens Single-member Court of First Instance 1937/1974; Pireus Court of Appeal 65/1988; Pireus Court of Appeal 1633/1989; ΑΠ 1070/76; ΑΠ 59/1989; Pireus Court of Appeal 1633/1989; Athens Court of Appeal 2135/1987; Pireus Multi-member Court of First Instance 494/1987; ΑΠ 1627/1986; Pireus Multi-member Court of First Instance 2400/1983; Corfu Court of Appeal 75/1981; Sparta Single member Court of First Instance 74/1981; Pireus Multi-member Court of First Instance 1903/1979; ΑΠ 616/1976; ΑΠ 439/1954; ΑΠ 21/1934; ΑΠ 171/1907. However, see *contra* ΑΠ 358/1966.

[11] See Dizis, *op.cit.*, pp. 128-133; Voutsis, *Companies of Commercial Law* (1986, Sakkoulas, Athens), p. 138, who notes that the criterion of the nationality of a public company limited by shares is mainly its seat; and Megglidou, *op. cit.*, p.201, who states that "...In private international law theory, the seat of a company is the place, where the administration of the company is seated, that is the place where the company's administration acts; in other words, the place where all significant decisions are taken".

market or other benefits. Moreover, *Pireus Court of First Instance 1152/1969 (Introductory Report)* clearly states that the seat of a company is the location, where its administration really takes place and not the location stated in the company's Articles. Thus, the disctinction is accepted by jurisprudence. The question is which is the company's real seat. Since this is determined by the factual circumstances of each case, there is no legal text expressly introducing criteria for the identification of the true seat. Judges tend to order the litigants to prove their allegation regarding the seat's location with facts during separate proceedings.[13] The main criteria for the determination of a company's *siège réel* are introduced by *Supreme Court 46/1905*, which declares that the *lex fori* of public companies limited by shares is determined by the location where:

a. the main decisions on the company's actions are reached;

b. the main guidelines and orders for the company's operation are produced;

c. the company's control is exercised; and

d. the results of the company's operation are harvested.[14]

The main significance of the *lex fori* is its role in the identification of the company's nationality. This represents the bond between the company and the state, whose law is the *lex fori*.[15] If the company's *lex fori* is Greek law, the company is considered Greek. If, however, the company is bound to a legal system other than the Greek, it is considered foreign and derives its nationality from that state. Adopting the stand-point taken by Art.10 CC, the Greek legislator includes the same provision in Law 2190/20, which stipulates that Greek public companies limited by shares must be seated in a city or community of the Greek state (Art. 6 CC). Companies not seated in Greece are not Greek and are considered foreign (*argumentum a contrario*). According to the *Introductory Report of Pireus Court of First Instance 1152/1969* public companies limited by shares, whose administration is exercised in Greece, are Greek companies even if their articles state that their seat is located abroad. Consequently, Art.50 of Law 2190/1920 on the secondary establishment of foreign public companies limited by shares is not applicable in the case of their establishment in Greece.

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[12] See Krispis, *op.cit.*, p.72.

[13] See *ibid*, p.64.

[14] It should also be noted that before 1946 a small number of legal scientists believed that the seat of a company with more than one centres of administration was the one with the greatest importance for its unhindered functioning. If more administrative centres were equally significant, the seat was the one indicated by the will of its founders in the company's Articles. See Spiropoulos, *op.cit.*, p.185. This opinion is based on the view that company law, being private, should leave the conditions of each transaction to the free will of the parties. It was, therefore, the statutory seat of the company which determined the company's *lex fori*. Recently, however, this doctrine has lost ground giving way to the theory of the *siège réel*. See Athens Court of Appeal 262/1935, Introductory Report of Pireus Court of First Instance 1152/1969, Athens Single-member Court of First Instance 1937/1974.

According to *Pireus Multi-member Court of First Instance 2075/84* and *Patras Multi-member Court of First Instance 2278/86*, foreign public companies limited by shares, which were not legally formed under their *lex fori* yet operated in Greece, companies are considered valid for the period of their functioning in Greece.[16] However, since they have not fulfilled the conditions for their formation, they are not public limited companies. They are *de facto* partnerships (a type of partnership best known in Greece as *afanis eteria*, which is legally formed following minimum requirements).[17] A different viewpoint was put forward by the Pireus Court of First Instance which considered such companies to be *quasi* public limited companies. Whichever opinion is followed, it is widely accepted that all transactions with such companies are valid. Moreover, *Patras Court of Appeal 191/1925* provides that the rescinding of the Decree on the company's establishment does not prohibit it from demanding the compulsory execution of its debts before the Greek courts.[18] Even after recognition the company does not acquire Greek nationality. It remains foreign and is subject to the provisions on foreign legal entities. The main consequence of the company's recognition is that it is considered a legal entity, which signifies that its ability to exercise commercial activity in Greece while maintaining the powers awarded to it by its *lex fori* is acknowledged. The company also acquires the right to present itself before the Greek judicial and administrative authorities for its defence in any disputes deriving from its legal actions and relationships (even those which took place abroad).

C. RECOGNITION OF FOREIGN COMPANIES IN FRANCE[19]

In Greece the *ipso jure* recognition of foreign companies is introduced by Art.10 CC, which does not distinguish amongst companies of different forms. In France, however,

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[15] See Streit-Vallindas, *op.cit.*, p.83.

[16] See Athens Court of Appeal 175/1988, which regulated that a foreign aviation company functioning in Greece may be legally sued before the Greek courts, even if - under Art.66 of the Code of Civil Procedure- it has no independent legal personality according its *lex fori*. Only in the extreme case that, according to its *lex fori* the foreigner wishing to present him/ or herself before the Greek courts does not even have the attribute of being a natural or a legal person, only then do the Greek courts lack the jurisdiction to recognise his ability of performance.

[17] See E. Perakis, P. Karamanolis and A. Portolou-Mihail, "Greece" in *Doing Business in Europe* (1996, CCH International, Bicester), pp.42,001-48,702, at par.41-630 on p.42,572.

[18] However, the minority of judges of that Court had the view, that the company's case to the court was inadmissible, because after the recall of the Decree, the company as a legal entity ceased to exist and could not therefore demand the execution of its claims. As far as the determination of the exact time that the company as a legal entity began to exist, it is ruled by its *lex fori,* even if the dispute derives from the company's actions in Greece. See Krispis, *op.cit.*, p.103.

[19] See H. Xanthaki, "The establishment of foreign companies in France" [1996b] 17 *The Company Lawyer* 28, at 28-29.

this has not been the case. The *sociétés de personnes,* covering partnerships, foundations and associations, have always been automatically recognised.[20] This automatic recognition has been based on Arts.38 and 39 of the *Code Civil* (CC), which stipulates that the legal personality awarded to foreign *sociétés de personnes* by the law of their country of origin is recognised in France. Thus, foreign *sociétés de personnes* may function legally in France, provided that their activities do not threaten, directly or indirectly, the French *ordre public.*[21] The liberal status of *ipso jure* recognition has been judicially extended to private limited companies.[22]

This is not the case with public companies limited by shares. Following the theory of fiction, according to which foreign companies are mere fictional creations of a legal system which is the only one that can and must recognise them,[23] and with the help of an extensive commercial and legal battle with Belgium,[24] the Law of 30 May 1857 expressly excludes foreign public limited companies from the field of application of the provisions on the *ipso jure* recognition of foreign private companies and expressly stipulates that public limited companies can only be recognised on the basis of a special or bilateral agreement between France and the country of origin. It would seem therefore that French law on the recognition of foreign public companies limited by shares is quite prohibiting. However, international agreements also form part of French law and under Art.55 CC are higher in the hierarchy of laws compared to any enacted domestic legislation. Moreover, the 1956 Hague Convention on the Mutual Recognition of Companies and the 1968 Brussels Convention on Companies and Legal Entities have been ratified in France by Laws 62-704 of 29 June 1962[25] and 69-1134 of 20 December 1969[26] respectively. On the basis of these two international agreements and Art.293 EC it is now accepted beyond doubt that public companies limited by shares originating

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[20] See Yvon Loussouarn and Pierre Bourel, *Droit International Privé* (1993, Précis Dalloz, Paris), p.663.

[21] See Yvon Loussouarn, "*Sociétés étrangères*" in *Encyclopedie Dalloz*, vol. *Société IV* (Dalloz, Paris), p.3.

[22] See Rennes Court d' Appel, 8 July 1981, *Rev. crit. DIP*, 1982, note Mayer; also see D. Holleaux, J. Foyer and G. de Gouffre de la Pradele, *Droit International Privé* (1987, Mason, Paris), p.153.

[23] See Cass. civ. 25 July 1933, DP 1936, 1, 121, note Silz; also see Y. Loussouarn and M. Trochu, "*Les sociétés étrangères en France*" in Labic, J., *Collections des Juris-Classeurs, Juris-Classeurs de droit international*, vol.8/2 (1994, Editions Techniques-Juris-Classeurs, Paris), Fasc.194-1, p.2; also see Y. Loussouarn, *Encyclopedie Dalloz*, *op.cit.*, p.1.

[24] The Belgian *Court de Cassation* with its judgement of 8 February 1849 refused to recognise a French public limited company, thus creating chaos in the French-Belgian commercial and legal relationships. See *ibid*, p.2.

[25] See BLD 1962.402; JO 30 June 1962.

[26] See JO 23 December 1969.

from other EU Member States do not fall within the field of application of the Law of 3O May 1857[27] and are therefore recognised in France *ipso jure.*

Insofar as non-EU companies are concerned, these have to rely upon the signing of a *décret collectif* under Art.2 of the Law of 30 May 1857, or of a bilateral convention between France and their country of origin.[28] Recently the *Court de Cassation* in a series of revolutionary judgements has awarded legal personality for the purpose of debt recovery to all legal persons, irrespective of their country of origin, based on Arts.6 and 14 of the European Convention on Human Rights and Arts.1 and 5 of its Additional Protocol.[29] Thus, even non-EU companies whose country of origin has not signed a relevant bilateral or international agreement with France may be recognised as legal entities within France for the purpose of safeguarding their property and the property of third parties. For debt recovery and collection purposes, such companies may legally submit their claim and present themselves before the French courts.[30] However, they may still not exercise commercial or other activities within the French boundaries.[31]

Having established that France recognises foreign EU public companies limited by shares as legal entities *ipso jure*, it is necessary to examine which legal system is determined as their *lex fori* under French law. In the past French legal theory seemed reluctant to accept that the notion of nationality could be extended to legal persons.[32] At present, however, most authors accept nationality for legal entities. This is defined as the legal system which regulates the company's internal structure, internal relationships,[33] directors' powers,[34] external relationships (constitution, dissolution and functioning)[35] and judicial competence.[36]

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[27] See B. Mercadal and P. Janin, *Mémento Pratique Francis Lefebvre: Sociétés Commerciales* (1995,Editions Francis Lefebvre, Levallois), p.1237; also see C. Galvada and G. Parleani, *Traité de droit communautaire des affaires* (1992, Litec, Paris), p.256.

[28] See, for example, the *Convention franco-tunisienne* of 9 August 1963 (Rev.crit. DIP 1965, 801), the *Convention franco-sovietique* of 3 September 1951 as modified (Rev.crit. DIP 1959, 560); for a list of such bilateral conventions, see Y. Loussouarn and M. Trochu, *op.cit.*, p.7.

[29] See Crim 12 November 1990, Extraco Anstalt, *Rev.crit.*, 1991, 667, 2, note Khairallah; also see Civ.1, 25 June 1991, Extraco Anstalt, *Rev. crit.*, 1991, 667, 3 esp., note Khairallah, D 1992 Som. 163, obs. Audit.

[30] See Crim. 12 November 1990, *Bull. crim.*, no 377; *D* 192.29, note Bouloc; *Bull. Joly* 1992.42, note Legros; *Rev. sociétés* 1992.39, note Roujou de Boubée; also see B. Mercadal and P. Janin, *op.cit.*, p.1238.

[31] See P. Mayer, *op.cit.*, p.657.

[32] See J.-P. Niboyer, "Existe-t-il vraiment une nationalité des sociétés?" in *Revue de droit international privé* [1927] 402-415; also see P. Mayer, *op.cit.*, p.657; also see Y. Loussouarn and M. Trochu, *op.cit.*, pp.1-3.

[33] See Civ. 1, 17 October 1972, *Bull. civ.* I, no 204; *Rev. cr. dr. inter. privé*, 1973, 520, note Batiffol; *Rev. sociétés* 1974, 127, note Bismuth.

[34] See Com., 21 December 1987, *J.C.P.*, 198, II, 21113, note Montanier; also see Com., 9 April 1991, *RJDA*, 7/91, 613; Com., 9 March 1993, *RJDA*, 7/93, 617.

[35] See Y. Chaput, *Droit des sociétés* (1993, Presses Universitaires de France, Paris), p.48; also see Civ. 17 October 1972, *Rev. int. dr. internat. privé*, 1973, 520, note Batiffol; *Rev. soc.*, 1974, 127.

In view of the extensive role that nationality plays for its functioning, the determination of the company's *lex fori* is of great importance. Unfortunately, French laws fail to expressly define foreign companies. The only indication of the characteristics of foreign companies derives from Art.1837 CC, which defines French companies as those whose social seat is situated within the French territory.[37] Legal theory defines foreign companies as "companies which without possessing the French nationality have a recognised legal personality and can be authorised to undertake on French territory certain acts and to exercise a certain number of rights".[38] Another interpretation defines foreign companies as those "which based on the place where their statutory seat or central administration is situated escape from the application of French law or of one of its branches (e.g. taxation law)".[39] Several other criteria have also been put forward, such as the place of the company's registration, the place of its administrative and exploitative centre, the notion of control and the place where its seat is situated.[40] The *Tribunal des Conflits* has expressly ruled that company nationality is determined via a combination of the criteria which better serve French public interest and the interests of the company itself.[41] These criteria can even be introduced by special laws in cases where the state has a special interest in linking a company to either France or abroad. In the recent past, French law has bound the nationality of companies to the origin of their proprietors, directors or main capital sources law.[42] The criterion of incorporation is rarely used in France.[43] The criterion of the administrative and exploitative centre, which links the company's nationality to the legal system of the country where the main decision-making centre is situated, is used in France in certain special laws.[44] Another aspect of the same criterion, often confused or used in conjunction with the criterion of

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[36] See T. civ. Metz, 22 February 1950, *D.*, 1950, *Somm.*, 46; also Colmar, 23 June 1950, *D.*, 1951, 62, note R. Savatier; *contra* T. civ. Mulhouse, 2 May 1950, *Rev. cr. dr. inter. privé* 1951, 157, note Niboyet.

[37] See Y. Chaput, *op.cit.*), p.48.

[38] See *Guide Juridique Dalloz,* vol. *Sociétés étrangères* (Dalloz, Paris), p.480-1.

[39] See *Guide Juridique Dalloz,* vol. *Etranger* (Dalloz, Paris), p.250-1.

[40] See M. Germain, G. Ripert and R. Roblot, *Traité de droit commercial* (1993, Librairie générale de droit et jurisprudence, Paris), p.573.

[41] See *Tribunal des Conflits* 23 November 1959, *JCP* 1960.II.11430, note Aymond; also see Paris, 17 May 1967, *D.*, 1968, 313; *JCP*, 1968, II, 15427, note Oppetit.

[42] See B. Mercantile and P. Janin, *op.cit.*, p.140.

[43] See P. Mayer, *op.cit.*, p.661.

[44] Thus, the nationality of the establishment in France of the American company Remington Typewriter was considered American on the basis that it did not use its capital in France and was merely dealing with the sale of machinery made by the American establishment. See Req. 12 May 1931, *S.*, 1932.1.57, rapport Bricout, note Niboyet, *DP* 1933.1.60, note Silz.

the administrative or exploitative centre, constitutes the notion of control, which binds the company's *lex fori* to its "economic and political domination".[45]

Thus, the determination of company nationality in France does not always follow uniform rules.[46] However, the criterion that prevails in legal theory and practice is that of the *siège social réel* (real social seat),[47] according to which a company's nationality derives from "the place where the legal entity's judicial and economic integration is situated",[48] that is the place of the company's principal establishment.[49] The *siège social réel* is defined as "the place where the company has its centre of legal activity, bank accounts, accountability and general assemblies".[50] The *siège social réel* can be different from the location where the establishment is situated,[51] but in principle should be the same as the place of incorporation.[52] The criterion of the real social seat prevails in judicial practice. Moreover, Art.3 of the Law of 66-537 of 24 July 1966 expressly introduces it as the criterion for the determination of the nationality of commercial companies. French legal theory tends to favour the combination of those of the above criteria which best serve the purpose of the whole exercise, which is to identify the state with the most substantial financial, legal and political bond with the company.[53] For the choice of the right country one or all of the above criteria can be used. In the particular case of secondary establishments of companies already established abroad what should be used is a combination of the criterion of the real social seat with those of the administrative/exploitative centre and of control.[54] The *Cour de Cassation* declared that the

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[45] See J. Frossard, "Un vide législatif: la nationalité des sociétés" in *Dalloz et Sirey Jurisprudence Générale* [1969] 2e cahier, Chronique, p.16; also see B. Mercadal and P. Macqueron, *Le droit des affaires en France* (1994, Editions Francis Lefebvre, Levallois), p.104.

[46] See B. Mercantil and P. Janin, *op.cit.*, p.139; also see P. Didier, *Les Sociétés Commerciales* (1991, Presses Universitaires de France, Paris), p.42.

[47] See Art.3(1) of the Law of 24 July 1966; also see Conseil d' Etat, 22 February 1960, *JCP*, 1960.2.11790, note Aymond; Cass. req. 22 December 1986, *S.* 1987, 1.84; crim. 4 August 1906, J. Clunet, 1907, 151; civ. 30 March 1971, *Rev. crit. dr. inter. privé*, 1971, 451, note Lagarde, *JCP*, 1972.2.17101 and 17140, note Oppetit, J. Clunet, 1972, 834, note Loussouarn; Paris, 26 March 1966, *D.*, 1966, Somm. 103; *rev. crit. dr.inter. privé*, 1968, 58, note Loussouarn; *Gaz. Pal.*, 1966, 1, 400.

[48] See S. Boulin, "Siège social" in J. Labic, *op.cit.*, p.fasc.28 bis, p.24; also see Aix 23 October 1979, Bull. Aix 1979, 4, p.31; Paris 17 October 1980, JCP, 80, ed. G, IV, 374; P. Louis-Lucas, "Remarques relative à
la détermination de la nationalité des sociétés" *La Semaine Juridique* [1953] 1104.

[49] See "Siège social", Guide Juridique Dalloz, *op.cit.*, p.472-5.

[50] See F. Lemeunier, *Sociétés Anonyme, Constitution - Gestion* (1994, Delmas, Paris), p.39; also see Civ. 7 July 1947, D., 1948, Somm., 9; JCP 1947, II, 3871, note J. L; Cass. civ., 10 March 1976, *Rev.crit.dr.pr.*, 1976, 658.

[51] See Y. Chaput, *op.cit.*, p.46; also see Com. 16 December 1958, Bull. civ., III, no 438.

[52] See B. Goldman, A. Lyon-Caen and L. Vogel, *op.cit.*, p.91.

[53] See Cass. com. 12 December 1972, *Bull. cass.* 1972, 4, p.307; also see Paris, 20 March 1944, *D.*, 1945, 24, note Basdevant.

[54] See P. Mayer, *op.cit.*, p.664; also see C. Hannoun, *Le droit et les groupes des sociétés* (1991, Librairie Général de Droit et de Jurisprudence, Paris), pp.275-278; B. Mercadal and P. Macqueron, *op.cit.*, p.104.

branch of the American company Shell in France, which had its real social seat, principle establishment and centre of direction and exploitation in France, should be considered a French company.[55] This ascertains that under French law the primary establishment of a foreign company is a theoretical impossibility, as such a unit would immediately acquire the French nationality.[56]

As a consequence of the recognition of foreign companies by the French legal order, these companies constitute subjects of rights and obligations.[57] Non-recognised foreign companies are denied legal personality in France, and do not legally exist under French law. In principle, non-recognised foreign companies cannot present themselves before the French courts, cannot acquire property and are not recognised as legal creditors.[58] However, under the European Convention on Human Rights non-recognised foreign companies may be considered *de facto* companies, thus enabling third parties to bring them before the French courts for the settlements of claims against them.[59]

D. RECOGNITION OF FOREIGN COMPANIES IN ITALY

The conditions for the recognition of foreign companies in Greece and France are simple and clear-cut. This is not the case with the Italian provisions. Although the direct or *ipso jure* recognition of foreign companies in Italian law is undoubtful, academic opinion tends to disagree on the legal basis upon which such a recognition is made. In a much criticised relevant judgement,[60] the *Tribunale di Roma* stated that the *ipso jure* recognition of foreign legal entities is based on the relevant well established principle of private international law which is part of Italian law under Art.10 of the Constitution.[61] This opinion stems from a similar view shared by the Belgian legal system, which adopts the principle of extra-territoriality on the basis of the relevant international law

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[55] See Cass.civ. 10 March 1976, *Rev.cr.dr.inter.privé*, 1976, 658; also see Cons. d' Et., 22 February 1960, *D.*, 1960, 671, note Blancher; Com. 20 October 1953, *D.*, 1954, Somm., 13; *JCP* 1954, II, 7898, note Freyria.

[56] See F. Lemeunier, *op.cit.*, p.41; see P. Le Cannu, *Code des sociétés* (1995, Dalloz, Paris), p.25; also see B. Goldman, A. Lyon-Caen and L. Vogel, *op.cit.*, p.93; also see TGI Seine, 1 February 1967, *JCP*, 1967, II, 15163, note Fabre; Cass. civ., 30 March, 1971, no 67, 13874; *JCP*, G., 1972, II, 17101, note Oppetit; *Rev. crit. dr. inter. privé*, 1971, 451, note Lagarde.

[57] See B. Goldman, A. Lyon-Caen and L. Vogel, *Droit commercial européen* (1994, Precis Dalloz, Paris), p.92.

[58] See Y. Loussouarn and P. Bouret, *op.cit.*, p.92.

[59] See Civ., 25 June 1991, *Bull.*, I, 207; also see Crim., 12 November 1990, *RDJA*, 1/91, 25.

[60] See A. Santa Maria, *Enciclopedia del diritto, vol.XLII* (1990, Giuffrè, Milan), 883, at 883.

[61] See Trib. Roma, 2 May 1963, *Giust. civ.*, 1964, I, 697-701.

principle.[62] Morelli argues that foreign legal entities are recognised on the basis of their legal existence within a foreign legal system.[63] However, the legal value of the rationale behind this interpretation has been questioned by many legal authors.[64] Others support the view that the *ipso jure* recognition of foreign companies is based on Arts.16,[65] 17[66] or 25 disp. prel.,[67] which refer to the status and capacity of foreign persons. It is argued that these regulations should be interpreted widely in order to cover not only natural but also legal persons. However, these provisions can only deal with foreign natural persons in specific, as they also regulate family relationships.[68] Anyway, "the nationality of legal entities and the nationality of individuals are institutions profoundly different and therefore cannot be reduced to one concept".[69] Another group of legal authors base the recognition of foreign companies in Italy on Arts.2505-2509 *Codice Civile* (CC) on companies with some connection to foreign legal systems. Since the *lex fori*, establishment and functioning of foreign companies are regulated by specific provisions of the *Codice Civile* and since such entities are allowed to function within the Italian economic system, Italian law has no option but to recognise them and award them a legal personality.[70] The result of all these doctrines leads to the *ipso jure* recognition of foreign legal entities.[71] Despite the consequent minimal practical value of the choice of the theoretically correct doctrine, it is noteworthy that this seems to lie with the general principle of international law which is part of Italian law both directly (as a general principle) and indirectly (as a provision of EC law).

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[62] See H. J. Abrahams, *Les sociétés en droit international privé, recherche du principe d' extraterritorialité* (1957, Paris-Liège), p.169.

[63] See Morelli, *Elemento di diritto internazionale privato italiano* (1986, Jovene, Italy), p.92.

[64] See A. P. Sereni, "La cittadinanza degli enti morali nel diritto internazionale" [1934] *Riv. dir. inter.* 171, at 171; also see B. Grossfeld, "Die Annerkennung der Rechtsfähigkeit juristischer Personnen" [1967] *RabelsZ* 1, at 7.

[65] See Art.16 of the preliminary regulations of the *Codice Civile*; also see Monaco, "Personna giuridica" in *Novissimo digesto italiano*, vol. XII, 1053, at 1053; also Cassazione 2414/80 in Cendon, *Commentario al Codice Civile* (1991, UTET, Italy), p.1339.

[66] See Art.17 of the preliminary regulations of the *Codice Civile*; also see Trib. Roma, 19 June 1968, *Foro it.*, 1969, 1006; Trib. Monza, 9 November 1985, *Riv. dir. inter. priv. e proc.*, 1969, 1006; also, Bignami, "Riconoscimento e trattamento delle società straniere dell' ordinamento italiano" [1980] *Rivista società* 121, at 122.

[67] See Balladore Pallieri, *Diritto internazionale privato* (1950, Giufrrè, Milano), p.134.

[68] See Cendon, *op.cit.*, p.1339.

[69] See Caruso, *Le Anstalten nell' ordinamento italiano* (1979, Editoriale Scientifica), p.21.

[70] See Cendon, *op.cit.*, p.1339; also see Trib. Milano, 4 May 1978, Soc. Idera Business A.G. *v* Fallimento Soc. Idera Business A.G., unpublished; also see Trib.Napoli, 8 luglio 1995, *Le Società*, 11, 1995, 2.2670.

[71] See Cassazione 3089/85; Corte di appello di Genova, , 28 aprile 1993, *Riv.dir.int.priv. e proces.*, 1993, 734; Trib. Livorno, 15 marzo 1994, *Le Soc.*, 1994, 8; Trib. Salerno, 21 dicembre 1992, *Riv.dir.int.priv. e proc.*, 1994, 418; Trib. Udine, 18 giugno 1993, *Le Soc.*, 1993, 9; also see A. Santa Maria, *Le società nel diritto internazionale privato* (1970, Giuffrè, Milan), p.107; M. Monti, "Legge regolatrice delle società straniere: sedi secondarie delle società straniere in Italia" [1975] *Rivista delle Società*, pp.1268-1294, at 1268.

Having established the *ipso jure* recognition of foreign companies in Italy, it is necessary to select the legal system which constitutes the company's *lex fori*. Italian law defines the *lex fori* as the law which regulates the company's legal nature, its social rights, its constitution, transformation and existence, its capacity, its formation, its representation regime, the rights and obligations of its shareholders, its liability regime as well as the consequences of the company's violations of the law or the regulations of its constitutive act.[72] Until 1995 the company's *lex fori* was regulated by Arts.2505-2510 CC, which divided foreign companies into the following categories:[73]

a. companies incorporated abroad and having their seat within Italian territory;

b. foreign companies with a secondary seat within Italian territory;

c. foreign companies of a type different from that of domestic companies;[74]

d. companies incorporated in Italy but exercising their activities abroad; and

e. companies with prevailing foreign interests.

The first category of companies was regulated by Art.2505 CC, which stipulated that "companies incorporated abroad, which have within the territory of the state the administrative seat or the principle object of the enterprise, are subject to, even for the prerequisites for the validity of their constitutive act, the provisions of Italian law."[75] Italian nationality was awarded on the basis of two alternative criteria, which were considered equally sufficient,[76] namely the company's administrative centre or its principle object of activity.[77] In Italian law the principle object of activity is defined as "the precise activity presented to the world of finance",[78] which need not coincide with the location specified in the constitutive act.[79] The seat of the company is defined as the place where its principle object is administered,[80] the "central seat of the company's direction, control and economic activity",[81] or simply "the location where the decisions on

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[72] See Art.25 of the Law of 31 May 1995, N. 218 Riforma del systema italiano di diritto internazionale privato in *Gazz. Uff.*, suppl. ord. n. 68 of 3 June 1995.

[73] See E. Vitta and F. Mosconi, "Stato e capacità delle persone [1994] *Diritto Internazionale Privato e Processuale*, pp.183-198, at 194.

[74] Since the topic of this thesis refers to public companies limited by shares, which do exist in Italy in the form of *Società per azioni*, this category of companies does not fall within the scope of the thesis and will not be analysed here.

[75] See Art.2505 *Codice Civile* in G. Milloza, *Codice delle società* (1995, Pirola, Milano), p.707.

[76] See A. Santa Maria, "Società" in Treccani, G., *op. cit.*, p.7; also see C. Bignami, *op.cit.*, p.163.

[77] See U. Leanza, "Società straniere" [1987] *Novissimo Digesto Italiano* 408-420, at 409.

[78] See Simonetto, "Trasformazione e fusione delle società, Società costituite all' estero" in Scialoja e Branca, *Commentario di Codice Civile* (1976, Zanichelli-Foro Italiano, Italy), p.140.

[79] See Caruso, *Le società nella C.E.E.* (1969, Jovene, Italy), p.72; also see Capotorti, *La nazionalità delle società* (1955, Jovene, Italy), p.215.

[80] See E. Simonetto, *op.cit.*, p.140; also see O. Cagmasso and M. Irrera, "Società Estere" in W. Bigiavi, *Giurisprudenza Sistematica di Diritto Civile e Commerciale* (1990, UTET, Italy), pp.455-537, at 465.

[81] See Cassazione, sez. III, 10 December 1974, 1806; also see Cassazione, 26 May 1969, *Foro it.*, 1969, I, 25381857; Trib. Roma, 2 May 1963, *Giust. civ.*, 1964, I, 698.

the activity of the company are taken",[82] even if this is different from the location determined in the statutes.[83] The domicile or residence of the company's administrators is irrelevant.[84] Thus, under Art.2505 CC for the determination of the company's *lex fori* Italian law relied on its *siège réel social.*[85] Companies incorporated abroad, but having their *siège social* in Italy were considered Italian.[86] The prevalence of the theory of the social seat signified that companies, which having been incorporated abroad and having their seat in Italy have failed to comply with the Italian conditions for their formation of such companies, lacked legal personality and under Italian law simply did not exist.[87] However, such companies were considered to still have the capacity to present themselves before the Italian courts and could both sue and be sued for claims deriving from their activity.[88] Moreover, companies constituted abroad but failing to comply with the conditions for their incorporation under the law of the state of incorporation did not acquire legal personality under Italian law and were not recognised as legal entities in Italy.[89] Furthermore, foreign companies, which moved their principle place of activity or their social seat in Italy, became Italian.[90] The change in nationality, which was valid only if conducted under the law of the host state,[91] occurred at the exact time when the seat or principle object of activity was moved to Italy.[92] However, it was disputed whether Italian companies transferring their seat abroad were transformed to foreign companies[93] or whether they withheld their Italian nationality even after the transfer of their seat or principle object of activity.[94]

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[82] See T. Ballarino, *op.cit.*, p.62.

[83] See *ibid.*, p.388; also see Cendon, *op.cit.*, p.1341.

[84] See E. Simonetto, *op.cit.*, p.389; also see B. Ferraro, "Società estere e sedi secondarie in Italia" [1986] *Le Società*, pp.584-590, at 585.

[85] See T. Ballarino, *op.cit.*, p.11.

[86] See Cassazione, 26 May 1969, *Foro it.*, 1969, I, 2538; also see Maisto and Miscali, *Business Law Guide to Italy* 1992, CCH Editions Limited, Great Britain), p.32; T. Ballarino, *La Nazionalità delle Società a la Condizione delle Scoietà Straniere* (1976, CEDAM, Padova), p.1573.

[87] See Trib. Roma, 2 May 1963, *Giust. civ.*, 1964, I, 698; also see Trib. Genova, 31 March 1967, *R.I.P.P.*, 1967, 802.

[88] See App. Milano, 8 May 1956, *Foro pad.*, 1957, II, 40.

[89] See T. Ballarino, *op.cit.*, pp.75-76; also see P. Perlingeri, *Codice Civile Annotato con la dottrina* (1991, Zanichelli, Italy), p.614; Cassazione., 20 October 1978, no 4750, *RFI*, 1978, voce *Società*, c.2502, n.348.

[90] See S. Neri, "Lo stabilimento in Italia di società commerciali con particolare riguardo alla C.E.E." [1960] *Riv.trim.dir.e proc.civile* 894-957, at 922; also see C. Angelici, "Società" in *Enciclipedia Giuridica* (1993, Istituto della Enciclopedia Giuridica, Italy), p.7; Trib. Roma, 9 December 1982, *Riv. not.*, 1983, 1213.

[91] See Art.25 of the Law of 31 May 1995, N. 218, Riforma del systema italiano di diritto internazionale privato in *Gazz. Uff.*, suppl. ord. n. 68 of 3 June 1995.

[92] See Santa-Maria, 1990, *op.cit.*, p.892.

[93] See Trib. Verona, 5 December 1996, *Soc.*, 1997, I, 574.

[94] For a further analysis of the rationale behind both opinions and a list of their supporters, see Cendon, *op.cit.*, p.1340. A. Santa Maria, 1990, *op. cit.*, p.899, favours the opinion that such companies withhold their Italian nationality; also see Cassazione, sez. lav., 12 June 1982, No 3573, *Mass. dec. civ.*, 1982,

Following Law 218/1995, Art.2505 CC was repealed.[95] The literal interpretation of the new provision signifies that the principle criterion for the determination of the company's *lex fori* now is the location of its incorporation, which regulates the legal nature, the denomination, constitution, transformation and extinction, the capacity and legal relationships of the company.[96] However, the maintenance into force of Arts.2506-2508 and 2510 CC and the second part of Art.25 of the Law itself introduces a radical exemption from the application of the theory of incorporation. The theory of the social seat applies to companies incorporated abroad but having their administrative centre or principle object in Italy.[97] On this basis, the currently prevailing view is that, in practice, the reform has not altered the criterion used for the determination of the companies' *lex fori*,[98] which remains the company's social seat.[99] Consequently, the previous interpretation of Art.2505 CC is still valid.

The second category of foreign companies concerns companies establishing a secondary seat within the Italian territory. The legal regime referring to such companies is introduced by Art.2506 CC as modified by Directive 89/666/EC of 21 December 1989 which was implemented pursuant to DL No 142 of 19 February 1992. This Article refers both to the *lex fori* of such companies as well as to the conditions for their establishment in Italy. The first issue will be analysed in this Chapter, whereas the second issue will be referred to in Chapter 4. Art.2506 stipulates that foreign companies formed abroad and having one or more secondary seats with permanent representation in Italy are subject for each secondary seat to the provisions of Italian law on the deposit of the articles of incorporation, the filing of these articles with the Company Registrar and the publication of their balance seats. Art.2506 CC is applicable if two conditions are met. Firstly, there must exist a secondary establishment in Italy and secondly this establishment must represent the main company on a permanent basis. If either of these condi-

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421.538; also Cassazione, sez. lav., 26 October 1982, No 5597, unreported. However, see *contra* Cian and Trabuccchi, *op.cit.*, p.1681, who supports the view that in this situation the company's nationality would change.

[95] See Arts.25 and 73 of Law 218 of 31.5.1995 in UTET, *Codice Civile e Leggi Collegate* (1996-97, UTET, Milano), pp.481-489, at 484 and 489.

[96] See F. Gazzoni, *Manuale di Dirittio Privato* (1996, Ediz. Scientifiche Italiane, Italy), p.1342; also see T. Ballarino, *Diritto Internazionale Privato* (1996, CEDAM, Italy), p.344.

[97] See A. Silverio, *Riforma del Systema Italiano di Diritto Internazionale Privato* (1997, CEDAM, Italy), p.154; also see F. Moscomi, *Diritto Internazionale Privato e Processuale* (1997, UTET, Italy), pp.31-33; F. Capelli, "La nuova legge applicabile alle società costituite all'estero" [1995] *Le Società*, no 9.

[98] See A. Santa Maria, "Legge 31 Maggio 1995 N. 218" in [1995] *Rivista di Diritto Internazionale Privato e Processuale*, pp.1036-1043, at 1039.

[99] See F. Seatzo, "Sulla nuova disciplina delle società nel diritto internazionale privato italiano" [1997] *Giurisprudenza Commerciale*, pp.830/I-841/I, at 838/I; also see T. Ballarino, *Diritto Internazionale Privato: I Codici Esplicati* (1997, Ed. Simone, Italy), pp.52-53.

tions are not met, Art.2506 CC does not apply even if company activity is frequently carried out in Italy.[100] A secondary establishment exists when "an organised Italian enterprise unit is organically bound with a foreign central seat through a relationship between the principle seat and the subject which administers the secondary seat in Italy" or "the subject which has invested in the stable representation in Italy".[101] Thus, an office of representation dealing exclusively with the collection and offer of information on behalf of the foreign company does not fall within the scope of Art.2506 CC. What falls within the scope of the Article is any unit or establishment, organically connected with the central seat, which enjoys a certain degree of administrative autonomy and whose administration is entrusted in a subject with the legal capacity to act in the name of or on behalf of the foreign company in a permanent manner.[102] The subject can be a legal and a natural person.[103] Permanent representation in Italy is established through the formal delegation of a wide range of powers to the company's secondary seat.[104] The permanency requirement refers to the functioning of the secondary seat and not to the domicile of the natural persons representing the secondary seat.[105]

The provisions of Italian law indicate that for the determination of the companies' *lex fori* it is the theory of the social seat that prevails.[106] As a result of this prevalence, Art.2510 CC regulates that companies with prevailing foreign interests are subject to special Italian laws. Thus, companies falling within the fifth category mentioned above, namely companies formed and functioning in Italy, remain Italian even if they represent foreign interests.[107] The combination of this provision with the now repealed (yet unchanged in substance) Art.2509 CC[108] indicates that the subsidiaries of foreign companies are considered Italian and not foreign legal entities. The practical value of this observation will be evaluated in the second part of this chapter.

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[100] See Cassazione, 26 October 1955, No 3491, *Foro it.*, 1956, I, 335; also see E. Vitta, *Manuale di Diritto Internazionale Privato II* (1975, UTET, Milano), p.99.

[101] See accordingly Cassazione, sez. un., 15 November 1960, No 3041, *Giust. civ.*, 1961, 650; also see Trib. Roma, 2 May 1963, *Giust. civ.*, 1964, I, 698; Cass., 19 November 1971, no 3319, unreported; Trib. di Roma, 3 October 1984, *Riv.dir.com.*, 1985, II, 215.

[102] See Trib. Roma, 24 November 1987, *Le società*, n. 4/1988, 395; also see M. Ginelli, "Questioni in tema di interpretazione degli artt.2506 ss. c.c." [1967] *Rivista delle Società*, pp.620-625, at 620, note 1.

[103] See Cassazione, sez. I, 30 November 1967, No 2854, *Giust. civ. Mass.*, 1967, 148.

[104] See Cassazione, 15 November 1960, No 3041, *Giust. civ.*, 1961, 650.

[105] See E. Simonetto, *op.cit.*, p.410.

[106] See A. Santa Maria, "Problemi attinenti al diritto internazionale privato e processuale delle società" [1987] *Rivista delle Società*, pp.1473-1500, at 1498.

[107] See Trib. Genova, 21 February 1948, *Giur. compl. Cass. civ.*, 1948, IV, 873.

[108] According to the repealed article companies falling within the fourth category, namely those formed in Italy, were considered Italian even if their principle object of enterprise or their seat was situated abroad. See F. Capotorti, "Studi in tema di società e di impresa nella C.E.E." [1966] *Riv. delle Soc.*375-389, at 389.

E. EVALUATION OF NATIONAL LAWS ON RECOGNITION

The recognition of foreign legal entities from legal systems other than the one from which these companies originate is twofold, and includes both the recognition of such companies by the host country and the determination of the *lex fori*. With reference to the first issue, EC law follows the liberal theory or theory of *ipso jure* recognition of foreign companies as legal entities. This theory is followed in Greece on the basis of Art.10 CC, in France on the basis of decrees and bilateral agreements which are now accepted to cover all company forms -even public companies limited by shares- originating from EU Member States,[109] and in Italy on the basis of Arts.2505-2520 CC as reaffirmed by Art.2 of Law 218/95 and numerous international Conventions to which Italy took part.[110] Moreover, the *ipso jure* recognition of EU foreign companies now forms part of the internal laws of the three selected states under Art.293 EC.[111] It is argued that this provision merely introduces the obligation of Member States to proceed to negotiations leading to the *ipso jure* recognition of foreign companies and does not introduce liberal recognition as such. However, it is widely accepted that the imposition of the theory of the *ipso jure* recognition is directly implied in the provisions on the freedom of establishment, which could not be realised without a liberal recognition regime.[112] Furthermore, the liberal theory on the recognition of foreign companies is *de lege lata* introduced in EC law on the basis of the 1968 Brussels Convention signed by all the then six members of the EEC. The Convention constitutes one of the first legal instruments to expressly introduce the liberal theory of recognition for all signatory states. France has signed and ratified the Convention under Law 63-1134 of 20 December 1969, Italy has signed and ratified the Convention under Law 220 of 28 January 1971,[113] whereas Greece has done neither. However, all three countries follow the theory of the *ipso jure* recognition, thus awarding legal personality to most foreign legal entities and especially to public companies limited by shares originating from other EU Member States. This position is in compliance with EC law as expressed directly in

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[109] See B. Goldman, A. Lyon-Caen and L. Vogel, *op.cit.*, p.91.

[110] For a list of such Conventions, such as the 1968 Brussels Convention on the recognition of companies, the 1968 Convention on the execution of civil and commercial judgements within the EU, see A. Santa-Maria, 1993, *op.cit.*, p.9; also see G. Girello, "La legge applicabile alle persone giuridiche nel diritto internazionale privato" [1996] *Diritto del Commercio Internazionale*, pp.285-287, at 285.

[111] Reciprocity is irrelevant. See E. Calò, "Le persone giuridiche straniere" [1992-1995] *Studi e Materiali*, pp.119-126, at 121; also see G. Broggini, "Conflitto di leggi, armonizzazione e unificazione nel diritto europeo delle obligazioni e delle imprese" [1995] *Rivista di Diritto Internazionale Privato e Processuale*, pp.241-264, at 251.

[112] See S. Neri, *op.cit.*, pp.940-941; also see C. Galvada and G. Parleani, *op.cit.*, p.109.

[113] See Law 220 of 28 January 1971 in *G.U.*, 6 May 1971, no 113.

Art.293 EC and the 1968 Brussels Convention, and implied indirectly in the provisions on the freedom of establishment of foreign EU companies within other Member States.

With reference to the *lex fori*, in Chapter 2 it was concluded that EC law determines it as the law of the country where the company has its registered office, central administration or principle place of business. In the light of this, Greek law on the recognition of foreign legal entities, which follows the theory of the *siège réel*, seems to comply with EC law. In Greece the real seat of the company is defined as the location where the company's basic decisions are made, where the guidelines for the company's operation are issued, where the company's control is exercised and where the results of the company's operation are collected.[114] The Greek description of the company's seat falls within its EC interpretation as the place of management and administration. However, Greek and EC legislation differ on the issue of the status of companies which, having been incorporated abroad, have their true seat in Greece. Under Art.4 of the Brussels Convention, which has been confirmed by *Centros*,[115] these companies should be recognised after the imposition of certain mandatory provisions by the host country, whereas in Greece they are considered to be Greek companies with the same legal rights and obligations as companies registered in Greece. A second difference concerns the status of companies which were not legally formed according to their *lex fori*, yet function legally in Greece. Although the Brussels Convention neglects to tackle this issue, the implication is that since these companies are invalid according to their *lex fori*, they should also be considered invalid by the host country, on the grounds that the host country must award the companies under recognition the same powers awarded by the company's *lex fori*. In Greece, however, the prevailing theory awards such companies all legal rights, at least for the period of their functioning in Greece. The third variation between the two laws lies in the fact that the Convention is applicable within the EU, whereas Greek law does not really distinguish between EU and non-EU companies. All these problems, however, derive from the difference between Greek law and the regulations of the yet unratified Brussels Convention, to which Greece did not take part. It can therefore be stated that Greek law is compatible with EC regulations on the recognition of companies from other EU Member States. However, this is not a direct result of Greece's membership to the EU, as the relevant Greek legislation was passed well before the Greek accession. Furthermore, Greece has not signed the Brussels Convention. This compliance is probably due to the fact that the Brussels Convention is really a

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[114] See ΑΠ 64/1905; also see Athens Court of Appeal 262/1935; Introductory Report of Pireus Court of First Instance 1152/1969; Athens Single-member Court of First Instance 1937/1974.

written report of the prevailing international law and Greece (in its effort to lure foreign companies within its dominion) has always been ready to observe international law.

Contrary to Greece's willingness to recognise foreign legal entities irrespective of their country of origin, France underwent a long history of restrictive legal theory and practice. Despite the recent acknowledgement of the applicability of the notion of nationality to legal (as well as natural) persons, French law is still failing to recognise expressly all foreign legal entities indiscriminately. The French legal regime is even more prohibiting in reference to foreign public companies limited by shares. The latter are recognised only if they originate from an EU Member State. Consequently, French law guarantees the recognition of all types and forms of EU legal entities, thus creating an exclusive, liberal environment for their establishment in France. The question, however, is whether French law on the non-recognition of foreign public companies limited by shares deriving from non-EU Member States complies with EC law and the Brussels Convention.[116] EC law and the freedom of establishment are *ratione materiae* applicable exclusively to EU companies. Thus, EC law does not apply to the French treatment of non-EU companies. This is reflected in Art.3 of the Brussels Convention, which expressly introduces the right of a signatory state to refuse recognition to companies which have no genuine link with the economy of an EU Member State. It must be accepted that companies whose legal, administrative and managerial centres are not located in France lack genuine link with the French economy. Thus, such companies can legally, even under the provisions of EC law, be refused recognition. These companies are considered foreign non-EU companies in France, where the prevailing theory for the determination of the company's *lex fori* is that of the *siège social réel*. This is defined as the location where the company's principle legal, administrative and managerial centre is located, or as the place of the company's judicial and economic integration, or the location of the company's principal establishment. This criterion, almost identical to the one introduced by Greek law, is quite similar to the one introduced by EC provisions on the freedom of establishment. The Brussels Convention is also observed by France, whose method of determination of the companies' *lex fori* is in absolute compliance with its Arts.1 and 2, as well as EC law.

Another issue worth addressing concerns the status of companies which have been incorporated abroad, but have their true social seat in France. Art.4 of the Brussels Convention regulates that such companies should be recognised as legal entities by the

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[115] See case C-212/97 *Centros Ltd* v *Erhvervs-og Selskabsstyrelsen*, 16 July 1998, unreported.

signatories of the Convention. Recognition does not occur *ipso jure*. The signatory states may impose all regulations applicable to domestic companies of the same or a similar type. The Convention seems to imply that such companies should be recognised as foreign legal entities. However, in France, and as a direct result of the application of the theory of the true social seat, such companies are considered French. Insofar as recognition is concerned, however, the matter seems to be of theoretical importance, since both under French law and under the Convention these companies will have to go though the same recognition procedure, namely the one applicable to domestic companies of the same type or form. However, the matter is of practical importance for the treatment of such companies. Another problem concerns the treatment of companies which were not legally formed according to their *lex fori.* Under the regulations of the Brussels Convention such companies lack legal personality and should be considered non-existence both from the law of the *lex fori* as well as the law of the host state. However, in France such companies may present themselves before the French criminal and civil courts for the defence of their rights. This regulation seems to violate the Convention's stipulations. However, the relevant French law cannot be considered a breach of EC law, as its source is the European Convention on Human Rights, which also constitutes a source of EC law. In general, therefore, French law is in compliance with EC law on recognition. The willingness of France to adapt its legislation so as to accommodate the relevant EC law provisions is quite obvious and is reflected in the remarkable difference between the legal status of foreign non-EU public companies limited by shares which, in principle, are not recognised in France and the status of foreign EU public limited companies which are recognised as legal entities *ipso jure*.

Italian law also recognises foreign companies *ipso jure*. The *lex fori* of legal persons is defined as the legal system of the country where the company's administrative and managerial centre is located or as the place where the precise activity of the company is presented to the world of finance. Thus, in Italy the criterion for the determination of the company's nationality is its managerial and financial centre. The Italian interpretation of the theory of the *siège réel social*, which is very similar to the Greek and French versions, is in absolute compliance with the relevant EC provisions.

What is worth further examination is the legality -under EC law- of the Italian legal position concerning the nationality of companies which, having been incorporated abroad, have their true social seat in Italy. The Italian position, which is very similar to

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[116] In France there are still restrictions in the recognition of foreign non-EU *sociétés de capitaux*. See B. Mercadal and P. Janin, *op.cit.*, p.1238.

the French,[117] is that since such companies have failed to comply with the conditions for their legal formation imposed by their true *lex fori*, namely Italian law, they lack legal personality altogether and are therefore not recognised as legal persons. This regulation seems to be in breach of Art.4 of the Brussels Convention, according to which such companies must be recognised as legal entities following the completion special of mandatory procedures introduced by the law of the receiving state.[118] The matter is mainly of theoretical value. Under the Convention such companies need to undergo a special recognition procedure, whereas under Italian law such companies need to fulfil the conditions for their formation in Italy as domestic companies. The two positions seem quite similar with their only difference lying in the procedure to be followed for their recognition. However, things are not quite so simple. Should the Convention's rules be followed, the company would be recognised as a foreign legal entity with the rights and obligations awarded to foreign companies of that type or form. Should the Italian position be followed, the company would change nationality and become Italian. In that case problems would arise concerning the existence of the initial company and its relationship with the new Italian unit. However, this is a problem inherent in most countries following the doctrine of the true seat, which has recently been identified in *Centros* and confirms the need for an express, uniform regulation at the EU level.

Another issue arising here refers to the Italian stipulations on the regime of foreign companies which have failed to follow the conditions for the formation of a company of this type or form under the law of their *lex fori*. In Italy these companies are considered to lack legal personality and are not recognised as legal entities. This position is in compliance with the relevant provision of the Brussels Convention. However, Italian law allows such companies to present themselves before the Italian civil and criminal courts in order to participate in trials concerning the defence of their property rights. This seems to violate the general non-recognition guideline for similar companies. However, most EU jurisdictions do allow this minimum of rights to foreign companies, even when the latter lack legal personality, on the basis of the relevant provision of the European Convention on Human Rights which is accepted as a source of EC law.

Italian law on recognition does comply with EC law. The same conclusion is applicable to Greek and French law. This does not mean, however, that problems and inequalities in the recognition of legal entities do not exist. However, in view of the

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[117] See T. Ballarino, *La Società per Azioni nella Disciplina Internazionalprivatistica* (1994, UTET, Italy), p.11.

[118] G. M. Ubertazzi, "Riconoscimento e stabilimento delle società nella C.E.E." in [1970] *Rivista delle Società* 526-539, at 534.

similarity in the provisions within the three selected countries and the similitude in the nature and type of the precise differences between the three national laws and the relevant EC stipulations, it must be accepted that these minor discrepancies derive from the application of the principle of the real seat as the prevailing doctrine for the determination of the companies' *lex fori* and not an alleged intention of the three legislators to violate EC law. Another additional cause of problems is the inherent difficulties in the parallel application of two contradicting theories of recognition within the EU. It must also be acknowledged that any discrepancies between Greek, French and Italian law on the one hand and EC law on the other derive from the provisions of the Brussels Convention, which at the moment is not yet into force. Obviously, these discrepancies demonstrate the differences between the national positions of these three Member States on each particular issue and the underlying disposition of a the states which signed the Treaty of Rome. Although these discrepancies are noteworthy, they do not constitute violations of EC law. Insofar as the provisions of the Treaties are concerned, they seem quite vague in the definition and description of the criteria used for the determination of the companies' *lex fori*. The only relevant express provision refers to the introduction and equal acceptance of both the criteria of the true seat and of incorporation.

Since the theory of the true seat is used in all three selected jurisdictions, it can be stated that Greece, France and Italy observe the regulations of EC law on the recognition of foreign public companies limited by shares originating from a Member State other than the one from which recognition is sought. Thus, any breaches of EC law in the field of company establishment within these three countries must be sought in other aspects of their national law. Chapter 4 will refer to the formal requirements for the secondary establishment of foreign public companies limited by shares, whereas following Chapters will analyse the substantive requirements and restrictions imposed on such establishment by the legal and administrative provisions of the three selected states.

CHAPTER 4

Formal Requirements for Secondary Establishment in Greece, France and Italy

A. INTRODUCTION

The question addressed in this Chapter is, whether France, Italy and Greece hinder the secondary establishment of foreign EU public limited companies via national legal or administrative regulations concerning the legal formation of a secondary unit within their boundaries. The main aim of Chapter 4 is to assess whether the relevant national laws comply with EC provisions on the freedom of establishment or whether breaches of EC law in this field still take place within the three selected countries. In order to achieve this aim, Chapter 4 will present the formal requirements, legal and administrative, for the secondary establishment of foreign EU public companies limited by shares in Greece, France and Italy. This presentation will be followed by the comparative analysis of the relevant national laws with EC law already analysed in Chapter 2.

B. ESTABLISHMENT IN GREECE

B.1. The establishment of branches and agencies (Art.50 of Law 2190/1920)

In Greece public companies limited by shares (*Anonimos Eteria* or AE) are defined as commercial companies with a separate legal personality, capital divided in equal amounts called shares, and liability for their own debts *in totum*. The companies' shareholders are liable only to the extent of the unpaid amount on their shares.[1] The legal and administrative requirements for the secondary establishment of foreign legal entities of a type equivalent to the AE in Greece are introduced by Art.50 of Law 2190/1920. In

order to establish a branch or an agency, foreign public companies limited by shares with the right to function legally in Greece must submit to the Greek Ministry of Commerce a ratified representation document of their plenipotentiary or agent, also appointing a person authorised to accept service of documents and declaring the date of the company's foundation and the names of its representatives at its seat.[2] Law 2190/1920 introduces both the substantive and the procedural conditions for the establishment of foreign companies in Greece.[3]

According to Greek legal theory neither branches nor agencies constitute legal entities[4] separate from the foreign company which initiated and completed the required procedure for their establishment in Greece.[5] Consequently, branches and agencies negotiate and enter into contracts in the name of the main company. Branches and agencies are types of permanent establishment.[6] This characteristic distinguishes them from mere company representatives.[7] Both forms of establishment have their own employees and material establishment (address). They also have identical rights and obligations. What distinguishes between the two is their relationship to the main office: the agency's relationship to the company's seat (ruled by commercial law) indicates a commercial representation,[8] whereas the branch's relationship to the company's seat (ruled by civil

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[1] See N. Rokas, *Commercial Companies* (1990, Sakkoulas, Athens), p.121.

[2] For the full text of the law and its official translation in English, see H. Xanthaki, 1996a, *op.cit.*, appendix 1.

[3] The Law includes two conditions for the establishment of a company in Greece: the company should have the right to establish under its regulations and it should also exercise its right by meeting the formal requirements of this Law. Consequently, Art.50 of Law 2190/1920 provides the answer to the following two questions:

a. Which category of companies has the right to establish in Greece under this Law; and

b. which are the legal actions that should be taken and the documents that should be presented by the company, in order to be allowed to exercise its right of establishment in Greece.

[4] See Thieffry et associés, *Guide des sociétés dans la CEE* (1992, Centre français du commerce extérieur, Paris), p.180. The branch as a legal term has a completely different meaning from the simple existence of propriety or functioning of a company's department in a location other than the company's seat. Factory or warehouse, simple internal departments are not enough to indicate the functioning of a branch. A branch as a term indicates "exercise of trade or transactions with customers through employers of the branch, which should be permanently established in a precise address". See L Georgakopoulos, *National Company Law, Volume III: The public company limited by shares,* (1972, Sakkoulas, Greece), p.135.

[5] "When Law 2190/1920 refers to the company's offices, it means the company's seat. Branches are not identical with the seat or the main office of the company; the branch is not a separate legal entity". See Kribas, *Commercial Companies,* (1986, Sakkoulas, Athens), pp. 137-138; also Krispis, *op.cit.*, p.29; L. Georgakopoulos, *op.cit.*, p.135. Also see Athens Court of First Instance 6857/77.

[6] See Krispis, *op.cit.*, p.25.

[7] Representatives of the company do not necessarily sustain an office, whereas branches and agencies must have a permanent office in a precise address. The representative has the power to represent the company in transactions and contracts which have been agreed beforehand, whereas "a branch exercises commercial activity with staff of its own; a few transactions are not enough to indicate its legal functioning". See Athens Court of Appeal 5779/1982.

[8] See L. Georgakopoulos, *Textbook of Commercial Law,* (1985, Sakkoulas, Athens), p.36.

law) indicates an employer-employee bond.[9] Thus, the branch is usually defined as an organised unit where decisions of limited importance for the future of a company are taken, where decisions and guidelines introduced by the company's true seat are executed and where one part of the enterprise activity, limited both from financial and legal aspect, of the company takes place.[10] The agency is defined as a unit which, according to its agency contract, undertakes the obligation to complete particular actions on behalf of the parent company.[11] Greek jurisprudence defines an agency as an office conducting business at a specified location.[12] Agents are merchants (Art.2 of the Commercial Law), a characteristic distinguishing them from representatives, who act in the name of merchants as their employee.[13] The second characteristic distinguishing between an agency or a branch and a representation office lies in the regularity and extent of transactions, material and legal, performed by these units within Greece. The secondary unit of a foreign company which deals with sporadic or isolated transactions in Greece is a mere representation office and is excluded from the application of Art.50 of Law 2190/1920.[14]

Due to their lack of legal personality both the branch and the agency inherit the parent company's *lex fori*. This can lead to jurisdictional difficulties. It is argued, however, that in principle cases deriving from the activity of the branch or agency in Greece should be judged before the Greek courts.[15] Thus, the legal obstacle of the branch's lack

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[9] If the staff working in the company's established office are not considered employees, but authorised representatives, this office is an agency. Still, the office must deal with customers and exercise independent commercial activity. If, however, this is not the case, then the legal relationship between the office and the main company is either simple representation or mandate. See L. Georgakopoulos, *op.cit.*, 1972, p.135; also see Athens Court of Appeal 5779/1982, *EEmpD*, 1983, 70.

[10] See E. Perakis, *op.cit.*, p.440.

[11] See *ibid.*, p.441; for a general introduction to the concept of the agency, see Th. Liakopoulos, "The Agency Contract" [1990] *EEmpD* 561.

[12] See ΑΠ 179/1936; also Athens Court of Appeal 1088/1908. Perifanakis notes, that: "...One may determine an agency as a private enterprise, which administers the transactions of third parties at a cost agreed beforehand, under the condition that this relationship is not considered otherwise by the Greek law". See Perifanakis, *Company Law,* (1956, Sakkoulas, Athens), p.96.

[13] ΑΠ 55/1945 and 145/1947 state that "an agent acting exclusively as a company's or a merchant's employee, without exercising independent trade, is not a merchant". Thus, the "agent" of an aviation company is its employee and is not considered a merchant according to Greek Commercial Law, whereas a the travel agent exercises trade and is therefore considered a merchant. See Thessaloniki Court of Appeal 419/1955 and ΑΠ 284/1935 respectively.

[14] See E. Perakis, *op.cit.*, p.442.

[15] This opinion is expressed by many Court decisions, the most recent of which are Pireus Court of Appeal 91/1982 and Athens Court of Appeal 2779/1984. I will refer to the decision by Pireus Single-member Court of First Instance 1086/1984, which is quite representative: "...At this case, the company is proved to be seated in Pireus, because only there can its activity take place. Moreover ... the President of its Board of Directors is Greek. However, it is judged, that even if the company was seated abroad and sustained only a branch in Pireus, even then the Greek courts would have the international jurisdiction to decide on the case. Moreover, this court would have the local competence to decide on this case. Paragraph 1 of Article 905 of the Code of Civil Procedure includes in its definition of 'residence' the 'special domicile' of the debtor, that is the branch of a foreign corporate body (Art.25, par.2 of the Code of Civil Procedure and Art.51 of the Civil Code)".

of legal personality (which could have led to its inability to present itself before the Greek courts) is put aside for the purpose of protecting third parties which must be able to sue the company in Greece. This provision protects third parties and the branch or agency itself, as it allows them to avoid proceedings before foreign courts.

In order to become formally recognised, foreign companies must submit to the Greek Ministry of Commerce a copy of the document of representation of their agent or representative ratified by the Greek Consulate.[16] For the establishment of agencies the document must include the appointment of the company's representative, whereas for branches the company must name the person responsible for the functioning of the branch. The first question arising here concerns the issue of the determination of the legal system which regulates the document of representation[17] and more specifically its form, its contents and the extent of the representatives' powers.[18] Art.11 CC regulates that several national laws can be applicable for the determination of the document's form.[19] These include the law of the state where the interested parties declare their will to enter into the contract (*locus regit actum*) since representation is a unilateral declaration of legal will, the *lex patriae* of the represented company, namely its *lex fori*, or the law of the state where the branch is located, namely Greek law.[20] The document must also include the appointment of a person authorised to accept service of documents. Providing an exemption to the general rule of Art.142 of the Code of Civil Procedure, which requires official declaration of the attorney receiving service of documents to the Secretariat of the Athens Court of First Instance, Art.50 of Law 2190/1920 requires only the submission of the document of representation to the Greek Ministry of Commerce.

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[16] Kiandos specifies that this ratification is valid if done by any kind of authorised Greek authority abroad. These include Greek Embassies, General Consulates and any other type of Consulate and honorary Greek consuls. See V. Kiandos, *Private Law of International Trade* (1987, Sakkoulas, Athens), p.27.

[17] The submission of this document is necessary for the establishment of all types of foreign companies wishing to establish in Greece. See Law 3190/1955 and Presidential Decree 400/1970.

[18] Fragistas notes that in principle the extent of the representatives' power is regulated by the law of the company's seat. Basically, however, the regulations of the document prevail. If there are any vague points, or if no regulation on certain points was agreed, then one must apply the *lex causae* of the representation, which is Greek law, as the law of the state, where the representative acts. See Fragistas, *op.cit.*, p. 283.

[19] See *ibid*, p.281, who notes that the representation document provided by the foreign public limited company to its representatives in Greece is valid, provided that one of three national laws are followed. These are the law of the state, where the representation was given, the law of the company's seat and Greek law. The latter must be followed when the foreign company gives its representative the power to enter into a contract involving transferring part or the whole of the company's real estate located in Greece.

[20] Megglidou notes that if any other than the Greek law is followed, one is led to wonder about the extent of the representatives' power. Moreover, this regulation concerning the establishment of foreign companies in Greece is a condition of establishment set by public law. Therefore, Greek law should prevail. In practice, a safe solution to the problem would be for the document to take the form of a public document. The private form can be used, as long as the document may take the form of a public one according to the law of the state of the person who edited it. See S. Megglidou, *op.cit.*, p.206.

Theodoropoulos notes that the person appointed is the only one authorised to receive legal documents concerning litigation judged by foreign courts (provided that the litigation derives from the company's activity in Greece) and litigation judged by the Greek courts, even if they derive from the company's activity abroad.[21] The document must include the year of the company's foundation and the names of its representatives at its seat. This regulation prohibits a foreign company not yet founded abroad from establishing in Greece. Moreover, it offers security to third parties interested in commercial dealing with the company's branch, since those entering into contract with the branch (being familiar with the names of the company's representatives) will be able to sue the parent company, if suing the branch is impossible. A representative of the company at its seat is defined as a member, who according to the company's articles expresses the will of the company as a legal entity and represents it before the courts. Their relationship is an organic representation.[22]

Public companies limited by shares are invalid if their aim is either illegal or contrary to Greek public order.[23] The Minister of Commerce may reject an application for establishment in Greece, if s/he assesses that the company's activities and aims as stated in the company's articles are prohibited in Greece. Even if only some of the company's activities are illegal under Greek law, the Minister of Commerce has the right to prohibit its establishment. As this provision, passed to protect Greek public order, is valid for Greek and foreign companies alike, it is not discriminatory against foreign companies.[24] The Decision of the Minister of Commerce on the establishment of a foreign public company limited by shares in Greece must be published in the Bulletin of Public Limited Companies of the Government Gazette.[25] Only after this publication is the company legally established.[26] The refusal of the Minister to publish the decision preventing the company from establishing in Greece is an administrative act, against which any interested party may appeal to the Council of State.

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[21] See Theodoropoulos, *Code of Civil Procedure, Interpretation and precedents* (1978, Sakkoulas, Athens), p.303.

[22] See ΣτΕ 4815/1983.

[23] See Art.4a of Law 2190/1920. It is argued that the Greek state can decline the establishment of a foreign company in Greece, on the grounds that its capital is lower than the minimum amount required for Greek companies. According to Legislative Decree 1027/83 of the Greek Ministry of Commerce the establishment of such a company would be opposed to Greek public order (Art.33 Civil Code). This Decree was based on the 781/74 Plenary Legal Council of the State. However, Legislative Decree 70/67 considers this establishment as a circumvention of Greek law.

[24] See ΣτΕ 3395/1971.

[25] See Art.1 of Presidential Decree 16/22.1.1930.

[26] Kiandos notes that the company must know precisely the conditions for its establishment. Therefore, the Ministerial Decision should not only become known to the company, but it should be published to the

It is interesting to note that the aim of Law 2190/1920 is twofold: to stipulate a simple procedure for the establishment of foreign companies in Greece, and to introduce a regime protecting the Greek public and foreign companies. Greek law shields foreign companies from the bureaucratic procedure set for the formation of Greek companies. As the required formalities are particularly limited in the case of public limited companies, it is concluded that the Law was intended to be favourable and therefore attractive to financially strong foreign companies.[27] The attention given to the legality of the company's establishment combined with the need for publication of the Ministerial Decision indicates the second aim of the Law, the protection of Greek public and third parties.[28] The surprising longevity of this old is probably due to the rigidity of Greek legislative procedure and the continuing existence of the main reasons for its initial passing.

B.2. The establishment of Commercial/Industrial Off-shore units (Law 89/67)

Despite the efficiency of Law 2190/1920 the desire of the Greek administration to lure foreign companies to Greece led to the passing of Law 89/67, which regulates the establishment of offices for the exclusive purpose and with the sole responsibility to supervise the company's commercial activities. Law 89/67 applies exclusively to foreign companies, namely companies whose real seat is located outside Greece.[29] The Law applies to all known forms of commercial/industrial companies, including public limited companies. Art.1 of the Law provides that foreign commercial/industrial companies of any type or form, functioning legally at their seat and engaged in commercial activity abroad, may establish in Greece after permission from the respective Minister. The application, submitted to the Service for External Capital (*Ipiresia Kefaleon Exoterikou*)

Government Gazette. Therefore, the decision of the Minister is in force after its publication in the Gazette. See Kiandos, *op.cit.*, pp.28-29.

[27] Oliver notes that while the number of companies in England and Wales (approximately 6,000) is small compared with that of private companies (approximately 816,000), it includes many large companies. See M. C. Oliver, *Company Law* (1987, Longman, London), *op.cit.*, p.24.

[28] Foreign companies are compelled to declare their representation by their Greek branch or agency, appoint a person authorised to accept service of documents and specify the year of the company's foundation, as well as the names of the company's representatives at its seat (Art.50, Law 2190/1920). The Minister of Commerce controls the fulfilment of the above conditions, the legality and morality of the company's aim and decides on the establishment of the branch or agency in Greece. According to the Law proposal, Art.50 ensures that both the foreign companies and the Greek public wishing to enter into contracts with the branches are protected from those fraudulently appearing as representatives of foreign companies, or even real representatives who either act without company authorisation on this specific occasion or exceed the limits of their representation.

[29] Pireus Court of First Instance 11,428/1981 regulates that foreign companies established in Greece under Law 89/67 and founded under a foreign law are not considered *de facto* Greek or *afanis* companies. Greek law applies only if these companies have their true seat in Greece and provided that they have been

must include a declaration of the nationality of the parent company, the form of the company functioning at its seat, the form of its establishment in Greece (as a branch, agency or office), a description of the company's activities and the name of the new unit's administrator. The company must also submit a surety from a recognised national or foreign bank, which shall forfeit in favour of the Greek State, if the company's staff breaks any of the above rules. The Minister decides on the application within eight days.

Greek authorities are precluded from prohibiting the establishment of companies on the grounds that they belong to a type unknown or invalid in Greece. In fact, the Minister lacks authority to determine whether the company belongs to a type familiar to Greek law.[30] However, for the protection of the Greek public from fraudulent companiest, the Minister may order further inquiries on the company's legal formation and functioning at its seat.[31] The term commercial/industrial is new to Greek law. The broad term used by the legislator indicates the wish to allow the majority of foreign company forms to benefit from this Law.[32] Rokas defines commerce as an activity aiming to profit.[33] Commercial are these companies which act as mediators between production

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illegally founded according to the law of their statutory seat or if they have not followed the regulations of Law 89/1967.

[30] In the past foreign companies and the Greek authorities faced many difficulties trying to categorise foreign companies wishing to establish in Greece under Law 2190/1920, in terms of subjecting them to one of the legal forms of companies stipulated by Greek Company Law. In an attempt to end such complications, the legislator created one unique status for all types of companies establishing in Greece under Law 89/67. Thus, the subjection of foreign companies to Greek company types became both needless and pointless. Consequently, the Minister of Co-ordination when deciding on the company's petition to establish in Greece adopts the company's type, as it is expressed in its Articles and characterised by the company's *lex fori.*

[31] In practice the legality of the formation and functioning of the company is proved by a formal document from the competent authority of the country where the company's true seat is located. On the basis of my research in the Government Gazette where the Decisions of the competent Minister for the establishment of foreign companies under Law 89/67 are published I reached the conclusion that Greek Law does not request a document from a specific office of the foreign country. What is required, is a formal document from the authority responsible for the control of the legal functioning of companies in the foreign country's dominion, which may differ from country to country. For example, Hong Kong companies submit a certificate from the "Company Secretariat", Liberian companies submit a document from the General Consulate of Liberia in Greece, American companies submit a document from the "Secretariat of Public Limited Companies" of the state where the company is seated or the Minister of External Affairs of the State. See Decisions IE/23636/11093, IE/63515/11094, IE/28316/11099 and IE/27749/11098 accordingly. British companies tend to submit a certificate from the Secretary of Companies of the town where the company's seat is located.

[32] In order to demonstrate the large variety of companies permitted to establish in Greece under Law 89/1967, it can be stated that before Special Laws on the establishment of foreign maritime companies were passed in Greece, even maritime companies adopted the regulation of Law 89/1967. See H. Xanthaki, "Compliance of Greek Law on the Establishment of Foreign Maritime Plcs by the Law of the European Union", *University of Athens Law Review* [1993b] pp.100-118.

[33] See K. Rokas, *Introduction to Commercial Law,* (1970, Sakkoulas, Athens), p.3. Article 4 of the Proposal for the Greek Commercial Code (which has not been passed yet) regulates that commercial are all financial activities, whose subject is the production, modification and the disposition of goods or services, credit or navigation.

and consumption.[34] The question is whether the term commercial refers to the aim of the company or to its legal nature as a civil or commercial legal entity. As the legal nature of the company is regulated by another provision of Law 89/67 according to which foreign companies establishing under Law 89/1967 may belong to any type, the legislator clearly refers to the activity and not the nature of the company. If the company's activity -as described in its articles- is trade, the company is characterised as commercial.[35] An industrial company is one, which either produces new products by processing raw materials or perfects old products by increasing their quality. In either case, the use of a large numbers of specialised machinery and staff is essential.[36] Although the characterisation of a company as industrial derives mainly from the declaration of the company's aim and activities in its articles,[37] it must be able to prove the reality of its declaration with proof admissible to the Greek courts.[38] Thus, the activity of companies establishing under Law 89/67 may be either of the above two (commerce or industry) or a mixture of

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[34] Kotsiris refers to the substantive criterion for the classification of companies and notes that commercial companies are those whose object is commercial undertaking. Companies formed to engage in commercial acts or commercial activities such as business are considered commercial under art.1 of Greek Commercial Code. Commercial acts or activities are defined restrictively by law in art.2 and 3 of Royal Decree of 1835. Commercial companies, designated as such in a broad sense because of their object, are the general partnership, the limited partnership by shares, the silent partnership and the joint shipownership. Civil companies carry on a civil object, such as farming, home leasing and buying and selling land. See L. Kotsiris, *Greek Company Law* (1989, Sakkoulas, Athens), p.35.

[35] M.C.T. FOOTWEAR COMPANY LIMITED seated in Hong Kong and established in Greece under Law 89/67 is a commercial company, whose activity is "general commerce, construction, export, import, purchase, sale and negotiation of commercial materials, products of every kind and every place of the world..." See Ministerial Decision IE/23636/11093 of February 1991.

GAS AND PETROLEUM LIMITED seated in Liberia and established in Greece under Law 89/67 is a commercial company, whose main activity is the international trade of marine lubricants. See Ministerial Decision IE/63515/11094 of February 1991.

MIPSO TRADING COMPANY LIMITED is a commercial company seated in Cyprus, whose activity is "general trade" See Ministerial Decision IE/29545/11097 of May 1991.

[36] ΣτΕ 1147/1984 offers the definition industrial enterprises as enterprises, which using a large amount of capitals, specialised machinery and staff and elaborating natural or other materials, either produce new products or improve the already existing ones by improving their quality and with the aim to offer them to further industrialisation.

[37] SERVICE-MASTER MIDDLE EAST LTD seated in the State of New Jersey in the U.S.A. and established in Greece under Law 89/67 is an industrial company, whose activity is "cleaning houses, offices, hospitals and factories, as well as constructing, maintaining, functioning, repairing, distributing and storing machinery and other objects of the health sector." See Ministerial Decision IE/28316/11099 of May 1991.

CONARPO LIMITED seated in Britain (Cardiff) and established in Greece under Law 89/67 is a company mainly occupied in oil industry. See Ministerial Decision IE/29303/11100 of May 1991.

DAR AL RIYADH INT'L, LIMITED seated in the British Virgin Islands and established in Greece under Law 89/67 is an industrial company, whose activity is the construction of University campuses, hospitals, railway stations and other public buildings. See Ministerial Decision IE/52175/11095 of March 1991.

[38] An Opinion of the Legal Council of the Ministry of National Economy 255/1983 on the establishment of foreign technical companies is quite interesting for this analysis, as its regulations may be applicable here with an analogous interpretation. This decision notes that the characterisation of the enterprise as technical derives from the document of its formation. Its activity may be proved with every legal mean, since the crucial point for the application of the law is the activity of the enterprise as technical. Moreover, the activity of the company at its seat must be proved before the Minister publishes his decision.

both.[39] Furthermore, the company's activity must exclusively be the execution of commercial business outside the Greek boundaries. The term is interpreted in Arts.2 and 3 of Ministerial Decisions approving the establishment of foreign companies in Greece under Law 89/67, according to which branches, offices or agencies deal exclusively with the co-ordination, supervision, control, observation and promotion of the company's activities abroad. Conducting commercial business in Greece is "categorically forbidden".[40] This type of arrangement is described as off-shore and involves companies whose capital and activities are located outside the country of establishment. This provision is another expression of the Greek desire to attract foreign companies.[41]

Foreign companies wishing to establish in Greece under Law 89/67 submit an application and a document of suretyship from a recognised bank.[42] The application includes a declaration of the company's nationality, type, form of establishment in Greece, its activities and the name of the manager or administrator of the Greek unit. The company also declares within two months the name of an attorney authorised to accept service of documents. The suretyship is forfeited in favour of the Greek State, if the company or its personnel violate the conditions of its establishment or Greek taxation laws.[43] The suretyship document is evidence of the bank's parallel liability for the company's debts to the Greek State up to the amount stated in the document. The bank, however, can object to the payment of the company's debts until the Greek State has already completed the procedure for the collection of the money from the company it-

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[39] SFM INVESTMENT AND TRADING CO. S.A. "SINTRACO" seated in Panama and established in Greece under Law 89/67 is occupied in "commercial, industrial and agricultural activities". See Ministerial Decision IE/24662/11096 of March 1991.

CONTROL DATA MIDDLE EAST INC. seated in the State of Minnesota of the U.S.A. and established in Greece under Law 89/67 is occupied in research in the field of electronics and especially the control and processing of data, trade of computers and other relative activities. See Ministerial Decision IE/27749/11098 of May 1991.

[40] The Greek legislator wanted to prohibit any connection (even indirect) of the company with commercial activities in Greece. To achieve this, in the form of the Ministerial Decisions approving the establishment of foreign companies under Law 89/67 it is stated that every connection or parallel offer of services from the branch itself or its foreign personnel to other forms of establishment of the mother company in Greece is prohibited as illegal, if the other establishment is permitted to conduct any form of commercial activity within the boundaries of the Greek state. The two establishments are prohibited from having any relation, dependence or co-operation, same seat or accounting books.

[41] Giannitsis refers to the policy of the dictatorship concerning foreign companies as bridge-policy, explaining that Greece's intention was to play the role of a bridge uniting the markets of the West with the ones of the Middle East. See Gianitsis, *Foreign banks in Greece* (1982, Gutemberg, Athens), p.106.

[42] According to the text of the Law the petition for the company's establishment must be submitted to the Service of Foreign Capitals of the Ministry of Co-ordination. This Ministry ceased to exist in 1985 and its responsibilities were transferred to various other Ministries. The Service of Foreign Capitals was specifically transferred to the Ministry of National Economy and as a department of this Ministry continues to exist and function in the same way it did when Law 89/67 was passed. Thus, the petition must now be addressed to the Greek Ministry of National Economy, Service of Foreign Capitals.

[43] According to Megglidou this regulation is set for the protection of the Greek State in case that the foreign company or its personnel breaks the stipulations of the Greek law. See Megglidou, *op.cit*, p.207.

self and this procedure proved fruitless.[44] The bank's objection to pay is inadmissible, if any attempt for execution against the company is obviously useless.[45] The Minister must decide on the company's application for establishment within eight days.[46]

Apart from the conditions of Law 89/67 additional conditions for the establishment of foreign companies in Greece are set by Greek legal theory and texts. First, the company is legally established only after the publication of the Ministerial Decision approving the company's application. The publication date is the date of the actual circulation of the relevant issue of the Government Gazette, not the date printed on it.[47] Second, establishment and functioning of the company is prohibited, if its object is unlawful or contrary to public policy.[48] However, this prohibition is limited to cases where the object of the company is prohibited by a law set to protect exclusively the Greek public or vital Greek interests.[49] Third, as Law 4310/1929 prohibits non-EU natural persons from working without permission, the company must submit formal documentation by the Greek authorities allowing non-EU agents or representatives to work in Greece.[50]

B.2.1 Choice of the Appropriate Establishment Law

Commercial/industrial foreign public companies limited by shares are subject to both Laws 2190/1920 and 89/67. The existence of two laws with the same field of application gives rise to questions concerning the laws' validity, parallel legal value and precise applicability *rationae materia*. In fact, under the principle *lex posterior derogat lex priori*, Law 89/67 as a newer law may have implicitly abolished the older Law 2190/1920 as far as the establishment of foreign commercial/industrial public limited companies

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[44] See Pireus Single-member Court of First Instance 1026/86.

[45] See Athens Court of Appeal 3196/83.

[46] After Prime Minister's Decision Y 1201/5.10.90 concerning the determination of the responsibilities of the Deputy Minister of National Economy, both the Minister and the Deputy Minister of National Economy have the authority to approve or reject the petition of foreign companies for their establishment in Greece.

[47] Decision of the ΣτΕ 3289/1980 regulates that according to the relevant stipulations, which were passed to insure not only the safe and sure publication of the administrative acts, but mainly the realisation of the Constitutional principle of the clear action of the State for the declaration of its acts to its citizens, whose legal status they affect, the time of the publication in the Government Gazette is considered to be not the date printed on the Gazette, in favour of which exists only rebuttable presumption of authenticity, but the date, when the Gazette was really and truly released for circulation.

[48] See Article 33 of the Greek Civil Code. According to Legal Advice of the Ministry of Commerce (by Argiropoulos St.) 1027/1983 the company's aim must be an insult to the Greek public order.

[49] As this clause could offer the Greek authorities an excuse, albeit lawful, for the prohibition of the establishment of any company non grata in Greece on the grounds that the company's objectives contradict one of the thousands of existing Greek laws, the Athens Court of Appeal 946/71 has ruled that the term unlawful in Art.33 of the Greek Civil Code should be strictly interpreted.

[50] See Legal Opinion of the Greek Ministry of Commerce 51/1983. It should be noted, however, that very recently (in 1993), Law 4310/1929 was modified and does not apply to EU nationals.

are concerned.[51] However, Law 2190/1920 on public companies limited by shares is a special law compared to the general law 89/67 (regulating the establishment of all types of companies). According to the principle *lex posterior generalis non derogat legi priori speciali*, the newer but general Law 89/67 does not abolish the older but special Law 2190/1920.[52] This is reflected in the express declaration of Art.4 of Law 89/67 that it does not abolish Law 2190/1920. Consequently, both Laws are applicable in parallel.

The question is, which are the differences in their fields of application. The distinction between the two laws lies with the aims of the Greek secondary establishments. Although Law 2190/1920 does not prohibit (therefore allowing) any activity within and outside Greece, Law 89/67 prohibits engagement of the Greek unit in commercial business in Greece.[53] Consequently, if the company's Greek establishment aims to execute commercial transactions in Greece, the company must follow the procedure of Law 2190/1920. If the activities of the Greek unit are limited to co-ordination and control of the company's activity abroad, Law 89/67 is applicable. Thus, Law 89/67 applies to the establishment of branches or agencies of foreign commercial/industrial companies of any type establishing in Greece solely for the co-ordination of their business abroad, and to the establishment of foreign commercial/industrial public limited companies when the unit's activity is exclusively trade abroad. Law 2190/1920 is applicable to the establishment of foreign public companies doing business within and outside Greece, and to the establishment of all commercial/industrial public limited companies not subject to Law 89/67. Law 89/67 creates ideal taxation and commercial status for companies establishing in Greece and ensures their favourable treatment.[54] Proof of its efficiency is

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[51] Simandiras notes that such an abolition of a law may be categorical or silent. Categorical is the abolition of the law, when the newer law includes a special Article, which states that the older law is abolished (or modified). Silent is the abolition of the law, when the content of the new law indicates the will of the legislator to abolish the previously applicable law, or when the newer law is opposed, or incompatible to the older one. See ΟλΑΠ 310/1966. This is the case, when the newer law regulates the same issue either exclusively or in a way completely different from the previous law. See ΑΠ 558/1969. However, when the newer law does not categorically abolish an older one, the issue of the extent of the abolishment of the older law is a matter of interpretation. See C Simandiras, *General Principles of Civil Law*, 3rd edition, Semi-volume A (1980, Sakkoulas, Athens).

[52] See Georgiadis-Stathopoulos, *Civil Code, General Principles* (1978, Sakkoulas, Athens), pp.7-8. Newer general laws do not abolish older but special laws (*lex posterior generalis non derogat legi priori speciali*). Then again, it is a matter of interpretation whether this principle is applied in each case or not. See ΑΠ 221/48, 661/61.

[53] The Ministerial Decisions approving the company's establishment under Law 89/67 clearly prohibit not only the direct, but also the indirect involvement either of the company itself or its staff in any kind of commercial activity or trade within the boundaries of the Greek state.

[54] See Julian Maitland-Walker, *The Guide to European Company Laws* (1993, Sweet and Maxwell, London), p.189, where it is noted that offices operating under the status of Law 89/67 enjoy certain benefits, for example, they are exempted from Greek taxes, they may keep their books in a foreign language, they may import free of custom duties and other charges all necessary office equipment and private cars of its foreign employees, who are also entitled to obtain work permits regardless of their nationality etc.

the large number of foreign companies choosing to establish in Greece under it.[55] In turn, this proves that the companies' main interest is not to undertake commercial activity in Greece, but to supervise their international trade.[56]

B.3. Subsidiaries

Despite the frequent use of subsidiaries as a form of company expansion within the EU, Greek legal theory and commercial practice is not familiar with it. This is due to the combination of the complicated procedure required for their formation and the lack of taxation and other advantages. In addition to this, the continuing Greek breaches on the free movement of capital (analysed in Chapter 5) signify a prohibition to the export of more than 10% of the companies' capital and 12% of their annual profits.[57] Although Acts of the Director of the National Bank of Greece have been waiving these restrictions for one year at a time since 1992, the relevant restrictive laws have not been abolished and the law applicable after the expiry date of each Act is uncertain. These disadvantages combined with the limited (in volume) commercial activity in Greece lead foreign companies to the formation of branches, agencies or off-shore units. However, after the implementation of Presidential Decree 409/1986 adopting Directive 83/349/ 1983, which sets the basis for the harmonisation of Greek with EC law and the modernisation of Greek law on subsidiary companies, their frequency is increasing. Under Decree 409/1986, which supplemented Law 2190/1920 through the addition of Art.42 (e5), a company is considered the subsidiary of a parent company when the latter controls the majority of the subsidiary's shares or exercises a dominant influence over its administration, either directly or through third parties (accumulation principle).[58] A parent-subsidiary relationship exists when the parent company controls at least 50% of the votes of the subsidiary's share-holders or members, either by ownership or by authori-

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[55] Even in the period of the dictatorship, which was characterised by instability and hesitation on behalf of foreigners to invest in Greece, the number of foreign companies establishing a branch or an agency under Law 89/67 was impressive. According to Megglidou the financial press estimated that many hundreds of companies had already established in Greece by 1971. See Megglidou, *op.cit.*, p.207.

From my research in the Government Gazette, where the Ministerial Decisions approving the establishment of companies are published, the number of foreign companies establishing in Greece under Law 89/67 is staggering (at least two approvals are published daily in the Issue of the Government Gazette).

[56] See B. Bizet, *L' entreprise dans les états de la CEE* (1992, Belfond, Paris), p.123.

[57] See B. Bizet, *ibid.*, p.119.

[58] The establishment of subsidiaries is regulated by article 42 of Law 2190/1920, although the establishment of foreign companies in Greece is stipulated by article 50 of the Law. See Perakis, *op.cit.*, p.442. However, Pamboukis considers the acquisition of dominant influence over a Greek public company limited by shares (through the acquisition of shares) by a foreign company, as a form of establishment of the foreign company in Greece, which must be regulated by Art50. See C. Pamboukis, *Inclusion of a public company limited by shares to a multi-national group* (1989, Sakkoulas, Thessaloniki), p.25.

sation of third members;[59] controls the majority of shareholders' or members' votes through an agreement for co-operation with third parties; participates in the capital of the subsidiary and has influence in the appointment and removal of the majority of the subsidiary's directors; and exercises dominant influence over the subsidiary, i.e. possesses at least 20% of the votes and influences its management.[60]

Subsidiaries have separate legal personalities.[61] This leads to the need to determine their *lex fori*. Rokas considers Greek subsidiaries of foreign companies as separate Greek companies on the basis that their seat is located in Greece.[62] This view is supported by the express provision that Decree 409/1986 supplements Art.42 of Law 2190/1920 on the formation of Greek companies rather than Art.50 on the formation of foreign companies. It must be noted that the characterisation of the Greek subsidiaries of foreign companies as Greek is an exemption from the theory of the real seat. Subsidiaries located and formed in Greece but controlled or dominantly influenced by the foreign parent company have their true seat abroad and under Art.10 CC would be considered foreign companies. The parallel validity of Art.10 CC and the Decree led Pamboukis to the false assumption that the acquisition of dominant influence over a Greek company, as a form of establishment of a foreign company in Greece, must be subjected to Art.50 of Law 2190/1920 on foreign companies.[63] Although this view is an accurate application of the prevailing theory of the true seat, it is incorrect in the case of subsidiaries as it disregards the characterisation of subsidiaries as Greek companies.[64] In view of their Greek nationality, subsidiaries need not seek recognition in Greece and are formed under the procedure of Law 2190/1920 on the formation of Greek companies.

In order to form Greek subsidiaries, foreign public companies limited by shares must first draft the Articles of Association of the new company. This is a transaction between two or more natural or legal persons[65] or their representatives[66] certified by a

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[59] See N. Rokas, *op.cit.*, p.183.

[60] The last two conditions are added by L Kotsiris, *op.cit.*, p.79.

[61] See G. Mihalopoulos, "Protection of creditors of subsidiary companies" [1981] 32 EED, pp.33-41, at 356; also see N. Rokas, *op.cit.*, p.183.

[62] See *ibid*, p.16.

[63] See C. Pamboukis, *op.cit.*, p.25.

[64] V. Kiandos justifies the subjection of subsidiaries to Greek law, by noting that they are legally independent of their parent companies. Consequently, they should be considered (legally) Greek companies. See V. Kiandos, *op.cit.*, p.51; also see H. Xanthaki, "The Establishment of Foreign Subsidiaries in Greece", *Nomiki Orizontes* [1993a] pp.16-19, at 17.

[65] According to Art.1 of Legislative Decree 4014/1959, the Greek state can be allowed to form a company by itself. However, a permitting Ministerial Decision is necessary.

[66] The company's Articles of Association include the name of the company, the aim of the company, its duration, the seat of the company, the amount of the share capital, details on the company's shares (number, worth, type) and the identity of the company's founders.

notary.[67] Second, the capital is subscribed either through a decision to maintain all shares with the founders, or through the offer of a number of shares to public subscription. These are paid for in a bank before the third stage. Third, the company acquires administrative authorisation by the County governor[68] who assesses the company's legality and expediency.[69] Fourth, publication requirements must be met. Under Legislative Decree 406/86 on the harmonisation of Greek Company Law with EC regulations, the company submits its permission to establish and its Articles of Association to the Registry of Public Limited Companies. A notification of registration is published to the Issue of Public and Private Limited Companies of the Government Gazette. The company acquires legal personality after its registration to the Register of Public Limited Companies. Publication of the relevant notification to the Government Gazette, however, is extremely important for the company's functioning, as only published provisions of ita articles are admissible to the Greek courts in support of the company.[70] Third parties may rely on all particulars (published or unpublished) entered in the Register.

The procedure introduced for the formation of Greek subsidiaries, which is identical to the procedure followed for the formation of Greek companies, is complicated compared to the formation of branches, agencies or off-shore units where only the last two stages are necessary. The extent of state administrative control on the formation of subsidiaries is broader than that exercised on the formation of branches, agencies and off-shore units. The latter are established with the legal authorisation of the respective

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[67] The notary document is written by a qualified notary, who verifies the truth of the document's content, calls the interested parties, reads the content of the document to them and (after the signing of the document) keeps the original in his archive and has the authority to give certified copies to all who are interested. Thus, the content of the document can not be altered and its content and date of signing can not be argued. Although the notary must prevent the parties from making any kind of legal errors, the parties are also represented by an attorney.

[68] If the administration rejects or refuses to answer to the company's application, the company can appeal to the Council of the State. According to precedents of the Council of the State, the administration controls the formal and substantial legality of the regulations of the company's Articles. See ΣτΕ 413/1950 and 3167/1968. Also see Legislative Decree 532/1970.

[69] The extent of this control has been an issue repeatedly discussed both in theory and in practice. Two opinions have been produced. It is suggested that the state administration has the power to control both the company's legality (i.e. the completion of the legal acts required for its legal formation), as well as its expediency (i.e. its aim and its compatibility with the Greek market in general). Those opposed to the control of the company's expediency state that the administration has no authorisation to control whether the company plays a positive role in the development of the Greek economy, or its capital is sufficient for the completion of its aim). They believe, therefore, that the administration has the legal obligation to give its permission for the formation of the company, provided that the latter was legally formed. Law 2190/1920 adopts the mixed administrative system, according to which authorisation is necessary for the company's legal formation, but the administration controls only the legality of the company. See P. Dagtoglou, "I. Constitutional protection of shares; II. Principle of previous audition of the interested part" [1979] 27 No.V pp.1409-1415 and 1556-1560, at 1556. In certain cases, however, the administration may judge on the expediency of the company's statutes (for example banks, insurance companies and real estate agencies). See N. Rokas, *op.cit.*, p.112.

Minister, who is hierarchically superior to the governor who permits the establishment of subsidiaries. This is due to the fact that the legality of subsidiaries is already supervised by the notary on the first stage of formation, while the legality of branches, agencies and off-shore units is supervised solely by central administration. Thus, the scrutiny of its administrative instruments is necessary. The publication of the company's permission to establish and its articles (imposed to all forms of establishment) protects the public by guaranteeing the company's legality and ensuring knowledge of its articles. It must be noted that Greek authorities may not refuse a permission of establishment without sufficient legal justification. Illegal or inadequate justification is grounds for the annulment of the act by the administrative courts, which may abolish the act of the Minister or the governor and order them to allow establishment.

C. ESTABLISHMENT IN FRANCE

C1. The establishment of branches or agencies

In France secondary establishment may take the form of a branch (*succursale*), agency (*agence*) or subsidiary (*filiale*). Despite the popularity of branches as forms of secondary establishment, both by French and foreign companies, French legal texts fail to introduce an express direct definition of this term. This is usually attributed to the will of the French legislator to subject to this term a wide range of legal relationships between the main establishment and its permanent secondary units.[71] This phenomenon is not exclusively French.[72] However, it leaves ground for the manipulation of the concept of *succursale* by the French courts, which tend to take the opportunity to follow the interpretation, restrictive or broad, which better serves French public interest in each particular case. Thus, the types of secondary units characterised as branches for the purposes of exemption from publicity requirements tend to be rather restricted, whereas the range of secondary units defined as branches for taxation purposes tends to be much broader.[73] This variation in the interpretation of the term, which -admittedly- must no

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[70] Even published regulations are admissible 15 days after their publication, if third parties can prove that they could not possibly learn about them earlier.

[71] See Cass. req., 5 November 1928, *S.*, 1929, I, 177, note Solus.

[72] For an analysis of the same rationale in the Swiss legal system, see F. Diesbold, *Les succursales suisses d' entreprises étrangères* (1958, Lausanne).

[73] See Cons. D' Etat, 7 December 1883, *Rec. Conseil d' Etat*, 1884, 892; Cons. d' Etat, 9 February 1895, *Rec. Conseil d' Etat*, 1895, 146; Cons. d' Etat, 26 April 1895, *Rec. Conseil d' Etat*, 1895, 366; Conseil d' Etat, 16 March 1900, *Rec. Conseil d' Etat*, 1900, 207.

longer be exaggerated,[74] has created insecurity for companies wishing to establish a French branch. The issue is of particular importance to foreign companies, since it is not only the establishment requirements but also the nationality of their French unit that may change according to the various interpretations of the term. In an attempt to solve the problem legal authors usually define branches of foreign companies broadly as "industrial or commercial establishments without legal personality owned by a foreign company".[75] In view of the lack of an express legislative definition and the great number of various interpretations of the term provided by legal authors, French courts now accept that an adequate definition of branches can only be achieved through the description of the concept's constitutive elements.[76]

Despite some initial isolated objections,[77] it is now accepted by French courts and academic opinion that one characteristic of branches is permanence.[78] This view complies with the will of the legislator, who would not have introduced publicity requirements for the establishment of mere temporary or occasional units. Another element of branches, adopted in the past by certain judgements defining them as important "centres of business", seems to be a "certain grade of importance".[79] On this basis, a local unit employing one person was not allowed to serve as a branch.[80] However, recent judgements and academic opinion do not accept that the characterisation of a unit as a branch depends on its importance for the parent company.[81] This view, which succeeds in diminishing the importance of the volume of business conducted by branches, reflects the rationale of the introduction of branches as forms of establishment. Companies requiring legally and financially active secondary units will probably invest on a subsidiary, a form of establishment which guarantees greater freedom of action but requires greater financial and legal commitment from the main establishment. Moreover, the lack of an importance requirement for the characterisation of a unit as a branch seems to comply with the choice of the legislator not to award branches a legal personality.

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[74] See M. Cabrillac, "'Succursales" in J. Labic, Collection des Juris-Classeurs, Traité des Sociétés, vol. 1 (1994, Editions Techniques Jurisclasseurs, Paris), fasc. 28, p.3.

[75] See B. Goldman, A. Lyon-Caen and L. Vogel, *op.cit.*, pp. 94-95.

[76] See Cass., req., 5 November 1928, *S.*, 1929, 1, 177, note Solus.

[77] Trib. com. Compiègne, 7 October 1921, *S.*, 1922, II, 69; Trib. com. Saint-Nazaire, 15 November 1923, *Gaz. Pal.*, 1924, I, 188.

[78] See Peytel and Heymann, "Les établissements à succursales multiples" [1949] *Gaz. Pal.*, *doctr.* 30, n.10; also see M. Cabrillac, "Unité ou pluralité de la notion de succursale en droit privé" in *Dix ans de conférences d' agrégation, Etudes en hommage à J. Hamel* (1961, Paris), p.119.

[79] See Cass. req., 18 November 1890, *Rev. Soc.*, 1891, 144; Cass. civ., 16 March 1927, *Gaz. Pal.*, 1927, II, 43; Cass. civ., 5 April 1949, *Bull. civ.*, 1949, II, n.168, 394; Orléans, 2 February 1889, *Rev. Soc.*, 1889, 199; Rouen, 16 February 1898, *DP*, 1898, II, 408.

[80] See Rennes, 21 March 1907, *Journ. Soc.*, 1909, 69.

One last point of interpretation concerns the extent of the branch's independence from the main establishment. Two issues arise at this point. First, does the end of the branch signify the end of the main unit? The legal basis of the answer to this question can be used as another example of the use of the lack of an express definition of the term by the courts for the support of French interests. In order to introduce the publication requirements for the formation of branches, French judges accepted that the end of the branch must signify the dissolution of the main company.[82] Subsequent judgements have tried to generalise this rationale by using it as the legal basis of arguments concerning most aspects of company functioning.[83] It is certain that due to lack of legal personality by the branch, the dissolution of the main establishment signifies the end of the branch's activity. However, since the branch is not considered to be of vital importance for the main establishment, its end does not necessarily signify the dissolution of the parent company. I therefore tend to disagree with Cabrillac and support the view that the answer to this issue must be a matter of individual consideration of the importance of the branch for the functioning of the company in each case and of the extent to which the branch is financially or otherwise dependent to the main company.[84] The second issue arising here concerns the extent of autonomy required for the characterisation of a secondary company unit as a branch. The view of the French courts has always been that a branch totally isolated from the main establishment is inconceivable.[85] Moreover, *ab definitio* the branch enjoys a certain degree of autonomy reflected in practice by its separate clientele, staff, relationship with third parties[86] and activities.[87] However, absolute autonomy is not a requirement.[88] The decision to exclude absolute autonomy as a criterion for the classification of a secondary unit as a branch is in compliance with the will of the legislator, who introduced the branch as a unit without separate legal personality as opposed to the subsidiary which has separate personality and therefore enjoys a greater degree of autonomy from the main unit.

Branches can be defined as commercial or industrial units[89] which are controlled by a representative of the principal company,[90] have a permanent distinct material es-

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[81] See Cass. civ., 20 October 1965, *D.*, 1966, 193; also see M. Cabrillac, 1961, *op.cit.*, n.10; Peytel and Heymann, *op.cit.*, n.10.

[82] See Bourges, 7 November 1923, *Gaz. Pal.*, 1924, I, 188; *Rev. Soc.*, 1924, 67.

[83] See Agen, 5 April 1950, *Gaz. Pal.*, 1950, II, 31; *D.*, 1950, somm., 46.

[84] See M. Cabrillac, 1994, *op.cit*, p.4.

[85] See Douai, 23 April 1951, *Gaz. Pal.*, 1951, II, 79; Montpellier, 14 May 1951, *Gaz. Pal.*, 1951, I, 349.

[86] See Cass. civ., 20 October 1965, *D.*, 1966, II, 192.

[87] See Y. Loussouarn, *op.cit.*, p.6.

[88] See Bordeaux, 16 May 1923, *Journ. Soc.*, 1924, 280; Riom, 25 July 1931, *Gaz. Pal.*, 1931, II, 454.

[89] See B. Mercadal and P. Macqueron, *op.cit.*, p.210; also see Thieffry et Associés, *op.cit.*, p.154.

tablishment, a certain autonomy to enter into contracts with third parties either in their name or on behalf of the principle establishment[91] and a separate clientele.[92] The advantage of this type of establishment is that, despite the limited investment required for its formation, it has the power to pursue independent commercial activity. This is the main reason for the popularity of branches as a form of expansion of foreign companies in France. It must be noted that the three main elements of this definition, namely permanence, a certain degree of autonomy and some liberty and diversification insofar as clientele and relationship with third parties is concerned, were also used for the definition of branches in EC law by the ECJ.[93]

The importance of the branch for the functioning of the principle establishment is precisely the criterion that commonly distinguishes it from an agency. Agencies are usually secondary units with limited powers to act and simple organisation,[94] which usually conduct mere informative, rather than commercial, activity.[95] To be more precise, the agency is an independent intermediary negotiating and eventually concluding contracts in the name of the company which it represents.[96] However, this distinction has little legal value, since in the majority of cases[97] the law views both branches and agencies simply as a set of units lacking legal personality.[98] As for subsidiaries, the main element distinguishing them from branches and agencies is their legal personality which is separate from that of the parent company.[99]

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[90] Such is the importance awarded to the control of the branch's actions by a representative of the principle company, that the *Court de Cassation* urges the French judges to use this as a principle element in their evaluation on the existence of a branch. See Cass. com., 18 October 1989, *Gaz. Pal.*, 1990, 2, 416, note Barbier.

[91] See Bordeaux, 16 May 1923, *J. Soc.*, 1924, 208; Riom, 25 July 1931, *Gaz. Pal.*, 1931, II, 454; Agen, 22 July 1935, *Gaz. Pal.*, 1935, II, 695.

[92] See M. Cabrilliac, *op.cit.*, p.6.

[93] See case 33/78 *Somafer SA* v *Saar-Ferngas AG* [1978] ECR 2183; [1979] 1 CMLR 490.

[94] See *ibid*, p.5.

[95] See Thieffry et associés, *op.cit.*, p.154.

[96] See B. Bizet, *op.cit.*, p.92.

[97] Thus, an agency fulfilling the conditions for the existence of a branch can also be considered as a branch. However, the contrary is not always true. Thus, the creation of an agency and the awarding of this title to an establishment abroad does not necessarily indicate willingness on behalf of the principal establishment for the creation of a subsidiary. See Rennes, 10 November 1959, *Gaz. Pal.*, 1960, I, 40; *RTD* Com. 1960, 304, note Jauffret.

[98] See Besancon, 25 January 1928, *Gaz. Pal.*, 1928, I, 546; also see G. Ripert and R. Roblot, *Droit Commercial, Tome 1* (1993, Librairie Général de Droit et de Jurisprudence, Paris), p.247.

[99] See Cass. 20 November 1922, *S.*, 1926, I, 305, note Rousseau. It must be noted here that some judges have used this difference between branches and subsidiaries as a means of abolishing the consequences of the existence of a separate personality in some cases of insolvency. Thus, they named some subsidiaries as branches so as to be able to exploit the subsidiary's property in the case of the parent company's termination of payments. See Cass. 13 May 1929, *S.*, 1929, I, 289, note Rousseau; also see Angers 13 July 1956, *JCP*, 56, ed. G, II, 9514; *Gaz. Pal.*, 1958, I, 150; Cass. civ. III, 11 March 1959; *Bull. civ. III*, n 135, p.124: see *contra* Cass. com. 28 June 1957, *JCP*, 1957, p.349; also see Cass. com. 25 April 1968, *Bull. civ. IV*, n 133, p.117; RTC com. 28 June 1968, 1138, note Houin.

Despite its lack of legal personality, the branch can sue and be sued before the French courts,[100] provided that it meets two conditions. First, it must have a permanent, stable establishment in France. A unit dealing exclusively with the administration of personnel, the administration of the company's recruitment or acting exclusively as the executionary intermediary of the main unit cannot sue and be sued before the court of the location of its establishment.[101] Equally, an agency serving as a mere administrative centre of the company cannot sue before the tribunal of the location of its establishment.[102] Second, the case brought before the tribunal of the branch's or agency's establishment must refer to the operation of the branch or agency and not to the activities of the main unit.[103] For any other case the company must still be sued before the courts of its social seat.[104] If this social seat is abroad, French creditors may sue in France both for cases deriving from the operations of the foreign company and from the activity of the French branch or agency.[105] However, for companies originating from other EU Member States cases relating to the validity, nullity or dissolution of the company are heard before the courts of the company's social seat even when the creditor is French.[106]

Recognised foreign companies wishing to establish a branch or agency in France must follow an administrative procedure.[107] They submit to the *Tribunal de commerce* of the area of the proposed unit two official copies, translated in French, of the company's articles of association along with any modifications.[108] The company also undertakes the obligation to submit two copies of its annual accounts as published in the country of the company's social seat. Similar requirements concerning French compa-

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[100] See B. Mercadal and P. Macqueron, *op.cit.*, pp.210 and 177; also see Cass. req., 15 June 1909, DP, 1912, I, 209, note de Boeck; *S.*, 1911, I, 81, note Naquet; Cass. civ., 20 October 1965, *D.*, 1966, II, 192; Aix, 28 June 1978, *Bull. Cour d' Aix*, 1978, 3, 54; Cass. req., 20 January 1936, *S.*, 1936, I, 127; Paris, 12 January 1902, *DP*, 1904, II, 156; Amiens, 25 October 1916, *JDI*, 1917, 623.

[101] See Soc. 10 February 1971, *Bull.*, V, 99.

[102] See T.G.I. Chartres, 20 January 1983, *BRDA*, 1983, 20, 18.

[103] See Paris, 16 February 1994, *Bull. Joly*, 1994, 503, note Daigré.

[104] See Civ., 25 March 1954, *Bull.*, II, 132; Cass. civ., 17 June 1958, *Rev. crit. dr. com.*, 1958, 704, note Francescakis; *Rev. trim. dr. com.*, 1959, 255, note Loussouarn; Paris, 2 November 1962, *JCP* 63, II, 13014; Paris, 26 March 1966, *Clunet*, 1966, 841, note Goldman; *Rev. crit. dr. internat. privé*, 1968, 58, note Loussouarn; Cass. civ., 28 May 1963, *Clunet*, 1963, 1006, note Goldman; *JCP*, 63, II, 13347, note Malaurie.

[105] See Art.14 CC; also see Trib. com. Seine, 7 June 1938, *S.* 1940, II, 51; *Clunet*, 1939, 628; Trib. civ. Metz, 22 February 1950, *D.*, 1950, Som. 46; *Rev. trim. dr. com.*, 1950, 703; Colmar, 23 June 1950, *Rev. trim. dr. com.*, 1950, 704, note Loussouarn; however, see *contra* Trib. Mulhouse, 2 May 1950, *Rev. crit. dr. internat. privé*, 1951, note Niboyer; *Rev. trim. dr. com.*, 1951, 396, note Loussouarn; Cour d' Appel de Paris, 13 March 1976, *Gaz. Pal.*, 1976, II, Som., 309.

[106] See Arts.16-2 of the 1968 Brussels Convention; see Cour d' Appel Versailles, 26 September 1991, *RJDA*, 1992, no 298.

[107] It must be noted here that Directive 89/666, *JOCE*, L 395, 30 December 1989 on the establishment of EU companies within other member states of the Union must also be taken into account. It is widely accepted, however, that the current French laws on publicity and establishment do not violate the directive in question. See M. Cabrillac, 1994, *op.cit.*, p.10.

nies have been abolished since 1935 and 1967 respectively.[109] Moreover, the company submits to the *Tribunal* within 15 days of the unit's opening a document with information on the principal company and the secondary unit and a request for registration in the *Registre de commerce et des sociétés*.[110] The relevant Decree, passed in 1967, is applicable to all types of permanent establishments in France where commercial activities are conducted.[111] The Decree was modified in 1984 and the newly introduced delimitation of secondary units obliged to register with the *Registre* includes all permanent units, distinct from the primary establishment and directed by a person with the power to represent the primary unit in legal acts with third parties.[112] Furthermore, the branches or agencies of foreign companies must always include in their commercial documents the registration number of the main unit, its name, its legal form and the location of its social seat.[113] Companies must also make sure that any non-EU branch employees have permission to work in France[114] and that non-EU directors of the branch or agency possesses a *carte de commerçant étranger*.[115] The relevant documents are also included in the registry. Although this provision may seem discriminatory against foreign employees and directors of branches or agencies in France, two points must be taken into account. First, this provision does not apply to EU citizens, hence there is no difference in the treatment of such persons on the basis of their nationality. Second, French directors of branches or agencies of foreign companies are also included in the registry along with an extract of their birth certificates or proof of naturalisation. Furthermore, since the creation and extension of a branch or agency is considered a direct investment in France, foreign recognised companies must also acquire the relevant permission of the Minister of the Economy and Finance.[116] After the fulfilment of these administrative re-

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[108] See Art 55 of the Decree 84-406 of 30 May 1984, as modified by Decree 92-521 of 16 June 1992.

[109] See M. Cabrillac, *op.cit.*, p.10.

[110] See Arts.1 and 5 of the Decree 84-406 of 30 May 1984. For further analysis, see G. Riper and R. Roblot, *op.cit.*, p. 157.

[111] See Art.21 of the Decree no 67-237 of 23 March 1967; also see Rép. min. no 30725, *JOANQ*, 11 August 1980, p.3380.

[112] See Art.9, par.3 of Decree no 84-406 of 30 May 1984.

[113] See Art.72, par.2 of Decree no 84-406 of 30 May 1984 as amended by Decree 92-521 of 16 June 1992.

[114] On the *carte de resident*, see Art.17 of the *Ordonnance* no 45-2658 as recently modified.

[115] See Art.5 of the Decree of 2 February 1939; also see the Decree of 27 October 1969. The *carte* may only be refused on the basis of the person's incapability to fulfil its obligations as a *commerçant*; see Circ. 24 October 1985, *JO*, 6 February 1985, 2093. The *carte* is no longer required of EU citizens under Art.1 of L. no 84-622 of 17 July 1984.

[116] It must be noted here that this declaration is needed in the case of direct investments of more than FF5Om, invested by companies whose annual turnover (Including that of their controlled companies) is above FF500m. See Decree of 29 December 1989, *JO*, 30 December 1989, Arts. 1-5 (as complemented by Decree 90-58 of 15 January 1990, Art 1; *JO*, 16 January 1990, rect. *JO*, 20 January 1990) as modified by Decree 92-134 of 11 February 1992, *JO*, 12 February 1992.

quirements, the branch may legally function within France. The lack of legal personality signifies that the branch shares the nationality of the principle unit.[117] Thus, the branch's internal structure and powers are ruled by the law of the foreign company's *lex fori.*[118]

C2. Participation in French companies

Branches and agencies are the form of establishment usually chosen when the principal unit wishes to bring its business closer to the French public without risking the loss of control over its secondary units. However, if the foreign company wishes to enter the French market through an independent establishment with its own legal personality and the right to exercise activities different from those conducted by the principal establishment, participation in an already existing French company may be the optimum solution.[119] This can be achieved through the placement of capital and the consequent acquisition of some degree of control over the company.[120] Placement of capital can be either direct or indirect. In the first case, the company may offer property (e.g. immovables or services) to the French entity, or purchase shares or subscribe capital in an increase of capital. In the second case the company may use intermediaries for the offer of property, purchase of shares or subscription of capital.[121] The characterisation of an offer of property, purchase of shares or subscription of capital as indirect participation is a matter of factual interpretation for the French judges, whose aim is to evaluate the intention of the parties. The purchase of shares by six natural persons, who also were the six out of eight shareholders of another company, was declared an indirect participation, even though the six people involved had purchased shares under their own name.[122] The same rationale was followed in a purchase of shares belonging to a French company by the natural persons who were shareholders of a foreign company. This was also declared an indirect method of participation.[123] For the purposes of the law participation only occurs when the acquisition of shares or capital of an already existing company is of a percentage

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[117] See B. Mercadal and P. Janin, *op.cit.*, p. 1239; also see S. Boulin, *op.cit.* par.36; Cass. civ., 20 February 1979, *JCP*, 79, éd. G, II, 19147, note Gulphe; *Rev. soc.*, 1979, 856; *Dr. prat. com. inter.*, 1979, IV, 533, note Mercadal.

[118] See Com. 21 December 1987, *JCP*, 1988, II, 21113, note Montanier; Com. 9 April 1991, *RJDA* 7/91, no 613; Com. 9 March 1993, *RJDA*, 7/93 no 617.

[119] See M. Germain, "Groupes de Sociétés" in J. Labic, *Traité des sociétés,* vol.1 (1992, Editions Techniques Juris-classeurs, Paris), Fasc. 165-2, pp 6-11; also see M. Gegout, "Filiales et participations" in *Encyclopédie Dalloz,* vol Sociétés (Dalloz, Paris), pp.1-30; M. Delapierre and C.-A. Michalet, *Les implantations étrangères en France: Stratégies et Structures* (1996, Calmann-Lévy, Paris), p.28.

[120] See B. Mercadal and P. Janin, *op.cit.*, p.1057.

[121] See *ibid.*, p.1058.

[122] See Com., 13 July 1948, *JCP*, 1949, II, 4938, note Bastian.

between 10 and 50%.[124] In the calculation of this percentage non-voting preferred shares are not taken into consideration.[125]

Such participation bears certain consequences. The directors or members of the directorate or the supervisory board (as well as their spouses) of a company owning more than 10% of the capital of another company may not serve as its statutory auditors.[126] The exercise of functions reserved to statutory auditors must not necessarily be permanent, direct, or beneficial to the company directed by the person in question.[127] Indeed, in a case brought before the *Cour de Cassation* the mere payment of a director's salary which amounted to more than double the average director's salary was considered sufficient proof that the director in question was also acting as an auditor for a company to which the one under his direction was participating.[128] The second consequence of participation is that for a period of five years after the termination of their services, statutory auditors may not be exercise the same function in companies owing more than 10% of the capital of the company where they were initially employed or a company they have audited or of which that company owes 10% of the capital at the time of the termination of their services as statutory auditors.[129] This prohibition is a mandatory regulation, the violation of which results to nullity of the acts reached irregularly.[130] Another consequence of participation is that the board of directors, the directorate or the manager of any company having interests must annex to the balance sheet a table for the purpose of showing the condition of such interests.[131] Moreover, a company holding 10% or more of the capital of a company on the basis of debts or other obligations may not, at any General Assembly meeting, participate in the voting process by using the bonds/debts which it holds.[132] Furthermore, as a general principle, a stock company may not own shares of another company if the latter holds more than 10% of its capital,[133] whereas if a company other than a stock company has as one of its partners or associates a stock company holding more than 10% of its capital, the first

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[123] See Cass. Req., 20 November 1922, *S.*, 1926, I, 306, note Rousseau.
[124] See Art.355 of Law 66-537 of 24 June 1966 on Commercial Companies.
[125] See Art.269-9 of Law 66-537 of 24 June 1966 on Commercial Companies, as modified by Law 78-741 of 13 July 1978.
[126] See Art.220-3 of Law 537 of 24 July 1966.
[127] See Crim., 18 October 1983, *D.*, 1984, 361, note Vidal.
[128] See Crim., 24 May 1983, *D.* 1984, 101, note Vidal.
[129] See Art.221, par.2 of Law 537 of 24 July 1966.
[130] See Soc., 20 October 1976, *D.*, 1976, *IR.*, 296; *Rev. soc.*, 1977, 277, note Guyénot.
[131] See Art.357 of Law 537 of 24 July 1966.
[132] See Art.308, par.4 of Law 537 of 24 July 1966.
[133] See Art.358, par.1 of Law 537 of 24 July 1966.

company may not hold shares issued by the second.[134] However, these regulations, applicable exclusively in the case of public companies limited by shares,[135] are widely considered inapplicable in the case of foreign companies.[136]

C3. Subsidiaries

Company participation to a percentage higher than 50% constitutes secondary establishment via a subsidiary. French law expressly defines the subsidiary as a company whose capital belongs to another company in a percentage of more than 50%.[137] In the calculation of this percentage non-voting preferred shares are not taken into consideration.[138] Goldman and Lyon-Caen define the subsidiary of a foreign company as a company separate from the foreign one, which has been constituted under the law of its social seat and whose parent company has control through the ownership of a substantial part of the subsidiary's capital either by financial or by other means.[139] The definition of subsidiaries by the law seems to rely on a purely mathematical criterion. However, it is now widely accepted that the mathematical criterion is inadequate.[140] Therefore, it is not the precise percentage of capital participation, but the dependence of the one company on the other that characterises a relationship between parent company and subsidiary.[141] This dependence may derive from either financial or administrative control of the parent company over the subsidiary.[142] The exact percentage of capital participation that would lead to financial control cannot be generally stated. It is agreed that it cannot be below 10%.[143] In general it can be stated that the percentage required is the one necessary under the particular circumstances of each case for the acquisition of control over the sub-

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[134] See Art.359, par.1 of Law 537 of 24 July 1966.

[135] See Rapp. au Sénat, 27 April 1966, *JO, Déb. Sénat*, p.364; also see Rép. Minist., *JO, Déb. Ass. Nat.*, 31 October 1974, p.573; *Rev. soc.*, 1975, 184; *Rev. trim. dr. com.*, 1975, 104, note Houin.

[136] See Gégout, *op.cit.*, p.13; also see Instr. D.G.E. no 4643, 3 May 1943, *JCP*, 1943, III, 7917; Décis. Minist. Fin., 11 May 1943 in response to an inquiry by ANSA: ANSA, *Communic.*, no 378; Percerou, "Commentaire de la loi du 4 mars 1943" [1943] *DC* L, 61, Art.8, n.2.

[137] See F. Lemeunier, *op.cit.*, p.60; also see Art. 354 of Law 537 of 24 July 1966.

[138] See Art.269-9 of Law 66-537 of 24 June 1966 on Commercial Companies, as modified by Law 78-741 of 13 July 1978.

[139] See B. Goldman and A. Lyon-Caen, *op.cit.*, p.93.

[140] See B. Mercadal and P. Janin, *op.cit.*, p.1057.

[141] See M. Gegout, *op. cit.*, p.7.

[142] See B. Mercadal and P. Macqueron, *op.cit.*, p.259.

[143] A percentage of a mere 26% was considered sufficient for the characterisation of a company as subsidiary on the basis that in that particular case it allowed the parent company to exercise influence on the execution of the subsidiary's social object. See Com., 24 November 1992, *Bull. civ.*, IV, 367; *Bull. Joly*, 1993, 224, note Le Cannu; *Dr. soc.*, 1993, 11, note Nabasque; *D.*, 1993, *IR.*, 14.

sidiary by the parent company.[144] Administrative control exists when the parent company has, on its own or after agreement with other participants, control over the majority of votes in the general assembly. This occurs when the parent company holds, directly or indirectly, a percentage of capital giving it the majority of voting rights at shareholder's meetings of the subsidiary, when the parent company has –under an agreement with other shareholders[145]– the majority of voting rights of the subsidiary, or when the parent company can determine through its voting rights the decisions of the shareholders' meetings of the subsidiary.[146] Proof of any aspect of administrative control (in the board of directors or other decision-making organs) may be adequate proof of parent company-subsidiary relationship.[147] Thus, the establishment of a company by the agency of another company, which also rented the building where the first company had its social seat was considered sufficient proof of a parent-subsidiary relationship.[148] Also, the employment of three common administrators was judged as a factor creating a subsidiary-parent link.[149] However, a common aim, common general interests and common commercial agents were not considered enough evidence of such a bond.[150]

One of the main characteristics of the subsidiary is the combination of financial or administrative control by the parent company with legal and judicial autonomy. This autonomy is reflected in the fact that, despite the possible financial and administrative bonds between parent company and subsidiary, the latter is considered a legal entity separate from the company which participates in its capital and might share its directors and administrators.[151] One of the results of this separate personality, and one of the main attractions of subsidiaries as a form of establishment, is that they do not share the parent

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[144] See *ibid.*, p.8; also see Nancy, 5 February 1921, *Gaz. Pal.*, 1921, II, 397; Rennes, 16 June 1930, *Journ. soc.*, 1932, 401, note Lecompte; Requ., 12 May 1931, *DH*, 1931, 329.

[145] In principle, a shareholder cannot renounce his/her right to vote. See Com., 10 June 1960, *Rev. soc.*, 1961, 34, note Autesserre. Any such agreement is not valid. See Com., 17 June 1974, *Gaz. Pal.*, 1975, I, 127; *RTD com.*, 1975, 534, note Houin; *Rev. soc.*, 1977, 84, note Randoux. However, agreements limiting the right to vote for the protection of a social interest are valid. See M. Dailly, *JO, Déb. Sénat*, 25 June 1985, p.1589; also see Trib. com. Paris, 1 August 1974, *Rev. soc.*, 1974, 685, note Oppetit; *RTD com.*, 1974, 130, note Houin; Trib. com. Paris, 4 March 1981, *RJ com.*, 1982, 7, note de Fontbressin.

[146] See Art.354 of the Law of 24 July 1966.

[147] See Art.355-1 of the Law of 24 July 1966. For an analysis of the notion of control,, see M. Gegout, *op.cit.*, pp.8-9; also see M. Germain, *op.cit.*, pp.3-6. It must be noted here that judicial action for the exclusive purpose of declaring that a company is controlled by another is not admissible. See M. Bourguignon, *JO, Déd. Ass. Nat.*, 13 June 1985, p.1647.

[148] See Req., 20 November 1922, *S.*, 1926, I, 305, note Rousseau.

[149] See Com., 13 July 1948, *JCP*, 1949, II, 4938, note Bastian.

[150] See Civ., 21 November 1934, *S.*, 1936, I, 289, note Rousseau.

[151] See Paris, 31 May 1989, *D.*, 1989, *IR.*, 227;.Paris, 4 May 1990, *D.*, 1990, *IR.*, 156; *Rev. soc.*, 1990, 449.

company's debts and *vice versa*.[152] Attempts to argue the opposite on the basis that the companies share a common name, representation and interests failed.[153] Thus, the parent company may not attempt to pursue payment for the subsidiary' debts.[154] Moreover, the parent company may not intervene in the decisions of the subsidiary's directors concerning property of the subsidiary which is separate from the one shared by the shareholders.[155] Furthermore, the end of administrators' or agents' employment or agency contract with the parent company does not necessarily signify the end of their contract with the subsidiary, provided that it is not due to their acting illegitimately.[156] Also, cooperation between parent and subsidiary for the fulfilment of obligations deriving from contracts of exclusivity constitutes a breach of that contract.[157] Lastly, the direct or indirect acceptance of remuneration by the statutory auditor of a public company limited by shares from a subsidiary company is a criminal offence.[158]

The main consequence of the subsidiary's autonomy is its separate legal personality. Since the subsidiary's centre of business, direction and administration lies in France, its is considered a French company,[159] which –without need for recognition– can freely establish in France under the same procedure and conditions followed by domestic companies.[160] Thus, a French subsidiary of a foreign company, whose social seat, principal establishment, direction and exploitation was in France was considered a French company.[161] This separate legal personality has often been used by French judges in their assessment on the legal nature of a secondary unit in France. Two units sharing the same administrators, location, buildings, personnel and liability obligations were evaluated as a main company establishment and an agency, rather than a subsidi-

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[152] See Paris, 31 May 1989, *D.*, 1989, *IR.*, 227; Com., 4 January 1982, *Rev. soc.*, 1983, 95, note Burst; Com., 28 May 1991, *Bull. civ.*, IV, 182; *Defrénois*, 1992, 906, note J, Honorat; *Rev. soc.*, 1991, 764; Com., 6 April 1993, *RJDA*, 1993, 705; *Bull. Joly*, 1993, 677.

[153] See Civ., 21 November 1934, *S.*, 1936, I, 289, note Rousseau.

[154] See Com., 12 May 1981, *Rev. soc.*, 1982, 318, note Chartier.

[155] See Paris, 16 May 1978, *Rev. soc.* 1979, 72, note Guyénot.

[156] See Reims, 10 November 1975, *Rev. soc.*, 1976, 307, note Guyénot.

[157] See Com., 24 May 1982, *Rev. soc.*, 1983, 361, note Béguin; Com., 29 June 1993, *Bull. Joly*, 1993, 1124, note Couret.

[158] See Art.220-4 of the Law of 1966; also see Trib. corr. Nantes, 25 September 1981, *D.*, 1982, 568; *Rev. soc.*, 1981, 775, note Guyon; Crim., 18 October 1983, *D.*, 1984, 361, note Vidal. Equally forbidden is global remuneration, indeed without being necessary for the judges to attribute this or part of it to this forbidden activity. See Crim., 3 January 1983, *D.*, 1983, *IR*, 208; *JCP*, 1983, II, 20070, note Vivandier; *Rev. soc.*, 1984, 114, note Bouloc.

[159] See Cass. 25 February 1895, *D.*, 95, 1, 341; *S.*, 95, 1, 180; *Req.*, 9 April 1913, *S.*, 1913, 1, 225; Civ. 15 June 1957, *D.*, 1957, 596; Paris, 30 January 1970, *RDC*, 1972, 493; also see B. Bizet.

[160] See M. Gegout, *op. cit.*, pp.16 and 21.

[161] See Cass., 8 February 1972, *Bull. civ.*, III, 83; *Clunet*, 1973, 218, note Oppetit; *Rev. trim. dr. com.*, 1973, 672, note Loussouarn; *Rev. crit.dr. inter. fr.*, 1973, 299; also see Cass., 10 March 1976, *Rev. crit. dr. inter. privé*, 1976, 658.

ary.[162] The same fate awaited a secondary unit sharing with the primary establishment the same funds and shareholders, whose employees and agents were supervised by and accountable to the main unit.[163] Also the debtors of two units with the same social aim, social seat, branches, telephone number and correspondence signature, which were evaluated as sharing the same legal personality and were linked in a company-agency relationship,[164] were allowed to pursue payment by either of the two.[165]

Foreign companies may choose to establish under any of the several company types introduced by French law. However, in view of the favourable taxation, the limited liability for all associates[166] and the possibility for entrance in the Stock Exchange, companies tend to opt for a company limited by shares. Since the subsidiary is a French company, its structure and functioning is ruled by French law on the functioning of domestic companies.[167] Foreign companies wishing to establish a subsidiary SA in France may chose between two types of formation, with or without public offering.[168] For the incorporation of a subsidiary without public offering, the company is formed by subscription to the capital,[169] the adoption of its statutes by a minimum of seven *bona fide* shareholders[170] and the completion of publicity requirements.[171] Subscription to the capital, which cannot be less than 250,000FF, may take the form of payment in cash or contributions in kind, namely offer of services or transfer of real rights.[172] These must be

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[162] See Req., 13 May 1929, *S.*, 1921, I, 289.

[163] See Angers, 13 July 1956, *Gaz. Pal.*, 1956, II, 125.

[164] See Req., 19 June 1929, *S.*, 1930, I, 176.

[165] See Poitiers, 7 March, 1933, *S.*, 1933, II, 124; also see Paris, 20 March 1986, *Rev. soc.*, 1987, 98; Aix-en-Provence, 11 January 1985, *Rev. soc.*, 1987, 98; Com., 8 October 1988, *Bul. Joly*, 1988, 923, note Le Cannu; Com., 1 March 1994, *Bull. civ.*, IV, 93; *Dr. soc.*, 1994, 87, note Bonneau; Trib. com. Paris, 10 March 1992, *RJDA*, 1992, 831; Trib. civ. Seine, 15 November 1957, *JCP*, 1958, II, 10420.

[166] The liability of all associates in both private and public companies limited by shares is limited to the value of their contributions. See C. Morlou, *Créez votre entreprise dans la CEE* (1990, ANCE, Paris), p.70.

[167] See M. Gegout, *op.cit.*, p.21; also see B. Bizet, *op. cit.*, p.93.

[168] Formation with public offering is regulated by Arts.74-83 of Law 537 of 24 July 1966, whereas formation without offering is stipulated by Arts.84-88 of the same law.

[169] Under Art.71 of Law 537 of 24 July 1966 the capital must be FF1,500,000 if the company makes public offering of shares and FF250,000 if it does not. Under Art.72 of the same law, a company is considered to make public offerings mainly if its securities are officially listed on a stock exchange.

[170] See Art.73 of Law 537 of 24 July 1966. The choice of number seven in the number of shareholders required for the legal formation of a company seem to have no rational explanation. See Y. Guyon, *La Société Anonyme* (1994, Dalloz, Paris), p.9.

[171] See CCH International, French Law on *Commercial Companies as of January 1, 1988* (1988, Commerce Clearing House, Chicago), p.3; also see B. Bizet, *op.cit.*, pp.95-96; Arts.74-88 of Law 537 of 24 July 1966.

[172] See Crim., 14 January 1905, *DP*, 1906, I, 129, note Le Poittevin; *S.*, 1907, I, 529, note Wahl; also see Brebner and Co, *op.cit.*, p.79; P. Didier, *Les sociétés commerciales* (1991, Presses Universitaires de France, Paris), p.47.

legal and transferable.[173] The funds used for the subscription of capital must be deposited to a notary, a bank or the *Caisse des dépôts et consignations*.[174] After the end of the formation procedure and on production of a certificate of registration by the secretary of the relevant tribunal,[175] funds can be withdrawn by the directors of the company.[176] The adoption of the company's statutes by less than seven shareholders results in its nullity,[177] even when the company has managed to complete the administrative procedure for its legal formation.[178] The requirement of a minimum of seven shareholders ceases after the adoption of the statutes.[179] There are no specific conditions for the qualification of natural or legal persons as shareholders. Spouses or even non-emancipated minors may legally sign the company's statutes.[180] The publicity requirements consist of the publication of the company's statutes in the *Journal d' annonces légales* of the location of its social seat, the submission of two copies of the constitution, the shareholders' list and the report of the statutory auditor to the clerk of the *Tribunal de commerce* of the company's social seat and the registration of the company to the *Registre du commerce et des sociétés* and other administrations, namely tax and social security authorities, a procedure which usually takes approximately one month.[181]

For the constitution of a subsidiary with public offering, a procedure of six stages must be followed. First, the company's statutes signed by one or more founding shareholders is submitted to the clerk of the commercial tribunal at the location of the company's social seat. Second, a notice is published in the *Journal d' annonces légales* of the location of its social seat. This notice is also submitted to the *Commission des opérations de bourse.* Third, the subscription of capital (minimum of 1,500,000 FF) takes place.[182] Fourth, the elements of this capital are submitted to a notary, a bank or

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[173] See Civ., 21 July 1987, *JCP*, 1987, E, 16959, note Viandier et Caussain; also see Y. Chaput, *op. cit.*, p.73.

[174] This certificate bears no legal certifying value; it is a mere administrative document required for the company's matriculation in the company registry. See Trib. com. Paris, 20 February 1991, *Dr. soc.*, 1991, 319.

[175] This has to be produced within five days of the submission of the relevant documents. Should the clerk fail to reach a decision on the legality of the matriculation within five days, the company is considered matriculated. See Art.31 of the Decree of 30 May 1984; also see Y. Guyon, *op.cit.*, p.13.

[176] See Y. Reinhard, *op.cit.* p.4.

[177] See Com., 17 November 1969, *Bull. civ.*, IV, 346; *D.*, 1970, *Som.*, 115; *JCP*, 1970, II, 16304; *Rev. soc.*, 1970, 290, *Gaz. Pal.*, 1970, I, 38. It must be noted here that the relevant Art.87 of the Law of 1966 has been modified by Law 83-1 of 3 January 1983.

[178] See Com., 17 July 1974, *Bull. civ.*, IV, 233; *Rev. soc.*, 1975, 649, note Hémard.

[179] See Bordeaux, 20 July 1931, *DP*, 1933, II, 129, note Pic.

[180] See Y. Reinhard, "Société Anonyme" in *Guide Juridique Dalloz* (Dalloz, Paris), fasc.475, p.2.

[181] See C. and L. Belmont, *European Company Law* (1989, FT Business Information Ltd., London), p.52.

[182] See Art.75 of Law 66-537 of 24 July 1966 as modified by Law 94-475 of 10 June 1994. Prior to this modification only half of the capital had to be subscribed. It must be noted that any subscription must be

the *Caisse des dépôts et consignations.*[183] Fifth, the first constituting General Assembly is called[184] and agrees the value of shares, adopts the statutes, ratifies decisions already taken and agrees on the participants to the company's bodies.[185] Sixth, the company's statutes are included in the *Journal d' annonces légales* of the location of its social seat, two copies of the constitution are submitted to the clerk of the *Tribunal de commerce* of the social seat and the company is included to the *Registre du commerce et des sociétés.*

D. ESTABLISHMENT IN ITALY

D1. The establishment of branches or agencies

Italian law does not distinguish between branches or agencies. The relevant provisions refer to secondary seats, a terminology which has not been altered even after the modification of Art.2506 CC on foreign companies with secondary seats in Italy for the purpose of harmonising this provision with Directive 89/666 on the publicity requirements concerning the "branches" of foreign companies within other EU Member States.[186] The only distinction in forms of secondary establishment refers to secondary seats of foreign companies in Italy regulated by Art.2506 CC and governed by the law of the principal unit's social seat, and foreign companies establishing a principal place of business in Italy regulated under the newly modified Art.2505 CC.[187]

Secondary seats are defined as locations of business with permanent representation from the main unit, located in a place different from the location of the principal unit, with a stable organisation of persons and means directed to the development of the company's social activity.[188] The activity of the secondary seat must be conducted in a location different from the one of the main unit.[189] It must both be relatively independent

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simple and pure. See Rouen, 21 June 1957, *D.*, 1957, 628; *S.*, 1958, 53; *Rev. soc.*, 1957, 405; also see T. com. Lyon, 28 February 1944, *Journ. soc.*, 1945, 115. Thus, conditional obligations are not valid. See Paris, 9 May 1868, *DP*, 1868, II, 173.

[183] In the case of fraud committed by the company's director by not submitting all capital to the notary, bank or *Caisse*, the remaining capital can be added without any consequences on the validity of the company formation. See Crim., 10 May 1993, *Bull. Joly*, 849, note Le Cannu.

[184] See Art.79 of Law 66-537 of 24 July 1966 as modified by Law 83-1 of 3 January 1983.

[185] For further analysis on the process and aim of the constitutive General Assembly, see Y. Reinhard, *op. cit.*, p.5; also see F. Lemeunier, *op.cit.*, pp.228-230.

[186] See D.Lgs. of 29 December 1992, no 516.

[187] See G. Millozza, *op.cit.*, p.708.

[188] See F. Martinelli, *Manuale delle società azionarie* (1995, Pirola, Milano), pp.31-32.

[189] See Cass., 4 February 1969, no 341, *Foro it.*, 1969, I, 1842 341/69; also see Cendon, *op.cit.*, p.884.

from the activity of the company's main unit and permanent.[190] Thus, the creation of a mere representation office and the offer of legal services for the signing of contracts between the main unit and its clients was not considered a formation of a secondary seat in Italy.[191] Moreover, the characterisation of a shipping agency as the secondary seat of a foreign company was not allowed to be based on the mere permanent, independent activity of the agency. The latter had to prove the formation of an organisational nucleus with organic bonds with the principal unit and a separate legal purpose for its existence in Italy other than to merely represent the main unit by signing contracts with its clients.[192] Furthermore, a representation office serving as a mere information point of the principal unit for possible clients at the location of the secondary unit was not classified as a secondary seat.[193] Indeed, it is this independent activity that gives rise to publicity requirements by the secondary seat. The latter has the obligation to publicise the details of the formation, existence and functioning of the secondary seat, as well as the exact nature of its dependent relationship with the main establishment of the company "whose it is only an organ, although it might seem to appear as legally autonomous".[194] The organic bond between the principal and secondary seat of a company does not necessarily imply the existence of an employer-employee relationship between the two.[195] Thus, a general managerial service for the principal company could fall within the activities of a secondary seat.[196] The assessment on the existence of a branch is a matter of factual interpretation.[197] Thus, agents or even legally independent companies may constitute a branch depending on the relevant factual circumstances.[198]

In the past the need for publicity requirements was under debate. The substance of the debate concerned the need for ratification of the permission for secondary establishment by the Italian tribunals. Those who argued for the necessity of ratification supported the view that the will of the legislator to introduce state authorisation for the es-

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[190] See C. Angelici, "Società costituite o operandi all' estero" in Trecchani, G., *Enciclipedia Giuridica* (1993, Istituto della Enciclopedia Giuridica, Italy), p.5; see Cian-Trabucchi, *op.cit.*, p.1680.

[191] See Trib. Roma, 24 November 1987, *Soc.*, 1988, 395; also see Cass., 4 February 1969, no 341, *Foro it.*, 1969, I, 1842; Trib. Milano, 9 December 1963, *Banca borsa*, 1964, II, 114.

[192] See Cass., sez. I, 8 March 1969, no 762, *Mass. dec. civ.*, 1969, fasc. 3, no 339.074.

[193] See Trib. Roma, 24 November 1987, *Soc.*, IV, 1988, 395.

[194] See Cass., 6 September 1968, no 2881, *Riv. dir. com.*, 1970, II, 9; also see Cass., 19 November 1971, no 3319, *Riv. not.*, 1972, 581.

[195] See Cass., sez. un., 15 November 1960, no 3041, *Dir. fall.*, 1961, II, 317.

[196] See Trib. Venezia, 24 June 1969, *Foro it.*, 1970, I, 653; App. Genova, 18 October 1962, *Foro it. Rep.*, 1964, *Società*, 316-317; Cass., 15 November 1960, no 3041, *Foro it. Rep.*, 1960, *Società*, 493; Cass., 26 October 1955, no 3941, *Foro it.*, 1956, I, 335.

[197] See Cass., 15 November 1960, no 3041, *Giust. civ.*, 1961, 650.

[198] See Cass., 30 November 1967, no 2854, *Boll. trib. inf.*, 1968, 722.

tablishment of branches was clearly reflected in the need for publicity requirements.[199] Those opposing ratification could not see the need for publicity either.[200] The issue is no longer under debate. Consequent to the introduction of Legislative Degree 516/1992, an express compromising position is now in force. Ratification or authorisation by the Italian authorities is not required for the legal formation of a secondary seat in Italy. However, publicity requirements have to be met.[201] This position is similar to the Greek and French provisions, which in turn are harmonised with EC legislation. It must be accepted that publicity requirements are useful for the protection of Italian public order, the foreign companies and the Italian public. However, it is doubtful whether Italy as an EU Member State could justify the need for state ratification for the functioning of a unit, which -not being a subject of rights or obligations under Italian law- lacks legal personality separate from the main company unit.[202] The introduction of such a ratification requirement could have been characterised as a hindrance to the free establishment of foreign companies in Italy.[203]

Secondary seats lack legal personality.[204] Thus, the transfer of employees from the secondary seat to the principal unit can not entail the end of their initial contract with the branch and its novation by a contract with the principal unit.[205] This is based on the opinion that the initial employment contract was really with the main establishment, even if the contract was between the employee and the secondary seat.[206] Moreover, due to the lack of legal autonomy between the principle seat and the secondary seat, which is considered a mere organ of the main unit, their participation in a creditor-debtor relationship is not legally conceivable.[207] The main unit is fully liable for all debts and obligations of the secondary unit.[208] Furthermore, the change of company type must be announced in the locations of both the company's primary and secondary units.[209]

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[199] See Trib. Milano, 19 March 1979, *Riv. not.*, 1979, 275; Trib. Roma, 11 July 1984, *Soc.*, 1985, 736; Trib. Milano, 10 February 1976, *Giur. comm.*, 1976, II, 810, note Ubertazzi; *Riv. soc.*, 1975, 1268, Monti.

[200] See Trib. Firenze, 12 April 1979, *Riv. not.*, 1979, 656; Trib. Roma, 25 January 1980, *Foro it.*, 1980, I, 3099.

[201] See Trib. Udine, 18 June 1993, *Soc.*, 1993, IX, 1255; Trib. Livorno, 15 March 1994, *Soc.*, 1994, IIX, 1112.

[202] See Cass., sez. lav., 26 October 1982, no 5597.

[203] It must be noted, however, that for reasons of public interest such an obligation is introduced for units dealing with banking. See Trib. Milano, 10 February 1976, *Giur. comm.*, 1976, II, 810 note Ubertazzi; Trib. Roma, 3 October 1984, *Riv. dir. com.*, 1985, II, 215, note Ferri.

[204] See Cian-Trabucchi, *op.cit.*, 1680.

[205] See Cass., sez. lav., 12 June 1982, no 3573, *Mass. dec. civ.*, 1982, 421, 538.

[206] See Cass., sez. lav., 1 December 1986, no 7096, *Mass. dec. civ.*, 1986, fasc.12.

[207] See Cass., sez. I, 6 September 1968, no 2881, *Giust. civ. Mass.*, 1968, 1500; *Dir. fall.*, 1969, II, 272; also see Benini, *Le società civili e commerciali nei paesi minori d' Europa* (1964, Padova), p.370.

[208] See J. Maitland-Walker, *op.cit.*, p.252.

[209] This must also be included in both registries. See App. Milano, 27 March 1959, *Dir. fall.*, 1959, II, 427.

The procedure for the establishment of secondary seats in Italy has recently been modified in order to comply with EC law.[210] A copy of the company's constitutive act must be submitted for registration in the *Registro delle imprese* of the location where the company establishes a secondary seat with permanent representation within thirty days from the establishment.[211] In order to prove the permanence of the representation, the company has to delegate a wide range of powers to the representative.[212] The permanence requirement refers to the unit and its activity and not to the natural or legal person who serves as a representative.[213] The copy must state the registry where the company is registered and the date of registration. With relation to public companies limited by shares, a copy of the decision of its General Assembly or a clause in its statutes permitting the formation of secondary seats must also be submitted for registration.[214] Moreover, the company must ensure that the creation of its secondary seat is included in the registry where the primary unit is registered. Furthermore, a form signed by the company's permanent representatives must also be registered.[215] This form must also include the name, surname, date, place of birth and authentic signature of the permanent representatives.[216] The aim of these publicity requirements is not to notify the public of a division in the company, but to expressly manifest the organic bond between primary and secondary establishment.[217] Ratification by the tribunal of the location of the secondary seat is not required for the legal formation of a secondary unit. This can be attributed to the fact that the legislator did not intend to link the formation of secondary seats with modification of the company statutes.[218] However, some argue that a modification does in effect take place and support the consequent view that a decision for extension can only be taken by the special majority introduced by the company's *lex fori* for the intro-

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[210] See Legislative Decree 142 of 19 February 1992, which enacts Directive 89/666 of 21 December 1989 on publicity requirements for the establishment of branches within the EU; also see Trib. Milano, 8 March 1994, *Riv dir.int.priv.proc,*, 1995, 135; Trib. Livorno, 15 March 1994, *Riv. not.*, 1994, 1444.

[211] See Trib. di Roma, 3 October 1984, *Le Soc.*, 1985, 303; also see Ministero dell' Industria, del Commercio e dell' Artigianato, *Circolare n.3202/C: Istruzioni sugli accertamenti da effettuare e sulla documentazione da richiedere per le denunce di iscrizione, di modificazione e di cessazione per il registro delle ditte*, 22 January 1990, *Gazzetta Ufficiale*, Serie generale, n.31, 7.2.1990, p.3.

[212] See Cass., sez. un., 15 November 1960, no 3041, *Giust. civ.*, 1961, 650.

[213] See Maisto and Miscali, *op.cit.*, p.33.

[214] See App. Milano, 19 January 1979, *Il Sole-24 ore- Guida norm.*, 1979, no 6, p.95.

[215] See Art.2299 CC.

[216] See Art.2506 CC; also see F. Laurino, "Pubblicità delle succursali all'estero" [1993] *Rivista delle Società*, pp.250-254, at 252.

[217] See Cass., sez. I, 13 May 1967, no 1005, *Dir. fall.*, 1967, II, 854; also Graziani, *Diritto delle società* (1963, Napoli), pp.139 and 190; Greco, *La società nel sistema legislativo italiano* (1959, Torino), pp.491 and 504.

[218] See Trib. Torino, 10 July 1986, *Giur. comm.*, 1986, II, 868.

duction of major decisions on the development of the company's activity.[219] In addition to these publicity requirements, the branch must register with the Chamber of Commerce of the province of its location. The branch must deposit a certified copy of the company's articles, a copy of its resolution to set up a branch, the name of its representatives and its fiscal number.[220] Persons liable for non-completion of these requirements are the company administrators and the notary appointed to certify the legal formation of the branch.[221] However, the non-fulfilment of the administrative requirements for the legal formation of a secondary seat does not lead to the nullity of the formation, but to the mere lack of proof concerning the company's characteristics against third parties.[222] Thus, such a company would be considered a *de facto* personal partnership.[223]

D2. The establishment of subsidiary companies in Italy

The issue of subsidiaries is complicated, as Italian law makes no direct or express reference to this concept. The need for the clarification of this term and the determination of the equivalent Italian concept first arose for the purposes of EC law. The Italian text of Art.43 EC refers to *filiali*, a term which Italian judicial theory and practice considered "substantially equivalent" to the notion of secondary seats.[224] As a result of this, the *filiale* of a foreign company was considered to be a "general agency" which dealt exclusively with contracts signed between the parent company and third parties in Italy and shared the property of the parent company.[225] On this legal basis, *filiali* were not considered to have a legal personality separate from the parent company and for their establishment in Italy applicable were the regulations concerning the formation of secondary seats.[226] This initial misunderstanding derived from the wrong terminology used in the Italian version of the Treaty of Rome. The term *filiali* might sound similar to the French

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[219] See Trib. Bari, 26 September 1983, *Vita not.*, 1984, 1010; App. Milano, 13 June 1983, *Vita not.*, 1983, 1551; also see F. Martinelli, *op.cit.*, p.31.

[220] See Art.7 of the relevant Ministerial Decision of 9 March 1992.

[221] See F. Di Sabbato, *Manuale delle società* (1992, UTET, Torino), p.182.

[222] See Art.2297 CC.

[223] See Cass., sez. I, 26 June 1990, no 6491, *Mass. dec. civ.*, 1990, 468.017.

[224] See A. Pietrobon, *L' interpretazione della nozione comunitaria di filiale* (1990, CEDAM, Rome), p.101; also see Messineo, *Manuale di diritto civile e commerciale* (1952, Milano), p.332; Scarpello, "Succursale" in *Nuovo Digesto Italiano* (1940, Torino) pp.1188-1190, at 1118.

[225] See Cass., sez. II, 8 January 1966, no 157, *Giur. it.*, 1966, I, 1, 723; *Foro it.*, 1966, I, 1310.

[226] See Trib. Bologna, 25 February 1966, *Giur. it.*, 1966, I, 2, 289; *Dir. fall.*, 1966, II, 284; also see Cass., sez. II, 18 June 1964, no 1556, *Dir. fall.*, 1964, II, 410.

term *filiales*, but in Italian law corresponds to a completely different concept.[227] The suitable term reflecting the characteristics of subsidiaries as used in EC primary and secondary regulations would have to be *società affiliate*, which refers to autonomous legal entities with some degree of control by the parent company.[228] However, even the use of the most suitable term fails to solve the problem. *Società affiliate* are not expressly regulated in Italian law, which views them as Italian companies whose establishment in Italy is often misevaluated as primary establishment.[229] Under Art.2510 CC companies with prevailing foreign interests are subject to Italian law. Thus, companies formed and functioning in Italy remain Italian even if they represent foreign interests.[230] Under Art.2509 CC companies formed in Italy are considered Italian even when their principle object of enterprise or their seat is situated abroad. Thus, the Italian subsidiaries of foreign companies are considered Italian and not foreign legal entities.[231] Consequently, their legal formation is subject to the provisions on domestic companies.[232]

Subsidiaries of foreign *Società per Azioni* (SpA) can be incorporated by private or, less commonly,[233] public subscription. In the first case, all participants meet before a notary and sign the Constitutive Act, recording their will to incorporate a company and some essential information, and the company statutes, including the internal provisions for the company structure, operation, functioning and dissolution. The Constitutive Act must indicate the company's name, the names, dates of birth and domicile of the shareholders, its true social seat, the nominal value of shares, the company duration, its object, the subscribed capital and details concerning its administrators.[234] The company name must be consistently referred to in the Act. Only one abbreviated form can be used.[235] It must include the indication SpA,[236] be original[237] and may contain the names

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[227] See R. de Dominicis, "Article 52" in *Commentario CEE* (1966, Milano), p.413, who notes that the use of this term in the text of Art.52 reflects "a frighteningly wrong concept, under the influence of the apparent analogy of the French term".

[228] See A.Pietrobon, *op.cit.*, p.101; also see Cass., 11 January 1957, no 45, *Giur. it.*, 1957, I, 1, 847.

[229] See *ibid.*, p.115; however, see *contra* S. Neri, *op.cit.*, p.957.

[230] See Trib. Genova, 21 February 1948, *Giur. compl. Cass. civ.*, 1948, IV, 873.

[231] See Maisto and Miscali, *op.cit.*, p.401.

[232] See Cass., s.u., 26 May 1969, no 1857, *Foro it.*, 1969, I, 2538.

[233] The procedure of public subscription is rarely used in practice due o its complexity. See P. Verrucoli, *Italian Company Law* (1977, Oyez Publishing, London), p.20.

[234] See Art.2328 CC. The notary involved must ensure that the company shareholders agree on these issues even if when they are not included in the Act. See App. Torino, 8 March 1982, *Giur. comm.*, 1983, II, 288, note Buralis and Boero; also see C. Angelici, "Atto costitutivo e statuto" in C. Angelici, *Trattato di Diritto Privato* (1985, UTET, Italy), pp.229-239, at 229.

[235] See Trib. Casale Monferrato, 5 December 1991, *Giur. comm.*, 1992, II, 622, note Constanzo.

[236] See Art.2326 CC.

[237] See Cass., sez. I, 10 April 1968, no 1077, *Dir. fall.*, 1969, II, 89; Trib. Milano, 13 May 1965, *Riv. dir. comm.*, 1966, II, 48.

of natural persons as long as their relationship to the company is also indicated.[238] The reason for this last condition is that the inclusion of a person's name in the company name may be perceived as an indication of his unlimited liability for company debts, which would be misleading in the case of a SpA. Any natural or legal person, private or public, may participate in a SpA.[239] Even unrecognised associations are able to become shareholders.[240] The domicile of the shareholders can not be used as a qualifying condition for their participation in the company.[241] What the law requires as and indication of the company's seat is still under debate. The prevailing view in academic opinion seems to be that a mere note of the community where the seat will be located is sufficient, although jurisprudence insists that what is really required is a precise address within this community.[242] The Act must also include the company's social object, which is often defined as the economic activity determined by the company itself as the type they wish to exercise.[243] The company's social object must be determined, namely not vague,[244] and possible, namely proportionate to the social object to be achieved.[245] The mere determination of a company's object as commercial, industrial or agricultural without specification of the specific area of activity, such as trade of books, is unacceptable.[246] The approximate cost of the formation must also be included in the Constitutive Act.[247]

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[238] See Cass. sez. I, 17 October 1960, no 2772, *Giur. it.*, 1961, I, 1, 1136.

[239] See App. Venezia, 15 May 1989, *Riv. Soc.*, 1990, 351.

[240] See F. di Sabato, *op.cit.*, p.244; also see T. Bologna, 29 November 1984, *Foro Pad.*, 1985, I, 430; App. Milano, 22 April 1986, *Dir. fall.*, 1986, II, 814; App. Bologna, 18 July 1985, *Riv. Not.*, 1987, 873; App. Bologna, 6 February 1987, *Vita Not.*, 1987, 808; however, see *contra* T. Roma, 4 July 1984, *Giur. it.*, 1985, I, 2, 613, note Mariconda; Trib. Lucca, 2 February 1994, *Riv. Soc.*, 1994, 807.

[241] See Trib. Cassino, 29 April 1992, *Foro it.*, 1992, I, 3200; Trib. Cassino, 9 June 1989, *Foro it.*, Rep. 1989, *Società*, 384; Trib. Roma, 27 September 1982, *Foro it.*, 1984, 318.

[242] See the liberal views of G. Millozza, *op.cit.*, p.208; also F. di Sabato, *op.cit.*, p.246. However, see *contra* Trib. Catania, 29 April 1982, *Le società*, 1982, X, 1154; App. Torino, 13 July 1981, *Riv. not.*, 1981, 964; Trib. Milano, 8 February 1982, *Le società*, 1982, V, 536; Trib. Torino, 11 Sepetember 1990, *Le società*, 1991, 73; App. Brescia, 7 October 1988, *Le società*, 1989, 74; App. Genova, 9 March 1984, *Vita Not.*, 1984, 612; App. Perugia, 21 February 1985, *Riv. not.*, 1985, 458; Trib. Perugia, 14 December 1984, *Riv. not.*, 1985, 458; Trib. Ascoli Piceno, 27 March 1985, *Le società*, 1985, 979; Cass., 7 March 1984, no 1573, *Rep. Foro it.*, 1984, *Società*, 244; Cass., 26 June 1984, no 3772, *Giust. civ.*, 1984, I, 2476, note Finocchiaro; Trib. Treviso, 31 July 1982, *Le società*, 1983, 493; Trib. Vicenza, 24 November 1983, *Dir. fall.*, 1984, II, 191; Trib. Udine, 24 September 1983, *Dir. fall.*, 1984, II, 180; Cass., 26 October 1982, no 5593, *Le società*, 1983, 1013; App. Torino, 24 March 1982, *Foro it.*, 1982, I, 2935; App. Catania, 29 April 1982, *Dir. fall.*, 1982, II, 707; App. Milano, 22 April 1982, *Riv. not.*, 1982, 337, note di Fabio.

[243] See F. di Sabato, *op.cit.*, pp.246-247; also see P. Jaeger and F. Denozza, *Appunti di diritto commerciale* (1994, Giuffrè, Milan), p.246.

[244] See Trib. Rimini, 11 February 1983, *Foro it.*, 1983, I, 1104; Trib. Ascoli Piceno, 20 May 1982, *Dir. fall.*, 1982, II, 221; Trib. Roma, 13 December 1977, *Foro it.*, 1977, I, 281.

[245] See Trib. Udine, 12 June 1982, *Foro it.*, 1982, I, 2619; Trib. Udine, 26 March 1982, *Dir. fall.*, 1982, II, 722; also see Trib. Rimini, 11 February 1983, *Foro it.*, 1983, I, 1104; Trib. Roma, 14 December 1977, *Giur. comm.*, 1978, II, 738; Trib. Lecce, 19 April 1983, *Le società*, 1984, 193.

[246] See Trib. Bologna, 15 January 1991, *Le società*, 1991, 824; Trib. Cosenza, 21 June 1990, *Le società*, 1990, 1386; Trib. Cassino, 6 April 1990, *Le società*, 1990, 1505.

[247] If not, the Act is invalid. See Trib. Lecce, 24 October 1987, *Le società*, 1988, II, 188; Trib. Cassino, 18 January 1991, *Foro it.*, 1991, I, 999; on the types of acceptable expenses, see D. Santosuosso, "Le

In the case of public subscription incorporation comprises two stages. In the preparatory stage the promoters draw up a file including the company object,[248] capital, share details,[249] the eventual participation reserved for the promoters, a basic Instrument of Incorporation and the deadline for its execution.[250] This file is kept by a notary, who also collects the details and funds of subscriptions.[251] This takes place via the submission to the notary of a relevant authenticated private document or through a declaration signed before any notary.[252] The rationale of this requirement is that subscriptions constitute parts of the company incorporation and need the increased legal value of the certified document form.[253] Under the new *Codice Civile*, which is inapplicable to companies already incorporated before its entering into force,[254] the promoters of the company may reserve a percentage of no more than 10% of the net company earnings for a period of no longer than 5 years.[255] Any other form of an additional beneficiary clause for the promoters is illegal.[256] In the second constituent stage at least 50% of the subscribers, or their legally appointed representatives,[257] meet before the notary, adopt the final version of the Instrument of Incorporation and appoint the directors and auditors.[258] The aims of this Assembly is to ascertain the fulfilment of the conditions for the company's legal formation, ratify the constitutive act and the beneficiary regulations concerning the promoters, and appoint the directors and auditors. The conditions required for the company's legal formation and ratified by the Assembly concern the details of capital subscription and the existence of any legal authorisations required by special laws on the

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spese per la costituzione di società di capitali: considerazioni intorno all' art.2328, n.12, CC" [1988] *Giurisprudenza Commerciale*, pp.874-895.

[248] See Trib. Rimini, 11 February 1983, *Foro it.*, 1983, I, 1104; the object cannot be generic: see App. Bari, 16 May 1989, *Riv. Soc.*, 1989, 1079; Trib. Udine, 12 June 1982, *Foro it.*, 1982, I, 2620.

[249] It is legal to issue shares carrying a preferential participation in the administration of the company. See Trib. Genova, 3 January 1986, *La società*, IV, 1986, 411.

[250] See Trib. Cassino, 26 April 1989, *Riv. Soc.*, 1989, 1305; App. Torino, 10 February 1984, *V. not.*, 1985, 359.

[251] See Art.2333 CC; also see Cass., 7 August 1963, n.2228, ureported; Cass., 21 April 1983, *Giuris. Comm.*, 1984, 380; Firma, "Un esempio di costituzione per pubblica sottoscrizione di s.p.a." [1987] *Giurisprudenza Commerciale*, pp.200-211.

[252] See Trib. Torino, 12 June 1961, *Giur. it.*, 1961, I, 2, 811.

[253] This is why subscriptions in the case of capital increased do not need to be authenticated or signed before a notary. See Cass., sez. III, 7 August 1963, no 2228, *Giust. civ. Mass.*, 1963, 1044.

[254] See Cass., sez. I, 29 August 1963, no 2372, *Riv. dir. comm.*, 1964, II, 49; Trib. Genova, 20 June 1961, *Riv. dir. comm.*, 1961, II, 444.

[255] See Art.2340 CC; also see Trib. di Roma, 2 November 1972, *Temi rom.*, 1973, 433.

[256] See Art.2431 CC.

[257] For the legal appointment of such representatives an authenticated private document of a representation contract signed before any notary is necessary. See App. Milano, 17 November 1961, *Vita not.*, 1962, 439; *Foro pad.*, 1962, I, 228; *Foro it.*, 1962, I, 787.

[258] See Arts.2334 and 2335 CC.

formation of companies undertaking certain types of activity, such as banking.[259] When ratifying the Instrument of Incorporation the Assembly must, in principle, ensure that it contains all the details required by law and that all details are correct. However, it is widely accepted that shareholders must check the legality not only of the Instrument but also of the Constitutive Act.[260] Administrators cannot be appointed for a period exceeding three years.[261] The board of auditors, the body which the law entrusts with the duty of supervising the activities of the board of directors,[262] consists of three or five members, shareholders or not.[263] The mere nomination of the auditors without their express appointment by the Assembly does not constitute a fault in the formation procedure.[264]

In both private and public subscription the formation of the company is legal if four basic conditions are met. First, the equity capital must be fully subscribed. Currently, the minimum capital must be Li200,000,000, a sum often accused for lack of touch with modern commercial practice.[265] Second, three-tenths of the capital must be deposited with a bank.[266] Third, the company must acquire an authorisation from the Treasury if its capital exceeds Li10,000,000,000.[267] Fourth, after a relevant court decision on the basis of a favourable opinion of the Public Prosecutor on the company's compliance with the requirements of the law concerning its legal formation, the company must register in the Register of Enterprises with the clerk's office of the tribunal of its social seat. Only after this registration does the company acquire a legal personality.[268] It is the responsibility of the notary conducting the company formation to ensure that the Constitutive Act is submitted to the registry within thirty days from its receipt.[269] This publicity requirement is mandatory and any clause within the Act relieving the notary from such an obligation "does not produce legal effect".[270] The obligation of

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[259] See Art.2329 CC. It must be noted that for the formation of credit institutions three tens of the subscriptions must be deposited in cash. Lack of this condition leads to the company's illegal formation. See Cass., sez. III, 21 April 1983, no 2745, *Mass. dec. civ.*, 427.658; also see Cass., sez. III, 26 October 1962, no 3036, *Vita not.*, 1964, 282.

[260] See App. Firenze, 16 January 1967, *Riv. not.*, 1967, 113.

[261] See Art.2383 CC.

[262] See, P. Verrucoli, *op.cit.*, p.110.

[263] See Art.2397 CC.

[264] See App. Cagliari, 26 September 1958, *Rass. giur. sarda*, 1959, 724.

[265] See Art.11 of Law 904 of 16 December 1977; for a critique of the law and the minimum capital required, see App. Napoli, 12 October 1984, *Dir. giust.*, 1985, 170, note Santoni.

[266] See Art.2329 (2)CC and Art.251 disp. trans. as amended by Art.36, d.p.r. no 30/1986 which refers exclusively to the Bank of Italy; also see Trib. Treviso, 9 December 1982, *Le società*, VI, 1983, 772; however, see *contra* for non-credit institutions Trib. Udine, 21 June 1982, *Le società*, III, 1983, 353; App. Venezia, 23 May 1981, *Foro it.*, 1982, I, 258; App. Milano, 2 December 1964, *Foro it.*, 1965, I, 560.

[267] See Art.21, Law no 281 of 4 June 1985.

[268] See F. di Sabato, *op.cit.*, p.240.

[269] See Art.2330 CC; also see F. Galgano, *Diritto Civile e Commerciale* (1994, CEDAM, Italy), p.79.

[270] See Trib. Cassino, 29 April 1992, *Foro it.*, 1992, I, 3199, note Morera.

the notary is to achieve the company's ratification by the tribunal of location of the company's true social seat, not to achieve its registration.[271] This is the exclusive responsibility of the administrators,[272] who must apply for registration within fifteen days from the day of the company's constitution.[273] The legitimacy of such strict publication and ratification requirements for the formation of a public limited company derives from the old Italian legal requirement for the recognition of all, foreign and domestic legal entities, by the judicial authorities.[274] After the company's constitution and before its ratification by the Italian judicial authorities, a copy of its Instrument of Incorporation must also be deposited in the Chamber of Commerce of the company's social seat[275] and published in the Official Bulletin of public and private limited companies.[276]

E. EVALUATION OF GREEK, FRENCH AND ITALIAN LAW

The definitions of the concepts of branch, agency and subsidiary seem to be very similar in the three selected countries. An agency is a representation office with the additional characteristic of permanence. A branch is a relatively autonomous, permanent secondary unit with its own clientele and sphere of activity in the host country. A subsidiary, the only unit with legal personality separate from the parent company, is an independent legal entity which is legally or financially controlled by the parent company. The national definitions of all three concepts are in absolute harmony with EC law. Even the permanence requirement, so clearly and expressly introduced by EC law as the distinguishing factor between establishment and provisions of services, also exists in the three countries as the qualifying factor of secondary establishment within their boundaries.

Greek company law introduces three basic forms of secondary establishment for foreign public companies limited by shares: branches or agencies, off-shore units and subsidiaries. Branches, agencies and off-shore units are subsumed within the legal entity of their founding company. Due to their lack of legal personality, they are considered foreign and before their legal establishment in Greece must be recognised by Greek law. Subsidiaries are ruled by the law of their statutory seat which must be a sincere reflection of its true seat. The procedure stipulated for the establishment of branches, agencies

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[271] Pret. Alexandria, 29 April 1981, *Giur. comm.*, 1983, II, 809, note D' Amico.

[272] See App. Milano, 10 May 1961, *Temi*, 1962, 173, note Candian.

[273] See Cass. pen., sez. III, 13 January 1964, *Giur. it.*, 1964, II, 338; Cass. pen., sez. III, 13 April 1964, *Giust. pen.*, 1964, II, 998.

[274] See C. Angelici, "Società per azioni e in accomandita per azioni" in *Enciclopedia di diritto: Vol. XLII* (1990, Giuffrè, Milano), pp.977-1042, at 1030.

[275] See F. Martinelli, *op.cit.*, p.19.

and off-shore units is fairly simple and brief. Essentially what is required by the law is the submission of a legal document, including details on the parent company and the branch representatives. The establishment is ratified by the Greek Commerce Minister and published in the Government Gazette. Under Greek standards, this procedure is quite simple and relatively free of bureaucracy. The exemption of foreign companies from the bureaucratic formation procedure imposed on Greek companies and the favourable status awarded to foreign companies reflects the clear aim of the legislator to attract foreign companies. Thus, the procedure itself does not pose obstacles to the companies' freedom of establishment in Greece.

One stage in this procedure is worthy of special comment, namely the requirement for ratification of the establishment of a branch or agency by the Greek Minister of Commerce. This seemingly harmless administrative requirement can be used by a *male fide* official as the basis for a legal, under Greek law, prohibition of establishment. This, if imposed in a discriminatory manner, would indirectly breach the company's freedom of establishment. However, Ministerial ratification is also required for the establishment of secondary units of Greek companies. Thus, the introduction of this requirement is not discriminatory in itself. Moreover, the only area of control allowed to the Ministry is the evaluation of the legal completion of the procedure for the valid secondary establishment of the company in Greece and the assessment of the legality of its activities under Greek law. This is also the basis for the Minister's decision to allow the secondary establishment of Greek companies. Thus, even the substance of the ratification requirement can not be characterised as an indirect breach of the freedom of establishment. Its aim, which clearly is the protection of Greek public order, is tolerated in EC law which expressly allows even discriminatory national provisions set for it.

What seems to be anomalous, however, is the difference in the treatment of subsidiary companies. The conditions set by Greek law for the establishment of Greek subsidiaries of foreign companies form a complicated, time-consuming procedure, which can have negative effects on the number of foreign companies wishing to establish in Greece. High taxation and the ambiguous Greek regime on the export of company profits imply that the Greek legislator chose to attract the non-incorporated presence of foreign companies. The most probable reason for this preference is that due to their lack of legal personality the legal and profitable functioning of branches, agencies and off-shore units is guaranteed by their flourishing parent companies, whereas legally autonomous subsidiaries may pose a danger to their creditors. However, this view ignores the fact

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[276] See V. Allegri, A. Cerrai et al., *Diritto Commerciale* (1993, Monduzzi, Bologna), p.246.

that, in practice, subsidiaries are also financially and organically dependent on their (usually successful) parent companies. Having noted the Greek preference for branches and agencies as forms of secondary establishment, compliance with EC law must be assessed. The main problem of the procedure introduced for the establishment of subsidiaries lies with its complexity and bureaucratic nature. The introduction of such a process can be seen as a direct discouragement and therefore an indirect hurdle for the establishment of foreign subsidiaries in Greece. However, it must be noted that foreign subsidiaries are considered to be companies possessing Greek nationality. Thus, the procedure introduced for their establishment is exactly the same with the one introduced for the primary establishment of domestic public companies limited by shares. In that respect this procedure, albeit complex and bureaucratic, does not discriminate against foreign public limited companies. Another issue arising here derives from the Greek provisions on the determination and definition of subsidiary companies. The strict Greek rules concerning the exact percentage of financial or legal control required for the characterisation of a company as a subsidiary could be used for the limitation of the range of controlled companies which may benefit from the freedom of establishment. Such a remark would be unfair, as it is applied in a non-discriminatory manner both on Greek and foreign legal entities. Moreover, the relevant Greek provisions were modified in 1986 in compliance with Directive 83/349. It can be stated therefore that the Greek administrative requirements for the secondary establishment of foreign public companies limited by shares are in absolute compliance with the EU freedom of establishment.

French law introduces three types of secondary establishment: branches and agencies, participation in an already existing French companies and subsidiaries. The formation of branches or agencies requires the completion of an administrative procedure before the French commercial courts introduced for the protection of both the constituting company and third parties wishing to deal with the company through the branch or agency. This procedure consists of a judicial stage, namely ratification of the company's establishment within France, and an administrative stage, namely publication requirements. The question is, whether this procedure is in compliance with EC law. Admittedly, French branches or agencies do not have a ratification obligation when establishing in France. Thus, the relevant requirement is imposed on foreign companies in a discriminatory manner. However, it would be difficult to deny that the judicial control of the legal submission of all required documents by the French judicial authorities, and especially the submission of details concerning the main establishment, the branch and its directors, serves public interest. The question is, which is the purpose of such

proceedings and the extent of control that French authorities have in deciding whether to ratify the companies' establishment. From the text of the law it becomes clear that the only purpose for this procedure and the only role of French courts in it is to evaluate whether all steps for the legal completion of the required proceedings have been taken. Thus, the procedure cannot serve as an indirect hurdle to establishment in France.

With reference to publication requirements, these are deemed necessary primarily for the protection of third parties that, having entered into contract with the company through the branch or having claims against the company deriving from the branch's operation, may decide to sue the company at the tribunal of the location of the French branch. In this case, the full details of the identity (residence and nationality) of the branch's or agency's director are crucial for the legal submission of the relevant writ and the execution of the judgement against the branch or agency. The need for such protection, introduced for the benefit of the public of the host country and the company itself, was acknowledged by the EU in the eleventh Directive of 21 December 1989.[277] In fact, the French publication requirements are a direct result of the transposition of the Directive into French law. Thus, the administrative procedure for the formation of secondary units of foreign companies in France is in compliance with EC law and do not hinder their expansion there.

Participation in an already existing French company requires no administrative procedure for foreign EU nationals, but awards very little control over the company's direction and administration. The minimal administrative and substantive obligations imposed on companies wishing to establish in France via participations, the independence of the French unit for the purposes of insolvency and the relevant favourable regime introduced for foreign companies renders this form of establishment quite attractive. However, its obvious disadvantage is the lack of any control over the investment of the foreign unit in France. Due to the relatively small percentage of shares or capital owned by the foreign company, any attempt to participate in the direction, administration or decision-making process of the French unit would not be successful. These disadvantages are inherent to the type of investment, rather than to the French law on the establishment of foreign companies in France. In fact, the obligations and restrictions imposed upon foreign companies are not only the same, but much lighter than those imposed on French companies. It would therefore be unfair to state that the relevant French legislation may or does act as an addition burden, namely a form of indirect hindrance, for the secondary establishment of foreign EU companies in France.

Should a company opt for control over its investment in France, subsidiaries are the best solution. They combine a degree of autonomy deriving from their separate legal personality with a degree of financial or administrative control from the principal unit. Subsidiaries are considered French companies, hence their formation follows the rules for the incorporation of a French SA. Their creation takes place at the end of a long administrative procedure which, albeit bureaucratic and time-consuming, is not discriminatory against foreign subsidiaries. Thus, French law on the formal requirements for the secondary establishment of foreign EU companies is in compliance with EC law. The conditions for the establishment of subsidiaries in France by foreign companies are exactly the same as those imposed to domestic companies. Therefore, this form of establishment does not suffer from breaches of the freedom of establishment.

For the final evaluation of French law on secondary establishment, reference to the French provisions on foreign direct investments, which is applicable to all three forms of secondary establishment in France, is necessary. Direct investments are defined as the creation of an extension, purchase or acquisition of branches or agencies or any personal company, or any other operation which leads to the control or acquisition of any commercial, industrial, financial, real estate or agricultural company.[278] Participation in an already existing foreign company through placement of capital constitutes such a direct investment if it amounts to more than 20% of the company's capital, whereas contributions of less than 10% are considered mere placements of capital and do not fall within the scope of either the law on participation or on direct investments.[279] This signifies that the creation of a subsidiary, where company control is a definitive characteristic, is always a direct investment in France. The establishment of branches or agencies is expressly characterised as a direct investment.[280] The result of the characterisation of an action as direct investment by foreign national, natural or legal persons, is the obligation to obtain prior authorisation for the investment by the Minister of Economy, Finance and Budget. This could indicate some form of state control over the establishment of foreign companies in France, which could lead to a violation of EC provisions. However, EU nationals are exempted from this obligation.[281] This exemption,

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[277] See 11th Directive of 21 December 1989, no 89/666, JOCE, L. 395, 30 December 1989.

[278] See Lamy, *Lamy Sociétés Commerciales* (1994, Lamy, Paris), p.954; also see Arts.1-5 of Decree 89-938 of 29 December 1989, as modified by Decree 90-58 of 15 January 1990.

[279] See G. Ripert and R. Roblot, *op.cit.*, pp. 1307-1308.

[280] See Decree 89-938 of 29 December 1989 as modified by Art.1 of Decree 90-58 of 15 January 1990 and supplemented by the *Circulaire* of 28 December 1990, *JO*, 1 January 1991.

[281] See Decree 94-658 of 27 July 1994. Exemptions are awarded by the same Ministry within fifteen days from the submission of the relevant application.

introduced only recently, lifts the last administrative hurdle for free company establishment in France, at least from a formal point of view.

Of the three selected countries Italy seems to be the one with the least complex legislation on the establishment of foreign companies. This simplicity is reflected in the lack of a distinction between branches and agencies. Both types of establishment constitute secondary seats and are regulated in an identical manner. The issue is not of particular practical importance. In Greece and France the distinction is of theoretical value, since the establishment of branches and agencies is regulated in an indistinguishable manner. What is important for EC law is that the permanence requirement for all types of secondary seats does exist in Italian law. Thus, the concept of secondary establishment in the Italian legal system does not differ from the EC notion, where permanence is the main distinguishing factor between establishment and provision of services.

The procedure for the establishment of secondary seats in Italy is quite simple as it consists of the publication of certain company details in the company registry. The relevant Italian provisions were modified in compliance with Directive 89/666. The prevailing view in academic opinion and jurisprudence is that the ratification of the company's establishment in Italy by the tribunal of the location of the secondary seat is not required. However, the matter is still under debate. The question is, whether the basis of the argument for the need for ratification is the intent to introduce an indirect hurdle to the establishment of foreign companies in Italy. The same debate refers to the establishment of secondary seats from domestic companies. The heart of the debate lies in the legal nature of the creation of a secondary unit. Should this be considered a matter of importance for the functioning of the whole company, the formation of a secondary seat would require the modification of the company's statutes. This would then require ratification by the tribunal of the location of the company's social seat. However, the formation of secondary seats does not fall within the scope of the law on statute modification. Thus, ratification is not required. Even the supporters of the need for ratification do not wish to impose it as a means of hindering the free establishment of foreign companies. If this view were to prevail, it would be implemented to foreign and domestic companies equally. Thus, even then Italian law would not be discriminatory.

It is unfortunate that the simplicity of the procedure for the establishment of secondary seats in Italy is not a characteristic of the procedure required for the creation of subsidiaries. The presentation of Italian law on the establishment of subsidiaries indicates that their formation entails a very complex, bureaucratic procedure of multiple administrative requirements. The complexity in the formation of subsidiaries character-

ises not only Italian, but also Greek and French, law. What differs here is the requirement for an official judicial ratification of the constitutive acts and the demand for judicial authorisation of the company's formation. This last condition could indicate the intention of the Italian legislator to limit the establishment of subsidiaries in Italy and could give ground to selective scrutiny by the Italian administrative authorises in the benefit of domestic companies and against foreign ones. However, the same procedure applies to all, domestic and foreign, companies. Thus, the imposition of such a requirement for the establishment of subsidiaries of foreign companies in Italy cannot be considered discriminatory and is in compliance with EC law. Moreover, the nature of the authorisation, which is based on the legality of the procedure followed for the company's constitution and does not extend to its nature, activity or general status, indicates that the aim of the relevant Italian provision is to ensure that Italian subsidiaries are legally formed for the protection of the public entering into transactions with such companies and not to indirectly prevent certain companies from establishing in Italy.

The assessment stemming from the presentation, analysis and evaluation of Greek, French and Italian law on the secondary establishment of foreign EU companies is that they do comply with EC law. The administrative requirements for the establishment of branches or agencies are minimal and mainly consist of the obligation to publicise the intention to expand within the three countries and to specify the exact nature of the relationship of the new unit with the main company seat. This procedure, set for the protection of the companies and the public of the host state, is legal under EC law and necessary on the basis of Directive 89/666. Insofar as subsidiaries are concerned, all three national laws introduce a fairly complex, bureaucratic, time and resources-consuming procedure. This could be interpreted to reflect the intention of the national legislators to discourage foreign companies from expanding within Greece, France and Italy through the formation of a subsidiary. However, subsidiaries of foreign companies have *ab definitio* their true social seat within the host state and in countries following the doctrine of the true social seat, such as all three selected states, are considered domestic companies. Thus, the regulations concerning the formation of subsidiaries in Greece, France and Italy, albeit detailed and demanding to the point of frustration, are not implemented in a discriminatory manner. Consequently, they do not clash with EC law on the companies' freedom of establishment.

CHAPTER 5

Substantive Conditions for the Establishment of Foreign Companies in France, Italy and Greece

A. INTRODUCTION

One of the main aims of this thesis is to establish that, despite the long period of considerable effort and movement towards integration,[1] breaches of the freedom of establishment of foreign public companies limited by shares still occur. Chapters 3 and 4 proved that the formal and procedural preconditions for recognition and secondary establishment in the three selected countries comply with the EU freedom of establishment. However, the mere provision of the opportunity to establish under a non-discriminatory administrative and legal regime, albeit important, does not suffice for the realisation of the freedom. Although, admittedly, this constitutes the first step to free establishment, the setting-up of secondary commercial units really is the mere foundation of the *forum* from which the right to establishment may be exercised. The realisation of the substance of this right, the practical exercise of its content, has not yet been examined.

The analysis of the right of foreign public limited companies to set up a secondary unit within the three selected countries would be incomplete without a study of the French, Italian and Greek legislation on the substantive conditions for their secondary establishment. The second element of the freedom (along with the company's durable physical presence within a Member State other than the state of origin) is economic activity within the host state to an extent allowing the company's integration to the na-

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[1] For a report on the effort of the Commission to abolish violations in the field of the Single Market, see European Commission, "Impact and Effectiveness of the Single Market", *Single Market News*, no 6, January 1997; European Commission, "Action plan sets agenda", *Single Market News*, no 8, July 1997; European Commission, "Strengths and weaknesses of the Single Market", *Single Market News*, no 10, December 1997; European Commission, "Progress n implementing Single Market legislation", *Single Market News*, no 15, December 1998.

tional economy of the host state. The right of foreign public limited companies to form secondary establishments within the three selected countries and their recognition as legal entities under the conditions imposed to equivalent domestic units would lack substance and practical value, if these secondary units were prevented from exercising their right to establishment.[2] This could be the result of special national laws limiting the exercise of the company's chosen activity to domestic persons, or allowing it under conditions deemed discriminatory on the basis of the company's nationality. The main aim of Chapter 5 is to asses whether the national administrative and legislative requirements for the exercise of commercial activity comply with EC law. In other words, whether the substantive conditions for the secondary establishment of foreign companies in France, Italy and Greece are equally liberal as the formal conditions, or whether the tolerant regime of establishment is limited to these areas of law which do not adversely affect domestic companies.

This examination will be carried out by selecting case-studies from these countries where breaches of EC law have occurred. For the selection of the violations to be used as case-studies, the wide field of application of the freedom of establishment *ratione materiae* has been taken into account. Since the broad application of the non-discrimination principle of Art.12 applies to all independent activities and services that can be characterised as financial and commercial, the companies' freedom of establishment covers all possible types of financial and commercial independent activities and all sectors of economic life, irrespective of their express subjection to Arts.43-48 via secondary legislative texts. As concluded in Chapter 2, for legal persons in specific the freedom covers all aspects of their functioning, administration and management. In view of this, any restrictions on the type of business pursued by foreign companies, any obligation to obtain government consent before establishing in the receiving state, or even a requirement of residence for the natural persons that participate in the company are strictly illegal under EC law. Thus, breaches selected as case-studies in this chapter include limitations on the setting-up of coaching schools in Greece; restrictions on the activity of dealing in transferable securities by companies registered in Italy; and limitations to companies dealing in crude oil and petroleum products in Greece.

The freedom of establishment also covers corollary activities of the above, namely activities which are of assistance in the pursuit of a liberalised occupation or company activity, such as limitations to the free movement of capital, or restrictions to the choice of employees of the foreign company based on their nationality. Thus,

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[2] See T. Ballarino, *Lineamenti di diritto comunitario* (1992, CEDAM, Milano), pp.298-299.

breaches of the freedom of establishment selected for presentation include restrictions on the denomination and type of company dealing with transferable securities in Italy; on the denomination of private coaching schools in Greece; on the nationality of tourist guides in France, Italy and Greece; on commercial agents in Italy and France; on the recognition of diplomas for certain professions in France, Italy and Greece; and on the import and export of capital in Greece. With reference to the violation on the nationality of tourist guides, it is noted that the distinction between establishment and provision of services does not lie with the nature of the activities exercised, but with the nature and extent of the activities themselves. Although the relevant ECJ judgements refer to breaches of the freedom to provide services, the same factual circumstances constitute violations of the freedom of establishment, should the activity in question be conducted on a permanent, rather than a temporary, basis and be primarily directed to the market of the receiving state. Moreover, since the freedom of establishment also applies to maritime companies, EU Member States must guarantee "equality of treatment between enterprises and means of transport on the one hand and users on the other" along with "freedom of action for the enterprises in fixing rates and in access to the various transport markets".[3] Therefore, Greek and French breaches on the nationality of ships as well as the French, Italian and Greek legal regime on cabotage are also analysed.

In the course of the research for this chapter, it became obvious that the existing violations of the companies' freedom of establishment tend to appear in clusters of persistent breaches of EC law referring to similar fields of commercial activity. Although it was initially thought that the best methodological approach to the topic would be to present each violation separately in a sub-chapter referring to each of the selected countries, the findings of the research led to the modification of the methodological structure selected initially. Thus, the examination of the selected violations will be presented by reference to the area of commercial activity restricted, directly or indirectly, for foreign companies through prohibiting national legislative measures in some or all of the three selected countries. In order to facilitate the reader to follow the conclusions of this chapter, such clusters of violations are presented by reference to their directness and subdivided on the basis of their purity. For the purposes of this chapter, direct are violations deriving from national legislation explicitly restricting an activity to domestic persons, whereas indirect are violations resulting from the application of seemingly non-restrictive national legislation. Pure are violations deriving from breaches referring exclusively to the freedom of establishment, whereas disguised violations are mere secon-

[3] See Straus, *op.cit.*, p.40.

dary results of breaches of basically other provisions of the Treaties. The selection of areas of violation was made on the basis of the number of breaches of EC law declared as such by the ECJ and referring to each particular sector of activity, the persistence of the breaches evident by subsequent ECJ judgements and the priority awarded to the final implementation of the relevant provisions of EC law on the specific cluster of breaches by the European Commission.

The national laws chosen for presentation have already been declared illegal under EC law by the ECJ. Since the second main aim of this chapter is to assess the best way under which companies which suffered damages as a result of breaches of EC law may successfully achieve compensation, it was thought that already declared violations would be the ideal basis of claims for compensation at the national and EU levels. Thus, there is at least one declared violation in each area of activity described. However, in an attempt to demonstrate that additional breaches of EC law occur, more violations, either yet unidentified or not yet brought before the ECJ, are also analysed. It must be noted that, although most Member States (amongst which the three selected countries) follow the civil law tradition, which allows even undeclared violations to constitute the legal basis for claims of compensation allowing the court to evaluate the existence of such a breach as a preliminary matter within the framework of the civil trial on the award of compensation, the national procedural rules within some Member States (such as the UK) are not equally accommodating.

B. DIRECT VIOLATIONS

B1. The Establishment of Private Coaching Schools in Greece

The only direct violation of the companies' freedom of establishment revealed in the course of the research for this chapter, which constitutes one of the most obvious violations of the companies' freedom of establishment, concerns the establishment of private coaching schools in Greece. This breach was selected for presentation here on the basis of its directness, purity and seemingly unusual persistency. Indeed, although several judgements of the ECJ have been reached on this area of law, the establishment, administration and teaching in such schools continues to be one of the activities considered a privilege reserved for Greek nationals. Art.68 of Emergency Law 2545/1940 regulates that the setting-up of a "frontistirion" is subject to authorisation from the Ministry of Education and Ecclesiastical Affairs. This authorisation is issued to persons

who possess the qualifications required for the post of public service as a teacher under the state education system. Under Article 18 of the Public Service Code one of these qualifications is Greek nationality. Thus, foreign companies wishing to establish in Greece coaching schools providing instruction in foreign languages are prevented from doing so on the basis of lack of Greek nationality.

Private vocational schools which do not fall within the field of application of this law are, in theory, excluded from the restrictive regulations concerning the nationality of the natural or legal persons wishing to exercise coaching activities in Greece. However, even this activity is preserved to Greek nationals under the relevant Decrees of 9 October 1935 and of 27 October/8 November 1972. These two decrees are still in force, even though Law 576/77 which expressly introduced a relevant prohibition for all, Greek and foreign, private natural and legal persons, has been repealed by Law 1404/83, albeit partially.[4] Even private tuition at home, which by nature is not covered by Law 2545/1940, as it is not undertaken in organised groups, is limited to Greek nationals under the Public Service Code. A special provision applies to teachers of foreign language coaching schools. Decree no 4508/1976 of the Minister of Education and Ecclesiastical Affairs allows the employment of a ratio of foreign teachers, which is set at one foreign national to five Greek nationals.

In order to evaluate the extent of the field of application of this Emergency Law one must take into account the definition of a coaching school, called a "frontistirion" in Greek. Under Article 63 of Emergency Law 2545/1940 a "frontistirion" is defined as an organisation which offers, in the same place and on a weekly basis, courses for groups of no more than five persons or, regardless of the composition of the groups, of no more than ten persons, which have as their purpose either to supplement and consolidate instruction forming part of the curriculum for primary, secondary and higher education, or to teach foreign languages, music, dance or general education in no less than three hours daily per group consisting of the same persons. This includes instruction in shorthand and typing, commercial correspondence, accounting and word-processing, as well as assistance in the preparation of students for national examinations (the UK equivalent to GCE examinations) for registration to University. The field of application of the Law also covers teaching at University level, since private Universities and/or US-styled Liberal Arts Colleges are only recognised as post-secondary education institutions awarding diplomas (not degrees) in Greece.

Insofar as foreign companies are concerned, Article 68(1) of Emergency Law 2545/1940 introduces authorisation to set up a "frontistirion" of any kind to natural persons only. However, by Decision no 158379/A/1025 of 4 November 1967 of the Minister of Education and Ecclesiastical Affairs, which was confirmed by Emergency Law 284/1968, legal persons may set up coaching institutions, as long as they provide instruction in foreign languages. Moreover, according to Art.2(1) of Royal Decree 658/1972, which as subsequent to Emergency Law 2545/1940 prevails when in clash with the provisions of the Law, authorisation to set up private vocational schools of a secondary level or below may be awarded to legal persons, provided that they have Greek nationality. Art.2(1) of Presidential Decree no 457/1983 provides that authorisation for the establishment and administration of music and dance schools must be awarded exclusively to Greek natural persons and legal persons where the majority of the administration is in the hands of Greek nationals. It seems therefore that foreign companies are affected by the restrictive Greek legislation on education in the areas of foreign language tuition, vocational courses at or below secondary level, as well as dance and music schools. Under Art.10 CC, analysed in Chapter 3, companies are considered foreign in Greece when their true seat, namely the place where the administration and decision-making really takes place, is located outside the boundaries of the Greek state.

The provision of instruction at the post-secondary level applies equally to foreign and Greek private natural and legal persons. In fact, even after the repeal of Law 576/1977 on the prohibition of the provision of vocational and technical training at post-secondary level, these activities are restricted to all private entities, both Greek and foreign, on the basis of Art.16(7) of the Constitution according to which "vocational training shall be provided by the State". This legal regime, which was clarified and reaffirmed by Art.48 of Law 1268/1982 and Law 1404/83, was held constitutional by the Greek Council of the State, the highest administrative court. This provision, as non-discriminatory, does not constitute a violation of EC law. However, all restrictions in the area of education and especially –for the purposes of this thesis– prohibitions on the setting-up, administration and teaching in private "frontistiria" of foreign languages or vocational and technical training at a secondary level or below, are discriminatory. These prohibitions severely limit the freedom of establishment of foreign companies wishing to exercise such activities in Greece and they therefore breach Art.43 directly.

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[4] In case 147/86 *Commission* v *Hellenic Republic* [1988] ECR 1637, at 1644, Y. Galmot, the Judge-Rapporteur, expressed the legally valid opinion that the law was repealed "only with regard to educational establishments which provide higher technical and vocational training".

Although even the Greek state accepts this position, it has always argued that the relevant national legislation does not constitute a violation of Arts.39, 43 and 49. The two main justifications for maintaining this legislation have been that the establishment of private institutes should be excluded from the application of the Treaty as an activity related to public authority and that in practice Greek authorities avoid its enforcement and do permit the establishment of foreign educational companies. Indeed, Greece has often argued that the existing restrictions in the area of education are justified by reference to Article 16(2) of the Greek Constitution according to which the provision of instruction is a "fundamental duty" of the Greek state which is connected with the exercise of official authority and includes the objective of developing the national consciousness of Greeks and ensuring the free and responsible exercise of the rights and obligations deriving from the Greek citizenship.[5] Thus, it is alleged that teaching or administering such educational establishments falls within the scope of "public authority" which, under Art.45, constitutes an exemption to Arts.39, 43 and 49.

However, the analysis of this provision in Chapter 2 has demonstrated that the definition and determination of "public authority" is to be interpreted very narrowly.[6] It would be difficult to dismiss the Greek arguments in the case of teaching of specialised subjects, such as "The Behaviour of a Greek Citizen" or even "Greek Civilisation" by foreign nationals, who may lack the substantive qualifications for such instruction. It is equally difficult, however, to comprehend how instruction in dance, music, foreign languages and technical or vocational courses may provide a better understanding of the rights and obligations deriving from Greek citizenship and the content of Greek consciousness. If anything, teachers of foreign languages do the absolute opposite, namely in addition to language they also provide instruction in the culture and consciousness of foreign nations. Thus, this Greek argument lacks legal standing. Equally, the argument of the Hellenic Republic that in practice foreign citizens are not prevented from establishing in Greece is not only irrelevant but also untrue, as will be proven below. The ECJ has consistently held that administrative practices which, by nature, are alterable do not suffice as proper fulfilment of the Member States' obligations under EC law.[7]

Therefore, the Greek legislation on "frontistiria", private music and dancing schools, and private tuition at home breaches the companies' freedom of establishment

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[5] See case 147/86 *Commission* v *Hellenic Republic* ECR [1988] 1637, at 1642.

[6] See case 2/74 *Reyners* v *Belgium* [1974] ECR 631; also see case 149/79 *Commission* v *Belgium* [1980] ECR 3881 and [1982] ECR 1845; also see M.-F. Schmidt, "Liberté d'établissement et libre prestation de services" in *Joly Communautaire*(1996, GLN Joly Editions, Paris), at 20.

[7] See case 236/85 *Commission* v *Netherlands* [1987] ECR 3989.

both directly, through prohibitions in the setting-up of "frontistiria", and indirectly, through restrictions in their administration and staffing. This was expressly declared by the ECJ in infringement proceedings brought against Greece by the Commission under Art.226.[8] It is noteworthy that this ECJ judgement was contested in three instances by the Panhellenic Federation of Owners of Foreign Languages Institutes (POIFXG), the Panhellenic Association of Owners of Foreign Languages Institutes (PALSO) and the Panhellenic Association of Owners of Private Technical, Professional and Maritime Educational Units (PSIITENSM) on the grounds that the breach held by the ECJ refers exclusively to instruction through private tuition at home for the first two applications, or exclusively to coaching schools of foreign languages for the applicants of the third application.[9] All three applications for third party proceedings were not examined in substance by the ECJ, which considered them all inadmissible.[10]

In fact, the initiation of third party proceedings was the argument put forward by the Greek state in an attempt to justify its delay to comply with the ECJ judgement in new proceedings under Art.228 brought against it by the Commission in 1990. In that case Greece argued that its compliance, albeit extremely difficult due to the long period of time during which the relevant laws had been into force, was imminent via two Presidential Decrees, one permitting nationals of other Member States to set up music and dancing schools and another permitting the setting-up of "frontistiria" by nationals of other Member States.[11] The ECJ considered the Greek arguments irrelevant and the alleged Greek attempt to comply with its Treaty obligations inadequate. After this judgement Greece passed Presidential Decree 211/1994 of 10 August 1994 aiming to abolish all relevant forms of discrimination on the ground of nationality and allowing EU nationals to set up "frontistiria" under the same conditions as Greek nationals, namely on production of the certificate imposed by Article 14 (10) of Law 1566/1985. This law introduces the obligation of all non-Greek nationals to produce a certificate attesting that they speak Greek fluently and that they have a knowledge of Greek history. This certificate is obtained by examination at the Ministry of Educational and Ec-

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[8] See case 147/86 *Commission* v *Greece* [1988] ECR 1637.

[9] See cases C-147/86 TO 1 *Panhellinia Omospondia Idioktiton Frontistirion Xenon Glosson (POIFXG) and Others* v *Hellenic Republic and Commission* [1989] ECR 4103; case C-147/86 TO 2 *Panhellinios Syndesmos Idioktiton Frontistirion Xenon Glosson (PALSO) and Antonios Trechas* v *Hellenic Republic and Commission* [1989] ECR 4111; case C-147/86 TO 3 *Panhellenios Syndesmos Idioktiton Idiotikon Technikon Epangelmatikon ke Naftikon Scholikon Monadon (PSIITENSM)* v *Hellenic Republic and Commission* [1989] ECR 4119.

[10] For a commentary on these cases see V. Christianos, "Commentary on cases C-147/86 TO 1, 2 and 3" [1990] *Receuil Dalloz Sirey*, pp. Jur. 381-385; also see S. Denys, "Commentary on cases C-147/86 TO 1, 2 and 3" (1993) *Journal de droit international*, pp.393-395.

[11] See case C-328/90 *Commission* v *Greece* [1992] ECR I-425, at I-428-429.

clesiastical Affairs. In 19 March 1997 the European Court of Human Rights heard the case of two UK citizens, Mr and Mrs Hornsby, living on the island of Rhodes whose numerous applications since 1984 to set up a school of English have been rejected by Greek administrative authorities. Although the judgement of the ECHR is irrelevant for the evaluation of the Greek compliance with EC law, it is noteworthy that the ECHR remarked on Greece's late implementation of EC law which has caused considerable damages to the applicants.[12] The judgement is also important as an undoubtful sign of non-compliance with EC law by Greece even after the two relevant ECJ judgements.

The fact that these breaches are still on-going in Greece, even after the two ECJ judgements, is noted by the Commission, which in a formal opinion sent to Greece expressed concern about the discriminatory regime applicable to the establishment of "frontistiria" in Greece.[13] On 19 February 1998 and after an informal letter by the Commission, Greece notified its compliance with the content of the Commission's letter via the adoption of a new Decree which limits the need for a certificate to the teachers of "frontistiria" and restricts the relevant examinations to tests on their linguistic capacity alone.[14] This seems to settle the matter for the Commission, which follows closely the Greek legal regime on the setting-up of private coaching schools in order to ascertain that the relevant violations are indeed a thing of the past.

Unfortunately, however, another violation of the freedom of establishment in the same area of Greek law seems to be taking place. The Commission is worried that the obligation of all educational establishments in Greece must have Greek denominations limits their right to establishment, as it prevents successful foreign units from exploiting their good reputation through the use of the denomination under which they are known in their country of origin. As the Greek authorities failed to respond to the Commission's letter, the matter is in the process of being brought before the ECJ.[15]

The variety of direct and indirect breaches of the freedom of establishment in the area of coaching schools in Greece and the Greek persistence to inhibit as much as possible the participation of foreign companies in this area of economic activity seem to justify the Commission's continuing observance of the relevant Greek provisions. From the point of view of this analysis, the question is, whether there are any legal reasons justifying the Greek reluctance to comply with EC law. The core argument of the Greek position in all relevant cases brought before the ECJ and all Greek replies to reasoned

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[12] See *Hornsby* v *Greece* [1997] *European Human Rights Reports*, vol. 24, pp.250-277, at 277.
[13] See European Commission, *Single Market News*, no 7, April 1997, p.14.
[14] See European Commission, *Single Market News*, no 14, October 1998, p.13.
[15] See European Commission, *Single Market News*, no 7, April 1997, p.15.

opinions sent by the Commission has been that, by nature, education does not fall within the field of application of Arts.43-48. There is little legal basis to this argument. Although the main aim of educational institutions should be the pursuit and dissemination of knowledge rather than the pursuit of financial profit, activities falling within the scope of the freedom of establishment are only required to have the pursuit of profit as one, albeit secondary, of its aims. Thus, the establishment of educational units of the type defined as coaching schools in Greece clearly falls within the filed of application of the freedom of establishment. The question is whether the relevant Greek legislation is, directly or indirectly, discriminatory against foreign nationals. It is clear from this presentation that the relevant legislation is applicable exclusively to foreign nationals, thus introducing a discriminatory regime for foreign natural and legal persons. It is also clear that the aim of the relevant laws, which should be the amelioration of the means under which knowledge is disseminated in these schools, is not served by this discrimination, which achieves lower, rather than higher, standards of education. Thus, the second argument of the Greek state, that the relevant laws fall within the scope of one of the exemptions to the freedom introduced by the Treaty, the exercise of public authority, must be addressed. Although the argument could probably be considered valid in the case of teaching related to the substance of Greek citizenship, it is difficult to see how public authority is possibly connected with instruction in dance, music, foreign languages and assistance in secondary education. Thus, there is little doubt about the fairness of the relevant ECJ judgements. There is equally little doubt that Greece seems to persist in its breach of the companies' freedom of establishment, albeit indirectly through the introduction of the general obligation of all coaching schools to use Greek denominations.

C. INDIRECT VIOLATIONS

C1. Pure indirect violations

C1.1. Dealing in transferable securities in Italy

An indirect but pure violation of the freedom of establishment, declared by the ECJ, refers to restrictions introduced in the dealing of transferable securities in Italy. Under Italian Law no 1 of 2 January 1991[16] activities covered by this term include dealing for one's own account or the account of others in transferable securities; investment and

distribution of transferable securities with or without prior subscription or purchase at a fixed rate or acceptance of guarantees with respect to the issuer; management of assets by means of operations relating to transferable securities; collection of orders for the purchase or sale of transferable securities; the provision of advice on transferable securities; and soliciting savings from the public by actions of a promotional nature. The Law prescribes that, in order to pursue legally their activity, security dealers must obtain authorisation by the Italian State. This authorisation is awarded exclusively to companies which are founded in the form of a share company or partnership limited by shares, whose registered office is in Italy and whose denomination includes the description *società di intermediazione mobiliare*. The Law is expressly not applicable to banks and finance companies of which at least 90% is controlled by banks under the *Decreto Legislativo* no 385 of 1 September 1985.[17] The core argument supporting the existence of a breach of Art.43 in this case is that the Italian Law does not allow the secondary establishment of foreign public limited companies through branches or agencies in Italy, since the legal entities wishing to establish in Italy must, in order to pursue legally their activity, create a commercial unit in the form of a company or partnership limited by shares registered in Italy. They are obliged to establish a new domestic company, possibly a subsidiary of the main foreign unit. Moreover, there are two further limitations to the freedom of establishment set out in the same law, which restricts the choice of form and denomination of the new domestic commercial unit.

The first issue under examination concerns the application of the provisions on the freedom of establishment to this area of activity. There is little doubt that the aim of companies dealing with transferable securities is the achievement of profit. There is also little doubt that the nature of this activity falls within the general area of finance and business which, as concluded in Chapter 2, certainly falls within the field of application of Arts.43-48. This is clearly demonstrated by the regulation of investment markets in the security field and the provisions on the capital adequacy of investment firms and credit institutions through Directives 93/22/EEC and 93/6/EEC.[18] It is also reflected in the declaration of the need for further regulation in this area of activity included in the Commission's White Paper on the implementation of the internal market of 1985.[19]

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[16] See *Gazzetta Ufficiale della Repubblica Italiana*, 4 January 1991, no 3.

[17] See *Gazzetta Ufficiale della Repubblica Italiana*, 30 September 1993, no 230, Ordinary Supplement.

[18] See *OJ* 1993 L 141, p.27 and *OJ* 1993 L 141, p.1 accordingly.

[19] See European Commission, *Commission White Paper addressed to the European Council: Completion of the Internal Market* (June 1985, European Commission, Luxembourg).

The next issue to be addressed refers to the legality of the Italian provisions, in view of the fact that national provisions may be considered legal, if they are introduced in a non-discriminatory manner, are justified by the general interest and are suitable for attaining their aim (which, however, may not be the introduction of inequality between domestic and foreign companies). It is obvious that the Italian Law in question serves little other than the protection of domestic companies through the introduction of administrative hurdles to the establishment of foreign companies.[20] It is equally evident that the protection of the general interest, which is the protection of investors and the stability of the capital market, can be served in ways other than the total ban of non-Italian companies dealing in transferable securities. A suitable, more acceptable, way could be the express application of the relevant measures to secondary establishments of foreign companies of any type or form and under any denomination.[21]

The main argument for the legality of the relevant Italian legislation is that the obligation to establish a primary Italian unit of the description introduced by the Law is imposed to entities of all nationalities, domestic and foreign. Thus, there is obviously no direct discrimination in this case. However, even indirect discrimination may suffice for the subjection of a national measure to the prohibition introduced by the primary and secondary EC legislation on the freedom of establishment,[22] as even provisions applicable without distinction may have restrictive effects.[23] Indirect inequity is interpreted very widely and includes technical and material discriminatory legal and administrative measures. It is clear that the prohibition of establishment through branches or agencies imposes on foreign companies the obligation to assume a different nationality, which inevitably leads to the duplication of the administrative conditions for access to their occupation within Italy and their country of origin.[24] This duplication is not required by Italian companies which are only requested to establish under the conditions of the Law. Thus, the Law on transferable securities is discriminatory against foreign companies.

However, one additional issue must be analysed, namely the justification of the Italian position on the basis of its exemption from the provisions of the Treaty on the grounds of public order under Art.46. As concluded in Chapter 2, the exemptions of

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[20] Branch offices are seen as 'agile and strong' instruments of foreign companies in Italy. See G.F. Borio, "L'impresa estera in Italia: Ospitalità fiscale cercasi" 17 (1997) *Commercio Internazionale*, F 817, at p.3.

[21] See case C-101/94 *Commission* v *Italy* [1996] ECR I-2691, at I-2694 and I-2702 .

[22] See J. G. Huglo, "Droit d'établissement et libre prestation des services" 28 [1992} *RTDE*, pp.687-711, at 690.

[23] See case C-340/89 *Vlassopoulou* [1991] ECR I-2357, par.1; also see case C-104/91 *Aguirre Borrell and Others* [1992] ECR I-3003, pars.5 and 7.

[24] See case C-101/94 *Commission* v *Italy* [1996] ECR I-2691, at I-2701.

public policy, public order and public security introduced by Art.46 must be interpreted narrowly and relate exclusively to provisions which have discriminatory effect for a clearly defined and strictly limited purpose.[25] Discriminatory provisions are therefore compatible with EC law only if they are justified by imperative reasons of public interest, and are suitable and necessary for attaining the aim pursued, that is proportionate[26] and indispensable for the achievement of the aim of the law.[27] However, the total ban of foreign companies in the field of transferable securities cannot possibly be considered proportionate for the achievement of transparency and security in the relevant transactions or for the protection of the companies' customers. This aim could have been equally successfully achieved with the provision of equivalence for administrative conditions already complied with in the companies' state of origin.[28] Thus, the restrictive Italian provisions on the setting-up of foreign companies dealing in transferable securities can not be justified by reference to Art.46 and is in breach of Art.43.

The same rationale and the same conclusions apply to the restrictions on the type and denomination of the companies dealing with transferable securities. These are covered by the provisions on the freedom of establishment, since they fall within the general classification of aspects of the functioning, administration and management of companies. These provisions are indirectly discriminatory against foreign companies which, again, must duplicate the conditions for their establishment in order to gain access to their occupation. These conditions are not justified by reference to public order as they are disproportionate to the aim of the provisions, which is the protection of the market and the security of the relevant transactions. Thus, even these two Italian clauses constitute violations of the freedom of establishment and must be abolished. This was the conclusion reached by the ECJ in its judgement of 6 June 1996, where it also declared that these provisions clash with the freedom of foreign companies to provide services in Italy under Art.49.[29] Unfortunately, the Italian government has failed to modify this legal text in compliance with EC law and the relevant ECJ judgement, thus allowing the continuing violation of the companies' freedom of establishment.

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[25] See R. Quadri, R. Monaco and A. Trabucchi, *Trattato Institutivo della CEE* (1965, Milano, Giuffrè), p.435.

[26] See C-19/92 *Kraus* [1993] ECR I-1663, par.32; also see case C-55/94 *Gebhard* [1995] ECR I-4165, par.37.

[27] See case C-3/88 *Commission* v *Italy* [1989] ECR 4035, par.15.

[28] See case C-101/94 *Commission* v *Italy* [1996] ECR I-2691, at I-2707.

[29] See *ibid.*

C1.2. Companies dealing in crude oil and petroleum products in Greece

The area of Greek law referred to here is quite complex and has been the subject of lengthy negotiations, which led to private agreements between the Greek state and some private enterprises[30] and to numerous reasoned opinions from the Commission in a variety of specific topics. From the point of view of the Commission and the ECJ[31] the main area of interest so far has been the extensively restrictive Greek legislation on all areas of commercial activity concerning crude oil and petroleum products. In the past the Greek state monopoly covered not only the production, but also the import, export, marketing, distribution and transport of such products. This monopoly was based on Law AMZZ of 19-3/24-5-1884, as modified and supplemented by the Royal Decree of 7/14.7.1938 (under which the state monopoly is limited to the exclusive right of import and purchase) and Legislative Decree 1642 of 30.7/14.8.1942 (which allowed the import of oil after special permission of the Financial Supervisor). The sale of all liquid fuel was permitted after a relevant Decision by the respective Minister. Following the Greek Accession to the then EEC and under Art.40 of the *Greek Accession Act* the Hellenic Republic undertook the obligation to abolish all state monopolies by 31 December 1985.[32] In fact, paragraph 2 of this provision regulated the immediate abolition of exclusive rights to the export of: petroleum by-products, fertilisers and tracing paper, as well as the exclusive rights for the import of sulphate of copper and saccharine. It is on the basis of this obligation that Greece amended the relevant restrictive legislation through Law 1571/85 of 21 October 1985.[33] However, even after this amendment, some illegal restrictions in this area remain. Although the Commission is monitoring this situation, it is only recently that it turned to the implications of the relevant laws to foreign companies wishing to establish a secondary unit.[34] Despite the lack of an ECJ ruling on the compliance of these laws with the freedom of establishment, this case is presented here due to its characterisation by the Commission as a priority case of infringement.[35]

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[30] See Article 3(1) of Law 1769/88 of 7 April 1988 ratifying the Agreement of 9 December 1987 amending the Agreements between Greece and certain oil companies and Annexes 1, 2, 3 and 4 published in *Greek Official Gazette ΦΕΚ* A' 66 of 7.4.1988.

[31] See case C-347/88 *Commission* v *Hellenic Republic* [1990] ECR I-4747; also see M. A. Hermitte, "Case-note on case C-347/88" (1991) *Journal de droit international*, pp.482-483.

[32] For a brief analysis on state monopolies, see J.J. Montero Pascual, "I monopoli nazionali pubblici in un mercato unico concorrenziale" (1997) *Rivista italiana di diritto pubblico comunitario*, pp.663-672.

[33] See *Greek Official Gazette* ΦΕΚ A' 192 of 14.11.1985.

[34] See European Commission, *Single Market News*, no 12, May 1998, p. 14.

[35] See Commission's letter sent to the Hellenic Repubic on 23 September 1997.

There is little doubt that the vast majority of the restrictions introduced by the relevant Greek legislation in this area of commercial activity inhibit trade for all undertakings to a great extent. There is no legal basis for the limitations on the refining and import of petroleum oil in Greece. There is no valid justification for the obligation on all companies dealing in Greece to use Greek distributors for a certain percentage of the product specified by Ministerial Decree. However, all these provisions do not infringe the freedom of establishment rules, as they apply equally to foreign and Greek undertakings. However, the situation may be different in respect of another Greek provision which relates to the establishment of companies dealing in the aspects of trade of petroleum oil now allowed by the Greek government. Article 15(1) of Law 1571/85, as amended by Article 5(3)(d) of Law 1769/88, provides that in order to trade in petroleum products all companies, domestic and foreign, must acquire special authorisation by the Ministry of Industry, Energy and Technology prior to their establishment in Greece. In order to obtain such authorisation all undertakings concerned must fulfil a number of conditions, including the declaration of the tankers at their disposal for the transportation of petroleum products. The minimum and maximum number of tankers are fixed by Ministerial Decisions. Unfortunately, this complaint was not considered by the ECJ in the case against Greece. Greece argued successfully that it is was inadmissible as it was not clearly mentioned in the formal letter sent to it by the Commission.[36]

However, the specific provision on the obligation of companies to acquire authorisation by the Greek Ministry of Industry, Energy and Technology before they establish within Greece needs to be discussed in the light of the freedom of establishment. The first question concerns the inclusion of this provision in the field of application of Art.43. Since this provision includes commercial activity in a vast variety of areas including industry, there is little doubt that the setting-up of companies dealing in crude oil and petroleum products is covered by the companies' freedom of establishment. However, the question is, whether Greek law impedes the companies' freedom of establishment and whether this is done in a discriminatory manner. Indeed, in the case against Greece the Commission was of the view that the need for authorisation did restrict the activity of companies dealing in this area.[37] In its prior case-law the ECJ has held that even administrative provisions in the form of mere formalities not involving the grant of authorisation at the discretion of competent authorities may be considered

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[36] See cases 211/81 *Commission* v *Denmark* [1982] ECR 4547; 124/81 *Commission* v *UK* [1983] ECR 203; also see case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, at I-4784.

[37] See case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, at I-4759.

hurdles in the activity of companies "on account of the delay it involves and the dissuasive effect it has upon trade".[38] On this basis, the complex authorisation required by companies including the declaration of the tankers available for the transportation of the product is an impediment of these companies' free establishment.

However, even obvious restrictions do not fall within the illegal impediments prohibited by the Treaties, as long as they are introduced in a non-discriminatory manner, justified by the general interest, suitable for securing the attainment of the objective which they pursue, or if the restrictions do not go beyond what is necessary for the attainment of their aim. In this particular case and according the express declaration of the Hellenic Republic the aim of the law is to secure the supply of petroleum products in view of the fact that on several occasions in 1985, 1988 and 1989 the refusal of owners of tankers to carry such products led to interruption in their supply in Greece.[39] Although the concern of the Greek state and its eagerness to ensure regular supply of such products is understandable and does fall within the general interest, the measures taken are neither necessary nor proportionate for the attainment of this aim. It is clear that the Greek government could have ensured supply through the already existing obligation on suppliers of such products to stock at any given moment in time a surplus of product in order to cover unusual circumstance of unusual demand in the market. It is also clear that such restrictions cannot possibly be accepted under EC law, as the same argument could be applicable to a variety of restrictions in the trade of a series of products which are equally important for the genera interest, from food to drugs and other similar products. Thus, such a rationale can only lead to a useless nationalisation of a vast part of trade whose effect would be anything but the protection of the general interest.

The other debatable issue, is whether these restrictions are discriminatory against foreign companies in view of their general application to domestic and foreign companies equally and that even provisions applicable without distinction may have restrictive effects.[40] Since the matter has not yet been considered by the ECJ, there is no authentic interpretation of the provision. However, the opinion expressed by the Commission in the case against Greece and in its recent reasoned opinion on the issue of petroleum products in Greece that the relevant provisions are discriminatory is persuasive. A mere request for authorisation does not necessarily signify a breach of the freedom of establishment. However, the use of discretion by national authorities which have

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[38] See case 68/76 *Commission* v *France* [1977] ECR 515.

[39] See case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, at I-4759.

[40] See case C-340/89 *Vlassopoulou* [1991] ECR I-2357, par.1; also see case C-104/91 *Aguirre Borrell and Others* [1992] ECR I-3003, pars.5 and 7.

been persistently trying to maintain some degree of control over this area of trade can only be received with suspicion by foreign companies. In view of precedent in this area, foreign companies would be excused to assume that authorisation will be based on nationality. In fact, there is little basis in the discretion awarded by the law to the Minister of Industry, Energy and Technology, whose acceptable role should have been the formal control of the conditions of establishment in Greece. Other relevant authorisations have been expressly declared "simple declarations" by the Ministry.[41] Moreover, the law does not waive any conditions of establishment on the basis of equivalency for companies already established abroad, thus leading to the duplication of the administrative conditions for access to their occupation within Greece and their country of origin. Is this breach justified by Greek national security, in view of the Greek geopolitical situation? As the ECJ expressly held in the case against Greece this argument cannot be accepted. Indeed, the proximity of Greece with the oil producing countries do not seem to support the Greek argument which was dismissed by the Court. On the basis of this analysis, therefore, it is submitted that the authorisation required by undertakings for their set-up in Greece is an unjustifiable violation of their freedom of establishment which, in all probability, will be addressed by the ECJ in the imminent case against Greece.

C1.3. Commercial agents in Italy and France

The third and last indirect and pure violation chosen for presentation in this chapter refers to the declared breach [42] on commercial agents and their activities in Italy and France. This breach was selected for presentation due to its current interest and clarity.

The term "commercial agents" was introduced in EC law by Directive 86/653/EEC on the co-ordination of laws relating to self-employed commercial agents.[43] The Directive includes provisions concerning the legal relationship between commercial agents and their principals. Although this directive does not deal with issues concerning the establishment of natural or legal persons acting as commercial agents as such, it provides an authentic definition of the term. Under Art.1(2) of the Directive, a commercial agent is defined as a self-employed intermediary, who has continuing authority to

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[41] See, for example, Ministerial Circular of 20 January 1989 on Decree no 3663 of 17 February 1987 in *Greek Official Gazette ΦΕΚ* B' 121 of 16.3.1987.

[42] See case C-215/97 *Barbara Bellone* v *Yokohama SpA* [1998] ECR I-2191.

[43] See *OJ* 1986 L 382, p.17; for an analysis of the Directive, see J.-M. Leloup, "La directive européene sur les agents commerciaux" (1987) *La Semaine Juridique, Édition génerale*, no 48, p.I-3308; also see J.-

negotiate the sale or purchase of goods on behalf of another person called the principal or to negotiate and conclude transactions on behalf of and in the name of that principal. As clarified in Art.1(3) of the Directive, the term does not include persons empowered to enter into commitments binding a company or association, partners lawfully authorised to enter into commitments binding partners, receivers, liquidates or trustees in bankruptcy. According to Art.2(1) of the Directive, its text is not applicable to commercial agents whose activities are unpaid and commercial agents operating in the commodity market, on commodity exchanges or the Crown Agents for Overseas Governments and Administrators in the UK. Although the Directive imposes no pre-conditions for the free exercise of such activities by natural or legal persons pursuing profit in this area of trade, Art.1 of Italian Law no 204 of 3 May 1985[44] links the exercise of the relevant professional activities with registration in the registry of the Chamber of Commerce introduced by Art.2 of the same Law. Under Art.9 persons failing to fulfil this obligation are prohibited from pursuing activities within Italy and, if they do, are subject to an administrative penalty of between LIT 1,000,000 and LIT 4,000,000. Moreover, agency contracts entered into by unregistered persons are void under Art.9 of the Law and Art.1418 of the Italian Civil Code.[45] These provisions, in specific the imposition of sanctions for unregistered agents, were declared a breach of the Directive by the ECJ.[46]

The question is whether these national measures hinder the freedom of establishment of legal persons wishing to pursue their activities within this area through the establishment of an Italian branch or agency consisting of one or more self-employed commercial agents. In view of the fact that the field of application of the freedom of establishment covers all aspects of commerce and finance, there is little doubt that the activities of commercial agents fall within the scope of Art.43. In fact, the protection of the agents' freedom of establishment, be it natural or legal persons, is set as the main objective of the relevant Directive and expressly referred to in the first and second recitals of its preamble. The question is, whether these restrictions inhibit the secondary establishment of such companies in Italy. Although this was not the main issue in the case before the ECJ, the Court did hold that the Italian provisions are "capable of significantly hindering the conclusion and operation of agency contracts between parties in different Member States and therefore from that point of view also are contrary to the

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M. Leloup, "La directive européene sur les agents commerciaux" (1987) *La Semaine Juridique, Édition enterprise (Études et commentaire)*, no 15024, pp.491-499.

[44] See *Gazzetta Ufficiale della Repubblica Italiana* no 119 of 22 May 1985, p.3623.

[45] See R. Baldi, "Il contratto di agenzia (1997, Milano, Giuffrè), p.322.

[46] See Opinion of Mr. Cosmas of 29 January 1998 in case C-215/97, *op.cit.*, p.I-2201; also see the relevant judgement, *op.cit.*, con.12.

aim of the Directive" which is the elimination of restrictions to the freedom of establishment.[47] As Advocate General Cosmas clarified, from the point of view of EC law the objection is not to the introduction of the obligation of all commercial agents to register in Italy as such, which merely ensures that all professionals in the list are qualified to exercise the relevant activity, but the imposition of sanctions on those not registered.[48]

On 23 December 1998 the Commission decided to refer Italy to the ECJ for its failure to comply adequately with the Commercial Agents Directive on three different points. First, with regard to the conditions under which an agent is entitled to be indemnified on termination of his contract, Italian law requires only that the agent should have brought new customers or that the indemnity should be equitable, whereas the Directive requires that both conditions are met. Second, according to the Directive each party to an agency contract is entitled to request a copy of a written contract or written evidence of an oral agreement. However, Italian law does not provide for a contract to be in writing, whereas in verbal agreements there is no obligation for parties to provide written documents as evidence that the agreement took place. Third, the entitlement to commission on transactions concluded after the agency contract has terminated is not restricted to transactions entered within a reasonable period after the termination. Thus, the Commission has decided that a referral to the ECJ is necessary, especially since the Italian promise to amend its law by the end of 1998 has not materialised.[49]

It must also be noted that a similar legislative regime is applicable in France, where commercial agents are required to be entered in a special register which is normally kept by the *tribunal de commerce* of the area where the commercial agent is registered.[50] Commercial activity is prohibited for unregistered agents, whose failure to register may result in imprisonment or fine, whereas the agency contract may be redesignated a commercial representation contract (*contrat de représentation commercial*).

From the analysis of this case-study it is clear that the Italian and French legislations on the conditions for the exercise of the activity of a commercial agent restrict the choice of personnel used within the area of Italy to only those persons registered in this country. Failure to use such persons results in the invalidity of the undertaken transactions, thus hindering the freedom of establishment of foreign companies wishing to open a secondary unit by employing one or more self-employed commercial agents.

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[47] See case C-215/97, *op.cit.*, con.17.

[48] See Opinion of Mr. Cosmas of 29 January 1998 in case C-215/97, *op.cit.*, pp.I-2200 and 2201.

[49] See European Commission, "Services and Establishment: Commission decides to pursue infringement procedures against six Member States", 23.9.1999, http://europa.eu.int/comm/dg15/en/services/infring/1174.htm, p.3.

[50] See Art.4(2) of Decree no 58-1345 of 23 December 1958, as amended.

C2. INDIRECT DISGUISED VIOLATIONS

C2.1. Tourist guides in France, Italy and Greece

One of the most harmonisation-resistant areas of national legislation in all three selected countries refers to the conditions under which foreign tourist guides may exercise their activities within other Member States. The issue has been heard by the ECJ in three separate infringement proceedings against the three selected countries.[51] In all three cases the ECJ held that an infringement has indeed taken place, albeit an infringement of the freedom to provide services for undertakings and natural persons who work for a tour operator established in one Member State which from its operating centre organises group travel in one of the three selected countries for tourists.

The question here is whether the same national legal background may lead to the inhibition of the freedom of establishment for companies, which have set a secondary establishment within France, Greece or Italy, dealing with the organisation of travel within that country and wishing to exercise their activity through tourist guides of the nationality of their country of origin. In Chapter 2 of this thesis it was concluded that, although the same persons pursuing the same activities may be subject both to Art.49 on the provision of services and to Arts.43-48 on the freedom of establishment,[52] on the basis of Art.50 the provisions on freedom to provide services are applicable only in cases where the provisions on the freedom of establishment are not applicable.[53] It would seem therefore that in the case of the declared violation of the tourist guides' freedom to provide services, the provisions on the freedom of establishment could not apply. This is certainly true, at least under the exact same factual circumstances described in the case brought before the ECJ, where the undertakings and guides in question were established temporarily in another Member State and merely organised visits to the host state whenever the opportunity arose.

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[51] See cases C-154/89 *Commission* v *France* [1991] ECR I-659; C-180/89 *Commission* v *Italy* [1991] ECR I-709; C-198/89 *Commission* v *Hellenic Republic* [1991] ECR I-727.

[52] See cases 147/86 Commission v Hellenic Republic [1988] ECR 1637, cons.17 and 18., on the setting up of private educational institutes in Greece; 305/87 Commission v Hellenic Republic [1989] ECR 1461, cons.27, 28 and 29 on the acquisition by nationals of other member states of immovable property from which or in which a service is provided; also see Joined Opinion of Advocate General Mischo on cases C-221/89 Queen v Secretary of State *ex parte* Factortame Ltd. and others and C-246/89 Commission v UK [1991] ECR I-3905, con.26 (2) on fishing activities.

[53] See case C-55/94 *Reinhard Gebhard* v *Consiglio nazionale Forense* [1995] ECR I-4165, cons.18 and 21.

However, the situation would be different for undertakings which, having opened a permanent secondary unit within the host state wished to exercise their tourist activity within both the state of origin and the receiving state[54] by engaging tourist guides qualified, and even based, in the country of their main, primary establishment. The main distinction between services and establishment lies with the permanence of the establishment in question and the scale of its commercial activity.[55] Thus, the rules on freedom to establish, and not those on the freedom to provide services, apply to persons providing services entirely or principally in the territory of another member state.[56] A secondary commercial unit of a foreign public company limited by shares whose main activity is the organisation of tours within the state of secondary establishment for tourists originating from the country of the primary unit would fall within the provisions on establishment rather than services. This means that the Greek, Italian or French branch or agency of a foreign public limited company whose main activity is to organise tours within Greece, Italy or France for tourists originating from the country of the primary unit has the right to establish within these three countries and any hurdle in this right constitutes a violation of the company's freedom of establishment under Art.43.

What remains to be seen is whether this right of establishment could be hindered in any way by the obligation of this unit to use guides qualified within the host country. In order to assess whether this is the case, it is necessary to look into the nature of the guide's profession and the obligations imposed to foreign guides by the three selected countries in some detail. Art.63 of Decree no 77-363 of 28 March 1977 French law defines a tourist guide as a person whose task is to guide French or foreign tourists and, in particular, to conduct guided tours in public thoroughfares, museums and historical monuments and on public transport.[57] Art.11 of the Italian Law 217 of 17 May 1983 defines guides as a person whose occupation is to accompany individuals or groups of persons on visits to works of art, museums, galleries and archaeological excavations, and provide commentary of points of historical, artistic or architectural interest, landscapes and national features.[58] Art.1 of Greek Law 710 of 26 and 27 September 1977 defines tourist guides as persons who accompany foreign or national tourists or visitors

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[54] See Opinion of Advocate General Leger in case C-5/94 Reinhard Gebhard v *Consiglio nazionale Forense* [1995] ECR I-4165, con.31.

[55] See case C-55/94 *Reinhard Gebhard* v *Consiglio nazionale Forense* [1995] ECR I-4165, con.31; also see case 196/87 Steymann [1988] ECR 6159, con.16

[56] Thus, an insurance undertaking of another member state which maintains a permanent establishment in the member state in question comes within the scope of the provisions on the right of establishment. See case 205/84 *Commission* v *Germany* [1986] ECR 3755, cons.21 and 22.

[57] See *Official Journal of the French Republic*, 1977, p.1890.

[58] See *Gazzetta Ufficiale della Repubblica Italiana* no 141 of 25 May 1983, p.4091.

to the country, guides them and shows them local points of interest, historic or ancient monuments, works of art of each period, and explains their significance, their purpose and their history, and gives general information on classical and present-day Greece.[59] Thus, these three countries have a common concept of a tourist guide, namely a natural person who conducts guided tours with a commentary for local and foreign tourists.[60]

The other common element is the obligation for guides providing such tours to qualify within the host state. Foreign guides wishing to provide their services, even on a scarce or temporary basis, need to qualify in Greece, France and Italy accordingly. This is possible through special examinations which –with the exception of France– are conducted wholly in the language of the host state. These include factual knowledge of the cultural heritage, history and economy of the state in question. In addition to the above, each of the three countries has added an extra element of examination. In France the ability of the guide to conduct guided tours in France is also tested. In Greece knowledge on whatever subjects were taught in the previous year in the school of guides in Greece are examined. In Italy basic knowledge of the Italian history, archaeology and objects of art in Italy is also checked.[61] As the ECJ has held in all three relevant cases, the introduction of these obligations constitutes a direct breach of the free provision of services both for guides wishing to work within these three countries on a temporary basis, as well for undertakings wishing to provide their services using their own staff.[62]

For companies, in particular, the imposition of the obligation to use domestically qualified guides with an excellent command of the language of the host state leads to the duplication of the conditions necessary for the exercise of their commercial activity. Companies have to employ either two different sets of persons for the same trip for each side of the border from the group's state of origin and from the host state accordingly, or persons with additional linguistic and professional qualifications for these two countries. Since the freedom of establishment also covers the activities which are of assistance in the pursuit of the company activity,[63] there is no doubt that for companies organising tourist guided excursions for foreign tourists through a branch or an agency within the three selected countries the obligation to employ guides qualified domesti-

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[59] See *Official Journal of the Hellenic Republic ΦΕΚ Α'* 283, 26-27.9.1977.

[60] See Opinion of Advocate General Lenz on case C-154/89, which deals with all three cases against France, Greece and Italy; see case C-154/89 *Commission* v *France* [1991] ECR I-659, at I-666.

[61] For France, see Art.10 of Law no 75-627 of 11 July 1975, *Official Journal of the French Republic*, p.7230, and Art.63 of Decree no 77-363, *op.cit.*; for Italy, see Art.11 of Law no 217 of 17 May 1983, *op.cit.*; for Greece see Art.1(1) of Law 710 of 27 September 1977, *op.cit.*

[62] For an analysis of these cases, see A. Boutard-Labarde, "Casenote", (1991) *Journal de droit international*, pp.473-475; also see A. Carnelutti, "Casenote", (1992) *Gazette du Palais*, I Jur, pp.198-199.

cally is a violation of their freedom of establishment.[64] This breach is totally unjustified as the relevant obligation is applied in a discriminatory manner, is not justified by imperative requirements in the general interest, is not suitable for securing the attainment of the objective which the relevant laws pursue and goes beyond what is necessary for the attainment of the aim of the relevant national legislation.

In the case of French, Italian and Greek branches or agencies of foreign tourist companies the obligation to employ guides also qualified in the host state prohibits the use of the regular, legally qualified staff from the state of primary establishment. Thus, the companies in question are forced to employ specially qualified personnel for each of the countries visited by the same group, in addition to the qualified guides escorting the group from their country of origin. According to the ECJ, this additional disproportionate obligation is not justified by considerations of general interest, suitability and necessity. Despite the arguments of France, Italy and Greece that the relevant restrictive national legislation protects the general interest, namely the proper appreciation of the heritage of the host country and consumer protection, the ECJ found that the imposed lack of contact of the tourist group with persons of their own language, culture and specific expectation inhibits, rather than assists, their appreciation of local culture and, consequently their protection as consumers which is realistically guaranteed anyway in view of the competitiveness of the tourist market.[65] Thus, the relevant Greek, French and Italian legislation does breach the companies' freedom of establishment. However, even after the relevant ECJ judgements, the Italian and Greek laws presented in this case-study have not been modified. Thus, the Commission has decided to send a reasoned opinion to the Italian government in order to instigate infringement proceedings against Italy for its failure to comply with a prior ECJ judgement under Art.228.[66]

C2.2. Restrictions related to the recognition of qualifications for certain professional activities in Greece, Italy and France

The second indirect and disguised violation presented in this selection of case-studies derives again from a declared breach in the area of provision of services. The relation-

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[63] See cases 63/86 Commission v Italy [1988] ECR 29, con.14; 305/87 Commission v Hellenic Republic [1989] ECR 1461, con.21.

[64] See J.-F. Couzinet, "Case-note on case C-198/89", (1991) *Receuil Dalloz Sirey*, pp. Jur.465-469, at 467.

[65] See case C-198/89 *Commission* v *Hellenic Republic* [1991] ECR I-727, con.23; C-180/89 *Commission* v *Italy* [1991] ECR I-709, con.22; C-154/89 *Commission* v *France* [1991] ECR I-659, con.19.

[66] See European Commission, *Single Market News*, no 5, October 1996, p.11.

ship between the freedom of establishment and the freedom to provide services has been analysed in Chapter 2 and in the study of the first indirect and disguised breach. Essentially it was concluded that circumstances which have already led to declared violations of the freedom to provide services may also constitute breaches of the freedom of establishment, should the activity of the unit in question be conducted on a permanent basis and be directed to the market of the host state.[67] The breaches presented here have been selected for analysis on the basis of their suitability as commercial activities conducted by undertakings and of their classification by the Commission as priority issues.

One relevant case, especially referred to here due to its wide scope of application, refers to the failure of Greece to comply with Council Directive 89/48/EEC on a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration.[68] According to the Directive, Greece was obliged to introduce by 4 January 1991 a system of recognition of all foreign professional qualifications, provided that the relevant theoretical and practical training had lasted more than three years. In compliance with this obligation, the Republic issued a Joint Decree of the Ministers for the Economy, Health, Welfare and Social Security in 1992. However, this Decree applied only to the health and welfare professions. In March 1995 and on the basis of this partial implementation of the relevant Directive, the ECJ declared that Greece failed to fulfil its EU obligations.[69]

The effects of this national legislative regime is detrimental for the secondary establishment of foreign public limited companies specialising in trade in many fields of commercial activity, where staff must, by the nature of the activity in question, be nationally trained and qualified. This includes architects, dentists, nurses, doctors, pharmacists, midwives, vets, paramedical professions, legal professions, sports professions, teachers, hairdressers and engineers.[70] In all these fields, foreign companies are obliged to employ natural persons whose professional qualifications are recognised by the Greek state. Since recognition for persons qualified abroad is not possible under the current legal provisions in Greece, the employees of foreign companies must be nationally qualified. These are, by default, Greek nationals. This restricts disproportionately

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[67] See M-J Domestici-Met, "Droit d' établissement et libre prestation des services" in J. Labic, *Collection des Jurisclasseurs, Traité de droit européen*, Vol.2., 1996, Paris, Fasc.710, point 40.

[68] See *OJ* 1989 L 19, p.16; for an analysis of the Directive, also see T. Ballarino, *op.cit.*, pp.288-293; it is noteworthy that Directives 89/48/EEC and 92/51/EEC are under modification: see COD/1997/0345 and COM (1997)0638 which are still awaiting the Council common position; see file:///A|/The Observatory procedure viewRECDIPL.htm.

[69] See case C-365/93 *Commission* v *Hellenic Republic* [1995] ECR I-499.

[70] For a table of the relevant professions and the infringements by state in each for 1996, see European Commission, *Single Market News*, no 7, April 1977, p.16

the selection of staff for the secondary establishment of foreign companies, which would in many cases prefer to use in their secondary establishment persons already employed in the primary unit. Since this is a situation mainly affecting foreign companies, this provision is discriminatory. As there is no obvious reasons of public health, safety or order justifying this inequality, the relevant Greek legislation is in breach of Arts.43-48. This is also the view of the Commission, which on the basis of the clash of this regime with the freedom of establishment and the freedom to provide services decided to initiate the first stage of infringement proceedings against Greece for its failure to comply with the judgement of the ECJ on this issue.[71]

The same rationale renders discriminatory, and therefore, illegal other national laws referring to various professions, such as the non-recognition of the qualifications of ski-instructors in France,[72] the residency requirement for the registration of individuals as dentists in Italy and the loss of registration for foreign dentists transferring their residency outside the territory of the Italian state under Law no 1398 of 14 December 1964,[73] the persistent administrative practice of the Italian authorities to delay the recognition of engineering qualifications by more than four months and to ignore the experience gained by migrants,[74] the Italian restrictions referring to the registration of consignors of goods,[75] the reserve of the profession of consultant in the field of road circulation to Italian nationals under Law no 264/91,[76] as well as the non-recognition of the professional qualifications of vets, psychiatric nurses and hairdressers in France.[77] All these violations have been identified by the Commission which placed them in its list of

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[71] See European Commission, *Single Market News*, no 7, April 1997, p.16.

[72] See European Commission, *Single Market News*, no 7, April 1997, p.17; also see European Commission, *Single Market News*, no 12, May 1998, p.17.

[73] See IP/98/1122 of 16 December 1998; also see European Commission, *Single Market News*, no 12, May 1998, p.16.

[74] See European Commission, *Single Market News*, no 12, May 1998, p.16.

[75] See http://europa.eu.int/comm/dg15/en/services/infring/295.htm of 29/04/98; the Commission has sent a reasoned opinion arguing that Italian Law no 1442 of 14 November 1941 breaches the freedom to provide services for consignors of goods wishing to exercise their profession in Italy on a non-exclusive basis.

[76] See European Commission, *Single Market News*, no 5, October 1996, p.11.

[77] See European Commission, *Single Market News*, no 5, October 1996, p.12. In July 1997 the Commission decided to refer this case to the ECJ. For a non-exclusive list of professions liberalised in France in the 1960s, see C. Doucouloux-Favard, "L'adaptation du système juridique français à la liberté d'établissement et à la libre prestation des services, prévues par le Traité instituant la CEE" in M. Mazziotti et al., *La liberté d' établissement et la libre prestation des services dans les pays de la CEE* (1970, Milano, Giuffrè), pp.211-264.

priority cases.[78] Equally discriminatory is the Italian condition of reciprocity for the recognition of foreign qualifications leading to access to professions in Italy.[79]

It is submitted, therefore, that these national provisions in all three selected countries constitute indirect, disguised violations of the freedom of establishment of foreign public limited companies wishing to create secondary units within France, Greece and Italy. This dimension of the relevant violations has so far been ignored by the Commission, which seems to focus exclusively on the direct clash of such provisions with the relevant professionals' freedom to provide services.

C2.3. Limits to the free movement of capital in Greece

The third indirect and disguised violation presented in this chapter refers to the on-going restrictions to the free movement of capital in Greece. This breach was selected on the basis of its persistence and its main reference to a chapter of the Treaty of Rome other than establishment and services. As proven in Chapter 2, free movement of capital is considered a necessary prerequisite for the effective exercise of the other freedoms ensured by the Treaty and especially of the freedom of establishment. Indeed, since the freedom of establishment also covers the corollary activities of the liberalised areas of trade falling within the scope of Art.43, namely activities assisting the exercise of the company occupation, limitations in the free movement of capital are widely accepted as restrictive of the freedom of establishment itself.[80] In fact, the ECJ has characterised the free movement of capital as a "prerequisite" of the freedom of establishment[81] and the freedom of establishment as "to a certain extent accessory to the liberalisation of movement of capital".[82] It can therefore be stated that restrictions to the free movement of capital inhibit the freedom of establishment, as foreign EU undertakings would be unable to use their right to establish freely in another member state, if they did not have the right to transfer sufficient capital to and from the host state.[83]

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[78] It must be noted that for the purposes of this thesis, health professions are of interest for France and Greece. In Italy such professions cannot constitute the main activity of commercial companies, especially public limited companies. See Tribunale di Cassino 19 June 1992, *Le società*, 1992, G 1388.

[79] See Cass., 19 April 1992, n.4240, *Riv.dir.int.priv.proc.*, 1992, 387; also see F. Toriello, *La Condizione dello Straniero* (1997, CEDAM, Italy), p.210.

[80] See A. Santa Maria, *Diritto Commerciale Comunitario* (1995, Giuffrè, Milano), p.197.

[81] See case 203/80 *Criminal proceedings against Guerrino Casati* [1981] ECR 2595; [1982] 1 CMLR 365, con.8.

[82] See the Opinion of Advocate General Lenz in case C-101/94 *Commission* v *Italy* [1996] ECR I-2691, at I-2697.

[83] For further analysis on the close relationship between freedom of establishment and free movement of capital, see F. Burrows, *op.cit.*, p.271; A. Papagiannidis and A. Christogiannopoulos, *op. cit.*, p.163; P.

The original version of the EEC Treaty already spoke of the abolition of obstacles to the freedom of persons, services and capital as one of the main objectives of the Community. The old Art.67(2) EC, now repealed, provided that current payments connected with the movement of capital between Member States shall be freed from all restrictions by the end of the first stage at the latest. In view of this provision, further provision in the field through Directives or other secondary legislative instruments was not necessary. Notwithstanding that, the Council did adopt the First Council Directive and the Second Council Directive "for the implementation of Article 67 of the EEC Treaty", which lay down liberalisation arrangements which vary according to categories of transaction, grouped together into separate lists. List A covers provisions on the repatriation of liquidated profits from direct investments. However, it was really the Single European Act of 1987 which, in the second paragraph of Art.18, equated the free movement of capital with the other, more established, freedoms. Under this provision the 31st December 1992 was the deadline for the realisation of free movement of capital within all Member States. The "movement of capital Directive" 88/361/EEC repealed all earlier directives on the old Art.67 and brought free movement of capital, defined very broadly to include all financial techniques available in the market, into effect on expiry of the transposition period on 1 July 1990.[84] The new legal regime was incorporated into the Treaty by Arts.56 and 60.[85]

Insofar as Greece is concerned, Art.52 of the Greek Act of Accession stipulates that blocked funds of EC nationals must be abolished by 1st January 1986.[86] In fact, this provision in combination with the general provision on the free movement of capital pre-Maastricht constituted the basis of the main arguments of the Commission in a case brought against the Hellenic Republic,[87] where Greece was identified as the only Member State which (under Law 1704/1939) prohibited export of funds belonging to foreign natural and legal persons on the grounds that allegedly Art.52 of the Act of Accession required funds blocked in Greece belonging to residents of other member states to be released solely for use in Greece and not for transfer out of the country. The ECJ held that Greece was in breach of the free movement of capital and that it was under the duty

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Zontanos, *op.cit.*, p.169; P. Oliver and J.-P. Bache, *op.cit.*, p.62; also see case 203/80 *Criminal Proceedings against Guerrino Casati* [1981] ECR 2592; [1982] 1 CMLR 365.

[84] See *OJ* 1988 L 178, p.5.

[85] See *OJ* C 224 of 31.8.1992.

[86] Article 52 of the Greek Act of Accession regulated that: "Funds blocked in Greece belonging to persons resident in the present Member States shall be progressively released by equal annual instalments starting from accession until 31 December 1985, in six stages, the first of which shall begin on 1 January 1981". Smit & Herzog, *op.cit.*, p.726, note that "those payments are thus to be liberalised as of the date of accession".

to release all blocked funds including such funds arising from operations which were not personal, thus rendering the funds of EU legal and natural persons arising from any legal transaction or activity unrestricted and freely transferable in Greece.

Special reference must be made to Law 2687/53, which is of particular interest to companies. It stipulates that foreign companies which on authorisation of the Minister acquire the right to import foreign exchange (a term interpreted broadly to include machinery, materials, technology, inventions, manufacturer's and trade marks, and which aim at productive activities, i.e. exporting business, industries or other commercial activities leading to the import of foreign exchange), have the exceptional right to export a small percentage of their capital (10% of the imported capital annually) and annual profits (12%). The latter restriction was modified by Legislative Decree 4256/1962, which increased the transferable value of capital and interest to 70% of foreign exchange receipts. EC law on the free movement of capital imposes the abolition of these (admittedly limited) restrictions on the import and export of capital.[88]

In an attempt to comply with the relevant EC legislation, the Director of the National Bank of Greece issued Act 2022 of 28.1.1992, according to which foreign companies subject to Law 2687/1953 may export foreign exchange equal to the amount of their 1991 profits,[89] provided that these profits derive from the import of foreign exchange under the provisions of Law 2657/53. Profits gained in the future are also liberated. Art.2 of the Act provides that previous profits may be exported in three equal instalments from 1 May 1992. These provisions, allowing free movement of capital for EU and non-EU nationals, aim to harmonise Greek and EC law and to create a liberal market for foreign companies. It must be noted, however, that no provision is made for the export of the company's capital or interest from other investments or other funds. Although the Commission seems to be of the opinion that the Greek position has changed adequately for the purposes of respecting the free movement of capital, and consequently the freedom of establishment of foreign companies, it must be accepted that from a legal point of view the value of the Act is questionable. Being an administrative act, it regulates the issue of the export of capital for a certain period of time without abolishing the previously existing Greek law, only merely modifying it for the

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[87] See case 194/84 *Re Blocked Accounts: EC Commission* v *Greece* [1987] ECR 4737.

[88] See Bournous, *op.cit.*, pp.208-209; Kalavros, *op.cit.*, pp.272-273.; Bucklel and Artisien, "Policy issues of intra-EC direct investment: British, French and German multi-nationals in Greece, Portugal and Spain, with special reference to employment effects", [1987] JCMS, p.221.

[89] See relevant articles in [*Imerisia,* 31.1.1992, p.3; and *Kerdos,*31.1.1992, p.4, where it is clarified that companies may export an amount equal to their annual profits minus the companies' taxation or commercial debts.

set period of time. Despite the subsequent Acts published by the Director of the National Bank since[90] and the underlying willingness of the Greek government to maintain the new relatively liberal regime, legally the old restrictive laws are not repealed and may come back into force if and when the Director of the National Bank decides not to renew the relevant Act. It is also worth noting that the liberalisation in the export of capital seems to be advancing for the purposes of private transactions only. The amount allowed for export for tourist purposes was increased at 10,000 ECU, whereas for commercial purposes the amount of capital allowed for export seems to be stuck at a mere 2,000 ECU.[91] In view of this and of the persistently expressed opinion of the ECJ that mere administrative acts do not suffice for compliance with EC law, [92] it can be concluded that the Greek legislative regime on this issue is not in absolute compliance with EC law, despite its being hailed as "the impressive completion of the liberalisation of capital export".[93] The ECJ has consistently held that the incompatibility of national legislation with the provisions of the Treaty can only be achieved by "means of national provisions of a binding nature which have the same legal force as those which must be amended", as mere administrative practices are alterable at will be national authorities and are not given the appropriate publicity.[94]

In view of the proven inter-relation between free movement of capital and freedom of establishment, this is yet another breach of the freedom of establishment of foreign companies in Greece. The only difference to all the other case-studies presented here is that this violation derives from restrictions to the free movement of capital.

C2.4. Limits in the area of maritime transport in France and Greece

Persistency and variety in the area of commercial activity are the two main criteria for the selection of this case-study, which refers to violations of the companies' freedom of establishment in the area of maritime transport. The first issue to be addressed concerns the applicability of the provisions of the Treaty of Rome in the field of maritime transport, which is regulated by the special chapter of the Treaty on transport (Arts.70-80). In other words the question here is whether the subjection of transport to the special provi-

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[90] See Presidential Decree/Bank of Greece 2344/19.12.94; also see Presidential Decree/Bank of Greece 2449/5.8.99.

[91] See Presidential Decree/Bank of Greece 2449/5.8.99; also see *Kathimerini*, 10.8.1999, pp.1, 21 and 22; *Imerisia*, 10.8.1999, pp.4 and 5.

[92] See case 147/86 *Commission* v *Greece* [1988] ECR 1637, [1989] 2 CMLR 845.

[93] See *Kathimerini*, 10.8.1999, p.1.

sions of Arts.70-80 excludes the application of the provisions of the Treaty on the free movement of services, persons and capital. Despite the negative view of some Member States, driven by interest rather than legitimacy,[95] the ECJ has held that the rules on the free movement of goods, persons, services and capital constitute the foundation of the Community. These are applicable to the whole complex of economic activities, including maritime transport, unless otherwise expressly regulated by the Treaty. Thus, for the application of the freedom to provide services on specific aspects of maritime transport a Regulation was necessary.[96] Since the rules in respect to the freedom of establishment do not exclude the transport industry, they apply to cases tackling maritime transport.[97] In fact, in reference to this issue the ECJ has held that, far from derogating from these fundamental rules, the object of the provisions relating to transport is to implement and complement them by means of a common action.[98] This view was also adopted by the Legal Service of the Commission in an internal document, according to which the freedom of establishment of legal entities is indeed applicable in sea transport.[99]

This was one of the main issues discussed in detail in a case brought by the Commission against France in as early as 1973.[100] The subject of the case was the compliance of Art.3(2) of the *French Code du Travail Maritime* with the provisions of the Treaty of Rome on the freedom to provide services. Article 3(2) of the *Code* of 13 December 1926 provides that "such proportion of the crew of a ship as is laid down by order of the Minister for the Merchant Fleet must be French nationals". The Ministerial Order of 21 November 1960, as amended by the Ministerial Order of 12 June 1969 issued in implementation of this provision,[101] reserves employment on the bridges, in the engine room and in the wireless room of French vessels to French nationals. Under Art.2 of this Order certain other employment on every ship are reserved in the ratio of three French to one non-French. In its judgement, the ECJ held that the relevant provisions of the French Code are in direct clash with the free movement of workers, since it

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[94] See case C-334/94 *Commission* v *France* [1994] ECR I-1307, at I-1342, con.30; also see case 168/85 *Commission* v *Italy* [1986] ECR 2945, con.13.

[95] See J. Rogissart, "Observations: un arrêt de la Cour de justice capital pour la politique commune des transports" (1974) *Cahiers de droit européen*, pp.577-587, at 584.

[96] See Regulation (EEC) of the Council of 22 December 1986; also see case C-18/93 *Corsica Ferries Italia s.r.l.* v *Corpo dei piloti del porto di Genova* ECR [1994] I-1783.

[97] See M.L. Tufano, "I trasporti" in A. Tizzano, *Professioni e servizi nella CEE* (1985, CEDAM- Casa editrice Dott. Antonio Milani, Padova), p.170.

[98] See case 167/73 *Commission* v *France* [1974] ECR 359; case C-334/94 *Commission* v *France* [1996] ECR I-1307; case C-381/93 *Commission* v *France* [1994] ECR I-5145; case C-62/96 *Commission* v *Greece* [1997] ECR I-6725.

[99] See Note jur/133874-MS/RGB/21.5.74.

[100] See case 167/73 *Commission* v *France* [1974] ECR 359.

introduces a discriminatory legal regime based on the nationality of the worker.[102] It is evident that these French provisions violate the free movement of workers, since they introduce discriminatory conditions for access of foreign workers to employment on French vessels. The question is, whether this violation is also a breach of the freedom of establishment. Advocate General Fennelly in his Opinion on a subsequent case expressed the view that crewing is one of the conditions under which the right to establishment is exercised. Thus, the imposition of selection criteria for the crew of French vessels "presents obstacles to entrepreneurs from other Member States who wish to establish in France"[103] and must be considered a violation of Arts.43-48, and Art.39.

Despite the judgement of the ECJ on the case concerning the crewing of French vessels, the French state failed to comply with the relevant judgement. Twenty years after this first case, the Commission decided to initiate infringement proceedings under Art.228 against the French Republic for this "surprisingly long"[104] failure and, while doing so, took the opportunity to explore the general French regime on the registration of vessels and their right to the French flag,[105] which is contingent on registration under Art.217 of the *Code Français des Douanes*. In order to be registered, a vessel must, in respect of at least a majority stake, belong to French nationals, who, if resident in France for less than six months a year, must elect French domicile for all administrative and judicial purposes relative to the vessel; belong wholly to a company with its headquarters in France, or a company which, having its headquarters in another state where, pursuant to a convention concluded with France, French companies are permitted to exercise their activity, elects French domicile for all administrative and judicial purposes relative to the vessel; belong wholly to a combination of natural and legal persons fulfilling the conditions of the first two categories; be destined to belong to persons in the first two categories after the exercise of an option to acquire the vessel under a leasing agreement; or in the case of a vessel flying a foreign flag, become French property in total after shipwreck on the French coast and after repairs amounting to at least four times the purchase price. Registration is allowed after authorisation by the Minis-

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[101] See *JO* of 1.12.1960, p.10770 and *JO* Of 1.12.1960, p.10770 and *JO* of 13.6.1969, p.5923 accordingly.

[102] See J.-V. Louis, "Discrimination interdite et manquement de l' État" (1974) *Cahiers de droit européen*, pp.588-592, at 591.

[103] See Opinion of Advocate General Mr. Fennelly in case C-334/94 *Commission* v *France* [1994] ECR I-1307, at I-1326, con.35; also see the relevant case-notes by D. Wyatt (1975) *ELR*, pp. 61/62; T. Hartley (1975) *ELR*, pp.53-54; D. Ruzié (1974) *La Semaine Juridique, Édition général*, II, 17863; B. Pacteau (1974) *Receuil Dalloz Sirey*, pp.Jur.719-722.

[104] See S. Denys, *Europe, Revue Mensuelle*, 1996, vol.6, fasc.380, p.9; also see S. Denys, *Europe*, 1996, no 181, p.9; P. Chaumette, *Le droit maritime français*, 1996, Dalloz, Paris, pp.752-758.

[105] See case C-334/94 *Commission* v *France* [1994] ECR I-1307.

ters for the Navy and for the Budget in two cases. First, when natural and legal persons falling in the above categories own only a majority interest in the vessel in circumstances where a total interest is required, so long as the management of the vessel is entrusted to them or to other persons fulfilling these conditions. Second, if the vessel has been taken under a bare-boat charter by a French undertaking which controls, fits and manages it, where such a change in flags is permitted by the state whose flag the vessel previously flew. From the point of view of this thesis, this brief reference to the relevant French legislation renders clear the fact that the aim of the legislator is to link the nationality of the vessel in question with its true social seat, the private international law theory followed by France (as established in Chapter 2 of this thesis).

Does this provision inhibit the companies' freedom of establishment in France? Following *Factortame*[106] it is now clear that where the use of a vessel for economic purposes requires the proprietor to have a fixed establishment in the Member State concerned, its registration entails observance of the rule on the freedom of establishment. Therefore discriminatory rules based on the nationality of the natural or legal persons owning, managing or even crewing the vessel in question are prohibited, especially registration rules which require that the owners or charterers of the vessel have a particular nationality or, for legal persons, have a certain proportion of shareholders or directors of a certain nationality. Such rules are contrary not only to Arts.43-48, but also to Art.294 on the equal treatment of EU nationals on participation in the capital of companies within the meaning of Art.48. Equally discriminatory, and hence prohibited, are provisions making registration contingent on the location of the centre of control of the vessel in the Member State concerned, as they preclude a secondary establishment from operating under instruction from a primary establishment in another Member State.[107]

The same regime applies to fishing vessels, as the real economic link between the fishing vessel and the Member State in question required for the licensing of vessels with relation to fishing quotas concern only relations between the vessel's activity and the local populations dependent on fisheries and related industries,[108] rendering any national rules imposing nationality or residency requirements in respect of ownership, management or crewing of fishing vessels unrelated to the objectives of the Community

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[106] See case C-221/89 *The Queen* v *Secretary of State ex parte Factortame and Others (Factortame II)* [1991] ECR I-3905.

[107] See *ibid*, cons.22, 29-31, 33 and 35; also see case C-246/89 *Commission* v *UK* [1991] ECR I-4585; case C-93/98 *Commission* v *Ireland* [1991] ECR I-4569.

[108] See case C-3/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food ex parte Agegate* [1989] ECR 4459, cons.17 and 27; case C-216/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food ex*

quota system. In so far as vessels not used for economic activity is concerned, they do not directly benefit from the freedom of establishment, whose main aim is to cover activities in pursuit of profit. Having said that, the registration of a vessel for leisure purposes only is the corollary of the freedom of workers and to the freedom of establishment, as persons and companies establishing in the Member State in question must enjoy the same rights as domestic natural and legal persons.[109] This rationale led the ECJ to declare once again that the French legislation on the registration of vessels is in breach of EC law and constitutes a violation of Arts.43-48.

The persistence of this breach over a period of above twenty years and the rare width of the field of application of the relevant discriminatory national provisions should not be too surprising, not after the *Factortame* judgements. What became evident after the French condemnation for its registration provisions was that the relevant laws tend to be discriminatory and restrictive in a number of EU Member States. In proof that this phenomenon is not limited to the UK and French borders, the ECJ delivered a third relevant judgement describing the relevant Greek legislation on the same issue as a failure to comply with its EU obligations deriving from the following provisions:

a. Arts.12, 39, 43, 48 and 294;

b. Art.7 of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State; and

c. Art.7 of Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity.[110]

Art.5 of the Greek *Nationality of the Vessel* Code describes in detail the conditions under which Greek nationality (flag) may be granted to all vessels, including leisure and fishing ships. Under this provision, the Greek flag is granted to vessels, upon application by their owner and upon submission of the document of title, whose shares belong to Greek natural or legal persons by a percentage of more than 50%, or whose capital is held by Greek nationals to a percentage of 50% or above. If at any given time these two conditions are no longer fulfilled, the ship in question loses the Greek nationality under Art.16, par.1 of the Greek Code of Public Maritime Law. The law concern-

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parte Jaderow [1989] ECR 4509, cons.18 and 43; case C-246/89 *Commission* v *UK* [1991] ECR I-4585, cons.12 and 35.

[109] See case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195; also see case C-45/93 *Commission* v *Spain* [1994] ECR I-911.

[110] See case C-62/96 *Commission* v *Hellenic Republic* [1997] ECR I-6725.

ing access to the Greek flag is so strict, that when 50% of a Greek ship is transferred to a foreign legal person, "the transaction is invalid as far as 1% of the ownership is concerned" and the foreign person in question is entitled to compensation for damages in the Pireus Court of First Instance.[111] These provisions introduce a discriminatory regime for foreign companies, which are excluded from trade restricted to domestic ships. According to Tzoannos, in general such discrimination usually includes exclusive carriage of certain goods by national ships, purchase of goods by foreign countries in F.O.B. or C.I.F. prices which leads to the exclusive carriage of these goods by national ships only (a method utilised by countries of the former Eastern Bloc), regulation of measures disadvantageous to foreign ships (such as higher prices for the use of national ports, long-lasting and complicated procedures for the loading and unloading of foreign ships, exemption of foreign ships from the coastal commerce) and last but not least exemption of foreign ships from the execution of certain kinds of activities (such as cabotage).[112] According to the Greek government, these provisions protect Greek national security, as they are required for the Greek military defence organisation which is of specific character due to historical and geo-political reasons. These arguments were not accepted by the ECJ, which noted that the Greek military requirements are adequately served by its right to decide the requisition for military purposes of all Greek vessels alike.[113]

From the analysis on the provisions concerning access to the French and Greek flag it becomes obvious that the restrictive provisions in both countries are in clash with the companies' freedom of establishment.[114] However, these are not the only limitations to the exercise of commercial activity of foreign companies in these two countries. In 1994 the ECJ[115] declared that Art. R.212-217 of the French Code governing maritime ports is in breach of Art.1 of Council Regulation (EEC) No 4055/86 applying the principle of the freedom to provide services to maritime transport between Member States and between Member States and third countries.[116] This article introduced a system for levying charges on the disembarkation and embarkation of passengers from vessels using port installations situated on French continental or island territory. Charges were higher in the case of passengers embarking for ports situated in another Member State

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[111] See Art.16, par.2 of the Greek Code of Public Maritime Law.

[112] See J. Tzoannos, *European Community and Greek Shipping, Speech in the Financial Conference of 6-9 March 1979* (1980, Papazisis, Athens), pp.201-202.

[113] See *ibid*, con.26.

[114] The registration of vessels and granting of flag rights in France is still discriminatory and proceedings continue, whereas the Commission initiated proceedings for the failure of Greece to comply with the ECJ judgment in case 62/96. See European Commission, *Update of the Single Market 1998*, http://europa.eu.int/comm/sg/sgb/infringements/pdf/ text_rap98_en/pdf, p.51.

[115] See case C-381/93 *Commission* v *France* [1994] ECR I-5145.

than when they travelled from a port situated on national territory. Thus, the French Republic was in breach of EC law.[117]

It is obvious that the French provisions mentioned here are discriminatory. Even though the regulation is applicable to ships of all nationalities, thus introducing a seemingly equal regime, the higher services apply to intra-Community transport, which is naturally the activity usually performed by foreign ships. Thus, the relevant French provision secures "a special advantage" for the domestic market and internal transport services within France,[118] thus clearly breaching EC law, albeit indirectly. It is on that basis that the ECJ considered this provision a violation of Art.49 on the freedom to provide services. The question is whether this French provision can restrict in any way the freedom of establishment of foreign companies, whose ships operate under the discriminatory regime described in this case-study. It has been established that the same provisions may constitute breaches of both freedoms, given the circumstances surrounding the establishment within the host state. Thus, a foreign company with a secondary establishment in France, exercising transport activity on an intra-Community basis mainly for the market of France would be established within that country. The provisions of the French Code, which undoubtedly affect the corollary activities of the company in question with regard to the cost of levies imposed on it, would be suffering from a restrictive regime, applied on a discriminatory basis under conditions which could not possibly be justified by the general interest or the exemption of public health, national security or public office. Thus, there is little doubt that the provisions in question limit the freedom of establishment of foreign companies and are in breach of Arts.43-48.

Another area of restrictions worth mentioning here concerns the limitations to the activity of foreign ships in the area of maritime cabotage. This issue is of particular importance for the three selected countries, as they all impose cabotage restrictions along with Portugal and Spain. Cabotage is defined as the "carriage of passengers or goods by sea between ports in any one Member State, including the overseas territories of that State".[119] France maintains *petit cabotage* involving trade between ports of Mediterranean France and *grand cabotage* involving ports in France's overseas territories such as Guadeloupe and Martinique, whereas Italy maintains cabotage restrictions

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[116] See *JORF* 1986 L 378, p.1.

[117] See Art. R.212.219 of the Code, as contained in Decree No 92/1089 of 1 October 1992 in *JORF* of 7 October 1992.

[118] See case C-381/93 *Commission* v *France* [1994] ECR I-5145, con.21.

[119] See V. Power, *EC Shipping Law* (1992, Lloyd's of London Press, London), p.211.

in all its coastal line under Art.224 of the Italian Codice di Navigazione.[120] Greek Law 6059 of 14/20.2.1934 introduces cabotage restrictions, of which only sailing vessels and freighter steamships for ports suitable for vessels of total weight tonnage of less than 100.[121] However, despite the obvious clash of these provisions with the freedom of establishment of foreign ships and Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States,[122] the Commission has yet to announce any measures against their application within the three Member States apart from the French referral to the ECJ in 1998.[123] In order to assess the Commission's inaction, one must take into account that the Regulation entered into force on 1 January 1993, whereas many states managed to secure derogation from its provisions. For France island cabotage in the Mediterranean islands may be extended until 1 January 1999, whereas Greek cabotage provisions for regular passenger and ferry services and services provided by vessels less than 650gt. are valid until 1 January 2004 for Greece.[124] From a political point of view, the legislation on cabotage and the usefulness of its abolition is still in debate within the EU. Thus, it seems that the Commission has so far chosen to ignore the relevant restrictions, possibly in order to secure a political agreement before initiating infringement proceedings against a large number of Member States whose geographical position as coastal nations renders cabotage a profitable, and hence sensitive, area of commercial activity. However, this position is due to change. The newly proposed Council Regulation amending Regulation 3577/92 resolves in a clear manner the problem of the determination of the national law governing the manning, required proportion of EU nationals in the crew (namely all staff employed on board) and the employment rights of peo-

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[120] See *ibid*, p.213; also see M.L. Corbino, "Operatività e limiti della riserva del cabotaggio" [1988] *Rivista dei trasporti*, pp.61–69; P.A. Toma, "La liberalizzazione temuta" [1992] *Rivista del Porto di Napoli*, pp.20-22; G. De Bartolo, "Il cabotaggio maritimo" (1994, Ed. Cacucci, Bari), p.21.

[121] See H. Xanthaki, H., *The Establishment of Foreign Companies in Greece with Particular Reference to the Compliance of Greece with the Law of the EU* (1995, Sakkoulas, Athens), pp.120-127.

[122] See *OJ L 364* of 12.12.1991, pp.7-10. Also see Commission Decision 93/396/EEC of 13 July 1993 on Spain's request for adoption by the Commission of a prolongation of safeguard measures pursuant to Article 5 of Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), *OJ L 173*, 16.7.1993, pp.33-35. It is noteworthy that the Directive is currently under modification following COM(1998)0251 and COD/1998/0158, which is currently awaiting the Council common position; see file:///A|/The Observatory procedure view.htm.

[123] See European Commission, *Update on the Single Market 1998*, http://europa.eu.int/comm/sg/sgb/infringements/ pdf/text_rap98_en.pdf, p.51.

[124] See A. Kiandou-Pambouki, "Community Liberties in Maritime Transport" in I. Koukiadis, *The Effect of Community Law to Greek Private Law* (1995, Sakkoulas, Athens), pp.181-195, at 193.

ple working on vessels dealing with maritime cabotage.[125] The passing of a new legislative text, the clarity of its provisions and the lack of any derogations can be seen as a clear indication of the Commission's willingness to deal with the issue of maritime cabotage in a manner ensuring uniformity and compliance with existing EC law.

D. EVALUATION OF FINDINGS

The main aim of Chapter 5 was to prove one of the two main hypotheses of this thesis, namely that violations of EC law in the field of secondary establishment of public limited companies are still present after more than 40 years of European integration at the legal and political level. As France, Italy and Greece were the countries selected for analysis in the thesis, the chapter concentrated on examples of breaches there. Reference to national provisions in more than eight sample areas of law (see Table 3) proved that breaches of the companies' freedom of establishment are very much a problem in all three selected countries. Admittedly, the sample legislation selected represents some of the most persistent and widely applicable breaches of EC law. Although these may, consequently, be seen as a set of cases of extreme non-compliance, they still prove beyond doubt the existence of violations of the freedom of establishment which adversely affect the formation and functioning of secondary units. This observation seems to clash with the negative findings of violations in the evaluation of the formal conditions for the recognition and establishment of such units reached in Chapters 3 and 4. However, there is no discrepancy in the concluding remarks of Chapters 3, 4 and 5. Consideration of the relevant findings in conjunction indicates that, quite simply, the three selected Member States have abolished the easily traceable prohibitions of establishment (which by default refer to the formal prerequisites for the recognition and establishment of secondary units), but have maintained a regime of restrictions in the substantive conditions for the establishment and functioning of foreign secondary units.

This finding justifies the methodological choice to look closer both into the formal and the substantive conditions of establishment. It is also consistent with the fact that most breaches still present appear to be well camouflaged in indirectly discriminatory cases which may be equally disruptive for the activity of foreign secondary units, but (from a legal point of view) are far more difficult to detect. Research for this chapter revealed only one case of persistent direct violation, the case of Greek coaching schools.

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[125] See Proposal for a Council Regulation (EC) amending Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime

It is therefore evident that, although national legislation that clashes with EC law is obviously still in force, the national authorities of the three selected countries seem to have eradicated laws of obvious non-compliance.

In fact, the analysis of indirect and disguised breaches has brought to light the, seemingly unidentified, effect that violations of EC provisions in other areas of EC law have on the establishment and functioning of foreign secondary units. Research has shown that breaches of other EC legal provisions restrict the formation and functioning of secondary establishments considerably and, as such, also violate the companies' freedom of establishment. This has been demonstrated in the case of restrictions in the free movement of capital in Greece, provision of services for tourist guides and professions requiring recognition of diplomas, and in the area of maritime transport in all three selected countries. The main point of evaluation of this phenomenon refers to the large number and diverse nature of fields of commercial activity affected by breaches of EC law in the area of the freedom of establishment. For the general evaluation of the findings of this thesis it is significant to note that currently existing breaches of the freedom of establishment hamper the functioning of foreign secondary units dealing with a variety of commercial activities. In fact, the wide field of application of such breaches strengthens the initial assumption that research on this issue is worth pursuing.

The second observation, which plays a primary role in the evaluation of the protection offered to foreign companies suffering damages due to breaches of their right to establishment, concerns their inability to use ECJ judgements based on other chapters of the Treaty for claims for compensation referring to restrictions of the right to establishment. Since in some EU Member States, such as in Italy, the legal basis of a claim for compensation can only be a declared breach of relevant legislation, the declaration of the ECJ that a particular administrative or legal practice is a violation of another aspect of the Treaty would not suffice for the successful achievement of compensation for damages resulting from breaches of the freedom of establishment. Even for the rest of the Member States, such as in France and Greece, where such a requirement is not introduced by their national procedural provisions, the lack of a declared violation of the freedom of establishment would far from strengthen the case of the applicant company.

For the purposes of this chapter, however, the question is why are there, still, so many persistent violations in the area of secondary company establishment? In order to appreciate fully the extent of the problem, it is necessary to assess the nature and extent of the breaches analysed in this chapter. Although the sample laws used as case-studies

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cabotage), *OJ L 364*, 12.12.1992, p.7.

were selected on purpose from a wide field of areas of commercial activity, they do demonstrate the diverse number and nature of activities affected by breaches of EC law. Indeed, even a glance at the fields referred to in this chapter demonstrates that violations of EC law are spread in the widest possible array of activities, ranging from crude oil and maritime transport to commercial agents and transferable securities.

The sheer volume of the breaches in the field of secondary company establishment could signify a lack of effectiveness in the enforcement procedures of the EU. Could the reasons for the existence of so many persistent violations be the inability of, mainly, the Commission to identify such breaches?[126] On the basis of the variety of fields of commercial activity affected by violations of EC legislation it is difficult to support the view that violations in the freedom of establishment only occur in obscure fields of law, which tend to escape the attention of willing but overloaded EU enforcers.[127] In fact, if anything, the concentration of such violations in clusters of similar breaches in particular fields common to more than one Member States seems to facilitate their detection.[128] A primary example is that of maritime transport with a number of persistent breaches in all three selected Member States.

It is also true that these persistent breaches were detected by the Commission, which referred them to the ECJ. However, in all selected cases Member States tended to be usually unaffected by reasoned opinions by the Commission and ECJ judgements on infringement proceedings. The examples of tourist guides and access to the national flag are the most prominent violations analysed in this chapter, shared by more than one of the selected Member States. In both cases, reasoned opinions by the Commission and even ECJ judgements declaring the relevant legal or administrative practices illegal under EC law were ignored by the states in question, thus forcing the Commission to initiate proceedings under Art.228 a few years down the line. In fact, in the vast majority of the cases used here Member States continued to violate EC law years after a damning judgement by the ECJ.[129] One of the longest examples of non-compliance with a prior ECJ judgement concerns the French legislation on access to the French flag,

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[126] The Commission has admitted that violations in the field of establishment are amongst the most difficult to resolve. See European Commission, "Progress on implementing Single Market legislation, *op.cit.*, p.1 of the Report.

[127] Blaise argues that the criterion of the Commission selectiveness in respect of the violations they will pursue concerns economics, i.e. which violations affect the financial prosperity of companies. See J.B. Blaise, "1993: L' entreprise dans le Marché unique" 29 [1993] *RTDE* pp.285-287, at 286.

[128] The Commission has recognised the need to "remove sectoral obstacles" to market integration. See European Commission, "Action plan sets agenda", *op.cit.*, p.II of the Report.

[129] The Commission has acknowledged the need to introduce better enforcement instruments for the Single Market. See European Commission, "Impact and effectiveness of the Single Market", *op.cit.*, p.II of the Report.

condemned as illegal in 1996 after an initial judgement in 1973. Although one criterion for the selection of the breaches presented in this chapter was their persistent non-compliance with reasoned opinions by the Commission and prior ECJ judgements, and do not therefore reflect the percentage of compliance generally achieved by these means, it is still quite surprising that there are so many cases of non-compliance in only one specific chapter of EC legislation. The reasons for this are worthy of further analysis, as they tackle the effectiveness of the system of protection offered to foreign companies at the national and EU levels. This is the topic of Chapters 6 and 7.

However, it would be unfair to conclude that the judgements of the ECJ and the supervisory work of the Commission have no value.[130] It is precisely the relatively successful combination of the two,[131] which has limited the number of direct infringements of the freedom of establishment to fewer, usually persistent, breaches of indirect and disguised nature. The example of coaching schools in Greece reflects the attempts of Member States to invent innovative, indirect ways in which to protect their interests against the freedom of establishment.[132] Equally demonstrative is the case of the Italian restrictions in the denomination and form of companies dealing in transferable securities, which –being more difficult to identify– has a better chance of passing undetected.

It can therefore be stated that one of the reasons for the existence of so many persistent breaches of EC law in the area of secondary company establishment, which can be viewed as a reflection of the general level of compliance with EC law, lies with the evident inability of the ECJ and the Commission to play their role as enforcers efficiently. However, this observation does not address the reason for the existence of such breaches in the first place. Although the role of the Commission is to ensure that EC law is implemented within the Member States and the role of the ECJ is to condemn violations, it is surely an obligation of Member States to comply with EC legislation without the need for further encouragement or persuasion by EU institutions.

One reason for the number and extent of the breaches examined in this chapter could be the general level of compliance in these three particular countries. However, the findings of this chapter demonstrate that there is no truth in the commonly expressed stereotypical belief that there is considerable difference in the level of compliance

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[130] See A. Silvestro-Littlechild and M. Silvestro, "L' harmonisation juridique et fiscale des sociétés" [1993] *Revue du Marché Commun et de l' Union européen*, pp. 33-35, at 34.

[131] Most infringement cases are resolved before reaching the Court. See European Commission, "Strengths and weaknesses of the Single Market", *op.cit.*, p.II of the Report.

[132] According to the Scoreboard, there is a steady improvement in the implementation of Single Market legislation by Member States with a percentage of Directives not yet applied by all Member States falling

amongst Member States. If anything, this research has shown that traditionally pro-European France tends to breach EC legislation in the same manner and to comparable extent with traditionally defiant Italy. Similarly, older Member States (France and Italy) tend to have similar levels of non-compliance with the relatively newer Greece. Thus, the three chosen countries, with their seemingly diverse attitudes to compliance with EC law, share similar levels of non-transposition. Consequently, the selection of the three specific national legal systems seems to play a minor role in the justification of the existence of so many persistent breaches in the field of secondary company establishment.

The possibility that the three selected Member States genuinely believed that their national legislation was in compliance with EC law seems to be excluded by the fact that in the vast majority of cases before the ECJ the three Member States felt the need to justify their violations by reference to exemptions from Arts.43-48, such as public interest or public authority. It is equally interesting that in many of the cases analysed in this chapter the accused Member States avoided to discuss the substance of their alleged breach altogether. The other possibility, that the three Member States somehow neglected to comply with EC law in the same field perhaps as a result of unsuccessful and vague relevant EC provisions, seems to be eliminated by the number of relevant violations and the wide variety of fields affected by such violations. It is significant that in many cases of breaches, such as the case of tourist guides, the relevant EC instruments are not considered unsuccessful by other countries which have already transposed them into their national laws.

This line of thought can only lead to the conclusion that the violations in question are not a result of genuine mistakes or gaps in the process of legislative drafting at EU level or transposition at national level. It looks as if Member States are well aware of the fact that they adversely affect the establishment and functioning of foreign secondary units. Indeed, instead of attempting to comply with their EU obligation to transpose, the Member States in question attempt to devise innovative ways to obstruct the detection of the breaches and to comply with the remedies introduced by the Commission and the ECJ. What is equally significant is that the violations used as case-studies occur in clusters of identical or similar breaches within the same area of commercial activity in all three selected countries. For the evaluation of this remark it is interesting to note the similarity in the legal systems of the three selected countries, their common protectionist nature of commercial laws, and their similar geographical location. All

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to 14.9% compared to 26.7% in November 1997. See European Commission, "Progress on implementing Single Market legislation, *op.cit.*, p.1 of the Report.

selected countries are situated in the Mediterranean, which creates similar opportunities for sources of income, the most obvious of which are tourism and shipping. The occurrence of persistent breaches in these particular areas of trade, such as the violations referred to tourist guides and maritime transport, indicate that the reasons for the existence of such persistent breaches of EC law is the protection of the national economies from the 'intrusion' of foreign secondary units in areas of commercial activity which are considered to be cornerstones of national income. This explains the similarity in the nature of the breaches. The similarity in the legal sources of such breaches is simple to identity. Since the legal systems of the three countries share a civil law structure and, very often, almost identical legislative texts, the legislative or administrative instruments chosen for the introduction of restrictive legislation or practice is obviously the same.

It can therefore be stated that the combination of similar legislative texts with analogous sources of state income indicates that the main reason for the existence of cluster cases of protectionist legislation clearly reflects a similarity in the protectionist interests of the three states. These, rather than maliciously deciding to defy EC law in specific fields, attempt to reserve areas of commercial activity of particular importance to their economies to domestic companies. After all, it is not accidental that all three countries follow the theory of the real social seat for the determination of a company's nationality. It must be accepted, however, that the interpretation of the existence of the breaches used as case-studies in this chapter does not explain the obvious inability of the Commission and the ECJ to force Member States to comply with EC legislation. From the case-studies presented here it is evident that even when the Commission does identify the relevant violations and does fulfil its duty to refer the issue to the ECJ, there is little guarantee that the violation in question will come to an end. In fact, the possibility of continuing violations remains even after the ECJ has reached a relevant condemning judgement. The realistic danger of persistent violations of EC law in the area of establishment poses questions about the nature, extent and effectiveness of the protection offered to foreign secondary establishments whose interests are harmed by such breaches. The identification of these questions at national and EU level and their clarification will be the subject of further discussion in Chapters 6 and 7.

Table 3

Violations used as case-studies

Direct Violations

Pure	*Disguised*
Establishment of private schools (G)	Exams on language fluency for teachers (G)
	National denominations for schools (G)

Indirect Violations

Pure	*Disguised*
Transferable securities through branches or agencies (I)	Tourist guides (G, F, I)
Trade in petroleum oil with obligatory declaration of tankers (G)	Recognition of qualifications (G, F, I)
Commercial agents' registration (I and F)	Capital import and export (G)
	Access to flag (G, F)
	Cabotage (G, F, I)

G= Greece

F= France

I= Italy

CHAPTER 6

The Protection of Foreign Secondary Units at National Level

A. INTRODUCTION

In the search of the main cause for the continuing occurrence of breaches of EC law in the field of company establishment, a possible reason put forward in Chapter 5 is the lack of effective enforcement mechanisms with which the three selected Member States could be encouraged to comply with EC legislation. These mechanisms offer judicial protection to foreign companies suffering damages as a result of breaches of EC law. The question is, what means are available to foreign companies suffering damages from such frequent breaches of EC law? More importantly, are they adequately effective? The second hypothesis of this thesis is that the protection currently offered to foreign companies suffering damages as a result of the Member States' violations in the field of company establishment is inadequate and ineffective.

Judicial protection is offered to foreign companies at the national and EU levels. The aim of this chapter is to assess the level of protection offered to foreign companies at the national level, that is before the national courts of the three selected countries. It is important to note that, for the purposes of this analysis, protection at the national level signifies judicial routes leading to compensation by use of the national courts. This includes national court cases where the state liability doctrine as a general principle of EC law is applied. In order to discuss protection at the national level in adequate depth the relevant procedure before the French, Italian and Greek courts will be presented. The method initially chosen for this presentation involved the analysis of the relevant procedure before each Member State separately. However, in the process of the research for this chapter it became obvious that the three selected countries share the same jurisdictional divisions and very similar substantive and procedural provisions in this area of law. This resulted in the modification of the methodological approach of the chapter.

The chapter is structured in themes of topics which are important for the evaluation of the legal position. These are discussed by reference to the legislation of all three selected countries. This approach facilitates the evaluation of the effectiveness of the legislative regime in the three chosen Member States, which leads to the assessment of the protection offered to foreign secondary units at the national level.

Specific emphasis is given to the choice of courts offered to foreign secondary units. As all three countries divide their courts into criminal, civil and administrative, the determination of the court with the jurisdiction to judge on the application of the company for compensation is crucial. Much more so for companies whose *lex fori* follows a unified court structure, where administrative courts are unknown. Another issue of particular importance refers to the special privileges granted to the state by special legislation. Such privileges may render the attempt of foreign companies to seek compensation from the state a difficult task. Last but not least, the issue raised in Chapter 5 on the possible difficulty faced by foreign companies wishing to achieve compensation for either non-declared breaches of EC law or declared breaches of other chapters of the Treaties will be addressed.

In July 1999 the new Greek *Code of Administrative Procedure* came into force.[1] Albeit mainly a mere codification of pre-existing provisions, the new Code regulated some issues -such as enforcement of administrative judgements and the state's obligation to comply with administrative judgements- in a different manner. The novelty of the provisions and the consequent lack of interpretative works and implementing judgements, as well as the lack of an express declaration of the Greek legislator on the particular pre-existing provisions that are abolished or modified after the new Code, renders the final provisions of Greek law on these matters uncertain and unclear.[2] For this reason, reference is made both to pre-existing laws and the new Articles of Code.

B. BRIEF GENERAL OVERVIEW OF THE SELECTED JURISDICTIONS

The main common feature of the French, Italian and Greek legal systems on the topic discussed in this chapter (which primarily led to the methodological decision to examine all three jurisdictions in parallel) refers to their court structure. In the widely acceptable, classical Dutreil classification on the administration of justice in Europe, the three countries fall within the group of jurisdictions which follow the Latin model commonly

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[1] See Law 2727/1999 *Code of Administrative Procedure*, ΦΕΚ 97 A'/17.5.1999.

[2] See A. Karamichalelis, "The new Code of Administrative Procedure", 3 [1999] *Συνήγορος*, pp.26-29.

found in the countries of the Council of Europe.[3] The main characteristic of this model is the existence of a separate administrative jurisdiction which is headed by an institution acting as the highest administrative court and also as the legal councillor of the government.[4] Indeed, in all three selected countries there is a separate court structure for administrative justice headed by the French *Conseil d'Etat*, the Greek *Συμβούλιο Επικρατείας* (Council of the State) and the Italian *Consiglio di Stato*.[5]

The main legal basis for the introduction of a third type of courts, apart from the civil and criminal, in all three selected countries lies with the basic constitutional principle of the separation of powers. The principle signifies that ordinary courts are not competent to hear disputes of an administrative character.[6] A contrary solution would lead to the unacceptable situation of the judiciary controlling the legislature and the executive. This would be a breach of the doctrine of the separation of judiciary, executive and legislature as the three distinctive functions of a modern democratic state.[7] It is important to note that the principle of the separation of powers and the consequent doctrine of the independent judiciary constitute a legal argument which justifies, rather than abolishes, the judicial control of the administration. In order to secure obedience to the law from both the administration and the judiciary, the Constitution of all three countries introduces judicial control over the legality of administrative acts. In view of the principle of the separation of powers, this judicial control is awarded by the administrative courts.[8]

As a general rule, therefore, the judicial control of acts of the legislature and the administration (including the government) in all three selected countries is conducted by the administrative courts. For the purposes of this thesis and for the evaluation of the effectiveness of the protection offered to companies suffering damages as a result of breaches of EC law on the freedom of establishment by the three chosen countries, it is necessary to establish the type of national courts which have the jurisdiction to judge on the claim of such companies for compensation.

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[3] See R. Dutreil, "L'administration et les juges en Europe" *Rivista trimestrielle di diritto pubblico* 42 [1992] 1017-1025, at 1017. The other two groups are the countries of separate administrative jurisdiction (the German model) and the countries of the British model, where no separate administrative jurisdiction is recognised.

[4] See *ibid*, p.1018.

[5] See Ph. Vegleris, *Administrative Justice and its Problems* (1977, Sakkoulas, Athens), p.31.

[6] See C. Dadomo and S. Farran, *The French Legal System* (1996, Sweet and Maxwell, London), p.46.

[7] See J. Rivero and J. Waline, *Droit administratif* (1994, Dalloz, Paris), pp.9 and 14; also see T.G. Waitkin, *The Italian Legal Tradition* (1997, Ashgate/Dartmouth, Aldershot/Brookfield USA/Singapore/Sydney), p.151.

[8] See P. Dagtoglou, *Administrative Procedural Law* (1994, Sakkoulas, Athens), pp.74-75; also see L. Bocchi, "Considerazioni sul processo amministrativo: tra ipotesi di riforma costituzionale e recenti normative ordinarie" 74 [1998] *Foro amministrativo*, pp.288-300, at 288.

C. PROCEDURE BEFORE THE NATIONAL COURTS

In order to determine the national courts with the competence to judge on breaches of EC law similar to those analysed in this thesis, it is necessary to establish the type of liability incurred. This can only be achieved through the identification of the possible case scenarios which may be presented before the national judges by secondary company units seeking compensation for damages suffered as a result of breaches of EC law by the state. These possible case scenarios can be divided into two wide categories, namely breaches resulting from national legislative measures which restrict the companies' freedom of establishment unjustifiably and are therefore illegal under EC law, and, perhaps more frequently, acts or omissions of the administration which restrict the freedom of establishment in breach of primary and secondary EC legislation.[9]

In the first type of violations, companies suffer damage as a result of a national binding legislative text which brings in a legislative measure introduced in a discriminatory manner for the protection of domestic companies. Examples of such breaches of EC law include the restrictive national laws on tourist guides in all three states, the law on commercial agents in Italy and France, and the Greek laws which restrict the export of capital analysed in Chapter 5. It must be noted that in this type of breach the mere existence of an illegal national legislative text suffices, as long as the law is still in force. The company suffering damages due to this legislation will turn against the national legislature for its failure to comply with its obligation to abolish all measures in clash with EC law and to refrain from introducing new illegal legislative texts.

In the second -most frequent- type of violations, the company will turn against the administrative authorities of the state which restrict trade in a discriminatory manner through prohibiting administrative acts. In this second type of violations the existence of a discriminatory legislative framework does not suffice. The company must have requested permission to either establish within the state or to pursue a type of commercial activity there and the permission must have been denied. In this case, the illegality of the state's treatment of the foreign company lies with a particular administrative act which is illegal under EC law, even though it may be legal under national law. For example, in the case of Greek law on private schools, the company seeking compensation must have applied to the Minister of Education for permission to establish in Greece and that application must have been rejected on the basis of the company's nationality. Omissions of the state may also constitute sources of state liability. The state's omission

to consider the company's application for permission to establish or trade within reasonable time, its omission to proceed to necessary internal operations, or even its forestalling to proceed to material acts necessary for the completion of the requested task may constitute the basis of a claim for compensation by the state.[10]

From this analysis it is clear that the same national laws may constitute the source of compensation under both types of violations. However, in the first type it is the illegality of the legislative regime which constitutes the basis of the company's claim, whereas in the second the basis of the claim is a concrete illegal administrative act issued on the basis of this illegal legislative regime. Although in both situations the state is clearly at wrong, it must be admitted that it is in the second type of violation where the case of the company is stronger, at least in practice. This is due to four main facts. First, the company will be turning against a published act and not a general legal regime whose interpretation and application in practice can be debated by the state. Second, the act is issued by a concrete organ of the state (basically the respective Minister) that can be identified beyond doubt and easily called to the stand to clarify the state's position. Third, the administrative act in question will inevitably include the justification of the state's refusal to allow the establishment or pursuance of activity of the foreign company. This justification is indicative of the reasoning of the state and will guide both the applicant company and, ultimately, the court in the evaluation of the arguments of the state and the legality of its policy. Fourth, it is fair to say that the liability of the state for legislative acts is a very recent doctrine mainly introduced through the recent case-law of the ECJ. As will be demonstrated in this chapter, in the three selected countries the success of the relevant claim for compensation is uncertain.

C1. The choice of national court

In France and Greece disputes involving "the administration of the state" are brought before the administrative, rather than the ordinary courts.[11] Disputes are defined as issues on which there is legal doubt which is presented before the court for resolution.[12] In an attempt to clarify the complex distinction between disputes falling within the jurisdiction of the administrative courts and those falling within the ordinary jurisdiction,

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[9] See E. Spiliotopoulos, *Droit administratif hellénique* (1991, LGDJ, Paris), pp.163-164.

[10] See *ibid*, pp.164-165. Also see ΣτΕ 1218/78, *ToΣ*, 1978, 367; ΣτΕ 4677/83.

[11] See G. Danet Bâtonnier and B. Weiss-Gout, "France" in M. Sheridan and J. Cameron, *EC Legal Systems: An Introductory Guide* (1992, Butterworths, London-Dublin-Edinburgh-Brussels), p.France-8; also see Y. Gramatides, "Greece", *ibid*, at Greece-8.

[12] See P. Dagtoglou, 1994, *op.cit.*, p.111.

Cairns and McKeon state that administrative disputes are those that involve the administration in the widest possible meaning of the term. This includes "any administrative unit, be it the state itself or the smallest local authority".[13] Katras defines administrative disputes as those involving a legal debate between the state and the citizen.[14] The criterion of the public legal personality of one of the plaintiffs is used by Spiliotopoulos, who defines administrative liability as the liability of public legal persons.[15] This criterion is reminiscent of the notion of *service public* as the determining factor for the classification of disputes as administrative. According to the older case-law of French and Greek administrative courts, all actions falling within the organisation and functioning of general and local public services constitute administrative operations giving rise to administrative disputes.[16] Despite its support in the case-law of the French courts, this criterion has been strongly criticised for imprecision in the dividing line between private and public persons, inability to adapt to the complexity and diversity of contemporary social and commercial transactions, and unawareness of the common aim of private and public law rules, which is the introduction of legal provisions aiming at the protection of the general interests of society.[17] The recent introduction of private contracts in the functioning of traditional public services and the increasing state commercial and industrial activity has led to a wide recognition of the fact that the notion of public service is no longer a suitable criterion for the determination of the competent court.[18] The currently prevailing criterion for the distinction between ordinary and administrate competence lies therefore with the nature of the provisions applicable in each case,[19] or - expressed in a different manner- with the existence of an administrative activity as the

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[13] See W. Cairns and R. McKeon, *Introduction to French Law* (1995, Cavendish Publishing Limited, London), p.138.

[14] See I. Katras, *Codification of Administrative Procedure* (1996, Sakkoulas, Athens), p.1237.

[15] See E. Spiliotopoulos, *op.cit.*, p.160.

[16] See C.E., 6 fév. 1903, *Gr. Ar.*, no 12, concl. Romieu, *Rec.*, p.94; also see T.C., 8 fév. 1873, *Blanco, Gr. Ar.*, 15; T.C., 29 fév. 1908, *Feutry, Gr. Ar.*, no 20; T.C.,13 avr. 1908, *de Fonscolombe, Rec.*, p.448; C.E., 4 mars 1910, *Thérond, Gr. Ar.*, no 24; C.E., 20 avril 1956, *Epoux Bertin, Gr. Ar.*, no 91, concl. Long, note Waline, *R.D.P.*, 1956, p.869; C.E., 12 avril 1957, *Mimouni, D.*, 1957, p.413, concl. Talcot, note P.L.J.; C.E., 19 oct. 1956, *Soc.Le Béton, Gr. Ar.*, no 92, concl. Long, *D.*, 1956, p.81.

Also see Athens Court of Appeal 4163/87, *Ελλάνη*, 1987, 942; Athens Court of Appeal 7261/86, *Ελλάνη*, 1986, 156; ΑΠ 418/78, *NoB*, 1978, 192.

[17] See C. Dadomo and S. Faran, *op.cit.*, p.22.

[18] See C.E., 31 juil. 1912, *Sté des granits prophyroïdes des Vosges, Gr. Ar.*, no 29; T.C., 22 janv. 1921, *Sté Commercile de l'Ouest africain, Gr. Ar.*, no 40; C.E., 28 juin 1963, *Narcy, R.D.P.*, 1963, p.1188; C.E., 22 nov. 1974, *Fédération des industries du sport, J.C.P.*, 1975, I, NO 2724; C.E., 23 janv. 1953, *Audoin, J.C.P.*, 1954, II, no 7916, note Vedel; C.E., 13 juillet 1967, *Allegretto, A.J.*, 1967, p.538; T.C., 26 mai 1954, *Moritz, J.C.P.*, 1954, II, no 8334, note Vedel; C.E., 5 fév. 1954, *El Hamidia, J.C.P.*, 1954, ii, NO 8136; T.C., 10 juillet 1965, *Sté Bourgogne-Bois, Rec.*, p.586; C.E., 13 octobre 1973, *A.D.A.S.E.A. du Rhône, D.*, 1979, p.249, note Amselek et Waline.

source of the dispute.[20] If the activity at the source of the dispute is of a private nature, then the actions of the administration fall within the scope of private disputes and are judged on the basis of civil law by the ordinary courts.[21] If, however, the administration acts within its competence of public power, applicable are the provisions of administrative law and any dispute must be brought before the administrative courts.[22] Thus, as Dickson notes, administrative courts judge on disputes "concerned with relationships in public law, or which relate to situations or powers which are different from those involving private individuals".[23]

In the case of the disputes of interest to this analysis, there is little doubt that it is the administrative courts which have the competence to hear the case. It is obvious that the state uses public power when passing a national law or issuing an administrative act rejecting the application of the foreign establishment.[24] Moreover, the interpretation of the Treaties and the compatibility of French law with the provisions of EC legislation falls within the competence of the administrative judge.[25] As Dantonel-Cor pus it, it is the task of the administrative judge to ensure that EC normative texts are applied in France.[26] The question is whether the French administrative courts can also hear claims for compensation or whether their competence is limited to applications for annulment of illegal administrative acts or declarations of illegality of normative legislative texts. The widely accepted position is that although companies are expected to attack the validity of the legislative provision grounding the administrative decision in the individual case,[27] even simple claims for compensation against the legislature or the administrative authorities of the state are heard before the administrative courts. A contrary solution

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[19] See J. Rivero and J. Waline, *Droit administratif* (1994, Dalloz, Paris), p.146; also see ΑΕΔ 5, 6, 8, 9 ΑΕΔ, *ΔΔ*, 1989, 779; Athens Three-member Administrative Court of First Instance 15222/90, *ΔΔ*, 1991, 1067.

[20] See P. Georges, *op.cit.*, p.254; also see G. Mitsopoulos, *Civil Procedure A'* (1972, Sakkoulas, Athens), p.105.

[21] See C.E., 5 fév. 1954, *El Hamidia, Rec.*, p.77; T.C., 15 janv. 1968, *Air-France c. Epoux Barbier, R.D.P.*, 1968, p.393; T.C., 22 janv. 1921, *Bac D' Eloka, Gr. Ar.*, no 40; C.E., 21 avril 1962, *Dame Agnesi*, D. 1962, p.535; also see ΑΠ 132/79, *ΤοΣ*, 1986, 177.

[22] See P. Dagtoglou, 1994, *op.cit.*, p.112.

[23] See B. Dickson, *Introduction to French Law* (1994, Pitman Publishing, London), p.30.

[24] See M. Jarvis, *The Application of EC Law by National Courts: The Free Movement of Goods* (1998, Clarendon Press, Oxford), pp.398-399; also see C.E., 23 mars 1984, *Alivar, Rec. Lebon*, 1984, p.127, *RTDE*, 1984, 341.

[25] See C.E., 29 juin 1990, *GISTI*, unreported; also see B. Stirn, "Le Conseil d'Etat et le droit communautaire, 49 (1993) *Actualité Juridique: Droit Administratif*, pp.244-246, at 244; for the negative response of the Conseil d'Etat on this matter until 1989, see N. Brown and J. Bell, *French Administrative Law* (1998, Clarendon Press, Oxford), pp.284-286.

[26] See N. Dantonel-Cor, "La mise en jour de la responsabilité de l'Etat français pour violation du droit communautaire" 31 [1995] *RTDE*, pp.471-507, at 472.

[27] See N. Brown and J. Bell, *op.cit.*, p.286.

would "undermine the separation of administrative and judicial authorities".[28] In any case, claims for compensation for damages resulting from legislative texts in breach of EC law has been considered admissible by administrative courts.[29] Similarly, admissible by administrative courts are claims for compensation for wrongful administrative acts.[30]

In Greece the determination of the courts with the jurisdiction to judge on such claims for compensation against the state was expressly introduced by Law 1406/1983, which was based on the general provisions of Arts.94 and 95 of the Constitution of 1975/86. According to these provisions, which were re-affirmed by Arts. 1, 2 and 71 of the Greek *Code of Administrative Procedure*, administrative disputes (and only administrative disputes)[31] are heard exclusively before the administrative courts.[32] Claims for state liability are disputes falling within the competence of the ordinary administrative courts which have jurisdiction in matters of *plein contientieux*, that is of claims for compensation.[33] One type of relevant claims are requests for compensation based on the "non passing of legislative or administrative provisions for the complete adaptation of Greek law with EC legislation [...] in the area of free establishment".[34] Such claims may be heard by the administrative courts during the trial for the annulment of the illegal administrative act or the declaration of the illegality of the law.[35]

The Italian position on this issue is different. The determination of the courts which can adjudicate in the cases of the breaches of EC law examined in this thesis is based on the distinction between subjective rights and legitimate interests. Disputes deriving from subjective rights are brought before the civil courts and disputes deriving from legitimate interests are judged by the administrative courts.[36] The French and

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[28] See P. Georges, *Droit public: Concours administratifs* (1992, Sirey, Paris), p.349.

[29] See, for example, Cour administrative d'appel de Paris (form. plen.), 1 juillet 1992, *Sté Jacques Dangeville*, *AJ*, 1992, p.768.

[30] See, for example, CE, 28 fév.1992, *AJ*, 1992, p.210.

[31] Civil disputes may not be added to the jurisdiction of administrative courts, not even by law. See ΑΕΔ 1/91, *Ελλδνη*, 1991, 1480; ΟλΑΠ 490/82 NoB, 1982, 204; ΟλΑΠ 488/82, *Ελλδνη*, 1982, 29.

[32] See ΑΠ 595/85, *Ελλδνη*, 1985, 300.

[33] See Athens Court of Appeal 1878/88, *Ελλδνη*, 1988, 349; Athens Court of Appeal 13605/88, *Ελλδνη*, 1988, 361; Athens Tri-member Court of First Instance 860/88, *ΔιΔικ*, 1, 122; Athens Court of Appeal 7711/87, *Ελλδνη*, 1987, 329; Athens Administrative Court of Appeal 1711/89, *ΔιΔικ*, 1, 1362.

[34] See S. Koukouli-Spiliotopoulou, "Issues arising from the effect of Community legislation to the provision of judicial protection" [1992] *NoB*, pp.825-847, at 845.

[35] See Art.26 of Presidential Decree 341/78, ΦΕΚ 71/10.5.1978, as codified in Art.124 (1) *Code of Administrative Procedure*; also see A. Liagas, "General introduction on the competence of administrative courts" in A. Liagas, V. Skouris and A. Sofialidis, *Delimitation of the Competence of Civil and Administrative Courts* (1990, Sakkoulas, Thessaloniki), pp.5-25, at 17; ΣτΕ 4052/1985, *ΔΔ*, 1986, 180.

[36] See G. Manca, A. Corrao and L. Longo, "Italy" in M. Sheridan and J. Cameron, *EC Legal Systems: An Introductory Guide* (1992, Butterworths, London/Dublin/Edinburgh/Brussels), p.Italy-23; also see L. Certoma, *The Italian Legal System* (1985, Butterworths, London), p.251; Cass. sez. un., 1 ottobre 1982, n.5030, *Giust. civ.*, 1982, I, 2916; Cassazione 18 novembre 1977, n.5042, *Giust. civ.*, 1978, I, 19; Cass. 15

Greek criterion of the nature of the applicable provisions is irrelevant in Italy. Thus, even in administrative disputes the ordinary courts adjudicate over subjective rights.[37] Despite the crucial importance of the distinction between the concepts of legitimate interests and subjective rights for the application of Italian law, they have not been adequately interpreted by the Italian courts.[38] Doctrine suggests that for the establishment of a subjective right the existence of a general legitimate interest is inadequate: what is required, is not only the illegitimacy and inappropriateness of the act or fact, but the acceptance that "a perfect and entrusted subjective right has been harmed".[39] Doctrine also accepts that the jurisdiction of ordinary courts in disputes deriving from acts of the state is limited to the examination of the effects of the act for the applicant, which may not extend to the revocation or modification of the act.[40]

In the case of disputes deriving from refusals of requests for authorisations to establish or trade in Italy, the subject matter is not the right to establish or trade but the exercise of these rights. The latter gives rise to subjective rights which fall within the jurisdiction of ordinary judges.[41] Similarly, disputes deriving from non-discretional registration in professional organisations as a condition for permission to trade in Italy are adjudicated by the ordinary courts.[42] However, an action for mere annulment of the administrative act turns against its legitimacy. It attacks the legitimate interest to establish or trade, which (being a legitimate interest) is a matter for the administrative courts.[43]

This observation is not too dissimilar to the conclusion reached in the analysis of the French and Greek positions. In all three countries only administrative judges may judge on the legality of administrative or legislative acts. However, there is one significant difference. In France and Greece the applicant company will submit its claim for compensation to the administrative judge who also has the competence to award damages. Italian law, however, has to take into account the persistent case-law of the *Corte Suprema di Cassazione*, which accepts civil liability of the administration only if a le-

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novembre 1983, n. 6767, *Foro it.*, 1984, I, 1009; Cass. 15 ottobre 1980, n.5456, *Foro it.*, 1981, I, 2530; Cass. 14 ottobre 1972, n.3060, unreported.

[37] See T. Watkin, *The Italian Legal Tradition* (1997, Ashgate/Dartmouth, Aldershot/Brookfield USA/Singapore/ Sydney), p.151.

[38] See La C. cost., 25 marzo 1980, n.35, *Foro it.*, 1980, I, 889

[39] See G. Landi and G. Potenza, *op.cit.*, p.330.

[40] See M. Severo Giannini and A. Piras, "Giurisdizione amministrativa" in *Enciclopedia del diritto* (1970, Giuffrè, Milano), pp.229-294, at 270.

[41] See, *ibid*, p.276.

[42] See Cons. St., sez. IV, 11 maggio 1966, n. 370, *Cons. St.*, 1966, 928.

[43] See Cass. civ., 9 giugno 1995, n. 6542, *Responsabilità civile e previdenza* 60 (1995), pp.710-712, at 711; also see Cass., 4 marzo 1985, n.1808; Tribunale Roma, 20 marzo 1987, *Foro am.*, 1987, 3540; also see N. Brown and J. Bell, *op.cit.*, p.273.

gitimate interest has been found to be injured.[44] Thus, for the establishment of civil liability, the company will have to prove as a *conditio sine qua non*[45] harm to a legitimate interest. As this can only be declared before the administrative courts, there seems to be only one legal route for the company: first attack the act before the administrative courts and then seek compensation for damages before the ordinary civil courts.[46] This has led Benvenuti to state that, quite simply, the existence of subjective rights signifies the lack of a valid administrative act, and the existence of an administrative or legislative act excludes any ground for recourse before the ordinary courts.[47] Similarly, many authors note that a claim for compensation pre-supposes the annulment of the act giving rise to the dispute.[48] This position reflects the change in the case-law of the *Corte di Cassazione*, which no longer accepts the evaluation of the legality of an act by the civil court as a preliminary issue, or the simple non-application of the act by the civil judge.[49]

In the particular case of claims for compensation against the Italian state for its failure to comply with its EU obligations, the *Corte di Cassazione* has held that claims based on any legislative or administrative act which leaves even the smallest margin of discretion to the state (either in the evaluation of the fulfilment of certain generically introduced conditions or in the determination of compliance with national acts) gives rise to legitimate interests which are protected, at least in the first place, by the administrative courts. These legitimate interests give rise to subjective rights, for which compensation may be sought only after the annulment of the relevant legislative or administrative measure.[50] Claims based on legislative or administrative measures which leave

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[44] See G. Landi and G. Potenza, *Manuale di diritto amministrativo* (1990, Giuffrè, Milano), p.330.

[45] See Cass., 5 ottobre 1979, n.5145; also see Cass., 5 ottobre 1979, n.5146; F. Satta, "Responsabilità della pubblica amministrazione" in *Enciclopedia del diritto* (1988, Giuffrè, Milano), pp.1369-1381, at1374.

[46] See Cass., sez.un., 22 ottobre 1984, n.5361, *Foro it.*, 1985, I, 2358; Cass., 6 aprile 1983, n.2443, *Foro it.*, 1983, I, 2498; Cass., 1 ottobre 1982, n.5027, *Foro it.*, 1982, I, 2433; Cass., 16 luglio 1985, n. 4151, *Foro it.*, 1986, I, 2206; also see V. Caianiello, "Il giudice amministrativo ed i nuovi criteri di riparto delle giurisdizioni" 74 [1998] *Foro amministrativo*, pp.1943-1955, at 1946; also see Trib. di Roma, 23 settembre 1987, *Giust. civ.*, 1988, 785, which states that the prohibition to open a pharmacy is a mere *interresso legitimo* and cannot give rise to claims for compensation until the relevant subjective right is born through the annulment of the act.

[47] See F. Benvenuti, "Giustizia amministrativa", *Enciclopedia di diritto* (1970, Giuffrè, Milano), pp. 588-612, at 602; however, see *contra* Corte cost., 8 maggio 1998, n.165, *Giur.it.*, 1998, 1929.

[48] See A. Toscano, "La responsabilità civile della p.a.", 38 (1988) *Giustizia civile*, pp.1042-1045, at 1042-1043; G. Zanobini, *Corso di diritto amministrativo* (1958, Giuffrè, Milano), p.339; also see Trib. Roma, sez. I, 30 giugno 1987, *Giust. civ.*, 1988, 1041.

[49] See Cass. civ., 9 giugno 1995, n. 6542, *Responsabilità civile e previdenza* 60 (1995), pp.710-712, which signaled a departure from the then prevailing view reflected in Cass. civ., Sez. un., 22 ottobre 1984, n.5361, *Resp. civ. prev.*, 1985, 625. The latter decision referred to the case where the illegitimacy of the act leads to its non-application by the civil court. For an analysis of the older position, see M. Cerrato, "Il giudice amministrativo e le direttive comunitarie" 70 [1994] *Foro amministrativo*, pp.2010-2049, at 2026.

[50] See Cass., sez. un., 18 giugno 1981, n.3967, *Giust. civ.*, 1981, 2217.

absolutely no ground for discretion to the state give rise to subjective rights which are directly adjudicated by the civil courts.[51] In any case, violations of EC law constitute the source of civil liability of the state and are mainly heard by the administrative courts.[52] The latter may take into account judgements of the ECJ declaring that the relevant legislative or administrative practises are in breach of EC law.

This brief reference to the problem of the determination of the court with the jurisdiction to judge on claims of foreign secondary establishments against the French, Greek and Italian state has led to the conclusion that in all three states claims for compensation against the state for breaches of EC law fall mainly within the competence of the administrative courts. The situation is quite clear in Greece, where the issue is resolved by the express provision of Law 1406/83, as amended by Arts.1, 2 and 71 of the new *Code of Administrative Procedure*, which subjects all claims for compensation against the state to the administrative courts. This provision is successful in creating a situation of legal certainty for foreign companies. In France the position seems to be equally clear. Indeed, the French legislator has attempted -and to a certain degree has managed- to clarify the French position through the Law of 16-24 August 1790 in combination with a series of judgements by the French courts. It must be accepted, however, that the general terms in which this ancient law is expressed in combination with the lack of a strict doctrine of precedent in French law poses some uncertainty over the exact distinction between the ordinary and administrative competence in each particular case. This has led to the criticism, albeit mild, of the French system for lack of specific provisions which would delimit beyond dispute the two competencies.[53]

Unfortunately, the Italian system is even less clear. In fact, the complex and fluid distinction between legitimate interests and subjective rights has been severely criticised for abolition of all commercial stability and legal certainty, for limitation to the access of individuals to compensation and for the "typically Italian discourtesy" of its encouragement of subsequent trials between the administrative and the civil courts for the final achievement of compensation.[54] Some authors support the view that this criterion should be abandoned in favour of "a clearer distinction on the basis of content", if only as a sign of the Italian willingness to contribute to the harmonisation of

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[51] See C.S., 26 aprile 1977, n.1561; sent. 15 ottobre 1975, n.3334; sent. 18 settembre 1970, n.1572.

[52] See Cons. St., Sez. V, 4 novembre 1991, *Foro am.*, 1994, II, 1257; Sez. IV, 18 gennaio 1996, n.54, *Giust. civ.*, 1996, 1191; Sez. II, 19 giugno 1991, n.570, *Foro it.*, 1994, III, 66; TAR Sardinia, 22 dicembre 1994, n.2204, *TAR*, 1995, I, 944; TAR Calabria, 19 dicembre 1989, n. 502, *Riv. dei appalti*, 1990, 133.

[53] See P. Georges, *op.cit.*, p.248.

[54] See V. Caianiello, *op.cit.*, pp. 1946 and 1948.

administrative laws within the EU.[55] Another point of criticism refers to the consequent subjective criterion for the classification of acts and disputes,[56] which may only lead to further confusion on the choice of the competent courts.[57] A third point of concern refers to the introduction of a dual jurisdiction. It is felt that the complex rules on the competence of the courts to judge on claims for compensation creates difficulty and confusion as to the court with the competence to hear each dispute.[58] Moreover, due to the lack of a strict doctrine of precedent in civil law jurisdictions, the judgements of the administrative courts seem to be of intermediary rather than final value for the civil judge, who may decide to apply or merely consult them for the final formation of a judgement.[59]

When analysed with reference to claims for compensation for state liability for breaches of EC law, the Italian position creates two additional points of unease. The first point concerns the need of foreign companies to establish the non-compliance of the act or law giving rise to state liability before the claim for compensation is heard. Since many breaches of EC law never reach the ECJ while many ECJ judgements rest in the declaration of breach of merely one relevant EC provision, it seems that foreign establishments will often have to undergo the additional burden of proving its non-compliance with the freedom of establishment. This will inevitably take place before the national courts under the procedure of preliminary rulings, whose effectiveness is under debate,[60] as will be demonstrated in Chapter 7. This is even more significant, if the need for two separate actions before two different national courts is taken into account. Thus, the second point of concern refers to the possible effectiveness of the protection offered to companies by a system which refers them to two different national judges, who may lack in knowledge and willingness to identify the issue as one of EC law, or to recognise the necessity to apply EC rather than national legal provisions.[61]

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[55] See L. Bocchi, *op.cit.*, p.290; for reference to doctrine supporting this view see *ibid*, note 8.

[56] See G. Landi and G. Potenza, *op.cit.*, p.224.

[57] See B. Spampinato, "Sull'estensione della giurisdizione amministrativa agli atti del privato concessionario", 73 [1997] *Foro amministrativo*, pp.977-998, at 977.

[58] See E. Reggio d'Aci, "Verso una giustizia amministrativa sostanziale?", 66 [1990] *Foro amministrativo*, pp.2515-2531, at 2526.

[59] See H. Simon, *Il comportamento amministrativo* (1979, Bologna), p.106.

[60] See M. Chiti, "I signori del diritto comunitario: la corte di giustizia e lo sviluppo del diritto amministrativo europeo", 41 [1991] *Rivista trimestriale di diritto pubblico*, pp.798-831, at 821-822.

[61] See Trib. Parma, 23 avrile 1994, *Foro it.*, 1994, I, 2526, which stated that the non-implementation of a directive does not need to be declared by the ECJ, but national courts must ascertain whether a situation of non-compliance with EC law exists.

C2. The choice of the suitable remedy before the national courts

In the three selected jurisdictions the first *forum* for the hearing of cases of breaches of EC law by the state is the administrative courts.[62] In France and Greece the case is heard in a single trial, where the court decides on the annulment of the illegal administrative act or the declaration of illegality of the illegal national legislative measure, ands on the claim of the company for compensation. In Italy, however, the initial process before the administrative courts which annuls the measure in question is followed by a second hearing brought before the civil courts which adjudicate on the claim for compensation. Before proceeding with the determination of the suitable remedy for the submission of the companies' claim, it must be noted that -as established in Chapter 3- foreign companies are recognised *ipso jure* within the three selected countries. Since secondary units lack separate legal personality, it is the recognised foreign company which has the right to submit a claim for compensation before the national courts.

In order to achieve a full examination of all aspects of the case, including an evaluation of the legality of the measure giving rise to liability and the claim for compensation, the company suffering damages will make use of the French unrestricted action (*contentieux de pleine jurisdiction*) or the similar Greek *prosfygi* brought on any possible ground of law or fact for the assessment of actions in tort against the state (*contentieux de la responsabilité*).[63] This action takes into account the whole administrative or legislative activity, not only under the profile of legitimacy, but also the evaluation of fact and merit.[64] In other words, the power awarded to the administrative judge in this type of action is far more extensive compared to actions for mere annulment: the judge is asked to acknowledge the existence of a right, to declare an illegal harm to this right and to rectify this situation.[65] Within this last framework the judge may even amend the illegal act.[66] The action is open to the beneficiaries of the legal right whose damage is claimed, or their legal successors,[67] and it is only these persons

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[62] Since the aim of this chapter is to evaluate the judicial protection offered to companies in the three selected countries administrative remedies heard internally by administrative organs are outside the scope of this analysis and will not be referred to here. For administrative remedies in France and Italy, see M. Protio, "La riforma del contentieux administratif" 72 [1996] *Foro amministrativo*, pp.2117-2162;also see B. Pacteau, *Contientieux administratif* (1997, Presses Universitaires de France, Paris).

[63] See W. Cairns and R. McKeon, *op.cit.*, pp142-143; also see P. Dagtoglou, 1994, *op.cit.*, p.479; N. Soleidakis, *Application for Compensation* (1998, Nomiki Vivliothiki, Athens).

[64] See G. Landie and G. Potenza, *op.cit.*, p.674; also see N. Brown and J. Bell, *op.cit.*, p.277.

[65] See J. Rivero and J. Waline, *op.cit.*, p.181.

[66] See C. Dadomo and S. Farran, *op.cit.*, p.224; also see P. Dagtoglou, 1994, *op.cit.*, p.465.

[67] See Art.24 , par.1 of the Greek Presidential Decree 341/78, ΦΕΚ 71 A'/10.5.1978 in combination with Art.4 of Law 1406/83, ΦΕΚ 182 A'/14.12.1983; as codified by Art.71 *CAP.*

who are legally bound by the court's judgement.[68] Last but not least, with this type of action, the company may seek both the annulment of the act and compensation for damages suffered.[69] This joint action is of particular use to companies which may have suffered damages in the past as a result of breaches of EC law by the Greek and French national authorities, but they still wish to establish and pursue their activities in these countries in the future. In this case, the companies' action before the courts will both achieve compensation for damages suffered in the past, as well as ensure the future observance of their legal rights by the national authorities.

In Italy, however, such a wide examination of a case is impossible. In the first, administrative stage of the action, the company has to seek annulment of the act which caused the alleged damage. In order to achieve this, the company must establish *legitimatio ad causam*, interest to act and *legitimatio ad processum*.[70] In other words, the judge needs to be satisfied that the subject of the remedy falls within the jurisdiction of the administrative courts,[71] the applicant has a personal, direct, actual and concrete interest in attacking the act whose annulment is sought,[72] and the company, as a person, can participate in a trial before an Italian court.[73] Moreover, the company will also have to prove the illegitimacy of the act under attack on the basis of one of the restrictively introduced grounds of incompetence, excess of power or violation of law.[74] If all these conditions are fulfilled, the administrative judge annuls the measure and either refers it back to the competent authority in case of incompetence, or annuls the measure in whole or part in cases of excess of power and violation of law.[75]

The Italian position on the issue of remedies for state liability due to violations of EC law is quite restrictive in comparison with the relevant Greek and French provisions. The most obvious constraints for the companies' access to justice refer to the delimitation of the circle of persons that may attack an illegitimate act. Although similar procedural restrictions are introduced by the French and Greek laws, these refer to the

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[68] See Art.57 of the Greek Presidential Decree 341/78, ΦΕΚ 71 A'/10.5.1978, as codified by Art.197(3) of the new *CAP*. In contrast, the effect of an *ultra vires* action apply *erga omnes*. See W. Cairns and R. McKeon, *op.cit.*, p.143.

[69] See J. Rivero and J. Waline, *op.cit.*, p.181; also see Art.26 of the Greek Presidential Decree 341/78, *ΦΕΚ* 71 A'/10.5.1978; Art.2, par.3 of Law 1649/1986, *ΦΕΚ* 149 A'/3.10.1986; Art.19, par.1 of Law 1868/989, *ΦΕΚ* 230, A'/10.10.89, as codified by Arts.79-80 *CAP*.

[70] See S. Satta, *Diritto processuale civile* (1981, CEDAM, Padova), p.132.

[71] See C. S., sez. IV, 29 aprile 1980, n. 473; C. S., ad. plen., 19 ottobre 1979, n. 24; Cass., 8 maggio 1978, n. 2208, TAR. Em. Rom., 26 gennaio 1977, n. 28.

[72] See C. S., sez. V, 28 febbraio 1975, n.233; TAR. Cal., 7 aprile 1975, n. 16; TAR. Lazio, sez. II, 17 dicembre 1975, n.575.

[73] See E. Picozza, "Processo amministrativo" in *Enciclopedia del diritto* (1987, Giuffrè, Milano), pp.463-519, at 474.

[74] See T. Watkin, *op.cit.*, p.153.

procedural ability of the company to be heard by the national courts, rather than to the quality of the right allegedly harmed by the act. An even more significant constraint concerns the delimitation of the grounds under which the application for annulment can be achieved. A consequent constraint refers to the extent of examination afforded by the Italian legal system with reference to the act. Although the legitimacy of the act is evaluated, there is no possible assessment of its merits. Similarly, there is little flexibility in the power of the administrative judge to rectify the damage caused, as there is no possibility of amending the act. Having said that, the decision of the Italian courts seems to be much stronger in legal value, as it is binding not only to the parties of the dispute, but *erga omnes*. This point is of particular significance for the three selected civil law jurisdictions, where -at least in theory- there is no obligation to follow precedents of other courts, especially those of different competence.

C3. The evolution of the case before the national courts

In France and Greece the hearing of the case in the first instance takes place before the French Administrative Court of First Instance and the Greek Tri-member Administrative Court of First Instance of the region where the wrongful administrative act was issued or where the head office of the administrative authority which omitted to issue the wrongful administrative act is based.[76] After the French reform of 1987 judgements of the administrative courts of first instance are subject to appeal before the *Cour administrative d'appel* of the region where the court issuing the judgement in the first instance is located.[77] The first instance judgement is subject to appeal before the Administrative Court of Appeal,[78] in the region of which sat the Administrative Court of First Instance which decided the case in the first instance. The appeal can be based on any ground of law or fact,[79] as long as the relevant argument is concrete and precise,[80] and has been put forward by the appellant.[81] The court judging on the appeal may quash, in part or in

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[75] See L. Certoma, *op.cit.*, p.259.

[76] See Art.7, par.6 in combination with par.5 of Law 702/1977, *ΦΕΚ* 268, A'/19.9.1977, and Art.2, par.1 and Art.3, par.1 of Presidential Decree 341/1978, *ΦΕΚ* 71, A'/10.5.1978, as codified by Arts.6 and 7 *CAP*.

[77] See the Law of 31 December 1987, as codified by Art.7(4) *CAP*; also see C.E., 12 juillet 1969, *L'Etang, Rec. Lebon*, 388; J. Rivero and J. Waline, *op.cit.*, p.161.

[78] See Art.8, par.2 of Law 702/1977, *ΦΕΚ* 268, A'/19.9.1977; Art.2, par.2 and Art.66, par.1 of Presidential Decree 341/1987, *ΦΕΚ* 71, A'/10.5.1978, as codified in Art.6(6) *CAP*.

[79] See Art.95 *CAP*.

[80] See ΣτΕ 1275/89, *ΔΔ*, 1989, 1285.

[81] See ΣτΕ 531/89 and ΣτΕ 4664/84, *ΔΔ*, 1990, 786, note Papahatjis; 75/90, *ΔΔ*, 1990, 788; also see C.E., 27 juin 1919, *Viallat et fils, Rec. Lebon*, 561.

whole, or modify the judgement under appeal.[82] Moreover, the court of appeal may nullify or modify the administrative act under attack for any reason, irrespective of whether it has been put forward by the appellant or not.[83] The company may seek the cassation (*anairesi* or *cassation*) of the decision of the Court of Appeal[84] before the Greek or French Council of the State for matters of law only.[85] Admissible grounds of cassation are excess of power of the court whose judgement is under cassation, wrongful or illegal membership of the court, wrongful interpretation or application of law, violation of procedural law, and existence of two conflicting judgements on the same case.[86] Cassation on the basis of wrongful evaluation of facts,[87] error concerning facts,[88] wrongful interpretation of the documents submitted as means of proof,[89] or violation of a non-binding internal administrative document have been unsuccessful before the Greek Council of the State.[90] The latter may reject the application, or accept it and quash the judgement under attack in part or in whole. In Greece the result of a successful cassation is the return of the case to the court of first instance,[91] which is legally bound to follow the decision of the Council of the State.[92] In France, however, the *Conseil* may either refer the case back to the court whose decision it decides to quash, or keep it and decide on its substance as a court of first and final instance.[93]

The Greek and French provisions on the remedies against the liability of the state have proven very similar. The foreign company has the opportunity to present its case in two instances, before the court of first instance and the court of appeal. Both courts decide fully on the case and may adjudicate issues of both substance and law. This system is quite similar to the procedure before the civil courts for private disputes. Equally similar is the procedure for cassation, judged before the hierarchically highest court which, adjudicates on matters of law only. From this brief reference to the proce-

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[82] See Art.174, par.1, ΚΦΔ; Art.75, pars.1 and 2 of Presidential Decree 341/1978, *ΦΕΚ* 71, A'/10.5.1978, as codified in Art.98 *CAP*; also see C. Dadomo and S. Farran, *op.cit.*, p.239.

[83] See ΣτΕ 633/75, unreported; also see P. Georges, *op.cit.*, p.263.

[84] Decisions in the first instance are not subject to cassation even after the end of the prescription period for the submission of an appeal. See ΟλΣτΕ 654/93, *ΔΔ*, 1993, 67; ΣτΕ 1648/93, *ΔΔ*, 1993, 714. Also see CE, 7 fév. 1947, *d'Aillières, G. Ar.*, no 68.

[85] See Art.95, par.1 b of the Constitution; see P. Dagtoglou, 1994, *op.cit.*, p.698. For France, see C.E., 9 juillet 1956, *Trassard*, p.310.

[86] See Art.56 of Presidential Decree 18/89 of 30.12.1988, *ΦΕΚ* 8, A'/9.1.1989; for France see reasons same J. Rivero and J. Waline, *op.cit.*, p.199.

[87] See ΣτΕ 2283/95, *ΔΔ*, 1995, 618; ΣτΕ 2625/89, *ΕλλΔ*, 1989, 374.

[88] See ΣτΕ 1955/87, *NoB*, 1987, 716.

[89] See I. Katras, *op.cit.*, p.130, note 10.

[90] See ΣτΕ 113/96, *ΔΔ*, 1996, 611.

[91] See ΟλΣτΕ 1470/90, *ΔΔ*, 1990, 713; also see ΣτΕ 1338/93, *ΔΔ*, 1993, 714.

[92] See ΣτΕ 173/90, *ΔΔ*, 1990, 714.

[93] See J. Rivero and J. Waline, *op.cit.*, p.199; also see P. Georges, *op.cit.*, p.264.

dure before the administrative courts it seems that foreign companies seeking compensation due to state liability suffer no additional burden in comparison with similar actions turned against private individuals.

This conclusion, however, does not take into account two areas where the state has maintained its privilege. First, both in Greece and in France the submission of an action for appeal or cassation against the state lacks the suspending effect which is introduced for similar remedies adjudicated before the civil courts.[94] This means that the initial judgement can be executed even if an appeal or cassation is submitted. Consequently, companies which have lost their application against the state in the first instance and are suffering damages due to a wrongful administrative or legislative act or omission will continue to be bound by the act and, as a result, to suffer additional damages while the appeal or cassation against the allegedly wrongful initial judgement comes to an end. This wouldn't have been the case in claims for damages against private individuals.[95] It must be noted that cassations submitted by the Greek state do have suspending effect. This provision has been strongly criticised as a breach of the principle of equality amongst plaintiffs.[96]

Second, the prescription periods introduced for the submission of the appeal and cassation are much shorter in comparison to actions against private individuals heard by the civil courts.[97] In France, the appeal and cassation must be submitted within two months from the day that the judgement under attack was issued.[98] In contrast, in civil law the limitation period begins with its notification to the plaintiff.[99] In civil law this prescription period may be extended to two years, when the judgement has not been served to the applicant.[100] In Greece these prescription periods are even shorter. The limitation period for the appeal is only one month starting from the next day after the notification of the judgement under attack and ending on the same day of the next

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[94] In the case of Greece, see P. Dagtoglou, 1994, *op.cit.*, p.672 for appeals and Art.54 of Presidential Decree 18/89 of 30.12.1988, *ΦΕΚ* 8, A'/9.1.1989; for France see J. Vincent and S. Guinchard, *Procédure Civile* (1994, Dalloz, Paris), pp.830-831; also see C. Dadomo and S. Farran, *op.cit.*, p.239.

[95] See B. Dickson, *op.cit.*, p.134.

[96] See Art.19 of Emergency Law 1715/1973 and Art.54 of Presidential Decree 18/1989 of 30.12.1988, *ΦΕΚ* 8, A'/9.1.1989; also see P. Dagtoglou, 1994, *op.cit.*, p.708.

[97] See P. Georges, *op.cit.*, p.262; also see J. Vincent and S. Guinchard, *op.cit.*, p.824; N. Soleidakis, *op.cit.*, pp.39 and 131-132.

[98] See C. Dadomo and S. Farran, *op.cit.*, p.239; also see C. Gabole, *op.cit.*, p.466; C.E., 8 décembre 1972, *Ministre de l'Intérieur*, *D.A.*, 1973, 27.

[99] See Art.528 CPC; also see Cour d'Appel, civ., 2, 13 janv.1983, *Gaz. Pal.*, 1983, 444, note du Rusquec.

[100] See Art.528, par.1 CPC; also see S. Guinchard, *op.cit.*, p.290.

month.[101] In any case, the appeal must be submitted within one year from the publication of the judgement, whereas in a civil trial the relevant prescription period is three years.[102] Following once again the French model, the Greek cassation must be submitted within 60 days starting from the notification of the judgement to the company or within 60 days starting from the date of publication of the judgement for the state.[103] In both France and Greece the difference in the initiating event of the prescription period is a violation of the principle of equality amongst plaintiffs, which -in view of the delays in the publication of administrative judgements and the consequent longer limitation periods for the state- proves to be beneficiary to the state.[104]

Without a doubt the company's claim for compensation against the state would benefit from a dual-grade procedure and a cassation before the highest administrative court. However, it would have to overcome the procedural hurdles set by the Greek and French law in favour of the state, namely lack of suspending effect of the judgement under attack and shorter limitation periods in comparison with the relevant procedures introduced for claims against private persons.

In Italy the company's case will be heard before the *Tribunale Amministrativo Regionale* (TAR) in the first instance.[105] Under Art.25 CPC, territorial competence to judge the case has the *tribunale* of the place where the head-office of the relevant *Avvocatura dello Stato* is located.[106] As a general rule, the aim of the procedure before the TAR is the attack of the legitimacy and expediency of the administrative or legislative measure which constitutes the source of the company's damage.[107] The court may annul the measure under attack for incompetence, excess of power or violation of law, or uphold it.[108] The merits of the case are irrelevant.[109] The judgement of the TAR is subject to appeal for matters of law and fact before the *Consiglio di Stato* within a short prescription period of sixty days from the notification of the decision in the first instance to

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[101] See Art.4 of Law 1406/83, *ΦΕΚ* 182 A'/14.12.1983, which refers to Art.167 of Presidential Decree 331/85, *ΦΕΚ* 116, A'/31.5; also see ΣτΕ 3504/91, *ΔΔ*, 1991, 294.

[102] See Art.5, par.2 of Law 702/1977, *ΦΕΚ* 268, A'/19.9.1977 and Art.58, par.3 of Presidential Decree 18/1989 of 30.12.1988, *ΦΕΚ* 8, A'/9.1.1989. Also see Art.518, par.2 of the Code of Civil Procedure.

[103] See Art.53 of Presidential Decree 18/89 of 30.12.1988, *ΦΕΚ* 8, A'/9.1.1989. Also see B. Papachristou, *Limitation Periods for and against the State and Public Enterprises* (1993, Sakkoulas, Athens), p.227; ΣτΕ 1084/1984, NoB, 1985, 342.

[104] See P. Dagtoglou, 1994, *op.cit.*, p.706; also see S. Guinchard, *Code de Procédure Civile* (1997-1998, Litec, Paris), p.289.

[105] See Art.6 Reg. Proc. TAR; also see Art.35 Cons. St. and 6 reg. proc. Con. St.

[106] Also see Royal Decree n.1611 of 30 October 1933; Law n. 260 of 25 March 1958; Law n. 103 of 3 April 1979, as subsequently amended.

[107] See L. Certoma, *op.cit.*, p.259.

[108] See T. Watkin, *op.cit.*, p.155.

[109] See L. Certoma, *op.cit.*, p.258.

the applicant.[110] Contrary to France and Greece, this period can be extended to the one year introduced by the relevant provision of civil procedure[111] in cases where the notification never took place or was undertaken in an illegal manner.[112] Similarly to Greece and France, however, the appeal before the *Consiglio di Stato* does not have suspending effect.[113] Under Art.362 CPC the decision of the Council of the State is subject to cassation before the *Corte di Cassazione* for jurisdictional grounds only.[114] Having succeeded to annul or modify the administrative or legislative measure which caused damage to the company, and thus having acquired a subjective right, the company will bring its claim for compensation before the civil court. This will probably be the *Tribunale*, which adjudicates claims of above 750,000 Lire.[115] Its decisions are subject to appeal on matters of law and fact before the *Corte d' Appello* which must be submitted within the prescription period of thirty days running from the day of the publication of the first instance judgement.[116] The decision on this appeal is subject to cassation before the *Corte di Cassazione* on matters of law only.[117] Valid grounds for cassation include errors in the jurisdictional process,[118] competence errors,[119] violation or false application of the law,[120] invalidity of the sentence or the procedure,[121] and omission or insufficient or contradictory legal basis.[122]

The Italian procedure for the achievement of compensation for state liability is characterised by its complexity,[123] which has already been mentioned. From the analysis of the evolution of the case before the Italian courts other disadvantages of the Italian

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[110] See Art.28, par.2 of Law 1034 of 6 December 1971; also see G. Landi and G. Potenza, *op.cit.*, p.800.

[111] See Art.327 CPC.

[112] See F. Benvenuti, "Processo amministrativo", *Enciclopedia del diritto* (1987, Giuffrè, Milano), pp.454-519, at 504.

[113] See G. Landi and G. Potenza, *op.cit.*, p.800.

[114] See Art.37 of Royal Decree no. 1443 of 28 October 1940; also see Maisto and Miscali, *op.cit.*, p.370.

[115] See Arts.339 and 343 CPC; Cass. Civ., sez. III, 11 ottobre 1978, n. 3542; also L. Certoma, *op.cit.*, p.188.

[116] See Art.341 CPC; Cass. Civ., sez. III, 11 gennaio 1979, n. 220; also see T. Watkin, *op.cit.*, p.105.

[117] See Art.111 of the Constitution; Art.59 of Law 353 of 26 November 1990; also see Maisto and Miscali, *op.cit.*, p.361; Cass. civ., sez. Un., 30 luglio 1953, n.2593.

[118] See Cass. Civ., sez. II, 15 aprile 1987, n. 3725; Cass. Civ., sez. I, 8 luglio 1986, n. 4455.

[119] See Cass. Civ., sez. I, 17 gennaio 1980, n. 385; Cass. Civ., sez. I, 4 febbraio 1980, n. 776; Cass. Civ., sez. I, 14 aprile 1993, n. 4442; Cass. Civ., sez. I, 16 luglio 1979, n. 4139; Cass. Civ., sez. II, 5 febbraio 1979, n.764.

[120] Cass. Civ., sez. II, 25 gennaio 1980, n. 617; Cass. Civ., sez. II, 8 gennaio 1980, n. 124; Cass. Civ. Sez. II, 16 novembre 1985, n. 5622; Cass. Civ., sez. Lav., 18 gennaio 1993, n. 550; Cass. Civ., sez. I, 26 gennaio 1987, n. 713.

[121] See Cass. Civ., sez. Lav., 25 giugno 1985, n. 3810.

[122] See Cass. Civ., sez. Lav., 10 maggio 1986, n. 3113; Cass. Civ., sez. I, 22 febbraio 1986, n. 1981; Cass. Civ., sez. I, 16 gennaio 1991, n. 357; Cass. Civ., sez. I, 18 settembre 1986, n. 5656.

[123] See F. Benvenuti, *op.cit.*, 1987, p.462.

position become obvious. First, the company claiming damages from the Italian state will have to seek the annulment of the relevant administrative or legislative measure on grounds which are much limited compared to the relevant provisions of French and Greek law. Indeed, the Italian grounds for the annulment of the act are limited to excess of power, incompetence and breach of law. This leaves little ground to annulment on the basis of wrongful interpretation of the evidence produced, wrongful ignorance of evidence or other matters of fact. This limitation in the grounds for annulment of the relevant measures acquires particular significance for the evaluation of the protection offered to companies under the Italian provisions, if one takes into account that failure of the company to establish a valid reason for the annulment of the act signifies lack of a subjective right, which in turn means lack of opportunity to achieve compensation. Second, in Italy the cassation in the administrative trial, allowed on matters of law only before the French and Greek Council of the State, is limited to purely jurisdictional issues. This withholds the company's right to a two-grade trial with the opportunity for a cassation on matters of law, which would normally be the case in claims for compensation against private individuals in the civil procedure. Third, as is also the case in France and Greece, the decisions of the Italian administrative courts lack suspending effect, a fact which disadvantages the companies and favours the state.[124]

Having said that, in Italy the time-limits set for the submission of appeals and cassations are the same in the administrative and civil process creating no difference between actions for compensation against the state and private individuals.[125] Moreover, in the Italian administrative stage of the claim for compensation, the presence of the company in court to defend its recourse is not necessary.[126] This signifies that the case will evolve even if, for any reason, the company does not appear before the administrative judge. In addition to this, the administrative judge has the power and the obligation to examine the validity of all grounds for annulment put forward by the applicant company but based on all possible arguments. This provision introduces a more in-depth examination of the merits on which the claim of the company is based.

From the analysis of the possible evolution of the trial before the national courts of the three selected jurisdictions it becomes clear that the company's claim against the state is more complicated and difficult compared to claims against private individuals.

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[124] See F. Bartolini, *Il nuovo codice di procedura civile* (1995, Editrice la tribuna, Piacenza), pp.536-537.

[125] See Art.369 CPC, as modified by Art.4 of Law 793 of 18 October 1977. For a criticism on the practice of introducing shorter time-limits, see Trib. di Roma, 11 febbraio 1993, *Foro it.*, 1993, 2391.

[126] See *ibid*, 1987, p.460.

C4. Miscellaneous procedural issues: enforcement and compliance

Having followed the procedural aspect of the company's claim for compensation against the state in the three selected countries and having established that claims against the state in all three jurisdiction tend to be burdened by special provisions introduced in favour of the state, it is time to refer an issue which is especially problematic in claims against the national authorities of the selected states. Perhaps, the most important point of reference for the assessment of the efficiency of the protection offered to foreign companies at the national level refers to national provisions on the execution of the relevant judgements. In other words, for the evaluation of the level of access of these companies to justice at national level, it is important to establish that the judgement of the national court awarding compensation to the company can be efficiently used for the final payment of the awarded sum to the foreign public limited company.

In Italy final judgements of civil and administrative courts may be enforced against the state. The procedure of execution or enforcement of civil court judgements is regulated by the third *Libro* of the CPC. As a general remark, it would be fair to state that in Italy (as in most civil law countries) the aim of the judicial system is to establish the existence of rights rather than to enforce these rights.[127] As a consequence of this philosophy, the execution process is initiated at the demand of the plaintiffs, who must acquire one of the exclusively introduced executive documents of Art.474 CPC. These include final judgements of the civil and administrative courts.[128] The powers awarded to Italian judges in the area of enforcement are wide and include all means under which the order of the final judgement on the substance of the case can be realised. Examples of such powers include an order to the administration to proceed to the realisation of the judgement without delay, or an order to the administration to issue a new act without delay, or the decision of the court to take action *in lieu* of the administration.[129] It must be noted, as rule, plaintiffs may seek the enforcement of previous judgements only when the state has failed to act in compliance with a previous final decision.[130] However, actions for enforcement have been considered admissible even in cases of pseudo-acts or wrongful acts.[131] Judgements on compliance are subject to appeal.[132]

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[127] See T. Watkin, *op.cit.*, p.106.
[128] See E. Picozza, *op.cit.*, p.515.
[129] See G. Paleologo, "Le juge administratif italien" [1993] *Rivista trimestriale di diritto pubblico*, pp.615-628, at 619.
[130] See Cons. St., sez. V, 5 giugno 1985, n. 230; Cons. St., ad. plen., 19 marzo 1984, n.6.
[131] See Cons. St., ad. plen., 14 luglio 1973, n. 23; Cons. St., ad. plen. 29 gennaio 1980, n. 2.
[132] See E. Picozza, *op.cit.*, p.518.

In France the enforcement of final judgements[133] in the administrative process depends very much upon the goodwill of the administration, as there is practically no means of forced execution against the state.[134] This is mainly based on the belief that there is a need for the state to enjoy certain privileges in order to serve the general good more effectively.[135] The weakness[136] of the administrative courts to force the national authorities to comply with their judgements is addressed via three routes: first, the right of the minister concerned to seek the assistance of the *Conseil d' Etat* on the appropriate manner in which a judgement against him may be enforced; second, the possibility of a *Conseil d'Etat* initiative to point out to the administration the implication of final judgements; and third, the right of the plaintiff to report difficulties of enforcement to the *Conseil*.[137] Insofar as orders to payment of compensation are concerned, the state has the obligation to proceed with payment within four months of the publication of the judgement. If the state does not conform with this obligation, the *Conseil d' Etat* has the power to order financial penalties and a fine for each day of non-compliance.[138] It must be noted, however, that the admittedly significant control awarded to the *Conseil* for the effectiveness of judgements against the state is clouded by the very cautious use of this action so far and the small number of successful actions.[139] Thus, there is little doubt that enforcement of final administrative judgements against the French national authorities is a problematic process. This is mainly due to the lack of execution mechanisms, as is the case with enforcement against private individuals. The introduction of indirect means of coercion of the French state to comply with administrative judgements can be of some help to foreign companies seeking the payment of compensation for violations of EC law. The usual compliance of the French authorities, albeit delayed, is also a fact which must be taken into account for the evaluation of the effects of this provision on the access of foreign companies to justice at the national level.[140] However, it would be unfair to say that this privilege of the French state does not radically and adversely affect the right of companies to effective judicial protection, even after the violation has been declared by the courts and compensation has been ordered.

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[133] See C.E., 15 mars 1963, *Centre hospitalier régional de Grenoble c/ Bossé, Rec. Lebon*, p.173; C.E., 5 février 1969, *Port autonome de Bordeaux, D.A..*, 1969, 109.

[134] See J. Rivero and J. Waline, *op.cit.*, p.194.

[135] See M. Protio, *op.cit.*, p.2156.

[136] See C.E., 13 juillet 1962, *Bréart de Boisanger, D.*, 1962, p.664.

[137] See C. Dadomo and S. Farran, *op.cit.*, p.238; also see Arts.58 and 59 of Decree of 31 July 1963.

[138] See Act of 16 July 1980 as supplemented by decree of 12 May 1981; also see W. Cairns and R. McKeon, *op.cit.*, p.189; C.E., 30 novembre 1923, *Couitéas, G.A.*, 247.

[139] See J. Rivero and J. Waline, *op.cit.*, p.197; also see C.E., 17 mai 1985, *Mme Menneret, A.J.D.A.*, 1985, p.454; C.E., 15 ocrobre 1986, *Mme Leroux, A.J.D.A.*, 1986, p.716.

[140] See C. Gabolde, *op.cit.*, p.418.

In Greece the provision on compliance has been modified after the introduction of the new *Code of Administrative Procedure* of July 1999. According to the pre-existing system in Greece, as in France, there was no specific provision expressly introducing the obligation of the state to comply with the judgements of the administrative courts. In order to achieve compliance of the Greek authorities to the judgements of the courts, Greek law introduced three methods of coercion for the state and its servants to comply. First, state employees who did not fulfil their duties were punished under Art.259 CrC. However, despite the undoubtful application of this provision in the case of civil servants who failed or omitted to comply with administrative court judgements on compensation for state liability, its implementation in practice was hindered by the need to prove that the relevant civil servants acted with intent and that their aim was either personal illegal gain or the provocation of harm to the state or third persons. Second, Art.205 of the Employer's Code introduced disciplinary liability to employees who failed to fulfil their duties through wrongful acts or omissions. However, the successful action against civil servants who failed to comply with administrative judgements would only succeed, if the plaintiff managed the impossible task of ignoring the collective policy of the particular department and determined attributable liability to a specific person. Third, the failure or omission to comply with court judgements gave rise to state liability. In practice, however, the Greek authorities tended to use "inertia, stalling and silent rejection" as means of non-compliance.[141] Thus, even these three methods were not considered capable of persuading the state to comply.

This position changed, albeit basically in theory, after the 1997 ratification of the 1966 UN International Agreement on Personal and Political Rights by the Greek Parliament.[142] The Agreement, which guarantees the execution of judgements against the authorities of the state, led a small number of Greek judges to recognise that forced execution was possible even against the state.[143] The new *Code of Administrative Procedure*, in force since July 1999, introduces the first Greek legislative provision on the obligation of the state to comply with the judgements of the Greek administrative courts. Art.198 *CAP* regulates that administrative authorities have the obligation to comply with the content of judgements on disputes brought before the courts under the procedure of *prosfygi*. In cases of non-compliance, state employees who fail or omit to comply are punished under Art.259 of the Penal Code and are personally liable to compensate those injured by their actions or inaction. There is little doubt that Art.198 is a

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[141] See P. Dagtoglou, 1994, *op.cit.*, p.608.
[142] See Art.1 of Law 2462/1997 ΦΕΚ Α' 25/26.2.1997.

revolutionary provision whose introduction can be seen as a guarantee for the effective protection of natural and legal persons claiming compensation for damages by the Greek state. Indeed, a guarantee of compliance by the Greek administrative authorities with the judgements of the administrative courts would signify unhindered access to justice for foreign companies suffering damages as a result of the Greek failure to comply with EC legislation. The question is, whether this new provision really guarantees this compliance. The interpretation of this provision by the Greek courts and its implementation by the administrative authorities in future cases will demonstrate its value. However, even without the benefit of case-law on this new provision, there are three points of concern in relation to its possible benefits. First, Art.198 refers to judgements under *prosfygi* only. In the cases examined in this thesis this signifies the state's obligation to comply with the judgements of the administrative courts concerning the validity of administrative acts and their compliance with EC legislation. However, it seems that the state's obligation to comply does not cover applications for damages suffered due to illegal acts or omissions of the state. It seems therefore that there is little guarantee for the final payment of compensation by the Greek state to the foreign companies. Second, the result of non-compliance is not liability of the state as such, but personal criminal and civil responsibility of the state employee whose action or inaction is considered to be in clash with judgements of the administrative courts. The value of these provisions were discussed in the analysis of the old position on non-compliance. The criminal liability of the employee requires proof of intent to harm and aim to personal gain, whereas the civil liability of the employee requires attribution of liability to an action or inaction of a particular natural person employed in one of the departments dealing with the file of the injured party. Third, in view of the express abolition of prior provisions on issues covered by the new Code,[144] it is doubtful whether the disciplinary punishment of such employees -introduced in the old system, but ignored in the Code- is still valid.

On the basis of the analysis of the Code so far, it is fair to say that the provision of the new Code on compliance is a timid act of the Greek legislator, which does not guarantee the effective protection of foreign companies suffering damages by the non-compliance of the Greek authorities with EC legislation. However, a final assessment of the new Code would be incomplete without reference to the issue of enforcement. In the past, in Greece -as in France- there was no mechanism for the enforcement of civil,

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[143] See 1212/1999 ΜονΠρΑθ (Ασφ.), NoB, 1999, pp.986-988.
[144] See Art.285 *CAP*.

criminal or administrative judgements against the state and its authorities.[145] This position was strongly criticised as a direct breach of the constitutional principle which introduces unhindered access of all citizens to justice.[146] Art.199 of the new Code regulates that for the enforcement of judgements reached under the procedure of application for damages plaintiffs must follow the enforcement procedure of the Greek Code of Civil Procedure. In other words, for the enforcement of judgements on compensation, foreign companies can seize assets of the Greek state under the procedure followed in the case of seizure against private individuals.[147] This constitutes the ultimate weapon for the coercion of the Greek state into compliance with the relevant orders for the payment of compensation by administrative courts. However, in view of the novelty of the provision on seizure against the state, there is uncertainty over the practical application of this provision. It is difficult to imagine which assets of the Greek state will be seized and, when liquidated, which particular department or organ will be entitled to the excess remaining after the subtraction of the sum ordered by the court. Moreover, there is scope for an argument that the seizure of assets of the state clashes with the general principle of the prevalence of public interest, which in this case is the unhindered functioning of the Greek administrative authorities. Furthermore, there is a problem concerning the legal basis of the company's request for the enforcement of judgements ordering compensation: as these are brought before the administrative courts under applications for damages, rather than under the procedure of *prosfygi*, the state has no obligation to comply. Since the state is not obliged to comply, it is doubtful that a seizure of assets will be theoretically sound and, consequently, practically allowed by the Greek judges who have always exercised their right to refrain from applying a procedurally valid Greek law if they consider it illegal or unconstitutional. Last but not least, this provision can only benefit future claims for damages and is inapplicable to orders for compensation already declared by the courts.[148] From the analysis of the old and new regime on the obligation of the Greek authorities to comply with administrative judgements and on the issue of enforcement it is clear that even the new Code fails to guarantee the final payment of foreign companies, even after a final judgement ordering compensation has been reached.

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[145] See Law 2052/52 of 24-28 April 1952; also see Art.909 CCP; ΟλΑΠ 108/71, NoB, 1971, 601.

[146] See Art.20, par.1 of the Constitution; see P. Dagtoglou, 1994, *op.cit.*, pp. 52-53; also see Athens Single-member Court of First Instance 6990/78, *ΤοΣ*, 1979, 649.

[147] See *Travaux Préparatoires of Law 2717/1999*, Art.199.

[148] See Art.278 *CAP*.

The issue of enforcement and compliance of the state with court decisions is of crucial importance for the evaluation of the effectiveness of the protection offered to foreign companies suffering damages as a result of state violations of EC law. In France and, seemingly still, in Greece there is little evidence that the companies which manage to acquire court orders for compensation will be able to use them and achieve payment in practice. The French express provision of non-enforcement against the state and the Greek ambiguity in the practical implementation of the new, seemingly permissive, provisions on enforcement constitute a significant blow to the effectiveness in the judicial protection of foreign companies in practice. As it limits the right of companies to be compensated, this doctrine can be viewed as in direct clash with the principle of the effective protection of the individual and, consequently, can be deemed illegal under EC law. This, however, is only one side of the problem. The final payment of compensation may satisfy the right of foreign companies to achieve restoration of damages suffered in the past. In both French and Greek law there is little, though, which could prevent future damages, as the national authorities may still refuse to comply with legality through the final rectification of the administrative or legislative act constituting the source of past damages. The constant persecution of authorities or employees for compensation due to their failure to comply with prior court's judgements declaring the relevant acts illegal is little comfort for companies whose main aim is to finally establish and pursue their economic activity within the Member State of their choice.

D. SUBSTANTIVE CONDITIONS FOR ACHIEVEMENT OF COMPENSATION

The analysis of the procedural conditions for the achievement of compensation by foreign companies suffering damages due to violations of EC law by the French, Italian and Greek authorities has demonstrated that the privileges enjoyed by the state in such disputes impede, to a certain extent, the companies' case for compensation. Even though the relevant provisions are slightly different in the three selected countries, mainly as a result of the Italian civil courts' competence to award compensation against the state as opposed to the French and Greek unitary system of administrative justice, the content of the relevant procedural provisions were found to be rather similar. Probably more so are the substantive provisions on the establishment of state liability in the three countries, which all follow the civil law tradition.[149] In general, the conditions of

[149] See P. Poulitsas *et al.*, *Interpretation of the Civil Code* (1955, Sakkoulas, Athens), at Arts.104-106 ΕισΑΚ, pars.9-10.

liability in the three selected jurisdictions are wrongful act, damage and a causal link between the first two elements. Since the civil law principles of liability are also applicable to state liability,[150] these elements also apply in the cases examined in this thesis. Let us examine each one of these elements separately.

D1. Wrongful act or omission

The source of the company's damage must be a wrongful act or omission by the authorities of the state. For the purposes of establishing state liability in the three selected countries, an act is defined as a judicial or material activity accomplished under the rules of administrative law or an omission of such activity.[151] Activity of the public administration giving rise to state liability can be acts, operations or any external expression of behaviour.[152] Material facts include negligence, error, delay or even failure to act within the time-limits introduced by the laws of the state.[153] Omissions are defined as violations of the legal obligation of national authorities to issue an act, or the ignorance of an act which is beneficiary to the citizen or may prevent future damage to the citizen in question.[154] An omission presupposes a "concrete legal obligation" to act.[155] It goes without saying that the relevant state act must be a result of willing and conscious behaviour.[156] The classification of the relevant act as enforceable under the national provisions of procedure is irrelevant for its characterisation as a possible source of state liability.[157] Even emanations of legislative acts which are "irregular and faulty" may give rise to state liability on the basis of the damage which they may cause in the future to individuals against whom the relevant legislative act may be applied.[158] This aspect of state liability will be examined separately. In Italy the action of the authorities must also

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[150] See J. Rivero and J. Waline, *op.cit.*, p.232; A. Pizzorusso, *Manuale di istruzioni di diritto pubblico* (1997, Jovene Editore, Napoli), p.537; E. Spiliotopoulos, *op.cit.*, p.163. Also see Arts.104-106 ΕισΑΚ for Greece; Art.2043 CC for Italy and Art.1582 CC for France as applied in the case of state liability.

[151] See E. Spiliotopoulos, *op.cit.*, p.163.

[152] See G. Landi and G. Potenza, *op.cit.*, p.330; also see N. Soleidakis, *op.cit.*, p.94.

[153] See W. Cairns and R. McKeon, *op.cit.*, p.139; also see ΑΠ 106/1969, NoB, 1969, 676; ΑΠ 1616/1981, EEN, 1981, 861.

[154] See Athens Court of Appeal 1335/1899, *Θεμ.*, ΙΑ, 262; ΑΠ 315/1911, *Θεμ.*, ΚΓ, 81; also see Athens Court of Appeal 2041/1906, *Θεμ.*, ΙΗ, 601; Athens Court of Appeal 458/1934, *EEN*, A, 400.

[155] See the Italian C.C., 83/908, 82/2134.

[156] See G. Cian and A. Trabucchi, *Commentario breve al Codice Civile* (1988, Cedam, Padova), p.2043.

[157] See Athens Court of Appeal 446/1901, *Θεμ.*, ΙΓ, 38; 506/1915, *Θεμ.*, ΚΖ, 548; 1203/1910, *Θεμ.*, ΚΒ, 519.

[158] See G. Zanobini, *op.cit.*, p.339.

harm a subjective right of the citizen. Such a subjective right may derive from the existence of a wrongful judicial act, an administrative regulation or a simple behaviour.[159]

The act or omission giving rise to state liability must be illegal, in other words it must be *contra ius*, namely contrary to the authority's duty to comply with and apply the national laws and regulations.[160] However, the law which the national authorities breach in each particular case must be introduced in order to benefit the citizens of the country. The breach of acts which are introduced for the exclusive protection of the general public interest cannot give rise to state liability.[161] As a rule, state liability occurs as a result of unlawful acts only.[162] In fact, illegality is widely considered to be a necessary pre-requisite for the establishment of state liability. This is the currently prevailing view which, however, is subject to possible change due to the recent development of a more liberal doctrine of state liability for legal acts by the ECJ.[163] However, so far there is little evidence to demonstrate that national courts are willing to accept state liability for legal acts. This is more so in Italy, where the illegality of the act must be declared by an administrative court before the subjective right giving rise to a right to compensation can be conceived.[164]

In order to establish state, rather than personal, liability the act or omission must have taken place within the framework of the provision of public service by the authority which issues or omits to issue the act giving rise to a claim for compensation. If this is the case, liable for compensation is the state and not the civil servant who acts or omits to act.[165] This is so, because the state authority and its employers are bound by a relationship of representation or order which signifies that the state is bound by the actions or omissions of its employees, as long as these fall within the framework of their

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[159] See G. Landi and G. Potenza, *op.cit.*, p.332; also see Trib. Roma, Sez. I, 30 giugno 1987, *Giust. civ.*, 1988, 1041; L. Attolico, "La responsabilità civile della p.a.", 38 [1988] *Giust. civ.*, pp.1042-1045, at 1042.

[160] See P. Poulitsas *et al.*, *op.cit.*, par.25; also see F. Piga, "Responsabilità civile degli amministratori pubblici: nuovi profili", 64 [1988] *Foro amministrativo*, pp.747-770.p.748; Trib. Roma, Sez. I, 30 giugno 1987, *Giust. civ.*, 1988. 1041; ΔΠρΑθ. 10472/1990, Αρμ., ΜΕ, 1991, 93.

[161] See ΑΠ 20/1929, *Θεμ.*, Μ, 277; ΑΠ 130/1932, *Θεμ.*, ΜΓ, 413; ΑΠ 729/1981, NoB, 1982, 231; Athens Court of Appeal 130/1904, *Θεμ.*, ΙΣΤ, 360; also see E. Spiliotopoulos, *op.cit.*, p.168. Laws referring to compensation for state liability are not set for the protection of general public interest; see N. Kalogirou, *The Criminal and Civil Liability of Members of the Government and the Civil Liability of the State in Greece* (1993, Sakkoulas, Athens/Komotini), p.229.

[162] See K. Kerameus and P. Kozyris, *Introduction to Greek Law* (1993, Kluwer/Sakkoulas, The Netherlands), p.42; also see R. Chapus, *Droit administratif général* (1987, Editions Montchrestien, Paris), p.904; also see C.E., 11 mai 1979, *Boulanger*, 202.

[163] See G. Cian and A. Trabucchi, *op.cit.*, p.1539; also see G. Zanobinbi, *op.cit.*, pp.337 and 350.

[164] See L. Attolico, *op.cit.*, p.1043; G. Zanobini, *op.cit.*, p.339; also see P. Pavlopoulos, *Civil Liability of the State* (1986, Sakkoulas, Athens), p.258.

[165] See ΑΠ 864/1954, *Θεμ.*, ΞΣΤ, 68; Π.Πατρ. 1458/1932, *Θεμ.*, ΜΓ, 808; ΕφΑθ 1103/1953, *Θεμ.*, ΞΔ, 792; ΑΠ 352/1953, *Θεμ.*, ΞΔ, 736.; also see G. Braibant, *op.cit.*, p.267.

contract of representation or order.[166] Activity within the framework of their public service is defined as the action within the circle of the competence of their functioning, which is regulated by legal rules introducing the conditions of legality of their acts.[167] However, if the civil servant acts or omits to act outside the framework of the activity undertaken by the department to which s/he is employed, or if the service provided to the citizen is in the name of the natural or legal person undertaking it on behalf of the state, the act or omission cannot be attributed to the state.[168] This could occur when the civil servant undertakes an action totally foreign to the work of the authority where s/he is employed with intent to achieve personal benefit.[169] In any other case, liability must be attributed to the state as a general rule.[170]

The source of illegality of the state's activity, or lack of, is the violation of law, which constitutes a sufficient element for the establishment of state liability as an objective factor. This means the citizen will not have to prove the existence of fault of the administration in any of the three countries examined here.[171] Thus, the public administration is at wrong every time that the law is broken. The theoretical justification of the prevalence of objective state liability lies with the impossibility in the attribution of subjective fault to particular organs in complex procedures of legislative and administrative decision-making. It is felt, and rightly so, that the introduction of subjective fault as an additional element of state liability would make its proof by the individual citizen impractical, since it would be humanly impossible for ordinary citizens to pinpoint all the particular natural and legal persons involved in the legislative or administrative act which is the source of liability and to attribute the exact percentages of such liability to

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[166] Art.28 of the Italian Constitution; G. Landi and G. Potenza, *op.cit.*, p.337; G. Zanobini, *op.cit.*, p.340; J. Rivero and J. Waline, *op.cit.*, p.238. P. Poulitsas *et al.*, *op.cit.*, par.49.

[167] See G. Papahatjis, *System of Administrative Law Applicable in Greece* (1983, Sakkoulas, Athens), p.42.

[168] See Cass., 17 febbraio 1939, *Foro it., repert.*, 1939, 1568; Cass., 1 luglio 1941, *Foro amm.*, 1941, II, 90; Trib. Milano, 11 giugno 1947, *Mon. trib.*, 1947, 237; Cass., 23 giugno 1949, *Foro it., repert.*, 1949, 1429.

[169] See Cass., 18 gennaio 1985, n.485; Corte dei Conti, Sez. Basilicata, 10 febbraio 1998, *Foro am.*, 1998, 2579; Corte dei Conti, Sez. riun., 23 settembre 1997, *Foro am.*, 1998, 1238. Even then, liability can only be established for positive damage, not mere loss of profits. See K. Kerameus and P. Kozyris, *op.cit.*, p.43.

[170] See Cass., 17 dicembre 1986, n.7631; 22 ottobre 1984, n.5333.; F. Piga, *op.cit.*, p.759; G. Braibant, *op.cit.*, p.267.

[171] See K. Kermaeus and P. Kozyris, *op.cit.*, p.43; E. Spiliotopoulos, *op.cit.*, p.168; ΑΠ 466/1969, NoB, 1969, 50; M. Jarvis, *op.cit.*, p.400; Trib. admin. de Strasbourg, 5 juin 1984, *Société Trensch-Alsacaves*, [1986] 2 CMLRev. 625; Trib. admin. Dijon, 15 avril 1986, *Société venicole Berard SA*, *Rec. Lebon*, 1986, 311, *RTDE* 1988, 112, note Soler-Couteaux; Cour d'Appel Admin. de Nantes, 20 juin 1991, *Rec.Lebon*, 1991, 742; C.E., 28 février 1992, *AJDA*, 1992, pp.210-226, at 220; also see A. Pizzorusso, *op.cit.*, p.538; Cass., Sez. un., 20 gennaio 1964, n. 126; see Trib. di Roma, Sez. I, 30 giugno 1987, *Giust. civ.*, 1041.

each.[172] Although the end result for the applicant is the same in all three countries, namely subjective fault of the administration does not have to be proven for the success of the claim for compensation, it would not be right to state that fault is not an element of liability in France. In the past, the French courts did indeed declare that state liability is one of no fault.[173] However, this position was battered by vocal critics who characterised it as "a disgrace" for the French legal system.[174] Rather than a reaction to the principle of no-fault state liability, this was the expression of adverse feelings towards the background to the decision of the French courts to introduce the principle in the first place, which was the well camouflaged attempt of French judges to avoid the examination of the preliminary issue of the legality of the act or omission.[175] As a result, the position of the French courts has recently changed and fault, albeit not subjective, is indeed an element of state liability. However, fault is required in the objective sense, namely as an element which is fulfilled with the existence of a violation of law.[176] For violations of EC law in specific, all three jurisdictions examined here now accept that the basis of liability is the breach itself.[177] The legal bass of this doctrine is the French and Greek recognition of the primacy of EC law, the Italian doctrine on the *obligatorietà* of EU provisions.[178]

Despite the legal basis of the national provisions on wrongful acts or omissions as elements of state liability in the three selected countries, the fact still remains that the company suffering damages as a result of a state violation of EC law does not have to prove a subjective fault by the administration. This means that the wrongfulness of the act or omission will be judged on the basis of its non-compliance with EC law and not on the basis of alleged negligence or intent by the national authority which issued the act or undertook the omission. It is widely accepted that the lack of a subjective element of fault is a guarantee of unhindered access of the company to justice.[179] Indeed, the in-

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[172] See G. Zanobinbi, *op.cit.*, p.342.

[173] See C.E., Ass., 28 mars 1984, *Société Alivar*, *A.J.*, 1984, 396.

[174] See B. Genevois, "Responsabilité de la puissance publique, 40 [1984] AJDA, pp.396-398, at 399.

[175] See C.E., Ass., 28 février 1992, *Société Arizona Tabaco Products*, *A.J.*, 1992, 210, concl. Laboque; also see M. Jarvis, *op.cit.*, p.400.

[176] See Cour d'Appel Admin. de Nancy, 9 juillet 1991, *Ministre de l' économie, des finances et du buget v Société Lefebvre*, *Rec. Lebon*, 741; C.E., 20 janvier 1988, *Aubin*, *Rec. Lebon*, 1988, 20; *JCP*, 1989, II, 21169, note Moderne, *AJDA*, 1988, 418, note Prétot; Cour de Cassation, ch. comm., 21 février 1995, *Dalloz*, 1995, IR 100; C.E., 28 février 1992, [1993] 1 *CMLRev.* 252; N. Dantonel-Cor, *op.cit.*, p.493.

[177] See D. Simon, "Droit communautaire et responsabilité de la puissance publique", 49 [1993] *Actualité Juridique Droit Administratif*, pp.235-243, at p.237; also see G. Alpa, "Nuove figure di responsabilità civile di derivazione comunitaria", 63 [1998] *Responsabilità civile e previdenza*, pp.5-28, at 24; P. Dagtoglou, 1994, *op.cit.*, p.69.

[178] See *ibid*, pp.41 and 69; C. St., Sez. IV, 18 gennaio 1996, n. 54, *Giust. civ.*, 1996, 1191.

[179] See D. Simon, *op. cit.*, p.241.

troduction of the mere demonstration of the existence of an EU violation as a poof of wrongfulness could not have been more liberal and beneficial a provision for the company. In any case, any concept of fault going beyond illegality would clash with the EU doctrine of *Brasserie* and would therefore be an unacceptable limitation to the access of foreign companies to justice at the national level.[180]

D2. Damage and Causation

The other two elements of state liability are damage suffered by the foreign company as a result of the state's violation of EC law and a causal link between wrongful act and damage. Since the regulation of these elements of liability are regulated by the relevant doctrines of civil law, they will be analysed briefly. Damage is defined as any loss suffered by the citizen in his corporal or incorporeal goods, or as any reduction in the legal interests of the citizen.[181] According to a well established civil law principle, applicable in the vast majority of civil law countries, damage is compensated only if it is certain, direct and subject to financial evaluation.[182] The damage is certain, if it is existent and actual. Having said that, future damage may be compensated for, as long as it can be currently evaluated and its realisation is certain, or at least quite probable.[183] As a general rule, the damage must be quantifiable. However, even where this is not the case, some damages will be awarded.[184] Damages can be awarded for financial loss, moral loss and loss of chance, that is loss of the opportunity to gain.[185] In the last case, the chance to gain must be established with sufficient certainty.[186] This would be the case in

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[180] See M. Jarvis, *op.cit.*, p.404.

[181] See E. Spiliotopoulos, *op.cit.*, p.165; also see F. Piga, *op.cit.*, p.753; C.C., Civ., 13 février 1923, *D.P.*, 1923, 1, 52.

[182] See G. Braibant, *op.cit.*, p.293; also see J. Rivero and J. Waline, *op.cit.*, p.234; L. Certoma, *op.cit.*, pp.366-367; N. Soleidakis, *op.cit.*, p.107.

[183] See P. Georges, *op.cit.*, p.363; also see G. Braibant, *op.cit.*, p.293; A. Iatrou, *An Outline of the Greek Civil Law* (1986, Tsapepas, Athens), p.106; N. Kalogirou, *op.cit.*, 229; Athens Court of Appeal 5432/1979, NoB, 1979, 1638.

[184] See C.E., 27 janvier 1988, *Giraud*; also see N. Brown and J. Bell, *op.cit.*, p.201; L. Certoma, *op.cit.*, p.367.

[185] See C.E., 27 may 1987, *Aubin, Rec. Lebon*, 1988, 20; *JCP*, 1989, II, 21169, note Moderne, *AJDA*, 1988, 418, note Prétot; C.E., Ass. plén., 6 mars 1959, *Secrétaire d' Etat à l'agriculture c/ Sté Fros Frères, Rec. Leb.*, 157; C.E., Ass., 28 février 1992, *AJDA*, 210; also see N. Brown and J. Bell, *op.cit.*, p.210; also see E. Spiliotopoulos, *op.cit.*, pp.165-166; G. Landi and G. Potenza, *op.cit.*, p.348; Corte dei Conti, Sez. Basilicata, 10 febbraio 1998, *Foro amm.*, 1998, 2579; ΑΠ 515/1980, NoB, 1980, 1946.

[186] See C.C., Civ., 2e, 20 juillet 1993, *D.*, 1993, 526, note Chartier. It must be taken into account, however, that by nature an opportunity is never totally certain. See C.C., Crim., 9 octobre 1875, *Gazz. Pal.*, 1976, 1.4.

the loss of the chance to enter into a contractual agreement, or to acquire funding which would have added to the property of a person.[187]

Moreover, in order to succeed in its claim for compensation, the company must prove that the relevant damage is direct. In other words, the company must prove that the damage is an immediate and direct consequence of the wrongful act or omission.[188] This occurs when, under normal circumstances, the wrongful act or omission would lead to the damages suffered.[189] Thus, the company seeking compensation will have to concentrate on two elements for the proof of causality between wrongful act and damage, namely the criteria of normality and proximity. The company will have to prove that the damage is the normal consequence of the wrongful act or omission, and that it was close to the act in time, space and situation which caused it harm.[190] Thus, it is the theory of the *causa adequata* which is applicable in this case.[191]

In the case of foreign companies suffering damages as a result of the state's violation of EC law, the company will seek compensation for losses suffered until the hearing of the trial and amounting to expenses occurred for the procedure necessary for the acquisition of state permission to establish or trade. However, the main claim of the company would be compensation for the loss of the opportunity to gain through trade within the state in question, or trade in a specific area of commercial activity within the state extending both before and after the hearing and until the annulment or modification of the wrongful act. This would amount to the profit which is the normally expected to accrue in the ordinary course of things or by reference to specific circumstances where preparatory measures have been taken.[192] The positive damage incurred is obviously certain and quantifiable. As far as the *manque de chance* is concerned, it may be future loss but the company will have little difficulty in proving that its establishment in the state and trade in the particular commercial activity of its choice would produce gain

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[187] See C.E., 19 avril 1985, *Comm. de Vitrolles*, *RDP*, 1985, 1701; C.C., Crim., 3 novembre 1983, *JCP*, 1985, II, 20360; for other types of loss of chance, see C.E., 3 novembre 1971, *Dlle Cannac*, 650; C.E., 17 mars 1972, *Dlle Jarrige*, 222; C.E., 22 janvier 1986, *Dlle Grellier*, *AJ*, 1986, 694; C.E., 6 février 1974, *Gomez*, *AJ*, 456.

[188] See P. Georges, *op.cit.*, p.363; also see L. Certoma, *op.cit.*, p.367.

[189] See E. Spiliotopoulos, *op.cit.*, p.166; See F. Galgano, *Dirittto Civile e Commerciale: Le Obligazioni e I Contratti* (1990, CEDAM, Padova), p.301; C.C., Crim., 10 mai 1984, *D.*, 1985, 256, note Penneau; ΑΠ 316/1983, NoB, 1983, 1571; ΑΠ 913/1988, Ελδνη, 1989, 1331; Athens Court of Appeal 13613/1988, NoB, 1989, 1299.

[190] See G. Braibant, *op.cit.*, p.293; Cass., 20 dicembre 1986, n. 7801, *Mass. Foro it.*, 1986, 480; ΔΠρΑθ 10472/1990, Αρμ, ΜΕ, 1991, 93; ΑΠ 462/1957, NoB, 1957, 111; ΑΠ 64/1955, NoB, 1955, 495.

[191] See A. Iatrou, *op.cit.*, p.107; F. Piga, *op.cit.*, p.753; G. Goubeaux and P. Bihr, *Code Civil* (1995-96, Dalloz, Paris), p.931.

[192] See A. Iatrou, *op.cit.*, p.106; Cass., 24 febbraio 1987, n. 1937, *Arch. circolaz.*, 1987, p.471; C.C., Civ., 1re, 18 octobre 1978, *Gaz. Pal.*, 1979, 1, 118, note Damien.

which they now missed due to the state's refusal or omission to allow this establishment or trade. Means of proof in this direction could be the production of annual profit of companies dealing in similar areas of trade, or reference to contracts which would have been entered to if the company were allowed to establish within the host state. The main problem with this loss of opportunity to gain, however, lies with the evaluation of the damages suffered. Although this damage is very difficult to quantify, the company should expect some level of compensation from the courts. Furthermore, the company will have to establish the direct causal link between act and damage as introduced by the prevailing doctrine on civil and administrative liability in the three selected countries, the *causa adequata*. In practice, this would be quite easy, as without the state's prohibition to establish or trade the company would have been allowed to make profit anyway. This brief reference to the issue of damage and causation demonstrates that the relevant national provisions allow a fair opportunity for the company to achieve compensation for all possible types of loss.

D3. Restitution

In the case of foreign companies suffering damages from acts of the national authorities which are contrary to EU provisions on the freedom of establishment, *in natura* restitution is not possible. In fact, it is accepted that restitution *in natura* could not be requested by the state due to the principle of the separation of powers, which prevents the intervention of the judicial function to the executive function.[193] This argument is not without legal basis. *In natura* restitution would involve an order by the competent judge to the authorities to abolish a precise act. The theoretical and practical problems of such an interference by the judiciary to the executive have already been analysed. In any case, *in natura* restitution would signify reversal to the situation before the occurrence of the damage, that is abolition of the administrative or legislative act in question. However, this form of restitution could not be considered full, as it would still not rectify the company's loss of the opportunity to gain.[194] Since the judge may order *in natura* restitution only when this type of compensation is not contrary to the interests of the applicant,[195] this type of restitution could not possibly be ordered in the case of foreign companies suffering damages as a result of breaches of EC law by national authorities. In-

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[193] See P. Poulitsas *et al.*, *op.cit.*, par.70; also see J. Rivero and J. Waline, *op.cit.*, p.245.

[194] See P. Poulitsas *et al.*, *op.cit.*, par.70; G. Cian and A. Trabucchi, *op.cit.*, p.2043; R. Chapus, *op.cit.*, p.855; P. Dagtoglou, *General Administrtaive Law* (1992, Sakkoulas, Athens/Komotini), p.801.

[195] See e. Spiliotopoulos, *op.cit.*, p.171; A. Iatrou, *op.cit.*, p.108; L. Certoma, *op.cit.*, p.368.

deed, in order to achieve full restitution, the judge in the case will have to order a lump sum for the expenses incurred and the loss of opportunity until the date of the trial, as well as a daily rate for compensation for future damages until the administration abolishes the wrongful act or proceeds with the act so far omitted.[196] For the evaluation of the compensation awarded the judge will base the judgement on the particular circumstances of the case and the detailed liquidation of losses submitted by the applicant.[197] A daily interest may also be awarded running from the date that the damage occurred until the date of payment of compensation.[198]

The Greek, French and Italian provisions on restitution for damages resulting from state liability are a replica of the relevant provisions for compensation in private disputes, to which they refer anyway. The compensation awarded to foreign companies equals the amount of money by which the company's fortune has decreased due to the wrongful act or omission of the administration.[199] This principle, also known as *Differenztheorie*, prevails in all cases of compensation in the three selected jurisdictions and, as non-discriminatory, is in full compliance with the criteria of restitution introduced by the EU doctrine on state liability.[200]

D4. Compensation for legislative acts

The analysis of the substantive conditions for the establishment of state liability in France, Italy and Greece has demonstrated that the elements of state liability for breaches of EC law in the three selected countries do not restrict the companies' freedom of establishment via limitations to their access to justice. However, although reference was made to both administrative and legislative acts as sources of possible damages for which compensation is sought, the issue of the recognition of state liability from legislative acts has not been explored. The acknowledgement of state liability for legislative acts is a doctrine recently introduced and developed by the ECJ after *Bras-*

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[196] See F. Galgano, *op.cit.*, p.307; A. Iatrou, *op.cit.*, p.140; Cass., 16 gennaio 1987, n. 333, *Mass. Foro it.*, 1987; Corte dei Conti, Sez. I centrale, 6 agosto 1997, *Foro amm.*, 1998, 1243; Athens Court of Appeal 523/1960, *Δικ.*, 1960, 581.

[197] See J. Rivero and J. Waline, *op.cit.*, p.246; F. Galgano, *op.cit.*, p.307; E. Spiliotopoulos, *op.cit.*, p.171.

[198] Arts. 1153 and 1154 of the French Code Civil; Arts.293-294 and 346 of the Greek Civil Code; Arts.1223, 1226 and 1227 of the Italian Civil Code.

[199] See C.E., Ass., 28 février 1992, *AJDA*, 1992, 210; Cass., 3 ottobre 1987, n.7389, *Mass. Foro it.*, 1987; G. Braibant, *op.cit.*, p.294; R. Chapus, *op.cit.*, p.876; E. Spiliotopoulos, *op.cit.*, p.171; L. Attolico, *op.cit.*, p.1044.

[200] See E. Scoditti, "Profili di responsabilità civile per mancata attuazione di direttiva comunitaria: il caso Francovich in Cassazione", 119 [1996] *Foro italiano*, pp.503-511, at 509; also see Pretura di Pistoia, 20 ottobre 1992, *Giust. civ.*, 1993, 1, 301.

serie and its subsequent judgements. This EU doctrine will be analysed in chapter 7. Since EC law introduces an obligation of the state to make good damages suffered as a result of a legislative act or omission of the state, the evaluation of the level of protection offered to foreign companies at the national level would be incomplete without reference to the issue of legislative state liability.

Such liability is not unknown to the three jurisdictions analysed in this thesis.[201] State liability is accepted for any illegal action or omission of the national authorities. The legislature is a national authority whose duty is to ensure that legislative texts passed by it are in compliance with the Constitution and, insofar as EU citizens are concerned, the regulations of the EU.[202] Thus, legislative acts in clash with EC law are illegal and may lead to compensation for damages under the general provisions on state liability.[203] Despite the acceptance of this position in the legal theory of all three selected jurisdictions, state liability for legislative acts is not accepted unconditionally. In all three countries legislative acts, albeit illegal, set for the protection of the general interests of the citizens of the state, general economic interest or social order may not give rise to legislative state liability, as any subsequent damage would not be abnormal and special.[204] Moreover, legislative state liability can only derive from a positive legislative action rather than an omission of the legislator to regulate a specific situation.[205] Last but not least, despite the support of the principle of legislative state liability by most Greek authors, the Greek *Areios Pagos* (the highest civil court) refuses to recognise liability for legislative acts.[206] Thus, in Greece state liability for legislative actions is not accepted and compensation for a relevant case has never been awarded.

Even in France and Italy, however, national law introduces two important restrictions. First, there is a limitation concerning the means with which this liability may occur. Contrary to one of the main general doctrines of civil and administrative law, an action is required whereas an omission is not sufficient. In principle, there is little to

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[201] See P. Poulitsas *et al.*, *op.cit.*, par.58; I. Kyriakopoulos, *Greek Administrative Law* (1954, Sakkoulas, Athens), p.491; J. Rivero and J. Waline, *op.cit.*, p.253; M. Cerrato, *op.cit.*, p.2018.

[202] See M. Jarvis, *op.cit.*, p.402; R. Chapus, *op.cit.*, p.955.

[203] See Cour admin. d' appel de Paris, 1 juillet 1992, *AJDA*, 1992, 768, note Prétot; 12 novembre 1992, *Rec. Lebon*, 1992, 790; A. Adinolfi, *op.cit.*, p.1341

[204] See P. Poulitsas *et al.*, *op.cit.*, par.58; also see D. Simon, *op.cit.*, p.242; J. Rivero and J. Waline, *op.cit.* p.254; C.E., 14 janvier 1938, *La Fleurette*, *Leb.*, 1938, 25; C.E., 22 octobre 1943, *Ste. des Etablissements Lacaussade*, *Leb.*, 1943, 231; C.E., 21 juin 1944, *Caucheteux et Desmond*, *Leb.*, 1944, 222; C.E., 5 janvier 1963, *Bovero*, *Leb.*, 1963, 53; C.E., 18 décembre 1981, *Ministre de la Culture et de la Communiction*, *Leb.*, 1981, 478; C.E., 23 décembre 1988, *Martin*, *Leb.*, 1988, 470; Cour admin. d' appel de Lyon, 16 février 1989, *Bente*, *JCP*, 1990, II, 21521.

[205] See Cour admin. d' appel de Paris, 1 juillet 1992, *AJDA*, 1992, 765, note X. Prétot.

[206] See P. Dagtoglou, 1992, *op.cit.*, p.826; also see ΑΠ 115/1935, Θέμις ΜΒ', 1935, 333; ΑΠ 37/1957, ΕΕΝ, 1957, 483; ΑΠ 665/75, ΤοΣ, 1976, 495.

justify this limitation to the rights of companies seeking compensation for legislative state liability. However, in practice the omission of the state to legislate on a particular issue would signify the existence of a *lacuna* in the relevant national legislation. For companies wishing to benefit from the freedom of establishment, this would be filled by reference to the relevant principles of EC law. This would not restrict their freedom to establish and trade within the territory of the host state. If the latter refuses to apply the relevant EC law provisions, then liability of the state would occur from a precise administrative act expressing the state's intention. In this case, the company is owed compensation on the basis of this illegal administrative act, rather than on the basis of the omission of the legislator to issue an act in compliance with EC law. Apart from the lack of practical value of this limitation, the theoretical background of its introduction seems to be the principle of the separation of powers. Although judicial control of an existing law is accepted to be not only a right but also a duty of the judicial function of a modern state, a court order forcing the legislature to take a particular legislative step or, even worse, an attempt by the judiciary to create a legislative regime through a court judgement would be an obvious and vulgar interference of the judiciary to the function of the legislative authorities of the state. Thus, the limitation of state liability to damages caused exclusively by legislative actions is justified by reference to the principle of the separation of powers.

A second restriction introduced in the area of legislative state liability refers to the nature of damages suffered by the applicant. These have to be abnormal and special, a result of a legislative act which was set for the protection of a particular circle of people, rather than the general interest. Admittedly, the French *Conseil d' Etat*, whose case-law also has an indirect effect to its Italian and Greek counterparts, seems to be quite liberal in its interpretation of this provision.[207] In any case, the effect of the legislative action to a specific circle of persons is an obvious expression of the German *Schutznormtheorie*, according to which the state is only liable when the interests of a closed circle of persons are injured by its action.[208] This doctrine also prevails in EC law as demonstrated by the ECJ's judgements in *Schöppenstedt* and *Brasserie*.[209] There is little doubt that this condition limits the access of individuals to justice at the national level. In fact, the introduction of additional conditions for the establishment of legisla-

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[207] See R. Chapus, *op.cit.*, p.957.

[208] See E. Grabitz, "Liability for Legislative Acts" in H. Schermers, T. Heukels, and P. Mead (eds), *Non-Contractual Liability of the EC* (1988, Martinus Nijhoff, London), pp.1-11, at 6.

[209] See case 5/71 *Aktien-Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975; also see 46 and 48/93 *Brasserie Du Pêcheur Sa* v *Germany, Regina* v *Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029.

tive state liability has been strongly criticised for its reluctance to "de-sanctify" the legislative function of the state.[210] It must be accepted, however, that the protection required from Member States is merely one equivalent to the level of protection made available under EC legislation. Thus, the restrictive provisions for the establishment of state liability is a general problem applicable to the protection of companies at both national and EU level. The evaluation of this problem is better placed in chapter 7 where the details of relevant recent case-law of the ECJ will be presented. For the purposes of this chapter, it suffices to state that the national provisions on legislative state liability in France and Italy are in compliance with EU standards, but are still restrictive for the access of the foreign companies to justice. In contrast to this, the Greek position on this issue is in clash with EC law and is another blow to the effective protection of foreign companies seeking damages due to violations of EC law by the Greek authorities.

The analysis of the substantive conditions for the establishment of state liability in the three selected countries has revealed that protection to foreign companies is offered by reference to the provisions applicable in the case of claims for compensation against private persons. In fact, the substantive prerequisites of state liability seem to be very liberal for the companies, which need not even prove the existence of fault in their claim. Thus, for the successful claim for compensation due to state liability, foreign companies need to establish a minimum set of conditions, whose content is unusually favourable for the applicants.[211] These conditions are very similar to those introduced by the EU doctrine of state liability. This is due to the recognition of EC law as a source of national administrative law, a doctrine which encourages the highest administrative national courts to create a state liability doctrine based on ECJ case-law.[212] In fact, Zanobini argues that the development of a doctrine even considering the possibility of state liability due to legal acts demonstrates how state liability has departed from ordinary, civil liability for damages and how extended the legislator seems to want it to be.[213]

E. EVALUATION OF PROTECTION AT NATIONAL LEVEL

The analysis of the national provisions on the procedural and substantive conditions for the establishment of state liability in France, Italy and Greece has led to a number of

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[210] See D. Simon, *op.cit.*, pp.242-243.

[211] See A. Iatrou, *op.cit.*, p.138.

[212] See P. Dagtoglou, 1994, *op.cit.*, p.39; also see G. Alpa, op.cit., p.27; C.E., 19 février 1988, *Association des proporiétaires riverains et plaisanciers du cingle de Tremolat-Cales-Mauzac et autres*, AJDA, 1988, 418.

[213] See G. Zanobini, *op.cit.*, p.347.

valuable findings. Despite the existence of three types of courts in the selected jurisdictions and the consequent creation of an administrative law of tort, state liability borrows most of its provisions from the general doctrines of civil torts. The elements of state liability are those applicable to any tort and include a wrongful administrative or legislative act, damage to the applicant company and a causal link between the two. The requirements for the characterisation of an act as wrongful is flexible in favour of the applicant. Indeed, the inclusion of omissions in the concept of wrongful acts for the establishment of state liability can only be seen as a advantageous extension of the possible sources of state liability and, consequently, an amplification of the field of application of the liability of the state. More importantly, the only condition for the classification of an act or omission as wrongful is its objective illegality. The subjective element of fault is not a prerequisite of liability. In fact, in Greece and Italy fault is not required at all, whereas in France the precondition of illegality as the exclusive means of demonstrating the existence of fault leads to its practical exclusion from the deliberation of the competent judges. This is reflected in recent judgements of the French courts who "intentionally" avoid all reference to fault.[214] The unusual exclusion of subjective fault is of paramount assistance to companies. Had the situation been different, they would have had to meet the impossible task of tracing negligence/intent to specific employees of the national authority and attributing percentages of it to members of the circle of administrative or legislative officials who dealt with the particular file.

The regulation of damage as an element of state liability is equally auspicious to the applicant company. Replicating the most accommodating of provisions in this area of civil law, the legislator allows compensation for state liability even for future damages whose certainty (an essential characteristic) is debatable. Along the same generous lines is the provision on the nature of damages which may be compensated for. These include positive damage, moral damage and loss of the opportunity to make profit. It is the last type of damages which is of particular interest to companies suffering harm due to breaches of EC law in the field of the freedom of establishment. The inclusion of *perte de chance* allows the company to seek restitution for the major part of its damages which will derive most probably from the loss of the opportunity to establish in the host state or to trade in a particular field of commerce therefore preventing it from making profit. Even when the damages in question are difficult to quantify the company will receive some compensation. Moreover, in order to submit a successful claim, the company will have to prove that the harm occurred is a direct consequence of the act or

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[214] See N. Dantonel-Cor, *op.cit.*, p.502.

omission of the state. This is another provision borrowed by the civil law of torts, which favours the theory of *causa adequata* in all three selected jurisdictions. The permissive substantive conditions for the establishment of state liability are complemented by an similarly accommodating doctrine of full compensation equal to the amount of money by which the company's fortune decreased due to the act of the national authorities.

The evaluation of the substantive elements of state liability in France, Greece and Italy draw an ideal picture of tolerance and permissiveness in the relevant provisions whose aim clearly is to allow foreign companies to achieve compensation for damages suffered as a result of a wrongful act or omission of the host state. This conclusion seems to be confirmed by reference to the doctrine of state liability due to wrongful legislative acts, which is recognised in France and Italy. Provided that the additional conditions of existence of a positive legislative act, affecting only a closed circle of people are met, the company may claim compensation for damages suffered as a result of a national legislative text, whose provisions breach EC law. These conditions, albeit identical to those introduced by the EU doctrine of legislative state liability, in combination with the reluctance of some judges to apply the relative new concepts of legislative state liability, render compensation due to this source somewhat uncertain.[215] It is therefore more effective for the company to seek permission to establish or to trade in the host state, so that a precise administrative act, albeit prohibitive, is issued. This act will assist the company with the establishment of a sounder legal basis for compensation, as well as with the provision of information on the concrete competent administrative organ and the detailed reasoning for the rejection of the company's request. This would be the only option available to the company in Greece, where legislative state liability is not accepted. In France and Italy, however, even though it is advisable for the company to try to establish state liability due to administrative acts or omissions, the recognition of legislative state liability presents an additional legal basis for the claim for damages which can be of particular use in the, admittedly rare, cases where permission by the authorities is not conceivable or extremely expensive and time-consuming.

Thus, in principle, the three selected jurisdictions award a high level of protection to companies at the national level. From the point of view of the substantive provisions this is mainly due to the harmonisation in the national case-law of EU Member States resulting from their reception of relevant ECJ and CFI precedents.[216] However, this picture of effectiveness becomes somewhat tainted when the procedural conditions

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[215] See N. Dantonel-Cor, *op.cit.*, p.499.

of compensation for state liability are examined. The first sign of problems appears well before the application for damages is lodged in the resolution of the preliminary issue of the choice of competent court. The existence of three types of courts in the selected countries forces foreign companies to determine the court with the jurisdiction to rule on its application for damages against the state very early on in the process. Leaving aside the increased difficulty involved for companies whose state of origin does not follow a system of separate administrative court structure, the determination of the competent court seems a difficult task, mainly due to the complexity and fluidity of the criteria introduced for this purpose. Greece is the only country of the three examined in this thesis which has adequately resolved this problem through the express subjection of claims for compensation against the state to the competence of its administrative courts. In contrast, France seems to suffer from the fact that the rules determining the right court derive from case-law and are therefore based on previous courts' judgements on specific cases. This method of introduction of legal provisions is problematic in a civil law country where the value of precedent is only limited to the parties in each dispute. However, the French uncertainty and complexity is only minimal when compared to the Italian position. The latter is based on the doctrine of subjective rights and legitimate interests which has been criticised for its complexity and distorting intricacy.[217]

These characteristics are carried onto the procedure of the trial, where the company needs to refer its case first to the Italian administrative courts for the annulment of the wrongful act or declaration of illegality of the omission of the authorities and then to the Italian civil courts which have the exclusive competence to adjudicate on the issue of compensation. This position creates delays in the dispensation of justice. Since a final decision by the administrative judge could take up to twenty years, there is little doubt that these long delays "threaten the efficiency of justice" and force individuals to turn to other routes of restitution outside the rules of law.[218] Another consequence of the Italian position is the imposition of a double-risk for foreign companies which are forced to face the common reluctance of national judges to identify their case as one tackling issues of EC law and to refer to the ECJ for a preliminary ruling twice.[219] A third consequence of the two-trial Italian system is the constraint in the circle of persons with the

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[216] See E. G. de Enterría, "Perspectivas de las justicias administrativas nacionales en el ámbito de la Unión Europea" [1999] *Rivista trimestiale di diritto pubblico*, pp.1-14, at 10.

[217] See E. R. D'Aci, "Notazione minime, ma non troppo, sullo stato della giusticia amministrativa", 66 [1990] *Foro amministrativo*, pp.2508-2514, at 2510 and 2511; also see G. Alpa, *op.cit.*, p.1306.

[218] See G. Paleologo, *op.cit.*, p.623. It should be noted that the article was written in 1993. To my knowledge, there is no recent calculation on this issue. Also see R. Chieppa, "Giusticia amministrativa, efficienza e pubblica amministrazione", 72 [1996] *Foro amministrativo*, pp.2500-2515, at 2504.

locus standi to seek compensation, in the grounds on which such claims may be successful, and in the powers of the adjudicating judges. These are limited to the persons, merits and powers introduced for actions for annulment of acts or omissions of national authorities are not as extensive as the ones provided for in France and Greece where the claims for compensation can be based on all possible factual and legal grounds of illegality which may lead not only to the annulment but also to the modification of the measure in question. It can be argued that this Italian handicap is counteracted by the increased protection offered by a double system of appeals and cassations. True as this argument may be, the resources and time constraints involved in such a long process render the detailed examination of the case before the Italian courts an exercise not worth pursuing for most companies.[220] Even if the time and money for the completion of this process, which may also entail preliminary rulings to the ECJ, were available, the comparison with the French and Greek models would be favourable to them as the merit, *locus standi* and court power limitations still impede access to justice in Italy.

Another problem of the protection offered to foreign companies at the national level refers to the state privileges in the case of compensations for state liability. These involve shorter prescription periods for the submission of appeals or cassations against judgements of the courts of first instance, which are introduced in a discriminatory manner in favour of the state. The introduction of shorter time-limits for the appeal of companies against court decisions is a significant impediment to the access of the companies to justice. However, a crucial finding of this chapter refers to the lack of mechanisms for the enforced execution of court judgements in France and Greece. This signifies the lack of practical value of court judgements against the state, whose authorities only execute court judgements if they so wish. The problem is one based on the constitutional principle of the separation of powers and extends in all judgements against the state irrespective of the identity or nationality of the applicant. However, it can only be seen as a terrible blow in the fight of foreign companies to achieve restitution for damages suffered as a result of wrongful acts or omissions by the host state. In fact, it can be stated that both the shorter prescription periods and the Greek and French problem of execution against the state are national provisions which, albeit non-discriminatory on the basis of the companies' nationality, impede the efficiency of the protection of EU nationals at the national level considerably and, thus, are contrary to EC law.[221]

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[219] See M. Chiti, *op.cit.*, p.824.

[220] For the need to put efficiency before legality, see F. Ledda, "Dal principio de legalità al principio d'infallibilità dell' amministrazione", 73 [1997] *Foro amministrativo*, pp.3303-3327, at 3307.

[221] See N. Dantonel-Cor, *op.cit.*, p.496.

CHAPTER 7

The Protection of Foreign Secondary Units at EU Level

A. INTRODUCTION

The second hypothesis of this thesis is that the judicial protection offered to foreign companies suffering damages as a result of direct or indirect violations of EC law by the Greek, French and Italian national authorities is inadequate and ineffective. One aspect of this hypothesis, namely the inefficiency of judicial protection at the national level, was addressed in Chapter 6. The second aspect of judicial protection, protection at the EU level, will be the topic of this last chapter. The main aim of Chapter 7 is to delve into the legal routes under which protection for foreign companies may be sought at the EU level. For the identification of these routes it must be noted that the remedies under which actions may be brought before the ECJ and the CFI are restrictively introduced by the Treaties. Thus, foreign companies seeking judicial protection at the EU level may only seek restitution for damages under one of the procedures introduced by them.

In examining the legal routes open to foreign companies at the EU level, namely involving direct or indirect contribution of the ECJ or the CFI, it is necessary to clarify that the action of the foreign company will inevitably refer to the alleged failure of a Member State to fulfil its EU obligations. Thus, the remedy which readily springs to mind is the initiation of infringement proceedings against the Member State under Arts.226 and 227 EC. However, a closer look at the text of these Articles excludes their use by private individuals on the basis of an express and clear lack of *locus standi*. Thus, the only possible role for foreign companies in such proceedings is limited to the mere notification to the Commission or another Member State that a violation of EC law is taking place, in the hope that these, as parties with *locus standi* in such proceedings, will initiate an action. Yet, the true role that an individual may play in such infringement proceedings is notoriously insignificant, a realisation which is interpreted as

the main factor of the decline of relevant complaints to the Commission.[1] Even if somehow[2] the company manages to persuade the Commission or another Member State to pursue the case, the end result of the procedure will be an ECJ declaration that the relevant national law is in breach of EC law without, however, reference to any damages caused.[3] The only value of such a declaration for the company lies with its possible use as an indication of illegality in actions for damages before national courts in proceedings offering judicial protection at the national level. Another possible route for the company's judicial protection could be the annulment of the allegedly wrongful national legislative or administrative act that constitutes the source of damage. Even this action, however, would be brought before the national courts, since judicial review at the EU level under Art.230 is admissible against Community acts only. A third possible means of judicial protection at the EU level can be sought through preliminary rulings proceedings under Art.234. This provision allows the company to bring an action for damages against the state before the national courts and, in order to pre-empt the problems inherent to judicial protection at the national level, persuade the national judge to seek clarifications on EC law issues of the case from the ECJ.

The procedure of preliminary rulings as a means of bringing the state liability doctrine to the ECJ will be analysed in this chapter. It must be noted that state liability may constitute the legal basis of cases against Member States before the national courts without necessarily reference to the ECJ. In this case, the analysis of Chapter 6 on protection at the national level will apply. Since this chapter discusses judicial protection at the EU level, it will focus on state liability in conjunction with preliminary rulings (the *Francovich* scenario) as a means of involving the ECJ, and protection at EU level, in the process. An in-depth examination of an innovative, some might even say, futuristic legal route which may soon become available to foreign companies on the basis of a possible interpretation of Art.288(2) and the concurrent liability scenario will also be undertaken. Finally, the judicial protection of companies at EU level will be evaluated. The assessment on the efficiency of judicial protection will influence the final deduction on the reasons for the existence of breaches of EC law within the three states after more than forty years of European integration.

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[1] See M. Horspool, *EU Law* (1998, Butterworths, London/Edinburgh/Dublin), p.188.

[2] See P. Craig and G. de Búrca, *op.cit.*, p.394.

[3] See N. Brown and T. Kennedy, *The Court of Justice of the EC* (1994, Sweet and Maxwell, London), p.119.

B. PRELIMINARY REFERENCES AND THE STATE LIABILITY SCENARIO

The main doctrine currently offered to individuals, natural and legal persons, for the restitution of damages suffered as a result of actions or omissions by Member States is state liability. For their judicial protection at the EU level, foreign companies may utilise the preliminary rulings process in order to involve the ECJ to judicial actions for damages initiated and heard before the competent national courts. State liability was formulated by the landmark *Francovich* case,[4] which has been described as one of the most obvious examples of "classic judicial activism".[5]

The foreign company suffering damages as a result of breaches of EC law by Member States may submit an action for damages before the competent national courts, determined in Chapter 6, against the Member State whose action or omission caused the damage. In order to assess whether compensation is due, the national judge will need to establish whether the legislative[6] or administrative[7] action or inaction of the Member State was wrongful. This can only be determined via the examination of a preliminary issue, namely whether the relevant action or omission is in compliance with EC legislation. This is a matter of EC law. In order to ensure that the decision of the court on this preliminary issue is based on a correct and full application of EC law, without the hindrance of the common natural prejudices for the state described in Chapter 6, the applicant foreign company has the right to argue that the national judge needs clarifications on the issue from ECJ judges. The company may thus persuade the national judge to request a preliminary ruling by the ECJ. The clarification and interpretation of the legal points provided by the ECJ in their preliminary ruling will be used by the national judges as the legal basis of their judgement, which may award compensation for damages suffered due to wrongful acts or omissions of the Member State.

It is worth noting that following the EU doctrine of state liability, to which every

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[4] See Joined cases 6/90 and 9/90 *Francovich and another* v *Italy* [1991] ECR I-5357. For a detailed listing of the relevant literature, see R. Caranta, "Judicial protection against Member States: A new *ius commune* takes shape" [1995] *Common Market Law Review*, Vol.32, pp.703-726, at 709, note 24. Also see *Opinion* of Advocate General Léger in case C-5/94 *Regina* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553, con.82, who notes that "the *Francovich* judgment fills a lacuna in the protection afforded to individuals".

It must be noted that state liability was introduced in the 1960s; see case 6/60 *Humblet* v *Belgium* [1960] ECR 1125.

[5] See D. O'Keeffe, "Judicial protection of the individual by the ECJ" [1996] *Fordham International Law Journal*, pp.901-915, at 913.

[6] See joined cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* v *Bundesrepublik Deutschland* [1996] ECR I-4845; also see joined cases C-283/94, C-291/94 and C-292/94 *Denkavit Internationaal* ECR I-5063; Opinion of Advocate General Mischo in case C-424/97 *Salomone Haim* v *Kassenzahnärzliche Vereiningun Nordheim*, 19 May 1999, unreported.

[7] See case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531.

national court must comply uniformly,[8] foreign companies may also seek compensation for damages deriving from the wrongful application of EC legislative texts which are not normally invokable before the national courts. This occurs in cases "where by reason of the insufficiently precise and unconditional nature of the provisions of a directive, he [the individual] cannot rely on it directly before its national courts".[9] Thus, foreign companies now have the opportunity to demand restitution on the basis of measures of "imperfect" direct effect, namely measures which do, not comply with the traditional conditions of direct effects. Moreover, following *Francovich* foreign companies may successfully seek compensation even in circumstances of horizontal direct effects, namely in disputes amongst private commercial units.[10] Furthermore, after the subsequent *Brasserie* judgement compensation may also be achieved for damages suffered by foreign companies as a result of actions or omissions undertaken by all possible types of national authorities falling in all three functions of the state, namely the executive, the legislative and the judiciary.[11] Also, foreign companies are now allowed to seek restitution for damages deriving from national measures implementing EU Directives even before the time-limit of the relevant Directive has expired.[12] On the basis of this, it would be fair to say that the development of the state liability doctrine and the subjection of new areas to EC law under the Treaty of Amsterdam has led to the expansion of the field of application of the right of foreign companies to seek compensation.[13]

The procedural conditions for the submission of the action for restitution are regulated by the relevant national procedural provisions. As these have been presented and evaluated in Chapter 6, there is no need for further analysis here. The substantive conditions for the establishment of state liability include the following three conditions:

a. the infringed rule of EC law must be introduced in order to confer rights to individuals;

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[8] See A. Campesan and A. Dal Ferro, "La responsabilità dello stato per la violazione degli obblighi ad esso incombenti in forza del diritto comunitario alle luce della sentenza Francovich" [1993] *Rivista di diritto europeo*, pp. 313-332, at 313; also see case 166/73 *Rheinmühlen-Düsseldorf* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, con.2.

[9] See Opinion of Advocate General Léger in case C-5/94 *Regina* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553, con.76.

[10] See J. Steiner, 'From direct effects to Francovich: shifting means of enforcement of Community law', *European Law Review*, Vol.18, 1993, pp.3-22, at 21.

[11] See Joined cases 46 and 48/93 *Brasserie Du Pêcheur Sa* v *Germany, Regina* v *Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029.

[12] See case C-129/96 *Inter-Environement Wallonie ASBL* v *Région Wallonne* [1998] 1 CMLR 1057.

[13] See A. Kaczorowska, "A new right available to individuals under Community Law" [1999] *European Public Law*, pp.79-90, at 90; also see A. Biondi, "The flexible citizen: individual protection after the Treaty of Amsterdam" [1999] *European Public Law*, pp.245-267; R. Kovar, "La contribution de la Cour de justice à l'édification de l'ordre juridique communautaire" in Academy of European Law, EUI, *Col-*

b. the breach must be sufficiently serious; and

c. there must be a direct causal link between the breach and the damage sustained.[14]

In *Brasserie* the Court clarified that a breach is sufficiently serious when the Member State has manifestly and gravely violated the limits of its discretion. In *Lomas* and *Dillenkofer* the ECJ explained, by reference to Art.288(2), that this criterion applied to cases where the state makes a choice of economic policy, whereas in all other cases any breach of EC law is sufficient for the fulfilment of this second *Francovich* condition.[15]

The procedure introduced by *Francovich* and developed by the ECJ and the CFI in their numerous post-*Francovich* judgements is of undeniable value to foreign companies. The presentation of complaints against Member States before the ECJ had been preserved for the Commission and other Member States, which have been (and still are) the only ones able to bring a national government before the ECJ in infringement proceedings against it. However, in combining state liability and preliminary rulings, the *Francovich* scenario can be seen as a means of opening the back door to foreign companies wishing to approach, albeit indirectly through their national judges, the ECJ with complaints against Member States. Not only that, but the factual circumstances giving rise to state liability and, consequently, to the right of foreign companies to seek restitution is greatly expanded. Moreover, following the state liability procedure companies acquire a uniquely significant, active role in the relevant proceedings. For the first time in EC law the company may initiate an action against Member States before the national courts, support its claim in an active manner, request reference of the case to the ECJ, where necessary, and argue for the correct and full application of the preliminary ruling in the particular case. On this basis, the initiative of ECJ judges to introduce and develop this type of doctrine can only be considered a revolutionary attempt by the ECJ judges to achieve effective judicial protection for the citizens of the Union.[16]

However, the value of state liability does not end there. The doctrine may finally

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lected Courses of the Academy of European Law, 1993, EC Law (1995, Martinus Nijhoff Publishers, The Hague), pp.15-122, at 109-122.

[14] For a brief analysis of these conditions with specific reference to British law, see A. Geddes, *Protection of Individual Rights under EC Law* (1995, Butterworths, London), pp.124-126.

[15] See case 5/94 *Regina* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553; Joined cases 178, 179, 188 and 190/94 *Erich Dillenkofer and Others* v *Germany* [1996] 3 CMLR 469.

[16] See for example, V.D. Simon and A. Barav, "La responsabilité de l'administration nationale en cas de violation du droit communautaire" [1987] *Revue du Marché Commun*, pp.165-174; also see F. Fines, "Quelle obligation de réparer pour la violation du droit communautaire?" [1997] 33 *Revue trimestrielle de droit européen*, pp.69-101. Arnull notes that *Francovich* represents a natural development of the Court's already well established case-law on primacy, direct effects and the duty of national courts to protect individual rights. See A. Arnull, "Judging the new Europe" [1994] *European Law Review*, pp.3-15, at 10.

create an expectation that infringements of EC law will not merely be noticed, but will probably result in financial punishment for the perpetrators, amounting to claims for compensation for damages suffered as a direct result of their action or omission. In other words, the state liability doctrine now acts as deterrent by applying pressure on Member States to implement EC law, and especially Directives, correctly and on time.[17] Furthermore, as Snyder puts it, the state liability principle "is likely to be an element, implicit if not explicit, in bargaining processes between the Commission and Member States, especially concerning the implementation of Community law".[18]

Without underestimating the significant role of the *Francovich* scenario for the effective judicial protection of foreign companies at the EU level, it must be accepted that the enthusiasm currently surrounding *Francovich* reflects and is partly due to the presently favourable evaluation of remedies initiated before national courts. In fact, the preliminary rulings procedure is often viewed as "the only way to make sure that these remedies are properly applied and developed further without losing their peculiar characteristic, which is to be common to all Member States".[19] Oliver notes that for its survival as a system of law, EC law depends on effective remedies and procedures for its enforcement before national courts.[20] The advantage of such procedures lies in the introduction of the possibility of enforcing EC law before national courts and in proceedings following the national rules of civil procedure.[21] Their value is reflected in the enormous and continuous success – both qualitative quantitative – of the preliminary rulings procedure. Indeed, from a quantitative point of view, it suffices to observe that half of the ECJ's judgements arise from preliminary rulings references.[22] From a qualitative point of view, it suffices to note the importance and the number of doctrines of EC law introduced by the ECJ on the basis of preliminary references, such as supremacy, direct effect, guarantee of fundamental rights, state and EU liability.[23] The success of the preliminary rulings procedure is also due to its favourable treatment from ECJ judges, who from the outset have not generally been pedantic as to the formalities of the

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[17] See C. Plaza Martin, "Furthering the effectiveness of EC Directives and the judicial protection of individual rights thereunder" [1994] *International and Comparative Law Quarterly*, pp.27-54, at 34.

[18] See F. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" [1993] 56 *The Modern Law Review*, pp.19-54.

[19] See R. Caranta, *op.cit.*, p.718.

[20] See P. Oliver, "Enforcing Community rights in the English courts" [1987] 50 *Modern Law Review*, pp.881-907, at 906.

[21] See E. G. de Enterría, *op.cit.*, p.5.

[22] See M. O'Neill, "Article 177 and limits to the right to refer: an end to the confusion?" [1996] *European Public Law*, pp.375-391, at 375.

[23] See R. Joulet, "L'article 177 du traité CEE et le renvoi prejudiciel" [1991] *Rivista di diritto europeo*, pp.591-616, at 592-593.

reference and the questions asked.[24] Another element of success refers to the application of national rules of procedure, a fact which aid national courts and tribunals to promote an internal harmony and consistency within the legal system of each Member State between the enforcement of EC law on the one hand and national law on the other.[25] Even when the introduction of new national authorities is deemed necessary, these authorities reflect the governmental and administrative traditions of each Member State, thus contributing to the acceptance of the Union and its law.[26]

However, proceedings initiated before national courts are not without disadvantages.[27] Several authors have expressed their concern at the disparities in remedies and procedures to be followed by applicants wishing to enforce their EU rights before their national courts.[28] Advocate General Capotorti held that at the present time, given the differences in legal rules between one Member State and another "inequality in treatment exists",[29] whereas the ECJ has often expressed concern as to the difference in the treatment of EU citizens amongst the fifteen different legal orders within the EU.[30] It is widely accepted that the main strength of such remedies also constitutes their major weakness, namely their reliance on national rules of procedure for their availability and effectiveness. Where EC law does not prescribe common provisions,[31] such rules differ amongst Member States, thus leading to lack of uniformity, inequality and unfairness in the protection of the individual during the relevant proceedings before the national courts.[32] Having said that, it must be accepted that these admittedly large discrepancies are now limited to a degree by the fact that the ECJ has increasingly impinged on national legal remedies by introducing general principles of EC law, such as proportional-

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[24] See G. Tesauro, "The effectiveness of judicial protection and co-operation between the Court of Justice and the national courts" [1993] *Yearbook of European Law*, pp.1-17, at 13.

[25] See D. F. Waelboeck, "Treaty violations and liability of Member States: the effect of the *Francovich* case-law" in T. Heukels and A. McDonnell (eds), *The Action for Damages in Community Law* (1997, Kluwer Law International, The Hague/London/Boston), pp.311-337, at 336.

[26] See J. Bridge, "Procedural aspects of the enforcement of EC law through the legal systems of Member States" [1984] *European Law Review*, pp. 28-42, at 31.

[27] See C. Stefanou and H. Xanthaki, "Are national remedies the only way forward? Widening the scope of Article 215(2) of the Treaty of Rome" in J. Lonbay and A. Biondi (eds.), *Remedies for Breach of EC Law* (1997, John Wiley and Sons), pp.85-101, at 88.

[28] See P. Oliver, *op.cit.*, p. 894; also see D. Anderson, *References to the European Court* (1995, Sweet and Maxwell, London), p.25.

[29] See case 130/79 *Express Dairy Foods Limited* v *Intervention Board for Agricultural Produce* (preliminary ruling requested by the High Court of Justice, Queen's Bench Division, Commercial Court) [1980] ECR 1887, at 1910.

[30] For example, see case 54/81 *Firma Wilhelm Fromme* v *Bundesanstalt für landwirtshcaftliche Marktordnung* [1982] ECR 1449, con.4.

[31] "The grey area, where Community law seems to stop and national law takes over, continues to generate intriguing problems". See S. Prechal, "Community law in national courts: the lessons from Van Schijndel" [1998] *Common Market Law Review*, pp.681-706, at 681.

ity, which contribute to the restructuring of national procedural systems with a view to forming a common European standard that focuses on effective judicial protection.[33]

Bearing this last point in mind, let us examine some specific discrepancies in such proceedings before national courts within different Member States. Amongst those reported to date are inequalities in the *locus standi* and time-limit requirements for actions against the state before the national courts. Indeed, time-limits vary between Member States "from a matter of a few weeks to a mater of several years in relation to the same type of case."[34] Other areas of discrepancy include national rules on the burden of proof,[35] inequalities in the legal aid[36] and its effectiveness, in the maximum sum awarded, and in the calculation of interest under the various national legal orders.[37] Further inequality arise from the fact that the application of national legal rules extends to all ancillary questions relating to actions for the enforcement of EC law.[38] Moreover, the maintenance of national rules in the areas of causation and damages creates further uncertainty not only from the EC law perspective and the consequent disparities in the national legal orders of the Member States, but also from the national law perspective, as these rules may be challenged under the effectiveness principle.[39] In pointing out these inequalities and discrepancies, it must be noted that they are an expected and normal phenomenon in a legal system attempting to rely upon fifteen different jurisdictions. In particular, supreme courts, which work on the basis of long settled legal traditions and principles, need time to adjust to the new methods of procedure and doctrines of substance.[40] This is demonstrated by the marked difference in the frequency of refer-

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[32] See J. Bridge, *op.cit.*, p.32; also see K. Lanaerts, "Some thoughts about the interaction between judges and politicians in the EC" [1992] *Yearbook of European Law*, p.17, at 6.

[33] See F. Snyder, *op.cit.*, p.46.

[34] See P. Oliver, *op.cit.*, p.894.

[35] See case 109/88 *Handels- og Kontorfuntionaerernes Forbund i Danmark* v *Dansk Arbejdsgiverforening acting ore behalf of Danfoss* [1989] ECR 3199, cons.13 and 14.

[36] See M. Brealy and M. Hoskins, *Remedies in EC Law* (1994, Longman, London), p.152.

[37] *Ibid.*, p.32; also see C. Harding, "The choice of court problem in cases of non-contractual liability under EEC law" [1979] *Common Market Law Review*, pp.389-406, at 391; T.C. Hartley, "Concurrent liability in EEC law: a critical review of the cases" [1977] *European Law Review*, pp.249-265., at 265, note 37, notes that "since the question would be governed by national law, the difficulty could not be solved by means of reference under Article 177 EEC". T. Hartley in "Non-contractual liability: Where to sue" [1975-76] *European Law Review*, p.399, notes that under such procedures the "jurisdiction of the European Court depends on a matter of national law: the existence of a remedy before the national courts".

[38] See case 26/74 *Société Roquette Frères* v *Commission* [1976] ECR 677.

[39] See case 208/90 *Theresa Emmott* v *Minister for Social Welfare and Attorney General* [1991] ECR 1; also see case 271/91 *Helen Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367, [1993] 3 CMLR 293.

[40] See M. Dauses, "Practical considerations regarding the preliminary rulings procedure under Article 177 of the EEC Treaty" [1986-1987] 10 *Fordham International Law Journal*, pp.538-577, at 576.

ences between the original six states and the newcomers, irrespective of their size.[41]

The diversity in the application of the preliminary references process and, consequently, of the *Francovich* scenario within different Member States can only affect the judicial protection offered to foreign companies at the EU level in a negative manner. The lack of certainty in the way under which this action is used by each national court and the realisation that the same factual circumstances may lead to different judicial orders depending on court and nationality can only harm the trust of foreign companies to EC law for the resolution of their claim against Member States. However, the *Francovich* scenario applied in the specific case of foreign companies examined in this thesis presents further problems which refer to the practical, rather than psychological, reception of this scenario by foreign companies. First, the submission of a request for a preliminary reference to the national judge may not necessarily lead to the reference of the case to the ECJ. Second, resorting to a preliminary reference before the ECJ will have a detrimental effect on the length of the proceedings. Third, in view of the recent change in the attitude of ECJ judges towards preliminary rulings may prevent the acquisition of a ruling even if one is ordered by the national judge. Fourth, even if a reference is indeed ordered, the decision of the national judge may still be uninfluenced by the interpretation of EC law provided by the ECJ in its preliminary ruling. Fifth, even in the doubtful case where the *Francovich* scenario is followed to the letter, the problems in the national proceedings identified in Chapter 6 still remain.

One of the main disadvantages of preliminary references, and consequently of *Francovich*, is that they cannot serve their purpose without co-operation from national judges. Indeed, the action of the foreign company against the Member State could not possibly acquire its desired EU dimension without the willingness of the national judge to order reference of the matter to the ECJ.[42] This co-operation is not always provided by national judges.[43] This is partly due to the common reluctance of national judges to accept that their ECJ counterparts have the ability and power to provide guidance in the

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[41] See D. Anderson, *op.cit.*, p.26. In order to prove this claim, the author mentions between 1989 and 1993 the newcomers made a total of 145 references out of the total of 832, a percentage of only 17%.

[42] On that aspect and problem of the procedure introduced by Article 177, see *ibid.*, p.391 and note 8 with reference to the *Dietz* case where the applicant expressed his fear in relation to the appeal before the *Bundesfinanzhof*. Also see J. Bridge, *op.cit.*, p.40 who notes that "paradoxically the inequalities which have been revealed by the case law are in a sense the direct result of Community law requiring reliance upon the laws of the Member States in the absence of any harmonising measures". On that matter also see comments by Advocate General Reischl in case 68/79 *Hans Just* v *Danish Ministry for Fiscal Affairs* [1980] ECR 531.

[43] See R. Caranta, *op.cit.*, p.721.

legal thought which will be used for the final judgement,[44] partly due to the ignorance of EC law[45] by the national judges or the lawyers of the case,[46] and partly due to national scrutiny procedures of requests for preliminary references to the ECJ, undertaken by the supreme courts of Member States. German courts are "reluctant, if not afraid to refer" as the German Constitutional Court scrutinises references quite closely in order to assess their necessity and legality.[47] It must be accepted, however, that the main reason for this reluctance of national judges to refer is the result of a "clear wish to control all transfers of competencies to the EU", a reluctance reflected in the 1997 declaration of the French *Conseil Constitutionnel* that the Treaty of Amsterdam was not compatible with the French Constitution.[48]

With specific reference to the judicial protection of foreign companies seeking restitution for damages suffered as a result of breaches of EC law in the three selected countries, it must be noted that the French, Italian and Greek judges have indeed shown signs of reluctance to refer to the ECJ. In fact, although the reception of the provisions on preliminary rulings by the French administrative courts are considered satisfactory[49] and France is the Member State with the second highest number of referrals to the ECJ,[50] the frequent use of the *acte claire* doctrine as a justification for lack of reference from the judge creates more than a few doubts as to the true willingness of French administrative judges to resort to the ECJ for the clarification of EC legal issues.[51] These doubts can only be strengthened by the common realisation that France is one of the Member States in which EC law "had the greatest difficulties to be fully integrated and

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[44] See R.M. Chevalier, D. Maidani and A. Calogeropoulos, *Practical Guide to Article 177 of the Treaty of Rome* (1981, Service for Official Publications of the European Communities, Luxembourg), p.17.

[45] See R. Voss, *op.cit.*, p.1124.

[46] See A. Bakopoulos, "The effect of EC law to the attitude of the judge" in I. Koukiadis, *The Effect of Community Law to Greek Private Law* (1995, Sakkoulas, Athens), pp.91-100, at 93.

[47] See *ibid*, p.1120.

[48] See S. Boyron, "The French Constitution and the Treaty of Amsterdam: A lesson in European integration" [1999] *Maastricht Journal of European and Comparative Law*, pp.169-191, at 169.

[49] See O. Audeoud, D. Berlin and P. Manin, "The application of Community law in France: review of French court decisions from 1974 to 1981" [1982] *CMLR*, pp.289-309, at 290. It must be noted that from 1987 onwards the number of preliminary rulings from French lower courts stabilised to thirty annually as opposed to only eighteen per year before 1986; see ECJ, *Annual Report 1991* (1993, Office des Publications Officielles des CE, Luxembourg), p.136.

[50] France has 594 references after Germany's 1113; see Table 17 in *Statistical Information on the Court of Justice (1998)*, http://europa.eu.int. Of those references 57 were referred by the Cour de Cassation, 15 from the Conseil D' Etat and 522 from other courts or tribunals. See Table 18 in *Statistical Information on the Court of Justice (1998)*, http://europa.eu.int.

[51] See R. Errera, "French courts and Article 177 of the Treaty of Rome" in H. Schermers, C. Timmermans, A. Kellermann and J. Steward Watson (eds.), *Article 177 EEC: Experiences and Problems* (1987, T.M.C. Asser Institute, the Hague), pp.78-108, at 90.

recognised as supreme to national law".[52] In Italy the situation is not too dissimilar to France. Despite the optimism concerning the adoption of preliminary references as a means of effective judicial protection inspired by their use in *Francovich*, Italian preliminary references are not as numerous as one might have expected.[53] In fact, although Italy has the third highest number of references within the EU, the number of references by the administrative courts which is of particular interest to this thesis is extremely low.[54] Until the beginning of the 1990s the *Consiglio dello Stato* had referred no cases to the ECJ,[55] whereas the *Corte Costituzionale* has yet to make use of what it describes as its faculty (note: not duty) to refer.[56] This Italian reluctance to refer is reflected in the writings of Italian authors, who insist that preliminary rulings are a means of co-operation and mutual respect between the national and European judges who, however, are "organs of two separate competencies".[57]

The situation tends to be even worse in Greece, where the total number of preliminary references is a very low 53.[58] In the past, the *Areios Pagos* avoided to refer to the ECJ on the flimsy excuse that its Secretariat did not know which reference form to fill in.[59] In fact until the end of 1985 not a single preliminary ruling had been requested by any Greek court,[60] a period of time which was not considered "excessive" by some

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[52] See J. Plötner, "Report on France" in A-M Slaughter, A. Stone Sweet and J. Weiler, *The European Court and the National Courts: Doctrine and Jurisprudence* (1998, Hart Publishing, Oxford), pp.41-75, at 41; also see S. Millns, "The Treaty of Amsterdam and constitutional revision in France" [1999] *European Public Law*, pp.61-77, at 77, where national sovereignty is described as "at once both jealousy guarded and yet half-heartedly conceded".

[53] See A. Saggio, "Italian experience in the application of Article 177 of the EEC Treaty" in H. Schermers, C. Timmermans, A. Kellermann and J. Steward Watson (eds.), *Article 177 EEC: Experiences and Problems* (1987, T.M.C. Asser Institute, the Hague), pp.109-113, at 111.

[54] See Table 17 in *Statistical Information on the Court of Justice (1998)*, http://europa.eu.int. Of those references 63 were referred by the Corte Suprema di Cassazione, 490 by other courts or tribunals and only 28 from the Consiglio di Stato. See Table 18 in *Statistical Information on the Court of Justice (1998)*, http://europa.eu.int.

[55] See M. Chiti, *op.cit.*, p.824.

[56] See M. Cartabia, "The Italian Constitutional Court and the relationship between the Italian legal system and the EU" in A-M Slaughter, A. Stone Sweet and J. Weiler, *The European Court and the National Courts: Doctrine and Jurisprudence* (1998, Hart Publishing, Oxford), pp.133-146, at 141; also see F. Ruggeri Laderchi, "Report on Italy" in *ibid*, pp.147-170, at 167.

[57] See G.B. Goletti, "L' art.177, tr. CE e la sua applicabilità" [1997] *Foro amministrativo*, pp.2615-2623, at 2617.

[58] See Table 17 in *Statistical Information on the Court of Justice (1998)*, http://europa.eu.int. Of those references 2 were from the *Areios Pagos*, 7 from the Council of the State and 44 from other courts or tribunals. See Table 18 in *Statistical Information on the Court of Justice (1998)*, http://europa.eu.int.

[59] See H. Xanthaki, *op.cit.*, pp.145-153. For a general comment on the failure of national courts to refer, see R. Caranta, *op.cit.*, p.721, who refers to the example of the decision of the House of Lords on case *Kirklees Metropolitan Borough Council* v *Wickles Building Supplies Ltd* [1992] 2 WLR 170, 188.

[60] See E.V. Konstantinidis, "Five years of application of Community law in Greece" [1987] *Legal Issues of European Integration*, pp.101-124, at 116.

Greek authors.[61] Another clash with EC law concerns the case-law of the *Areios Pagos* which refuses to examine whether there are issues of EC law in the cases brought before it, unless the plaintiffs specify the particular EC provisions relating to the case.[62] Insofar as Greek administrative courts are concerned,[63] there is one specific point of considerable concern. Under Art.15(5) of Act 1470/1984 a chamber of the Council of the State wishing to refer a matter to the ECJ must first refer the case to the Plenary of the court. This position imposes an additional hurdle to foreign companies seeking a preliminary ruling. It does not suffice for the company to persuade the Councillors of the State hearing the case that a preliminary ruling of the ECJ is necessary. The plenary of the court must also be convinced in proceedings to which the company itself plays no role whatsoever. The severity of this hurdle, which is in obvious breach of the spirit of the preliminary rulings process introduced by the Treaty,[64] is better appreciated when the nature of the Council as a court of last instance is taken into account.

From this brief presentation of the reception of EC provisions on preliminary rulings by the French, Italian and Greek judges it becomes obvious that the first hurdle in the successful outcome of a foreign company's request for a preliminary ruling lies in the persuasion of the reluctant national judges to order the reference. This issue is of particular importance in evaluating the effectiveness of the *Francovich* scenario, especially if one takes into account the fact that in deciding whether or not to refer, national courts "should bear in mind that the decision is theirs and theirs alone".[65] Even in cases where reference to the ECJ is obligatory, namely when the national court concerned is one of last instance, the awareness that reference is compulsory and the decision to fulfil the obligation to refer is left to the knowledge and discretion of national judges. A glimpse of hope for the foreign companies seeking restitution may derive from the recent *Brasserie* judgement, which expanded the source of state liability to all functions of the state, even the judiciary. On this basis, the foreign company which suffered damage as a result of the refusal of a French, Italian or Greek judge to comply with the obliga-

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[61] See A. Calogeropoulos, "The Greek courts and the preliminary references procedure according to Article 177 of the EEC Treaty: Some remarks" in H. Schermers, C. Timmermans, A. Kellermann and J. Steward Watson (eds.), *Article 177 EEC: Experiences and Problems* (1987, T.M.C. Asser Institute, the Hague), pp.122-127, at 127.

[62] See ΑΠ 816/1990 and 1148/1989, ΕλλΔνη, 1990, 31, 317; ΑΠ 963/1988, ΕλλΔνη, 30, 1988, 1345; ΑΠ 1465/1987, ΕΕΔ, 1987, 47, 1079; ΑΠ 1069/1983, Δ, 1983, 15, 419; also see S. Koukouli-Spiliotopoulou, *op.cit.*, pp.831-832.

[63] For examples of relevant Greek cases, see K. Vasilaki-Bouyouka, D. Anagnostopoulou, E. Adamantidou and A. Sgouridou, *Community Law in Greek Jurisprudence* (1994, Sakkoulas, Athens).

[64] See A. Calogeropoulos, "Commentary on case 1258/85 Council of the State" [1986] *Nomiko Vima*, pp.475-479, at 475.

[65] See A. Arnull, "References to the European Court" [1990] *European Law Review*, pp.375-391, at 387.

tion to refer the matter to the ECJ may attempt to seek compensation for damages from the relevant state. Although this may theoretically be achieved,[66] it is doubtful that any such claim may be successful in practice.[67] It is difficult to imagine that a French, Greek or Italian judge (or any other judge) will award compensation for damages to a foreign company on the basis of the failure of a colleague to refer to the ECJ. The roots of the constitutional principles of the separation of powers and of the independent judiciary are too strong to allow the recognition of such liability, which has not even been established in EC law anyway. It is therefore almost certain that, at least for the time being, foreign companies being refused reference of their case to the ECJ even from the courts of last resort have little else to do but accept the decision of the national court.

The second problem in the use of the state liability scenario for the achievement of compensation refers to the length of time required for a final decision when preliminary rulings from the ECJ are sought. It has often been argued that a direct action before the ECJ would be less lengthy and significantly cheaper for the applicant.[68] In the mid-1990s Voss supported the view that the main problem for referral to the ECJ in the Member States is that the then average of 18 months required for the completion of the procedure is "simply too long".[69] Similarly, Dauses expressed the view that the procedure of preliminary rulings often represents "an unnecessary prolongation of the proceedings or an additional element of uncertainty" for most applicants in most Member States.[70] Since the time when such views were being put forward, things have deteriorated considerably. In his Report on the future of the ECJ published on 28th May 1999, the President of the ECJ tied the delay in the preliminary rulings with the problem of inefficiency of justice at the EU level.[71] The same Report revealed that the average duration of proceedings for references for preliminary rulings was 17.4 months in 1990, 18.2 months in 1991, 18.8 months in 1992, 20.4 months in 1993, 18 months in 1994, 20.5 months in 1995, 20.8 months in 1996, 21.4 months in 1997 and 21.4 months in 1998.[72] This signifies that a foreign company submitting a request to the national competent judge for a referral for a preliminary ruling from the ECJ must be prepared to

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[66] See Advocate General Warner in case 9/75 *Meyer-Buckhardt* v *Commission* [1975] ECR 1171.

[67] See J. Steiner, "The limits of state liability for breach of EC law" [1998] *European Public Law*, pp.69-109, at 91-92.

[68] See C. Harding, *op.cit.*, p.391.

[69] See R. Voss, "The national perception of the Court of First Instance and the European Court of Justice" [1993] *Common Market Law Review*, pp. 1119-1134, at 1119.

[70] See M. Dauses, *op.cit.*, p.576.

[71] See European Court of Justice, "The Future", *Report of 28th May 1998 of the President of the ECJ*, http:/europa.eu. int/cj/en/pres/persp.htm, p.5.

[72] See *ibid*, p.29.

wait at least two more years for the final decision of the national court. If this figure is combined with the extremely long delays in the proceedings of national administrative courts especially in Italy (discussed in Chapter 6), it is evident that the time parameter can only deter the foreign company from seeking justice at EU level. This can only dent the efficiency of judicial protection at EU level.

The third problem faced by foreign companies seeking restitution via the *Francovich* scenario concerns a recent change in the attitude of the ECJ towards the procedure of preliminary rulings. One of the advantages of *Francovich* and the preliminary rulings procedure had been their accessibility to companies resulting from the lack of admissibility requirements.[73] Indeed, from very early on the ECJ encouraged national courts to refer preliminary requests to it by stating clearly that it would only refuse referral if it was the result of a manifest error by the referring national court.[74] This clear position became somewhat fuzzier after *Foglia*,[75] where the ECJ held that only genuine disputes may be referred to it without, however, specifying the criteria for the characterisation of a dispute as non-genuine.[76] This uncertainty in the nature of referrals that would be considered genuine, and consequently admissible, by the ECJ became rather more serious when the Court began to reject requests for preliminary rulings on that basis.[77] In *Leclerc-Siplec* the ECJ finally determined the difference between fictitious litigation as a means of abuse of the preliminary rulings process and genuine questions which, however, did not help the resolution of the case brought before the national courts and were therefore hypothetical.[78] Despite the initial warm welcome to this judgement,[79] it soon became clear that the ECJ has acquired a rather more restrictive attitude to the accessibility of preliminary rulings. O'Keeffe interprets *Leclerc-Siplec* and the subsequent case-law as "part of an effort to erect a series of tests for admissibility, without however developing a general system of admissibility".[80] This new idea of qualified access to references is reflected in the new guidelines for admissibility of pre-

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[73] See Advocate General Mancini in case 14/86 *Pretore di Salo* v *Persons unknown* [1987] ECR 2545, at 2557.

[74] See case 13/68 *Salgoil* v *Italian Ministry for Foreign Trade* [1968] ECR 453.

[75] See cases 104/79 *Foglia* v *Novello* [1980] ECR 745 and C-244/80 [1981] ECR 3045.

[76] See M. O'Neill, *op.cit.*, p.382.

[77] See C-83/91 *Wienand Meilicke* v *ADV/ORGA F.A. Meyer AG* [1992] ECR I-4871; also see cases C-343/90 *Lorenco Dias* v *Director da Alfadenga do Porto* [1992] ECR I-4673; C-320-322/90 *Telemarsicabruzzo SpA* v *Circostel, Ministero delle Poste e Telecommunicazioni and Ministero della Difesa* [1993] ECR I-393; C-157/92 *Pretore di Genova* v *Banchero* [1993] ECR I-1085; C-386/92 *Monin Automobiles* v *France* [1993] ECR I-2049.

[78] See C-412/93 *Société d'Importation Edouard Leclerc-Siplec* v *TFI Publicité SA and M6 Publicité SA* [1995] ECR I-179, cons.13-16.

[79] See M. O'Neill, *op.cit.*, p.389.

liminary references included in the *Note for Guidance on References by National Courts.*[81] The effect of this new attitude to the effective judicial protection of foreign companies is quite significant. When assessed in combination with the proven reluctance of some French, Greek and Italian judges to refer, this new ECJ policy can only be evaluated as an additional discouragement for national judges to refer to the Court. From the point of view of foreign companies, the uncertainty in the final outcome of the request for preliminary rulings makes the long delay involved in the process a burden even more difficult to bear.

Even if all these three hurdles are overcome by foreign companies seeking compensation for damages caused by breaches EC law from the French, Italian and Greek national authorities, a fourth obstacle may block their way to effective judicial protection at the EU level. This refers to the very real possibility of the misconstruction of the preliminary ruling by the national court which may lead to its incorrect application in the national hearing.[82] In view of the well documented reluctance of national judges to even refer to the ECJ, this theoretical possibility becomes a source of mistrust to the process. This damages its efficiency to a great extent. This inherent weakness of the preliminary rulings procedure, which affects the efficiency of the *Francovich* scenario, seems to be exacerbated by the already noted lack of tested mechanism for the coercion of national judges to implement the ruling of the ECJ correctly and in full.

The fifth problem of the *Francovich* scenario is that the use of national procedural rules for the achievement of compensation at the EU level does not relieve the applicant foreign company from the disadvantages of national procedures determined in Chapter 6. This observation has been endorsed by the ECJ in a strikingly express manner.[83] In fact, many authors argue that the problems of inequality deriving from a system of enforcement based on procedural autonomy is one of the worst weaknesses of EC law in general.[84] Such inequalities have been evaluated in Chapter 6 as detrimental for the effectiveness of judicial protection offered to foreign companies at the national level. This assessment can only be carried on to the evaluation of judicial protection at

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[80] See D. O'Keeffe, "Is the spirit of Article 177 under attack? Preliminary references and admissibility" [1998] *European Law Review*, pp.509-535, at 520.

[81] See European Court of Justice, "Note for Guidance on References by National Courts" in *Proceedings of the Court of Justice and the Court of First Instance of the European Communities*, no 34/96, 9th December 1996, [1997] *European Law Review*, p.55.

[82] See F. Mancini and D. Keeling, "From *CILFIT* to *ERT*: The constitutional challenge facing the European Court" (1991) 11 *Yearbook of European Law*, pp.1-13, at 2.

[83] See P. Craig and G. de Búrca, *The Evolution of EC Law* (1999, Oxford University Press, Oxford), p.294.

[84] See W. van Gerven, "Bridging the unbridgeable: Community and national tort laws after Francovich and Brasserie" [1996] International and Comparative Law Quarterly 507.

the EU level when the *Francovich* scenario is used.

On the basis of the evaluation of the *Francovich* scenario, it is clear that the *Francovich* route, albeit a revolutionary for some[85] and admittedly a useful remedy for the judicial protection of foreign companies at the EU level, cannot be considered an adequately effective solution to the problem faced by foreign companies seeking to succeed in their claims for damages resulting from French, Italian or Greek breaches of EC law. It is therefore fair to state that the judicial protection currently offered to such companies at the EU level is inadequate. The question is, whether foreign companies suffering from the current lack of effective judicial protection at the national and EU levels, have any hope in achieving compensation for their damages in the future.

C. AN INNOVATIVE SOLUTION BASED ON CONCURRENT LIABILITY

The inequality in the treatment of EU companies within different Member States, and its consequent damage in the effectiveness of indirect remedies, is "the direct result of Community law requiring reliance upon the national laws of the Member States in the absence of any harmonising measures".[86] One way of counteracting this damaging effect is the harmonisation of national procedural rules, whose absence is currently undermining the "authority, integrity and uniformity of EC law, as well as obstructing the realisation of Community objectives".[87] In fact, it is precisely this urgent need to achieve harmonisation in the national procedural rules that has led the ECJ to use the preliminary rulings process as an instrument which enables the Court to rule *de facto* on the compatibility of domestic law with EC law.[88] It must be accepted, however, that concrete measures of such harmonisation were never put forward by the EU. In any case, the ECJ has realistically little to offer in this direction.[89] Moreover, leaving the lack of EU initiative at this point aside, even if harmonisation in the national procedural rules is somehow achieved (leading to the compensation of the individual for damages caused by actions of the Member States),[90] as far as the *Francovich* scenario is concerned, the

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[85] Barav notes that *Francovich* was not a moment of eccentricity in the case-law of the Court, but a normal – almost expected – consequence of the principle of effective judicial protection. See A. Barav, "State liability in damages for breach of Community law in the national courts" in T. Heukels and A. McDonnell, *op.cit.*, pp.363-408, at 406-407.

[86] See the comments of Advocate General Reischlin case 68/79 *Hans Just* v *Danish Ministry for Fiscal Affairs* [1980] ECR 501, at 531.

[87] See *ibid*, p.41.

[88] See F. Mancini and D. Keeling, *op.cit.*, pp.8 and 12.

[89] See J. Bridge, *op.cit.*, p.40.

[90] See W. van Gerven, *op.cit.*, pp.690-691 who notes that this harmonisation comprises of three aspects, namely the definition of the exact scope of the rights conferred by EC law, the provision of adequate

problem of reliance upon national judges to refer the case still remains.

Since the disadvantages of the *Francovich* scenario derive from the inherent problems of preliminary rulings as indirect actions, the logical way forward for foreign companies would be to seek compensation at the EU level through actions brought directly before the ECJ. In fact, in view of the analysis of the inadequacies in the judicial protection currently offered both at the national level and through the *Francovich* scenario, avoiding altogether the use of national judges and national procedural rules as an even intermediary means of achieving justice may be the foreign companies' optimum criterion for the selection of an effective method of judicial protection. Such a direct remedy may derive either from the introduction of a new EC procedural provision, or through an innovative interpretation of an already existing remedy. After the 1996 Intergovernmental Conference, it has become apparent that Member States will not introduce new remedial provisions. Consequently, the hope of foreign companies to have effective judicial protection at the EU level lies with ECJ judges who, on the basis of the principle of the effective judicial protection of the individual[91] and through the use of the binding value of precedent,[92] may introduce a new interpretation of existing remedies. One of the few current remedies lending itself to such a novel interpretation for the purposes of achieving restitution for damages for foreign companies refers to Art.288(2). Although the text of this provision refers to a legal action available to EU natural and legal persons for the achievement of compensation for damages caused by the EU, its institutions and members of staff acting during the performance of their duties, the provision has also been successfully invoked in cases of concurrent liability between EU institutions and the Member States.

Pre-*Francovich* Art.288(2) had been interpreted to establish concurrent liability between the EU and Member States in cases where a Member State had applied a wrongful act issued by EU, in cases of unlawful decisions taken jointly by a Member State and the EU, and in cases of infringement of EC law by Member States.[93] Concurrent liability deriving from wrongful application of EC law by Member States usually arises when, on the basis of an illegal Regulation, the national authority either fails to pay the individual monies owed under EC law (a subsidy), or demands payment of

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sanctions guaranteeing the enforcement of these rights and the introduction of effective legal remedies for securing these rights. Also see F. Snyder, *op.cit.*, pp.45-47.

[91] See P. Pavlopoulos, *Guarantees of the Right to Judicial Protection in EC Law* (1993, Sakkoulas, Athens), p.58.

[92] For the legal value of the Court's precedents, see A. Arnull, "Owing up to fallibility: precedent and the Court of Justice" [1993] *Common Market Law Review*, pp.247-26.

monies not legally due (a tax or levy). According to the relevant ECJ case-law, if the claim simply relates to the act of the national authorities, restitution for damages caused must be sought under national law before the national courts.[94] If, however, the claim stems from EU legislative activity, the matter should be brought directly before the European Courts, where compensation can be obtained under Art.288(2).[95] Direct action before the European Courts is admissible only if an EU institution instructed the national authorities to proceed in a particular manner,[96] if there is no conceivable effective remedy under national law,[97] or if the substance of the claim is that the EU "has committed a tortuous wrong to the applicant".[98] The best known case of an unlawful decision taken jointly by a Member State and the EU is *Kampffmayer*,[99] where the Commission approved a German safeguard measure which was then held to be unlawful by the ECJ. This is one of the clearest forms of concurrent liability, which, however, rarely occurs in practice. Even in this case actions exclusively against Member States are heard by the national courts, whereas actions involving EU institutions are heard before the European Courts.[100] Concurrent liability in the case of breaches of EC law by Member States is a theoretical possibility examined, amongst others, by Wils and Kanellopoulos.[101] Such concurrent liability could occur when the Commission assists the Member State to apply EC law rules. However, the ECJ has consistently stated that expressions of opinion or recommendations, which are non-binding, cannot adequately establish liability of the Community. Thus, in this case, the Member State must be held wholly liable for the damages caused to individuals as a result of its actions or omissions.[102] Such concurrent liability may also occur if the Commission can be held liable for inadequate

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[93] See W. Wils, "Concurrent Liability of the Community and a Member State" [1992] *European Law Review*, pp.191-206, at 194-198.

[94] See P. Kanellopoulos, *Concurrent liability between the EC and the Member State during the application of EC law* (1990, Sakkoulas, Athens), p.138.

[95] The EU only incurs liability for normative acts if a sufficiently serious breach of a superior rule of law for the protection of the individuals has occurred. See case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975; also see W. Wils, *op.cit.*, p.195; S. Weatherhill and P. Beaumont, *EC Law: the Essential Guide to the Legal Workings of the European Community* (1993, Penguin Books, London), pp.270-271; C. Harding, 1979, *op.cit.*, p.395. For a detailed analysis of the case-law of the ECJ and the different types of cases falling in this category, see T. Hartley, 1977, *op.cit.*, pp.261-263.

[96] See case 175/84 *Krohn and Co Import-Export GmbH and Co* v *Commission* [1986] ECR 753, [1987] 1 CMLR 745.

[97] See case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969.

[98] See P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (1998, Oxford University Press, Oxford), pp.543-544; also see *ibid*, note 74 where it is stated that under the Dietz case the direct action to the European Courts is inadmissible when the national authorities themselves were partially to blame for the loss caused to the individual.

[99] See cases 5, 7 and 13-24/66 *Kampffmayer* v *Commission* [1967] ECR 245.

[100] See W. Wils, *op.cit.*, p.198; also see C. Harding, 1979, *op.cit.*, p.396.

[101] See W. Wils, *op.cit.*, p.195; also see P. Kanellopoulos, *op.cit.*, p.86.

supervision of the Member State which breaches EC law and causes damages to the company. The ECJ has never stated that inadequate supervision of Member States may not establish liability of the Commission. In *Lütticke* the ECJ was given the opportunity to examine this possibility, but dismissed the case by declaring that -although in principle such an action was possible- in these specific circumstances the Commission had fulfilled its supervisory task.[103] Thus, the opportunity for companies to attempt to establish that in specific cases of breaches of EC law the Commission has failed to supervise the Member States adequately and, consequently, has contributed to the damages caused to companies is still open. The question is, whether foreign companies suffering damages as a result of breaches of EC law by Member States could, in the future, use this action (which has been accepted by the ECJ in principle) as a means of achieving compensation on the basis of concurrent liability between the Commission and the Member State. As this argument has not yet been evaluated by the ECJ, it is interesting to assess whether its use by foreign companies could, in the future, prove beneficial in their struggle to achieve effective judicial protection at the EU level.

C1. The legal basis of the proposed remedy

For the establishment of concurrent liability in the case of damages caused to foreign companies due to violations of EC law in the field of company establishment, the liability of both the Member State and the EU must be proven. The legal basis of the Member State's liability in the concurrent liability scenario can be borrowed from the well established state liability doctrine of *Francovich*. Thus, the Member State's liability lies with Art.10, which introduces the obligation of Member States to ensure that EC law is implemented within the their territory. Before the introduction of the state liability doctrine, the role of Art.10 as an autonomous legal basis for actions brought before the European courts had been underestimated. This was mainly due to the rarity in which this provision had been used by lawyers in their case before the European courts and by judges in their decisions. It must be accepted, however, that this rarity of autonomous use of Art.10 is not a consequence of its insignificance, but a result of the nature of the provision introduced by it as a general principle of EC law, also referred to in other

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[102] See cases 99/74 *Grands Moulins des Antilles* v *Commission* [1975] ECR 1531; 12/79 *Wagner* v *Commission* [1979] ECR 3657; 217/81 *Interagra* v *Commission* [1982] ECR 2233.

[103] See case 4/69 *Alfons Lütticke* v *Commission* [1971] ECR 325.

Treaty articles[104] and specified through more precise provisions.[105] Recent case-law, however, has demonstrated that Art. 10 has a clear legal dimension.[106] In fact, even authors viewing with past scepticism the possibility of attributing enforceability in this legal provision now accept the fact that through the state liability scenario the ECJ has managed to "fashion" an enforceable provision out of Art.10.[107]

The determination of the authorities bound by the obligation introduced by Art.10 is significant for foreign companies, as they may seek restitution from all authorities covered by this provision. Such authorities include the Member State's executive, legislative, judicial, regional, local, State enterprises and private bodies to which state powers have been delegated.[108] The question is, which is the content of the Member States' obligation introduced by Art.10. In other words, which are the obligations which, when violated, may invoke the liability of the Member State in the concurrent liability remedy? Art.10 is viewed as a provision of dual nature. On the one hand, it imposes the positive duty for Member States to take all necessary actions in order to fulfil their EU obligations and to facilitate the achievement of EU objectives. On the other hand, Art.10 imposes the obligation of Member States to refrain from activities which could imperil the attainment of Treaty objectives.[109]

The obligation introduced by Art.10 has been interpreted to include the full compliance of Member States with all EC measures. This embraces decisions of the EU to which the Member State has disagreed, as long as no legal action for judicial review has been launched.[110] The obligation also includes the individual and collective duty[111] of Member States to contribute positively towards the unhindered functioning of EU institutions.[112] It covers the additional task for loyalty and genuine co-operation between Member States and EU institutions in order to facilitate the achievement of the tasks

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[104] See J. Temple Lang, "Article 5 of the EEC Treaty: the emergence of constitutional principles in the case-law of the Court of Justice" [1986-1987] *Forham International Law Journal*, pp.503-537, at 503-504.

[105] See cases 78/70 *Deutsche Gramophone GhmH* v *Metro-SB Großmärkte GmbH* [1971] ECR 487; 2/73 *Geddo* v *Ente Nazionale Risi* [1973] ECR 865; 192/84 *Commission* v *Hellenic Republic* [1985] ECR 3967.

[106] See K. Mortelmans, "The principle of loyalty to the Community (Article 5 EC) and the obligations of Community institutions" [1998] *Maastricht Journal of European and Comparative Law*, pp.67-88, at 67.

[107] See K. Lanaerts 1992, *op.cit.*, p.4.

[108] See J. Temple Lang, "Community constitutional law: Article 5 EEC Treaty" [1990] *Common Market Law Review*, pp.645-681, at 645.

[109] See C. De Keersmaeker and T. Pauwels, "Article 5" in H. Smit and P. Herzog, *The Law of the EC* (1998, Matthew Bender, The Netherlands), pp. 1/89-1/106.1, at 1/89.

[110] See case 130/83 *Commission* v *Italy* [1984] ECR 2849.

[111] See case 230/81 *Luxembourg* v *European Parliament* [1983] ECR 255.

[112] See case 85/85 *Commission* v *Belgium* [1986] ECR 1149.

awarded to the latter by EC law.[113] However, the most detailed delimitation of the duties introduced by Art.10 has been produced by Temple Lang who distinguishes fifteen different obligations.[114] There is the duty to give full effect to EC law, including judgements of the European courts,[115] the duty to implement EU objectives when the objective and the required action are sufficiently clear,[116] and to adopt any supplementary measures for the achievement of EU objectives on behalf of the EU.[117] There is the duty not to interfere with the operation of EC law rules, which includes the avoidance of measures that conflict with EC provisions and the avoidance of measures that may interfere with future decisions of the EU,[118] as well as the duty not to interfere with the internal functioning of EU institutions,[119] and not to enable, encourage or facilitate breaches of EC law.[120] Then there is the duty to clarify the national position under EC law when there is a possibility of uncertainty or conflict,[121] the duty to consider a specific measure legally binding if it is a concrete example of a general duty imposed under Art.10,[122] the duty to comply with the general principles of law,[123] duties specific in the field of external relations,[124] and the duty to consult the Commission when planning to adopt national measures of interest to the EU.[125] Moreover, there is the duty not to legislate on issues dealt with by EC law,[126] the reciprocal duty amongst Member States and between Member States and EU institutions to co-operate,[127] and the duty to enforce EC law. The latter obligation is intended to supplement the duty of Member States to observe EC legislation and includes the obligation of Member States, including the national courts, to eliminate all illegal consequences resulting from breaches of EU obligations.[128] Such elimination obviously includes the reparation of any damage caused by violations of EC law. The breach of this obligation constitutes the legal basis for the liability of the Member State in the concurrent liability scenario. This liability occurs even if the

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[113] See C. De Keersmaeker and T. Pauwels, *op.cit.*, p.1/92.
[114] See J. Temple Lang, 1986-1987, *op.cit.*, pp.506-536.
[115] See Joined cases 314-316/81 and 83/82 *Procurateur de la Republic* v *Waterkeyn* [1982] ECR 4337.
[116] See case 71/76 *Thieffry* v *Conseil de l' Ordre des Avocats à la Cour de Paris* [1977] ECR 765.
[117] See Joined cases 47 and 48/83 *Re Pluimveeslachterij Midden-Nedera BV and Pluim* [1984] ECR 1721.
[118] See case 231/83 *Cullet* v *Centre Leclerc Toulouse* [1985] ECR 305.
[119] See case 208/80 *Lord Bruce of Donington* v *Aspden* [1981] ECR 2205.
[120] See case 13/77 *NV GB-INNO-BM* v *ATAB* [1977] ECR 2115.
[121] See case 50/76 *Amsterdam Bulb* v *Produktschap voor Siergewassen* [1977] ECR 137.
[122] See case 141/78 *France* v *UK* [1979] ECR 2923.
[123] See case 237/82 *J. Kaas and Others* v *The Netherlands and Others* [1984] ECR 483.
[124] See case 61/77R *Commission* v *Ireland* [1977] ECR 937.
[125] See case 141/78 *France* v *UK* [1979] ECR 2923.
[126] See case 40/69 *Hauptzollamt Hamburg-Oberelbe* v *Firma Paul G. Bollman* [1970] ECR 69.
[127] See case 52/84 *Commission* v *Belgium* [1986] ECR 89.
[128] See case 6/60 *Jean Humblet* v *Belgium* [1960] ECR 1125.

breach of EC law has not been declared by the ECJ in infringement proceedings brought against the Member State.[129]

Even though the liability of the state has been the subject of thorough research, the liability of the EU has not been equally explored. This is probably due to the past cautious limitation of the ECJ's interpretation of Art.288(2) to the absolute necessary.[130] Indeed, the 1960s were a decade of shyness, during which the ECJ (possibly ill at ease with the ambiguous text of ex Art.215) did its best to avoid referring to its text in the hope that a detailed interpretation would not be requested. The 1970s was a decade of progress in the interpretation of EU liability. It was during this decade that most of the relevant principles (such as *Lütticke*, *Schöppenstedt and Kampffmeyer*)[131] were introduced, albeit in a manner which imposed limits and additional conditions for the successful request of compensation from the individual. The 1980s were an uneventful decade, during which the ECJ applied the already introduced principles of liability in the cases brought before it. Thus, the restrictions remained, but the rough edges of the existing doctrines were smoothed and finer points were addressed. It was only during the 1990s that, through the introduction of the *Francovich* scenario and the development of state liability, the ECJ finally turned to the interpretation of EU liability. The details of this interpretation will be used for the determination of the conditions for the establishment of the concurrent liability remedy.

A starting point for the establishment of EU liability in the concurrent liability remedy[132] could be found in Art.211 which introduces the obligation of the Commission to ensure that EC law is applied by the Member States.[133] This obligation includes the duty to gather information and the duty to proceed against offenders.[134] The Commission's duty to collect information includes the authority specifically granted to the

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[129] See W. van Gerven 1994, *op.cit.*, p.15.

[130] See C. Stefanou and H. Xanthaki, *A Legal and Political Interpretation of Article 215(2) of the Treaty of Rome: The Individual Fights Back* (2000, Ashgate, Aldershot), pp.62-63.

[131] See cases 4/69 *Alfons Lütticke GmbH* v *Commission* [1971] ECR 325; case 5/71 Aktien-Zuckerfabrik Schöppenstedt *v* Council [1971] ECR 975; and Joined cases 56-60/74 *Kurt Kampffmeyer Muhlenvereinigung KG and Others* v *Commission and Council* [1976] ECR 711.

[132] Under Art.282 the Commission represents the Community in legal proceedings.

[133] "In order to ensure the proper functioning and development of the common market, the Commission shall:

– ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;

– formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;

– have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this treaty;

– exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter".

Commission by Treaty provisions or by secondary legislative provisions, as well as the general task of collecting information that may assist the achievement of its goals even when relevant authorisation has not been obtained.[135] The Commission's duty to proceed against offenders encompasses not only redress, but also prevention. Thus, if the Commission acquires information according to which a Member State is likely to introduce a piece of legislation which violates EC law, it will fulfil its task as guardian of the Treaty in a more efficient manner by informing the Member State of the imminent problem before the new law is passed rather than waiting for the law to be passed and then initiating the administrative stage of Art.226. The preventative aspect of the Commission's duty is reflected in the view, recently shared both by the Commission and the ECJ, that the Commission's task includes its duty to take action when other EU institutions have failed to do so.[136] Once a violation has occurred, the Commission should proceed to redress under the procedures available by EC law.[137]

Since the Commission is entrusted with the task of ensuring that Member States implement EC law within their boundaries, the existence of a breach of EC law from any national authority is a *de facto* proof of the Commission's failure to fulfil this task. The question is whether this failure may lead to the establishment of liability. Steiner and Van der Woude argue that the Commission has complete discretion as to the time and manner in which its task may be fulfilled.[138] Ebke notes the "duty" of the Commission to ensure that the provisions of the Treaty and the measures pursuant to it are carried out,[139] whereas Bleckmann refers to the "obligation" of the Commission to bring a case against Member States which breach EC law.[140] Smit and Herzog are of the opinion that this is a matter that can only be decided on a case to case basis: when EC law prescribes a mandatory enforcement procedure, the Commission must follow it, whereas when the procedure is cast in terms of permission, the Commission must retain reason-

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[134] See H. Smit and P. Herzog, *The Law of the EC* (1998, Matthew Bender, UK), pp.5.170-5.198.2., at 5.176.

[135] See joined cases 188-190/80 *France, Italy and the UK* v *Commission* [1982] ECR 2545.

[136] See case 804/79 *Commission* v *UK* [1981] ECR 1045; also see case 124/80 *Officier van Justitie* v *J. van Dam & Zonen* [1981] ECR 1447; joined cases 47 & 48/83 *Re Pluimveeslachterij Midden-Nedera BV and Pluim* [1984] ECR 1721.

[137] The Commission's duty to proceed to the initiation of the judicial stage of infringement proceedings is under dispute. See P. Craig and G. de Búrca, 1998, *op.cit.*, p.539.

[138] See J. Steiner and L. Woods, *Textbook on EC Law* (1998, Blackstone Press, London), p.28; also see M. H. van der Woude, "Liability for administrative acts under Article 215(2) EC" in T. Heukels and A. McDonnell, (eds), *The Action for Damages in Community Law* (1997, Kluwer Law International, The Hague/London/ Boston), pp.109-128, at 127.

[139] See W. Ebke, "Enforcement techniques within the European Communities: flying close to the sun with waxen wings" [1985] *The Journal of Air Law and Commerce*, Vol. 50, pp.685-725, at 692.

[140] See A. Beckmann, "Zur Verbindlichkeit von Rechtsauskünften der EG-Kommission" [1988] *Recht der Internazionalen Wirtschaft*, pp.963-967, at 904.

able leeway in its decision to proceed or not.[141] In fact, within the framework of its task as guardian of the Treaty, the ECJ may charge the Commission with supervising the manner in which its judgement is observed.[142] It must therefore be accepted that the discretion awarded to the Commission in each particular case is determined by the specific provisions of EC law, introduced by legislative provisions or through the case-law of the European Courts, which constitute the source of the Commission's task to act in each specific case. It must also be accepted, however, that in the absence of specific provisions the Commission has an obligation rather than a discretion to act.[143] This is based on the use of the term "shall" in the text of Art.211, which introduces the general framework of the Commission's obligations. This view is also reflected in the expression "right and duty" used by the ECJ to describe the nature of the Commission's obligation to pursue its mission as guardian of the Treaties, to monitor the application of EC law, and to monitor and enforce compliance with EC provisions.[144] It is also reflected in the view of the ECJ that the procedure for establishing an infringement imposes upon the Commission an obligation unlimited in time.[145] Thus, the Commission must be held liable for its failure to act,[146] unless otherwise provided.

Foreign companies seeking restitution within the concurrent liability framework may base their claims on the combination of Arts.10 and 211.[147] Art.211 cannot constitute a source of Commission liability in all cases of breaches of EC law by Member States.[148] Such a claim would be unrealistic and unfair to the Commission, as it would totally disregard the huge number of actions or omissions undertaken by all types of national authorities within all Member States. It is unreasonable to expect the Commission to be fully aware of all such actions at any given time. However, the combination of Arts.211 and 231 could indicate that, when the Commission is notified of a specific violation yet fails or omits to act within two months, it bears liability for damages en-

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[141] See H. Smit and P. Herzog, 1998, *op.cit.*, p.5-184.

[142] See case 42/82R *Commission* v *France* [1982] ECR 841.

[143] See case C-351/88 *Laboratori Bruneau Srl* v *Unita Sanitaria Locale RM/24 von Monterotondo (Rom)*, transcript, 11 July 1991.

[144] See cases C-351/88 *Laboratori Bruneau* v *Unita Sanitaria Locale RM/24 von Monterotondo (Rom)* ECJ Fourth Chamber, Transcript, 11 July 1991; C-248/89 *Cargill BV* v *Commission* [1991] 1 ECR 2987; C-301/87 *France* v *Commission* [1990] 1 ECR 307; Joined cases 326/86 and 66/88 *Benito Francesconi and others* v *Commission* [1989] ECR 2087; 141/87 *Commission* v *Italy* [1989] ECR 943 and [1991] 1 CMLR 234.

[145] See case 324/82 *Commission* v *Belgium* [1984] ECR 1861.

[146] See case 289/83 *GARM and others* v *Commission* [1984] ECR 4295, [1986] 3 CMLR 15.

[147] Although the Member States may attempt to bring an action under Art.232 before the ECJ for the failure of the Commission to act against the breach of EC law by the Member State, such action would be inadmissible before the Court on the basis of lack of *locus standi*.

suing.[149] Does this signify that a foreign company notifying the Commission of a breach of EC law need only wait two months before it launches an action for damages against the violating Member State and the Commission for its failure to initiate infringement proceedings? According to the prevailing view "the action before the Court under Article 169 constitutes one of the Commission's institutional prerogatives and is associated with its general task under Article 155".[150] Moreover, the Treaties clearly award the Commission some discretion in its decision to refer Member States before the ECJ.[151] Thus, it is debatable whether the Commission's liability may be based on the mere omission of the Commission to initiate infringement procedures, especially when the indirectness of the causal link between the company's loss and the Commission's omission is taken into account.[152] It must be accepted, however, that the Commission may be held liable when the company can prove that the Commission failed or omitted to act in cases where it had the obligation to do so, or where policy had no effect on its decision.[153] This could be the case when the Commission failed or omitted to initiate even the first, informal, administrative phase of the infringement proceedings within a reasonable time, even though it was informed by the company that a breach of EC law was causing it damages. This would also be the case when the Commission wrongfully ignored the information presented to it by the company. The view that the Commission, under such circumstances, has the duty to refer the Member State to the ECJ[154] and that it is liable for damages, should it fail to do so, has been recognised by the ECJ. In general, it must be accepted that Commission liability may be easier to establish in cases of

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[148] See cases 151/88 *Italy* v *Commission* [1989] ECR 1255; 183/84 *Sohnlein Rheingold* v *Hauptzollamt Wiesbaden* [1985] ECR 3351; 133/79 *Sucrimex and another* v *Commission* [1980] ECR 1299; 12/79 *Hans-Otto Wagner GmbH Agrarhandel* v *Commission* [1979] ECR 3657.

[149] See case C-201/86 *Spie-Batignolles* v *Commission* [1990] ECR I-197.

[150] See case 137/88 *Schneemann and others* v *Commission* [1990] 1 ECR 369; also see cases 355/87 *Commission* v *Council* [1991] 1 CMLR 586 and [1989] ECR 1517; 205/84 *Commission* v *Germany* [1987] 1 CMLR 69. It goes without saying that the Commission also has the right and duty to act under Article 171. See case 48/71 *Commission* v *Italy* [1972] ECR 527, [1972] CMLR 699.

[151] See cases 137/92P *Commission* v *BASF AG and others* [1994] ECR I-2555; 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279; 337/82 *St. Nikolaus Brennerei und Likorfabrik, Gustav Kniepf-Melde GmbH, Rheinberg* v *Hauptzollamt Krefeld* [1984] ECR 1051, [1985] 3 CMLR 83.

[152] See 132/77 *Societe pour l'exportation des sucres, S.A.* v *Commission* [1978] ECR 1061, [1979] 1 CMLR 309; 12/79 *Hans-Otto Wagner GmbH Agrarhandel KG* v *Commission* [1979] ECR 3657; C-102/86 *Spie-Batignolles* v *Commission* [1990] 1 ECR 197; 151/88 *Italy* v *Commission* [1989] ECR 1255.

[153] See C. Stefanou and H. Xanthaki, "Restitution for EU companies under Article 215(2)EC and Integration Theory" [1999a] 6 *European Financial Services Law*, pp.58-66, at 59; also see C. Stefanou and H. Xanthaki, "The Principle of the Effective Protection of Individual in EC Law and the Dialectic of European Integration Theory" [1999b] 50 *Northern Ireland Legal Quarterly*, pp.213-233, at 220.

[154] See case 355/87 *Commission* v *Council* [1989] ECR 1517, [1991] 1 CMLR 586; also see cases 337/82 *St. Nikolaus Brennerei und Likorfabrik, Gustav Kniepf-Melde GmbH, Rheinberg* v *Hauptzollamt Krefeld* [1984] ECR 1051, [1985] 3 CMLR 83; case 42/82R *Commission* v *France* [1982] ECR 841; case 79/72 *Commission* v *Italy* [1973] ECR 667, [1973] CMLR 773. However, see cases 205/84 *Commission* v

total lack of any national attempt to implement EC legislation, whereas in cases of mal implementation the Commission could rely on its discretion to bring infringement proceedings to a greater extent.

With specific reference to most violations of EC law referred to in this thesis and presented in Chapter 5, it is worth noting that the complaint of companies would be that the Commission failed to act against a continuing breach of EC law by a Member State, even after an ECJ declaration on the illegality of the practice of national authorities has been issued. Indeed, in most breaches addressed in Chapter 5 the ECJ has declared that the legislative or administrative action or omission of France, Greece, or Italy is in breach of EC law. Consequently, in these specific cases the companies will be blaming the Commission for its failure to bring before the ECJ the failure of the respective Member State to comply with a prior ECJ judgement under Art.228. In these particular circumstances the use of the concurrent liability scenario by the companies will probably bear fruit, as the liability of the Community would not be too difficult to prove. Although reliance on Art.226 could necessitate a turn in the mentality of the ECJ judges, reliance on the failure of the Commission to act under Art.228 can be based on ECJ case-law. The Court has expressly held that when a Member State disobeys its decision, the Commission is obliged to initiate infringement proceedings.[155]

C2. Admissibility requirements

The theoretical possibility for the recognition of liability to the Commission for its failure to act towards the prevention or abolition of breaches of EC law by Member States is a very interesting prospect for foreign companies whose route to restitution is blocked by the inefficiency of judicial protection at the national level and by the profound disadvantages of the state liability scenario. A direct remedy heard before the European Courts would relieve foreign companies from the procedural hindrances introduced by national law and the preliminary rulings process, thus opening the way for a more effective route to effective judicial protection at the EU level. However, the efficiency of the new remedy has to assessed on the basis of its admissibility requirements and the substantive conditions it sets for the establishment of concurrent liability.

In theory, the possibility of such an action before the European Courts has not

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Germany [1986] ECR 3755, [1987] 1 CMLR 69; 220/83 *Commission* v *France* [1986] ECR 3663, [1987] 1 CMLR 150.

[155] See joined cases 24 & 97/80R *Commission* v *France* [1980] ECR 1319.

been excluded by the ECJ. Both in *Kampffmayer* and *Lütticke*[156] the ECJ accepted that such an action would be admissible in principle. As for the circle of persons with the *locus standi* to use this remedy, the text of Art.288 does not refer to the issue, at least not expressly. Some indication on the will of the Treaty signatories can be found in Art.43 of the Protocol on the Statute of the Court of Justice. This Article regulates the interruption of the period of limitation for the initiation of proceedings on an action for damages under Art.288(2), in the event of the submission of an application to the relevant EU institution by the aggrieved party. It can be argued, and quite persuasively so, that if the aggrieved party has the power to interrupt the prescription period for the proceedings with such an application, surely it is the aggrieved party that has the power to initiate the proceedings for compensation in the first place. For the characterisation of a party as aggrieved for this stage of the procedure, alleged damage is adequate.[157] This position was confirmed by the ECJ, which in *CMC* held that any person alleging to have suffered damage due to actions or omissions of institutions falling within the scope of Art.288(2) may initiate proceedings before the ECJ in order to prove the elements of liability.[158] Although the power of natural persons to submit claims for compensation was accepted by the ECJ from the very beginning, the power of legal persons was questioned by the Commission in two notable cases. In *Kerisnel* and *GAARM*[159] the Commission argued for the inadmissibility of the action on the basis of lack of *locus standi* by the companies, since it was individual producers that were empowered to submit claims and not legal persons representing a collective right to compensation. In both cases the ECJ held for admissibility on the grounds that the companies claimed restitution for damages suffered by them as individual legal persons rather than by the total of the producers participating in them. In *Union national des Coopératives Agricoles de Céreales*[160] the ECJ found that admissible are even actions initiated by legal persons to

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[156] See Joined case 5, 7 and 13-24/66 *Kampffmayer* v *Commission* [1967] ECR 245, con. 67; also see 4/69 *Alfons Lütticke GmbH* v *Commission* [1971] ECR 325.

[157] See E.-W. Fuss, "La responsabilité des Communautés européennes pour le comportement illégal de leurs organes" [1981] *Revue trimestrielle de droit européen*, pp.1-33, at 5.

[158] See case 118/83 *CMC and others* v *Commission* [1985] ECR 2325. Also see Joined Cases 256, 257, 265 and 267/80, 5 and 51/81 and 282/82 *Birra Wührer SpA and Others* v *Council and Commission* [1987] ECR 789.

[159] See case 144/83 *Société d'initiatives et de coopération agricole Kerisnel and others* v *Commission* [1984] ECR 2589; also see case 289/83 *Groupement des Associations Agricoles pour l' organisation de la production et de la commercialisation des pommes de terre et légumes de la Région Malouine and others* v *Commission* [1984] ECR 4295.

[160] See Joined Cases 95 to 98/74, 15 and 100/75 *Union National des Coopératives Agricoles de Céreales and Others* v *Commission and Council* [1975] ECR 1615.

which the right to seek restitution has been legally[161] transferred by the aggrieved party.

Having established the right of foreign companies to submit claims for restitution under Art.288(2), it is necessary to determine the court before which such an action is to be submitted. In the past this issue was resolved on the basis of Art.235 which awarded exclusive jurisdiction to hear disputes relating to compensation for damages against EU institutions to the ECJ. However, since 1988 claims initiated by natural or legal persons are submitted to the CFI, which judges in the first instance subject to appeal before the ECJ.[162] Appeals are limited to points of law and based on lack of competence, breach of procedure adversely affecting the interests of the appellant, or an infringement of EC law by the CFI.[163] Appeals must contain the pleas in the law and legal arguments relied on[164] and must specify the alleged flaws in the first instance judgement and the legal arguments in support of the application.[165] The mere reproduction of the pleas and legal arguments word for word is not acceptable.[166] The introduction of the two-tier judicial system has increased the efficiency of judicial protection at the EU level,[167] as it has "undoubtedly afforded greater protection to individuals" and has allowed the ECJ to "devote itself more fully to its essential task in ensuring the uniform interpretation of EC law under conditions which preserve the quality and efficiency of the judicial system".[168] The introduction of the right of companies to appeal against the CFI judgement eliminates another past problem in the effectiveness of the concurrent liability scenario, the lack of trial in the second grade. However, in comparison with the state liability scenario, even the current position seems disadvantageous. In the concurrent liability scenario companies may only appeal before the ECJ on pure matters of law. With state liability the judgement in the first instance is subject to an appeal on matters of both law and fact and a cassation on matters of law.

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[161] See case 250/78 *DEKA Getreideprodukte GmbH & Co. KG, i.L. (formerly Firma Contifex Getreideprodukte GmbH & Co. KG)* v *EEC* [1983] ECR 421.

[162] See Article 3, Council Decision of 24.10.1988 establishing a Court of First Instance of the European Communities (88/591ECSC, EEC, EUROATOM) as corrected by the corrigendum published in *OJ* No. L241 of 17 August 1989) *OJ* 1989, No. C215/1, as amended by Council Decision 93/350/ ECSC, EEC, EUROATOM of 8 June 1993 *OJ* 1993, No. L144/21 J.

[163] See par.1, Art.51 of the EC Statute on the Court of Justice. Also see case C-218/97 *Council* v *Leite Mateus* [1997] ECR I-6945, con.20.

[164] See Article 112(1)(c) of the Rules of Procedure of the Court of Justice.

[165] See case C-401/96 P *Somaco SARL* v *Commission* [1998] ECR I-2587.

[166] See case C-244/92 P *Kupka-Floridi* v *Economic and Social Committee* [1993] ECR I-2041; case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457; case C-59/96 P *Kölman* v *Commission* [1997] ECR I-4809.

[167] See European Court of First Instance, "Contribution of the Court of First Instance for the purposes of the 1996 Intergovernmental Conference", *Report of the Court of Justice on Certain Aspects of the Treaty of the European Union*, 15/95, May 1995, p.20.

[168] See European Court of Justice, "Report of the Court of Justice on certain aspects of the application of the Treaty on EU" (May 1995, Luxembourg, http://www.cec.lu/europarl/ igc/en/ cj_rep.htme).

This analysis leads to the question whether a company's claim for damages against the Member State and the EU can be judged in a single case before the ECJ,[169] or whether the ECJ is prohibited from doing so because "the Community legal order and national legal orders are separate from one another".[170] Until the development of the state liability scenario the general consensus was that a joint action was inconceivable,[171] as it involved two separate legal orders, national law for the Member State's liability and EC law for the liability of the EU. After *Francovich*, however, and the introduction of an EU doctrine of state liability[172] the submission of two actions, one against a Member State before its national courts and under its national rules of law, and one against the EU under EC law, for the same legal issue deriving from the same factual background would be a waste of time and resources. Furthermore, in cases of concurrent liability the acts of the EU and the Member State interlock in such a way that the liability of both parties can be established only if the complaints against both, as well as the provisions of both legal orders, are taken into account.[173] This, in combination with the obvious danger for the acquisition of double compensation during two separate trials, indicates that the concurrent liability between the EU and the Member States not only may, but also must, be assessed in one trial before the European Courts.

Another issue of procedural nature with reference to the proposed remedy concerns its characterisation as a remedy of last resort. In *Kampffmeyer* the ECJ declared that for the admissibility of the restitution action brought before it all national remedies must be exhausted.[174] In *Haegeman*[175] an action for damages was declared inadmissible on the basis that its subject (a national authority's application of EC law) rendered competent the national courts, whereas the ECJ reached the same conclusion in *Société Grand Moulin* on the claim for damages caused to the applicant company by the refusal of French authorities to reimburse it after the Commission's failure to reimburse France

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[169] Any trial against the EU or its institutions held before any other court would be "inconceivable". See M. Herdegen, "Zur Haftung für fehlerhafte Verordnungen im Recht der Europäischen Wirtschaftsgemeinschaft" [1984] *Neue Zeitschrift für Verwaltungsrecht*, p.347.

[170] See M.L. Jones, *op.cit.*, p.4.

[171] See P. Oliver, "Joint liability of the Community and the member states" in T. Heukels and A. McDonnell (eds), *The Action for Damages in Community Law* (1997, Kluwer Law International, The Hague/London/Boston), pp.285-309, at 308.

[172] See W. Wils, *op.cit.*, p.192; also see R. Caranta, *op.cit.*, p.713.

[173] See J. G. Huglo, "Cour de justice, responsabilité extracontractuelle", *Jurisclaseur Europe*, Vol. 370, pars. 82-90.

[174] See Joined Cases 5, 7 and 13 to 24/66 *Firma E. Kampffmeyer* v *Commission* [1967] ECR 245.

[175] See case 181/73 *R. & V. Haegeman* v *Belgian State* (preliminary ruling requested, by the Tribunal de premiere instance de Bruxelles) [1974] ECR 449; also see cases 99/74 *Société des grands Moulins des Antilles* v *Commission* [1975] ECR 1531.

for the payment of refunds to exporters of cereals under Community provisions.[176] This line of judgements by the ECJ established the view that claims for compensation must be considered inadmissible, when the national courts may offer effective protection under the national rules of law.[177] The last resort doctrine, which can be viewed as a reflection of the past trend towards judicial protection at the national level,[178] disregards both the inequality and inefficiency of judicial protection at the national level[179] and the recent U-turn in its doctrine of the ECJ. This is evident in *Brasserie* and *Dillenkofer* where the ECJ held that the admissibility of a claim for damages must not rely on the previous exhaustive use of national methods of recourse.[180] Similarly, in *Lomas* Advocate General Léger argued that the action for damages before the European Courts exists in parallel, not in exclusion of, actions for damages before national courts. The same Advocate General pointed out, however, that a claim for damages would be inadmissible if the individual concerned could obtain full compensation.[181] The interpretation of the recent case-law of the ECJ on the issue of the last resort doctrine leads to the conclusion that the application of the effective judicial protection principle does not allow the arbitrary imposition of such a restrictive additional condition of admissibility in the remedy of Art.288(2). It is clear from the text of the Article that the legislator envisaged no limitations in the access of individuals to this remedy. In fact, Heukels and McDonnell argue that, in recognition of the significance awarded to this remedy by the Treaty signatories, the ECJ tends to be quite lenient on issues of admissibility and chooses to reject claims mostly on material grounds.[182] It is also clear from the relevant extensive case-law of the ECJ that the remedy of Article 288(2) is of an independent nature. It is therefore not surprising that the ECJ no longer doubts the power of companies to challenge the legality of EC acts through actions for damages, even if they do not fulfil the conditions for the admissibility of a direct claim for judicial review under Arts.230 and

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[176] See cases 99/74 *Société des grands Moulins des Antilles* v *Commission* [1975] ECR 1531.

[177] See C. Harding, *op.cit.*, p.395.

[178] See F. Fines, "La recours en responsabilité extracontractuelle" [1993] *La Semaine Juridique*, Ed. G, pp.288-291, at 288; also see A. Durdan, "Restitution or damages: national court or European court?" [1975-76] *European Law Review*, pp.431-443, at 433..

[179] See A. Barav, "La repétition de l'indu dans la jurisprudence de la Cour de Justice des CE" [1981] *Cahiers de droit européen*, pp.507-538, at 523.

[180] See Joined Cases C-46 & 48/93 *Brasserie Du Pecheur SA* v *Germany*; C-221/89 *Regina* v *Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029; also see joined Cases C-178, 179, 188, 189 and 190/94 *Erich Dillenkofer and others* v *Germany* [1996] 2 CMLR 391.

[181] See case 5/94 *Regina* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553.

[182] See T. Heukels and A. McDonnell, "The action for damages in a Community law perspective" in T. Heukels and A. McDonnell, *The Action for Damages in Community Law* (1997, Kluwer Law International, The Hague/London/Bos-ton, pp.1-9, at 8.

232.[183] It can therefore be stated that the admissibility of such claims is not affected by the choice of companies to ignore national procedures leading to compensation.[184]

Under Art.43 of the *Protocol of the Statute of the ECJ* the company must submit its action for restitution of damages to the European Courts within a period of five years.[185] According to the text of this provision this period begins with the occurrence of the event which gave rise to liability. In the past this phrase was interpreted to involve the occurrence of the harmful event, the actual emergence of damage, or the time when the plaintiff could reasonably apprehend the damage and became aware of the identity of the responsible EU institution.[186] In the second *Meroni* case the ECJ held that the limitation period cannot begin to run unless there has been certain and finally quantifiable damage, thus using the existence of damage, rather than the occurrence of the damaging event, as the decisive factor in the commencement of the limitation period.[187] If, however, the applicant was not aware of the damage at the time of the manifestation of the damaging effects, the commencement of the limitation period is postponed.[188] This solution, which seems to comply with the relevant general principles of law common to the laws of the Member States, is quite favourable for the company which, however, must prove its lack of knowledge at the crucial time.[189] This favourable position leads to considerable flexibility in the determination of the limitation period. When the damage results from a legislative measure, the limitation period does not run from the time of the enactment, but begins on the day when the injury actually occurs. This leads to the theoretical possibility of actions for damages being admissibly submitted before the European Courts even decades after their enactment. If one combines this with the use

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[183] See P. Mead, "The relationship between an action for damages and an action for annulment: the return of *Plaumann*" in H. Schermers, T. Heukels and P. Mead (eds), *The non-contractual liability of the EC* (1988, Martinus Nijhoff, London), pp.105-119, at 116.

[184] See C. Stefanou and H. Xanthaki, 2000, *op.cit.*, p.80.

[185] "Proceedings against the Community in matters arising from the non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Community. In the latter even the proceedings must be instituted within the period of two months provided for in Article 173; the provisions of the second paragraph of Art.175 shall apply where appropriate". See Art.43 of the *Protocol of the Statute of the Court of Justice of the EEC*, amended by Council Decision 94/993 (*OJ* 1994 L379/1).

[186] See T. Heukels, "The prescription of an action for damages under Article 215(2) EEC" in H. Schermers, T. Heukels and P. Mead, *The non-contractual liability of the EC* (1988, Martinus Nijhoff, London), pp.83-103, at 85.

[187] See joined cases 46 and 47/59 *Meroni* v *High Authority* [1962] ECR 411; also see joined cases 9 and 25/64 *FERAM* v *High Authority* [1965] ECR 311; also see Joined Cases 256, 257, 265 and 267/80, 5 and 51/81 and 282/82 *Birra Wührer SpA and Others* v *Council and Commission* [1987] ECR 789; case 44/76 *Milch-, Fett- und Eier-Kontor GmbH* v *Council and Commission* [1977] ECR 393.

[188] See case 145/83 *Stanley George Adams* v *Commission* (No 1); case 53/84 *Stanley George Adams* v *Commission* (No 2) [1985] ECR 3651.

[189] See T. Heukels, 1998, *op.cit.*, p.90.

of Article 288(2) as an indirect means of judicial review, the flexible limitation period may legitimately result to a circumvention of the time-limit requirements of Art.230.[190]

Applications for compensation include the subject matter of the dispute and a brief statement on the grounds on which the application is based.[191] This statement must be sufficiently clear and precise to enable the defendant and the judge to respond to respond adequately to the case.[192] The company must state in a coherent, brief and intelligible manner the basic legal and factual particulars of the case. This condition of admissibility aims to guarantee legal certainty and sound administration of justice.[193] In order to satisfy these requirements, an action for damages must state the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage.[194]

The presentation of the admissibility requirements for the proposed remedy lead to the conclusion that the action for damages based on concurrent liability provides ample access to justice with the minimum procedural requirements. Foreign companies seeking compensation for damages are expressly empowered to submit such claims within a period of five years generously running from the materialisation of all substantive elements for the establishment of the liability, including the actual materialisation of a quantifiable damage and the claimant's knowledge of the damaging effects. This broad interpretation of the relevant provision of the ECJ's Protocol of Statute results in the almost indefinite extension of the limitation period for the submission of the claim for damages, since the company's knowledge may significantly post-date the damaging event and the existence of quantifiable damage may occur long after the damaging event actually took place. Moreover, the individual now has recourse to appeal before the ECJ, since in the first instance concurrent liability cases are heard by the CFI. It is also worth noting that the recent case-law of the ECJ has abolished the most restrictive admissibility condition for claims under Art.288(2), the last resort doctrine[195] whose main

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[190] See P. Mathijsen, *A Guide to EU Law* (1995, Sweet and Maxwell, London), p.105; also see case 11/72 *Giordano* v *Commission* [1973] ECR 417.

[191] See the first paragraph of Article 19 of the Statute of the Court of Justice, applicable to the CFI by virtue of the first paragraph of Article 46 of that Statute, and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

[192] See case T-113/96 *Edouard Dubois et Fils SA* v *Council and Commission* [1998] ECR II-125.

[193] See case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, con.20.

[194] See cases T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961; case T-195/95 *Guerin Automobiles* v *Commission* [1997] ECR II-679; case T-38/96 *Guerin Automobiles* v *Commission* [1997] ECR II-1223.

[195] See case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969; also see case 175/84 *Krohn* v *Commission* [1986] ECR 753; case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677. See *contra* case 96/71 *Haegemann* v *Commission* [1972] ECR 1015; case 46/75 *IBC* v *Commission*

legal basis has been the increase in the workload of the ECJ and the possibility of double compensation for the applicants.[196] Following *Francovich* the imposition of the last resort requirement concerning the prior exhaustion of national remedies would be lacking legality,[197] and would introduce double standards used unjustifiably[198] by the European Courts in their judgements on liability of the EU and Member States.[199] The recent post-*Francovich* case-law has also silenced all criticism against the impossibility of recognising the admissibility of a claim for damages brought before the European Courts against two different authorities liable under two different systems of law. The European Courts now have exclusive jurisdiction to hear concurrent liability claims, which they are fully equipped to consider on the basis of the doctrine of liability in EC law.

C3. Substantive requirements

The determination of the substantive conditions for the establishment of liability in the concurrent liability remedy is significantly facilitated by the express, and now well-established, ECJ position that the grant of damages by a national court for breach of EC law by a Member State should be subject to the same conditions as the grant for damages by the ECJ for infringement of that same EC provision by an EU institution.[200] The similarity in the conditions for liability with reference to both the EU and Member States increases the efficiency of the concurrent liability remedy, since the applicant company will need to establish the same conditions for both parties. Since the concurrent liability remedy in the form introduced in this thesis has not been brought before the ECJ so far, the conditions for the establishment of concurrent liability have not been determined authentically yet. However, the combination of the state liability case-law and the ECJ's precedents on the conditions for liability under Art.288(2) may elucidate the matter to great detail. More precisely, the conditions for the establishment of the liability of the Member State which breaches EC law do not merit separate analysis here,

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[1976] ECR 65; also see M.L. Jones, "The non-contractual liability of the EEC and the availability of an alternative remedy in the national courts" [1981] *Legal Issues of European Integration*, pp.1-42, at 10.

[196] See T.C. Hartley, *The Foundations of European Community Law* (1994, Clarendon Press, Oxford), p.501.

[197] See A.W.H. Meij, "Article 215(2) and local remedies" in T. Heukels and A. McDonnell, *The Action for Damages in Community Law* (1997, Kluwer Law International, The Hague/London/Boston), pp.273-284, at 284.

[198] See P. Mead, "The relationship between an action for damages and an action for annulment: the return of Plaumann" in T. Heukels and A. McDonnell, *The Action for Damages in Community Law* (1997, Kluwer Law International, The Hague/London/Boston), pp.243-258, at 257.

[199] See R. Caranta, *op.cit.*, pp.724-725.

[200] See Opinion of Advocate General Mischo on Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italian Republic* [1991] I-5370-5402, con.71.

as they have been presented in the first part of this chapter. In short, the conditions for the establishment of EU liability amount to a wrongful act, damage to the company and a causal link between the two.[201]

The first condition of concurrent liability refers to a wrongful act or omission by a national authority and the Commission. There is no doubt that the Commission may be held liable under Art.288(2) due to its role in the organisational structure of the EU.[202] In any case, the ECJ has expressly held that in Art.288 the term "institutions" is not confined to the institutions mentioned in Art.7(1), but extends to all EU bodies established by the Treaty and authorised to act in the name of the EU.[203] As for the nature of the act of the Commission, this may be actions or omissions,[204] such as the failure to adopt satisfactory procedures or the failure to supervise properly the work of an inferior body,[205] or non-performance of obligations.[206] The Commission or its organs do not necessary have to be aware of the illegality of its action.[207] The question is whether this position signifies that fault is not an element *sine qua non* for the liability of the Commission in the concurrent liability scenario. A number of authors argue that this liability may be based on factors other than fault, such as risk,[208] or even to the recognition of objective no-fault liability.[209] Goffin feels that the difference in the wording of Art.288(2), in comparison with the relevant Art.40 ECSC which expressly refers to fault, is a clear indication that fault is no longer a priority for the establishment of EU liability.[210] An equal, if not larger, number of authors continue to support the view that EU liability can only be based on fault.[211] In support of the same doctrine, Du Ban refers to the general principles of law common to the laws of the Member States which alleg-

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[201] See E.W. Fuss, *op.cit.*, p. 9. All elements must be present for the establishment of liability; see case 26/81 *Oleifici Mediterranei* v *Commission* [1982] ECR 3057.

[202] See E. Grabitz, "Das Amtshaftungsrecht der Gemeinschaft" [1991] *Europäisches Verwaltungsrecht*, pp.167-196, at 174; also see A.D. Papagiannidis and A.I. Christogiannopoulos, *op.cit.*, p.549.

[203] See case C-370/89 *SGEEM and Etzroy* v *EIB* [1992] ECR I-6211.

[204] See F. Fines, *Études de la Responsabilité Extracontractuelle de la Communauté Européenne* (1990, LGDJ, Paris), p.369.

[205] See cases 32 and 33/58 *SNUPAT* v *High Authority* [1959] ECR 127.

[206] See, for example, joined cases 9 and 12/60 *Vloeberghs SA* v *High Authority* [1961] ECR 197.

[207] See E. Grabitz, 1988, *op.cit.*, p.176.

[208] See Lord Mackenzie-Stuart, "The non-contractual liability of the EEC" [1975] *Common Market Law Review*, pp.493-512, at 501; also see G. Lysén, "Three questions on the non-contractual liability of the EEC" [1985] *Legal Issues of European Integration*, pp.86-120, at 109.

[209] See A.D. Papagiannidis and A. I. Christogiannopoulos, *op.cit.*, p.550-551; also see E. Grabitz, 1988, *op.cit.*, p.10.

[210] See L. Goffin, *La responsabilité non contractuelle des Communautés* (1969, Les Nouvelles, Paris), p.156.

[211] See P. Cahier, "Les éléments constitutifs de la responsabilité extracontractuelle de la CEE", *Mélanges Reuter* (1981), pp.127-152, at 145; also see T. Debart, "L'action en responsabilité extracontractuelle devant la Court de Justice des Communautés européennes", *Doctoral thesis, University Lyon III*, 1984, p.353.

edly demand the presence of fault for the establishment of liability.[212] Boulois refers to the same principles, but interprets them as allowing liability without fault, namely objective liability.[213] The case-law of the ECJ is equally undecided. In many cases the ECJ expressly held that the illegality of an act is not sufficient for the establishment of EU liability and that the existence of fault must also been proven.[214] However, since the 1970s (with a notable reappearance of the term in *Berti* in 1982) the Court has ceased to mention fault as an element of extra-contractual liability.[215] The view that the ECJ has moved from the notion of fault to the concept of illegality was confirmed in *Brasserie*, where the Court made it clear that there was no need for any finding of fault once there has been a finding of a serious breach of EC law.[216] Thus, the notion of fault is an objective one, which amounts to the material fact of the violation of an EU obligation and lies with the wrongful circumstances surrounding its application or the way in which the act has been taken. This conclusion is identical to the one reached in the analysis of fault in the state liability scenario of Chapter 6. It is interesting to note that equally similar is the cautiously positive position on liability due to unlawful legislative acts[217] which, however, is not of significance to this thesis, as the action of the Commission in the concurrent liability scenario is not of a legislative nature. The analysis of the first condition of EU liability leads to the conclusion that its interpretation is very similar to the interpretation of the wrongful act as an element of state liability at the national level. Consequently, foreign companies seeking restitution at the EU level are not disadvantaged by the introduction of the requirement of the existence of a wrongful act or omission. In fact, under the concurrent liability scenario the foreign company need only

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[212] See B. du Ban, "Les principes généraux et la responsabilité non-contractuelle de la Communauté" [1977] *Cahiers de droit européen*, pp.397-434.

[213] See J.Boulois, *Droit institutionnel des Communautés européenes* (1993, Montchrestien, Paris), p.399.

[214] See *Kampffmeyer* case, *op.cit.*, note 16; alse see 16/67 *Labeyrie* v *Commission* [1968] ECR 293; joined cases 19, 20, 25 and 30/69 *Richez-Parise* v *Commission* [1970] ECR 325.

[215] See case 131/81 *Mario Berti* v *Commission* [1982] ECR 3493; see F. Fines, 1990, *op.cit.*, p.375.

[216] See case C-46 and 48/93 *Brasserie du Pêcheur SA* v *Germany*; 46 and 48/93 *Brasserie Du Pêcheur Sa* v *Germany, Regina* v *Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029, [1996] 1 CMLR 889; also see P. Graig and G. de Burca, 1998, *op.cit.*, pp.526-527.

[217] For the definition of legislative acts, see A. Arnull, "Liability for legislative acts under Article 215(2) EC" in T. Heukels and A. McDonnell, *The Actions for Damages in Community Law* (1997, T.M.C. Asser Instituut, The Hague), pp.129-151, at 135; also see Joined cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens and Another* v *Commission* (Live Pigs) [1995] ECR II-2941; case C-298/89 *Gibraltar* v *Council* [1993] ECR I-3605; case C-63/89 *Assurances du crédit* v *Council and Commission* [1991] ECR I-1799; D. Curtin, "The non-contractual liability of the Community legislature for illegal directives: effective judicial protection?" [1992] *European Law Review*, pp.46-55, at 4; case 5/71 *Aktien-Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975; case joined cases C-46 and 48/93 *Brasserie Du Pêcheur Sa* v *Germany*; *Regina* v *Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029; case C-392/93 *Regina* v *H.M. Treasury, ex parte British Telecommunications Plc* [1996] 2 CMLR 217; Joined cases C-178, 179, 188, 189 and 190/94 *Dillenkofer and others* v *Commission* [1996] 3 CMLR 469.

prove the wrongfulness of the Member State's breach of EC law and of the Commission's omission or failure to act.

The foreign companies seeking restitution on the basis of concurrent liability must also prove that the damage suffered is reparable, specific and quantifiable, and that its repercussions are actual and impossible to reverse in a manner other than the reparation sought be the European Courts.[218] Reparable is any specific, real and certain damage.[219] Specific is the damage which affects the company's interests and assets in a special and individual way.[220] The reality of the damage is proof of its existence and as such constitutes a very significant part in the establishment of EU liability. The certainty of the damage refers to loss, which is either actual or certain to occur in the future. The broad interpretation of the term "certain" seems to be in compliance with the general principles of law common to the laws of the Member States, which in their majority accept the possibility of reparation for future but sufficiently certain damages.[221] However, in *FERAM* and *Nold*[222] the Court explained that purely potential or hypothetical damage cannot constitute the basis of EU liability under Art.284(2). The damage must also be proven,[223] and quantifiable, namely expressed or capable of being expressed in a specific sum of money.[224] Moreover, where the loss has been passed on to third parties, no damage will be recoverable.[225] In fact, the applicants have the obligation to prove that they could not have possibly limited the effects of the damaging event.[226] From this brief presentation its is clear that companies seeking restitution of damages caused by the Member State's breach of EC law and the Commission's failure to prevent or abolish this breach may seek compensation both for the actual damages suffered in its attempt to establish within the Member State and for the loss of income resulting from the prohibition or the limitation of the company's activities within the Member State.[227] How-

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[218] See E. Grabitz, 1991, *op.cit.*, p.180; also see F. Fines, 1990, *op.cit.*, p.410; A. Calot, J.M. de la Torre, M. Uria and J. Aguilo, "La responsabilidad extracontractual y razon de estado" [1989] *Revista general de derecho*, pp.6835-6874, at 6857.

[219] See case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677.

[220] See Joined cases 46 and 47/59 *Meroni* v *High Authority* [1962] ECR 411.

[221] See F. Fines, 1990, *op.cit.*, p.411.

[222] See case 4/73 *Nold, Kohlen-und Baustoffgroßhandlung* v *Commission* [1974] ECR 491; also see case 29/59 *FERAM* v *High Authority* [1959] ECR 517.

[223] See case T-64/89 *Automec* v *Commission* [1990] ECR II-367.

[224] See case 1/55 *Kergall* v *Common Assembly* [1954-1956] ECR 151; also see case 10/55 *Mirossevich* v *High Authority* [1954-1956] ECR 333.

[225] See E. Grabitz, 1991, *op.cit.*, p.182; joined cases 14, 16, 17, 20, 24, 26 & 27/60 & 1/61 *Meroni* v *High Authority* [1961] ECR 161; also see joined cases 9 and 58/65 *San Michele* v *High Authority* [1967] ECR 1.

[226] See case T-480 and 483/93 *Antillean Rice Mills and others* v *Commission* [1995] ECR II-2305.

[227] See Joined cases C-104/89 and 37/90 *Mulder* v *Council and Commission* [1992] ECR I-3061; also see J. Steiner and L. Woods, *op.cit.*, p.507.

ever, reparation for moral damage amounting to loss of reputation due to the Member State's refusal to allow the company's activity within its boundaries does not seem to be reparable under EC law. This would be the only difference in the restitution achieved following the concurrent liability scenario at the EU level and the compensation achieved by the company if protection at the national level were to be chosen. It must be accepted, however, that even before the national courts moral damage is not highly compensated.

The last element of concurrent liability is the directness of the damage, in other words the causal link between the wrongful act and the damage.[228] Grabitz expresses the view that the European Courts apply the *Adäquantztheorie* of causation, according to which causal link between action and damage exists if the action was not only necessary but also adequate and sufficient for the occurrence of the damage.[229] Thus, albeit necessary as an element *sine qua non*,[230] it would be insufficient for the company to prove that the damage would not have occurred without the wrongful action.[231] In fact, following the case-law of the ECJ, the company need only show that the Commission failed to act, thereby failing to exercise adequate control over the Member States.[232] Moreover, the company must show that the chain of causation was not broken by itself or the Member State. This would not be too difficult, as despite the position of the ECJ that the chain is broken by actions undertaken by an independent and autonomous authority of a Member State,[233] it must be accepted that following *Kampffmeyer*, *Vloeberghs* and *Lütticke* the Commission is still liable for the damages caused to the applicants due to its failure to exercise its supervisory duty. Moreover, the company will have to prove that the chain of causation was not broken by its negligence or contributory negligence[234] which is judged on the basis of the action expected by an average, vigilant, prudent and reasonable person.[235] The EU doctrine on causation is very similar to the theories applied by the French, Italian and Greek courts in proceedings heard before them.

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[228] See joined cases 64 & 113/ 76, 167 & 239/78, 27, 28 & 45/79 *P. Dumortier Frères SA and others* v *Council* [1982] ECR 1733.

[229] See E. Grabitz, 1991, *op.cit.*, p.183; also see joined cases 29, 31, 36, 39-47, 50 & 51/63 *Usines de la Provence* v *High Authority* [1965] ECR 911.

[230] See case T-478/93 *Wafer Zoo Srl* v *Commission* [1995] CMLR 750.

[231] See D. Chalmers, *European Union Law* (1998, Ashgate/Dartmouth, Aldershot/ Brookfield/Singapore/Sydney), p.595.

[232] See joined cases 9 and 12/60 *Vloeberghs SA* v *High Authority* [1961] ECR 197.

[233] See case 132/77 *Société pour l'Exportation des Sucres S.A.* v *Commission* [1978] ECR 1061.

[234] See case 145/83 *Stanley George Adams* v *Commission* (No 1); case 53/84 *Stanley George Adams* v *Commission* (No 2) [1985] ECR 3651.

If all elements of liability are proven, the company will receive compensation. In the absence of a set EU doctrine, the extent of the compensation awarded will be calculated on the basis of the general principles of law common to the laws of the Member States.[236] The doctrine prevailing in most civil law jurisdictions, as seen in Chapter 6, requires from the judge to award a sum equal to the damage suffered, nothing more, nothing less.[237] In other words, the Court must award "full compensation for the loss actually sustained".[238] This includes interest[239] set to 8% calculated from the date of the judgement.[240] In fact, the company can claim two types of interests, legal interest imposed on the amount awarded as compensation by the Court and therefore running from the day of the delivery of the judgement, and compensatory interest imposed on the damage actually suffered and hence running from the time that the damage was actually suffered.[241] It is also worth mentioning that the European Courts will most likely apportion damages between the Commission and the Member State.[242] Since the EC doctrine of full compensation is a guarantee of effective judicial protection for the company and since the national doctrines on compensation are being applied, it must be accepted that the company choosing to seek restitution under the concurrent liability scenario would benefit, rather than suffer, from its choice.[243]

The analysis of the substantive conditions for the establishment of liability in the concurrent liability scenario has demonstrated the great degree of similarity in the relevant provisions of French, Italian and Greek law, the state liability scenario and the concurrent liability remedy. This similarity may be due to the reference to the general principle of law common to the laws of the Member States in the text of Art.288(2), which guide the ECJ and the CFI in their attempt to create an EU doctrine of state and EU li-

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[235] See T-336/94 Efisol SA v Commission [1997] 3 CMLR 298; also see case 62/83 Eximo Molkereierzeugnisse Handelsgesellschaft mbH, Hamburg v Commission [1984] ECR 2295.

[236] See P. Craig, "One more unto breach: the Community, the state and damages liability" [1997] Legal Quarterly Review, pp.67-94, at 77.

[237] See L. Dubois, "La responsabilité de l'état législateur pour les dommages causés aux particuliers par la violation du droit communautaire et son incidence sur la responsabilité de la Communauté" [1996] *Revue française de droit administratif*, pp.583-601, at 594.

[238] See A.G. Toth, "The concepts of damage and causality as elements of non-contractual liability" in H. Schermers, T. Heukels and P. Mead (eds), *Non-contractual Liability of the EC* (1988, Martinus Nijhoff, London), pp.23-38, at 28.

[239] See A. van Casteren, "Art.215(2) and the question of interest" in T. Heukels and A. McDonnell (eds), *The Action for Damages in Community Law* (1997, Kluwer Law International, The Hague/London/Boston), pp.199-216, at 215.

[240] See 58/75 *Sergy* v *Commission* [1976] ECR 1139.

[241] See B. Fitzpatrick and E. Szyszczak, "Remedies and effective protection in Community law" [1994] *Modern Law Review*, pp.435-441, at 437.

[242] See case 308/87 *Alfredo Grifoni* v *European Atomic Energy Community (Euratom)* [1990] I-ECR 1203.

[243] See case 14/83 *Sabine von Colson and Another* v *Land Nordrhein-Westfalen* [1984] ECR 1891.

ability. Although the introduction of an EU doctrine of liability has rendered these general principles of law useful only as interpretative tool for the determination of the conditions for restitution under Art.288(2),[244] thus ridding this provision from one of the most restricting doctrines surrounding its application, it is precisely this reference which determined the theoretical background for the development of the EU doctrine of liability and rendered the concurrent liability scenario possible in practice.[245]

To summarise the substantive conditions for the establishment of concurrent liability, it suffices to note that the company need only prove the illegality of the act or omission undertaken by any type of national authority (executive, legislative or judicial) and the Commission, the extent and nature of damages suffered and the existence of a direct causal link between the first two elements. Thus, the company must prove that the Member State wrongfully breached EC law and that the Commission failed to fulfil its supervisory duty, even when its discretion is taken into account. The company must determine the actual, certain, concrete, assessable, direct or consequential loss suffered. This will most likely be equal to the amount of money that the company would have gained, had it been allowed to exercise its right to free establishment under EC law. Interest and other claims will also be taken into account. Moreover, the company will have to prove that the Member State's action or omission and the Commission's omission were the sole determining factors jointly leading to the occurrence of the damages sought. By its very nature, concurrent liability is established by two joint actions or omissions which lead directly to the effect of damage. Adequate proof of these three factors will lead to full restitution, which will be commensurate to the damage sustained. An interest of 8% will also be awarded. The criteria for the division of liability in the concurrent liability scenario is one of the areas where there actually is a lacuna in the law of the EU.[246] However, it would be very unlikely that the Commission would bear a higher percentage than the Member State which actually violated EC law. Payment of the successful applicant in the concurrent liability scenario is the joint responsibility of the Commission and the national authority. It must be accepted, however, that within the framework of the principle of effective judicial protection the Commission could be ordered to pay the full amount and then bring proceedings under Art.226 in order to recover the contribution of the Member State.

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[244] See J. Schwarze, *Europäisches Verwaltungsrecht* (1988, Nomos, Baden-Baden), Vol.1, p.63.

[245] See J. Basedow, "The renascence of uniform law: European contract law and its components" [1998] *Legal Studies*, pp.121-145, at 135.

[246] See H. Schermers and D. Waelbroek, *Judicial Protection in the EC* (1992, Kluwer Law and Taxation Publishers, Deventer), p.356.

D. EVALUATION OF THE PROTECTION OF COMPANIES AT EU LEVEL

The lack of effective judicial protection for foreign companies seeking compensation for damages resulting from French, Italian and Greek breaches of EC law before the national courts forces foreign companies to turn to protection at the EU level. In view of the limited role of natural and legal persons in infringement proceedings against Member States and the restricted field of application of the provisions for judicial review before the European Courts, the main remedy currently available to companies at the EU level is the *Francovich* scenario, which combines the doctrine of state liability with the procedure of preliminary rulings. This extends the power to turn against Member States for their failure to comply with EC law to companies suffering damages as a result of these breaches. These companies are now empowered to participate actively to the proceedings before the national courts. Another considerable advantage of the *Francovich* scenario is the expansion of its field of application to, amongst others, cases of horizontal and indirect effects. Moreover, all this is available before the familiar national courts under the known national procedural rules.

The question is, whether this is advantageous for companies. On the basis of the findings of Chapter 6, this cannot be the case. The familiarity of national proceedings, which is doubtful with respect to foreign companies, cannot possibly be considered more important than the confusion in the determination of the national competent courts in France and Italy, the Italian long delays until a final decision is reached and the French and Greek lack of mechanisms of enforced execution of the national courts' decisions. And all of the above comes as a supplement to the inherent problems of indirect remedies. These include the uncertainty as to the outcome of the company's application for damages caused by the unavoidable discrepancies in the national procedural rules applicable in the fifteen different jurisdictions of the EU, the reluctance of French, Greek and Italian judges to refer cases to the ECJ, the additional long delays in the final judgement on the application for damages by an average of 21.4 months until the ECJ reaches its preliminary ruling, the recent restrictive attitude of the ECJ concerning the admissibility of referrals, and the possibility of going through all of the above only to find that the national judge either misapplies or ignores the preliminary ruling of the ECJ. These significant, and very real, disadvantages of the state liability remedy render the judicial protection currently offered to foreign companies at the EU level as inadequate as the protection offered at the national level. Thus, the protection offered to foreign companies at the EU level is inadequate and ineffective.

The question is if this is a dead end for such companies, or whether EC law may still leave ground to hope for companies seeking compensation for damages caused by breaches of EC law by Member States. An innovative, some would say futuristic, solution to the current inability of foreign companies to achieve compensation at the EU level can develop through future ECJ case-law by reference to the concurrent liability scenario. Following the existing doctrine of concurrent liability introduced by *Lütticke*, foreign companies may argue that liable for their damages are both the Member State for its breach of EC law and the Commission for its failure to fulfil its supervisory duty adequately. Although the ECJ has, in principle, accepted this doctrine, its application to Art.288 has not be attempted. It is proposed here, however, that the *Lütticke* principle could aid companies in their search for an effective vehicle of judicial protection. If this proposal is followed by the ECJ, companies would be able to by-pass their national courts and the inherent problems of proceedings before them and initiate a direct action for damages against the Member State and the Commission before the CFI and the ECJ.

This is the main advantage of the proposed remedy. It is suggested that foreign companies seeking compensation for damages caused by French, Italian and Greek breaches of EC law may be able to establish a claim both against the relevant Member State for its failure to comply with its EU obligations and against the Commission for its failure to fulfil its supervisory task and ensure that EC law is implemented within EU Member States. This remedy would be a result of a novel interpretation of Art.288(2) and would be based on the obligations introduced for Member States under Art.10 and for the Commission by Art.211. It is widely accepted that Art.10 introduces the obligation of Member States to take all necessary measures for their full compliance with EC law, as well as to refrain from any action which could hinder this compliance. The use of this provision as a legal basis for the establishment of liability for the state which breaches EC law has been successfully used in the state liability scenario. Such liability is recognised under the flexible minimal substantive conditions of a wrongful act or omission, damage to the applicant and a causal link between the two. However, the establishment of the Commission's liability is not currently recognised equally widely. In fact, it is only after the change in the description used by the ECJ for the Commission's obligation to "a right and a duty" since the mid-1980s that the recognition of such liability could become possible. Even is this accepted, the mere existence of a breach of EC law may not establish the liability of the Community (represented by the Commission) in the concurrent liability scenario. The applicant company would need to prove that the Commission was fully aware of the violation and that it failed or omitted to act

towards its prevention or abolition as a result of negligence rather than as a result of a policy decision. This position is emphasised by use of the term "shall" in the description of the Commission's role in the initiation of the administrative stage of the infringement proceedings against Member States which fail to fulfil their EU obligations. It must also be accepted that in cases of failure of Member States to comply with prior ECJ judgements, as is the case with all breaches presented in Chapter 5, the failure of the Commission to refer the matter to the ECJ would be sufficient basis for the establishment of Community liability, since in the procedure of Art.228 the Commission has an obligation (rather than a discretion) to act.

The evaluation of the efficiency in the protection which would be offered to companies, should the concurrent liability doctrine be followed by the ECJ, can only be successfully achieved if the procedural and substantive conditions for its establishment are assessed. The substantive conditions for the establishment of liability in both the national courts' proceedings of Chapter 6 and the state liability procedure presented in this chapter were characterised by a flexibility and liberality which opened an unhindered route to justice for companies. This assessment also applies to the substantive conditions for the establishment of concurrent liability, since the ECJ has repeatedly stated that the conditions for liability are the same in EC law irrespective of the carrier of this liability. Consequently, an objectively illegal action or omission, damages to the applicant (including the future loss of the opportunity to make profit) and a causal link between the first two elements suffice for the establishment of the liability of both the Member State and the Commission in all EU doctrines for restitution irrespective of the remedy used as a vehicle for its request. It follows that the favourable conclusions on the effectiveness of state liability based on its substantive elements can be carried on to the evaluation of the concurrent liability remedy.

The final negative assessment of both protection at the national level and state liability was due to the restrictive procedural rules regulating the national and the state liability remedies. The question is, whether similar procedural rules block the way to the access of the company to justice in the concurrent liability remedy too. Since the text of Art.288(2) has been interpreted by the ECJ to introduce *locus standi* for companies, the latter cannot be prevented from submitting a claim for compensation under this provision. This claim must be submitted within a period of five years generously starting from the time when the injury actually occurred, as long as the company was in knowledge of its occurrence. The practical lack of admissibility restrictions in the remedy of

concurrent liability is an encouraging sign in the evaluation of the effectiveness of the concurrent liability remedy for the judicial protection of companies.

The main procedural problem is, whether the ECJ, as the court with the exclusive competence to judge on actions involving EU institutions, has the competence to judge on a claim against both the Commission and a Member State. Even in its pre-*Francovich* case-law the possibility of considering such an action admissible had not been excluded by the ECJ, which proceeded to judge on a large number of concurrent liability cases. The only difference between these cases and the present time is that nowadays a claim for damages against the Commission and the Member State would be submitted to the CFI which judges in the first instance subject to appeal on matters of law before the ECJ. In fact, this two-tier system increases the effectiveness of the judicial protection offered to foreign companies, as it introduces two grades of trial as a guarantee of a fuller and error-free examination of the case before the final decision is reached. Having said that, the EU two-tier court system is still behindhand the national systems of justice where an appeal on both law and fact, as well as a cassation on matters of law is available to the company. Even so, it would be unfair to let this point undermine the opportunities presented by the concurrent liability remedy. These derive from its directness, consequent lack of inherent problems presented by national proceedings and the state liability remedy, and the recent introduction of two grades of trial. However, it is precisely this directness which suffered considerably from a past doctrine of the ECJ that viewed the remedy of Art.288(2) as one of last resort. This doctrine demanded from the company to suffer all the problems of the national remedies examined in Chapter 6 before it could even launch an application for damages before the ECJ. Thankfully, this doctrine has now been eradicated by the judgements of the ECJ in *Brasserie* and *Dillenkofer*, where it was held that the rights of individuals to seek redress at the national and the EU level were parallel, rather than exclusive. This position offers extreme value to the concurrent liability remedy, which seems to be the only route for companies to effective judicial protection.

This observation, however, disregards the fact that the concurrent liability remedy has never been tried in practice, at least not in the format suggested in this chapter. Therefore, to conclude that the company seeking restitution for damages due to violations of EC law by Member States can find effective judicial protection at the EU level would be based on the hypothetical acceptance of the relevant remedy as proposed here by the CFI and ECJ judges. It must be clear that the protection currently offered to for-

eign companies at the EU level is based solely on the state liability remedy, which has proven inadequate and ineffective in practice.

The effective protection of the individual is not only a lawful right for the natural and legal persons, citizens of the EU,[247] but also a general principle[248] of EC law "which underlines the constitutional traditions common to Member States and has been enshrined in Art. 6 and 13 ECHR".[249] The principle was traditionally interpreted to entail the obligation of all national authorities to refrain from passing and/or applying any domestic law which could prevent the effective judicial protection of individuals.[250] After *Factortame I* and *Francovich*[251] the principle is defined as the positive obligation of national authorities to create the legal and administrative environment that would allow the assertion of EU rights before the national courts.[252] So far the principle has been applied on national authorities. However, as a recognised general principle of EC law, which forms part of the law of the Union,[253] it is binding not only to national but also to EU authorities. Thus, it is the duty of both national and EU authorities to ensure that individuals have the realistic opportunity to achieve compensation for damages caused by the failure of Member States to comply with their EU obligations.[254] From the analysis of the judicial protection offered to companies seeking restitution for damages caused by French, Italian and Greek breaches of the freedom of establishment it is clear that both the national authorities and the EU have failed to realise the general principle of effective judicial protection on this point. This observation emphasises the need for European judges to look into the possibility of accepting the remedy offered by

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[247] See A. Barav, *op.cit.*, p.509; also see the Opinion of Advocate General Leger in case C-5/94 *The Queen* v *Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553, cons.67.

[248] "It appears that the guarantee of effective judicial protection is a general principle of Community law". See W. van Gerven, "Non-contractual liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a view to a common law for Europe" [1994] *Maastricht Journal of European and Comparative Law*, pp.6-40, at 11.

[249] See Case 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097, par.14; also see cases 222/84 *Johnston* v *Chief Constable of the RUC* [1986] ECR 1651, par.18; Opinion of Advocate General Van Gerven in case C-128/92 *H.J. Banks* v *British Coal Corporation* [1994] ECR I-1209, at I-1253.

[250] See case 33/76 *Rewe* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1997, cons. 5; also see cases 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR 2053, const. 12-17; 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629, cons. 22; 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR. 3595; 222/84 *Johnston* v *Chief Constable of RUC* [1986] ECR 1651 cons. 17-20.

[251] See case C-213/89 *The Queen* v *Secretary of State ex parte Factortame* [1990] ECR I-2433; also see A.P. Tash, "Remedies for European Community Law claims in Member States courts: toward a European Standard" [1993] *Columbia Journal of Transnational Law*, pp.377-401, at 394 who notes that "the Factortame case goes far further than Von Colson because the Court actually specified the new remedies that the national courts must provide".

[252] See P. Oliver, "Le droit communautaire et les voies de recours nationales" [1992] *Cahiers de droit européen*, pp.348-374, at 348 and 353; also see R. Caranta, *op.cit.*, p.710.

[253] See J. Steiner, *Enforcing EC Law* (1995, Blackstone Press, London), p.10.

Art.288(2) and the concurrent liability scenario in a positive and sympathetic manner. Moreover, it leads to the conclusion that the failure of France, Italy, Greece and EU institutions to offer effective protection constitutes another breach of EC law, which must be added in the list produced in Chapter 5.

This brings us to an issue also raised in Chapter 5. The chapter concluded that breaches of EC law affect a large number of diverse areas of commercial activity, which tend to be common within the three selected Member States. These two factors render the identification of breaches of EC law rather simple. Moreover, the decisiveness of the EU to enforce EC law was demonstrated by the detection and condemnation of all cases of violations chosen for presentation in Chapter 5. In view of this, it was quite difficult to justify the large number of breaches of EC law -some persistent- still occurring in France, Italy and Greece after more than forty years of European integration. The findings of Chapters 6 and 7 confirm the doubts posed in Chapter 5 on the effectiveness of the restitution process at the national and EU levels. In fact, the combination of the vanity in pursuing the matter further for companies with the knowledge of Member States that the remedies available do not work in practice diminishes their fear of compensation orders and leads to the conclusion that these remedies are not as strong a deterrent as was initially expected.

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[254] See C. Stefanou and H. Xanthaki, 1997, *op.cit.*, p.87.

CHAPTER 8

Conclusions

This thesis examined the legislative and administrative conditions for the secondary establishment of foreign public companies limited by shares in France, Italy and Greece. Its main aim was to assess whether the companies' freedom of establishment introduced by EC law is observed within the three selected countries. The thesis revolved around two main hypotheses. First, it was suggested that even after more than forty years of European integration the companies' freedom of establishment is not fully respected, at least in France, Greece and Italy. Second, one of the main reasons for the continuing breach of the freedom of establishment lies in the current lack of effective judicial protection for foreign companies at the national and EU levels.

Chapter 2 examined EC law on the secondary establishment of foreign EU companies in other EU Member States. Establishment includes the recognition of foreign companies as legal entities. EC law recognises foreign companies *ipso jure*. The determination of the companies' *lex fori* is rather complicated due to the parallel prevalence of two clashing legal theories of private international law in the legal systems of EU Member States. Thus, EC law accepts the recognition of foreign companies under either the *lex* of incorporation or of the real social seat. Establishment is defined as the actual pursuit of economic activity through a fixed establishment. The permanent physical location of the company in a Member State distinguishes between establishment and provision of services, which is defined as the exercise of activities on a temporary basis in a manner primarily addressed to the market of a state other than the receiving one. The nature of the freedom of establishment is described as a fundamental EU right existing irrespective of special secondary legislation. Secondary establishment, namely the expansion of a company's activities in other Member States through the creation of branches, agencies, offices or subsidiary companies, is the only possible legal form of establishment in France, Italy and Greece. *Ratione personae* the freedom of establishment covers all legal entities which are profit-aiming, are recognised within the EU, have an effective and continuous link with the economy of the host state, and comply

with the EU rules of origin or the special anti-dumping regulations. *Ratione loci* the freedom applies to companies originating from the fifteen Member States and territories with a special relationship with these states. *Ratione materiae* the freedom is applicable to all forms of financial and commercial independent activities (including maritime transport) and their corollary activities, irrespective of whether they have been expressly subjected to the freedom of establishment under secondary EC legislation. National administrative or legal measures applied in a discriminatory manner restricting or prohibiting such activities for foreign companies breach their freedom of establishment.

Chapter 2 provided the legal background for the comparative analysis of French, Italian and Greek laws with EC law on the various aspects of national requirements for the secondary establishment of foreign companies presented in Chapters 3, 4 and 5. Chapter 3 referred to the first aspect of establishment, recognition. It analysed French, Greek and Italian laws on the recognition of foreign legal entities and evaluated their compliance with EC law as presented in Chapter 2. With reference to public companies limited by shares originating from other EU Member States, French, Greek and Italian law follow the liberal theory of recognition. Thus, in full compliance with EC law, such companies are recognised *ipso jure*, as long as they have legal personality according to the law of the *lex fori*, that is the law which regulates their formation, functioning, internal structure, external relationships and dissolution. This is determined by the company's true social seat, which is defined as the location where the main management, administration and financial activity of the company takes place. Since the company's seat as the determining criterion of its *lex fori* is also introduced by Arts.43-48 EC, Greek, French and Italian laws on the recognition of foreign EU companies are in absolute compliance with EC law. Discrepancies were observed between the national provisions of the three selected countries and the 1968 Brussels Convention. These refer to companies which have been incorporated abroad but have their true seats in Greece, France and Italy. Their non-recognition is in breach of Art.4 of the Convention which introduces the obligation of the signatory parties to recognise these companies subject to national mandatory provisions. Moreover, the right of companies which have failed to follow the conditions for their legal formation set by the law of their *lex fori* to appear before the French, Greek and Italian national courts violates the Brussels Convention which does not recognise such companies. However, in view of the recognition of the European Convention of Human Rights as a source of EC law and the lack of ratification of the Brussels Convention, these discrepancies are not breaches of EC law.

Chapter 4 presented another aspect of national prerequisites for the secondary establishment of foreign EU public companies, namely the formal requirements for their establishment in France, Italy and Greece. In compliance with Directive 89/666 the formation of branches and agencies (secondary units with no separate legal personality from the main primary unit) requires a relatively simple procedure mainly consisting of the registration of details both of the main company unit and the secondary establishment to the company registry. Insofar as subsidiaries are concerned, the three selected countries introduce a very complex procedure. However, all three states follow the doctrine of the true social seat whose application on subsidiaries results in the characterisation of such companies as domestic. Thus, this procedure, albeit complex, is implemented in a non-discriminatory manner and does not inhibit the companies' freedom of establishment. It must be noted however, that in view of the common provisions for the establishment of foreign EU and non-EU companies, the three countries' compliance with EC law is more a reflection of their open policy towards foreign companies, rather than a demonstration of their effort to comply with EC law.

The third aspect of national prerequisites for the secondary establishment of foreign companies analysed in the thesis referred to the substantive conditions for such an establishment, that is to restrictive national regulations on the nature of the activities allowed to foreign companies which, having been recognised as legal entities, were allowed to establish secondary commercial units in France, Italy and Greece. Specific areas of commercial activity were selected as case-studies and analysed in comparison with EC law in Chapter 5. The criteria for this selection were the common existence of breaches of EC law in the three selected countries, the existence of ECJ judgements declaring the relevant national laws as breaches of EC law and the continuing violation of EC law even after the judgement of the ECJ. The case-studies used in Chapter 5 proved beyond doubt that national laws and administrative practices do restrict, and consequently violate, the companies' freedom of establishment in the three selected countries. Such violations affect a large number of diverse areas of commercial activity, including trade in crude oil, commercial agents, education, tourism and shipping. In fact, the breaches discovered in the three selected Member States occur in similar areas of commercial activity. This seems to be mainly due to the common protectionist interests shared by these countries, whose governments seem to be eager to protect the same areas of trade, deemed of particular importance for their national economy. The persistence of the three Member States to maintain some privileges for domestic companies in particular areas of commercial activity is evident. So is the decisiveness of the Commis-

sion and the ECJ to fulfil their role as enforcers of EC law, demonstrated by the detection and condemnation of all cases of violations chosen for presentation in this chapter. This has forced Member States to abolish most direct breaches and to resort to indirect and disguised discriminatory practices, which by definition are not easily detectable. The examination of such disguised breaches also demonstrated the effect of breaches of other freedoms, such as capital or services, to the establishment and functioning of foreign companies. The restrictive effect of such breaches on the right of establishment, which also affects adversely the access of such companies to justice at national level, seems to be ignored by the EU. However, the large number of violations detected by the Commission and declared by the ECJ shows that the problem of infringements in the area of establishment is well known to the EU. So is the persistence of certain breaches, such as those used as case-studies here, which continue years after a relevant condemning ECJ judgement. This phenomenon poses doubts on the effectiveness of the enforcement process at EU level and, consequently, the level of protection offered to companies at national and EU level.

Having proven the first hypothesis in Chapter 5, Chapters 6 and 7 set out to prove the second hypothesis, namely that the continuing breaches of EC law in the field of company establishment are mainly due to the lack of judicial protection for companies suffering damages as a result of these The analysis of the relevant national provisions led to two main conclusions. First, the doctrine on the substantive conditions for the establishment of state liability in these three Member States has been influenced to a great extent by the EU doctrine on state liability. Thus, a liberal legal regime allowing for the establishment of state liability under minimum substantive conditions has been formed in all three selected countries by reference to the recent case-law of the ECJ and the CFI. Second, the procedural conditions for the establishment of state liability introduce considerable impediments in the access of individuals to justice in the case of state liability. The Italian system of distinction between legitimate interests and subjective rights leads to confusion as to the competent court for the application of the company for compensation. More importantly, the need for annulment of the wrongful act before the application for compensation is launched in a separate trial creates massive delays in the final award of justice and involves significant expenses for the company. The French lack of execution mechanisms against the state and the Greek ambiguity in the enforcement of administrative judgements leads to the decrease in the practical value of even final judgements of administrative courts. The privileges still enjoyed by the state validates the conclusion of Chapter 5 that the protectionist nature of the three selected

legal systems is geared towards the maintenance of some degree of control by the state. Moreover, they prove one element of the second hypothesis, namely the inadequate means of protection of foreign companies at the national level.

For the final proof of the second hypothesis, Chapter 7 examined the judicial protection of foreign companies seeking restitution for damages suffered as a result of breaches of EC law by the French, Italian and Greek authorities at the EU level. The role of the individual, natural and legal person, in direct proceedings before the European Courts is insignificant. At the EU level the only remedy which can result to a judicial order for a Member State to pay damages to such companies is a combination of the state liability doctrine with a request for a preliminary ruling by the ECJ. This remedy, also known as the *Francovich* scenario, offers foreign companies the opportunity to bypass some of the hurdles of national proceedings analysed in Chapter 6 by requesting reference of the case to the ECJ. The substantive conditions for the establishment of state liability under this scenario are minimal and, consequently, quite favourable to the applicant company. However, the procedural aspect of this scenario blocks the access of companies to effective judicial protection. The *Francovich* scenario is based on the proceedings for preliminary references, which requires reference of the issue from the national judge to the ECJ. The analysis of this mechanism showed that French, Greek and Italian judges are reluctant to co-operate with ECJ judges and refer to the ECJ. Moreover, since *Francovich* requires proceedings to be undertaken before the national courts under the national rules of procedure, the procedural problems of national procedures presented in Chapter 6 render judicial protection at the EU level equally ineffective with protection at the national level. The lack of effective protection for foreign companies by Member States and EU institutions constitutes a violation of the principle of effective judicial protection, which must be added to the list of breaches produced in Chapter 5. Moreover, it justifies the occurrence of so many breaches of EC law after four decades of European integration and, thus, proves the second hypothesis of the thesis.

The situation described in the thesis on the observance of the freedom of establishment of foreign companies and the protection offered to foreign companies whose right is circumvented is quite grim. For the evaluation of these conclusions, however, it is necessary to bear in mind that the countries selected for presentation in this thesis are amongst the worst observers of EC law. Moreover, the national laws chosen for analysis in the thesis are the most obvious examples of persistent violations of EC law in the field of company establishment, have been declared as breaches of EC law by the ECJ often in more than one occasions and are still in the list of priorities of the Commission

for further action. Furthermore, companies seeking restitution under the circumstances examined in this thesis may draw some hope for protection from a possible future interpretation of Art.288(2) and the concurrent liability remedy. Indeed, foreign companies may attempt to argue that the damages suffered is a result of concurrent liability between the Member State which failed to comply with its EU obligations and the Community due to the Commission's failure to fulfil its supervisory obligations. The legal basis of this remedy could be traced in the combination of Arts.10 and 211. The main advantage of such a remedy, if accepted by the future case-law of the ECJ and the CFI, is that it would combine the liberal substantive conditions for the establishment of liability introduced in the national and state liability remedies with uniquely favourable procedural requirements. The latter would include the practical lack of *locus standi* and time-limit conditions and must be assessed in combination with the abolition of the past doctrine of last resort by recent post-*Francovich* judgements. It must be noted, however, that the concurrent liability remedy has not been tried in practice and is therefore still only a theoretical possibility of protection.

It would seem therefore that in order to put an end to violations in the field of company establishment, the EU must finally award a more significant role to foreign companies which must be allowed to take matters in their own hands and pursue the condemnation of violating Member States within the framework of the EU justice system. One route for achieving this could be via the concurrent liability scenario. What remains to be seen is whether the ECJ is prepared to suffer another wave of objections to its activism in order to make the concurrent liability scenario part of EC law.

Appendix

New Numbering of Treaty Articles

(Numbering according to Article 12 of the Treaty of Amsterdam)

(*) New Article introduced by the Treaty of Amsterdam
(**) New Title introduced by the Treaty of Amsterdam
(***) Title restructured by the Treaty of Amsterdam

[Source: Treaty of Amsterdam]

A. Treaty on European Union

Previous numbering	*New numbering*
Title I	*Title I*
Article A	Article 1
Article B	Article 2
Article C	Article 3
Article D	Article 4
Article E	Article 5
Article F	Article 6
Article F.1 *	Article 7
Title II	*Title II*
Article G	Article 8
Title III	*Title III*
Article H	Article 9
Title IV	*Title IV*
Article I	Article 10
Title V ***	*Title V*
Article J.1	Article 11
Article J.2	Article 12
Article J.3	Article 13
Article J.4	Article 14
Article J.5	Article 15
Article J.6	Article 16
Article J.7	Article 17
Article J.8	Article 18
Article J.9	Article 19
Article J.10	Article 20
Article J.11	Article 21
Article J.12	Article 22
Article J.13	Article 23
Article J.14	Article 24
Article J.15	Article 25
Article J.16	Article 26
Article J.17	Article 27
Article J.18	Article 28
Title VI ***	*Title VI*

Article K.1	Article 29
Article K.2	Article 30
Article K.3	Article 31
Article K.4	Article 32
Article K.5	Article 33
Article K.6	Article 34
Article K.7	Article 35
Article K.8	Article 36
Article K.9	Article 37
Article K.10	Article 38
Article K.11	Article 39
Article K.12	Article 40
Article K.13	Article 41
Article K.14	Article 42
Title VIa **	*Title VII*
Article K.15 *	Article 43
Article K.16 *	Article 44
Article K.17 *	Article 45
Title VII	*Title VIII*
Article L	Article 46
Article M	Article 47
Article N	Article 48
Article O	Article 49
Article P	Article 50
Article Q	Article 51
Article R	Article 52
Article S	Article 53

B. Treaty establishing the European Community

Previous numbering	*New numbering*
Part One	*Part One*
Article 1	Article 1
Article 2	Article 2
Article 3	Article 3
Article 3a	Article 4
Article 3b	Article 5
Article 3c *	Article 6
Article 4	Article 7
Article 4a	Article 8
Article 4b	Article 9
Article 5	Article 10
Article 5a *	Article 11
Article 6	Article 12
Article 6a *	Article 13
Article 7 (repealed)	–
Article 7a	Article 14
Article 7b (repealed)	–
Article 7c	Article 15
Article 7d *	Article 16
Part Two	*Part Two*
Article 8	Article 17
Article 8a	Article 18
Article 8b	Article 19
Article 8c	Article 20
Article 8d	Article 21
Article 8e	Article 22

Part Three	*Part Three*
Title I	*Title I*
Article 9	Article 23
Article 10	Article 24
Article 11 (repealed)	–
Chapter 1	*Chapter 1*
Section 1 (deleted)	–
Article 12	Article 25
Article 13 (repealed)	–
Article 14 (repealed)	–
Article 15 (repealed)	–
Article 16 (repealed	–
Article 17 (repealed)	–
Section 2 (deleted)	–
Article 18 (repealed)	–
Article 19 (repealed)	–
Article 20 (repealed)	–
Article 21 (repealed)	–
Article 22 (repealed)	–
Article 23 (repealed)	–
Article 24 (repealed)	–
Article 25 (repealed)	–
Article 26 (repealed)	–
Article 27 (repealed)	–
Article 28	Article 26
Article 29	Article 27
Chapter 2	*Chapter 2*
Article 30	Article 28
Article 31 (repealed)	–
Article 32 (repealed)	–
Article 33 (repealed)	–
Article 34	Article 29
Article 35 (repealed)	–
Article 36	Article 30
Article 37	Article 31
Title II	*Title II*
Article 38	Article 32
Article 39	Article 33
Article 40	Article 34
Article 41	Article 35
Article 42	Article 36
Article 43	Article 37
Article 44 (repealed)	–
Article 45 (repealed)	–
Article 46	Article 38
Article 47 (repealed)	–
Title III	*Title III*
Chapter 1	*Chapter 1*
Article 48	Article 39
Article 49	Article 40
Article 50	Article 41
Article 51	Article 42
Chapter 2	*Chapter 2*
Article 52	Article 43
Article 53 (repealed)	–
Article 54	Article 44
Article 55	Article 45
Article 56	Article 46

Article 57	Article 47
Article 58	Article 48
Chapter 3	*Chapter 3*
Article 59	Article 49
Article 60	Article 50
Article 61	Article 51
Article 62 (repealed)	–
Article 63	Article 52
Article 64	Article 53
Article 65	Article 54
Article 66	Article 55
Chapter 4	*Chapter 4*
Article 67 (repealed)	–
Article 68 (repealed)	–
Article 69 (repealed)	–
Article 70 (repealed)	–
Article 71 (repealed)	–
Article 72 (repealed)	–
Article 73 (repealed)	–
Article 73a (repealed)	–
Article 73b	Article 56
Article 73c	Article 57
Article 73d	Article 58
Article 73e (repealed)	–
Article 73f	Article 59
Article 73g	Article 60
Article 73h (repealed)	–
Title IIIa *	*Title IV*
Article 73i *	Article 61
Article 73j *	Article 62
Article 73k *	Article 63
Article 731 *	Article 64
Article 73m *	Article 65
Article 73n *	Article 66
Article 73o *	Article 67
Article 73p *	Article 68
Article 73q *	Article 69
Title IV	*Title V*
Article 74	Article 70
Article 75	Article 71
Article 76	Article 72
Article 77	Article 73
Article 78	Article 74
Article 79	Article 75
Article 80	Article 76
Article 81	Article 77
Article 82	Article 78
Article 83	Article 79
Article 84	Article 80
Title V	*Title VI*
Chapter 1	*Chapter 1*
Section 1	*Section 1*
Article 85	Article 81
Article 86	Article 82
Article 87	Article 83
Article 88	Article 84
Article 89	Article 85
Article 90	Article 86

Section 2 (deleted)	–
Article 91 (repealed)	–
Section 3	*Section 2*
Article 92	Article 87
Article 93	Article 88
Article 94	Article 89
Chapter 2	*Chapter 2*
Article 95	Article 90
Article 96	Article 91
Article 97 (repealed)	–
Article 98	Article 92
Article 99	Article 93
Chapter 3	*Chapter 3*
Article 100	Article 94
Article 100a	Article 95
Article 100b (repealed)	–
Article 100c (repealed)	–
Article 100d (repealed)	–
Article 101	Article 96
Article 102	Article 97
Title VI	*Title VII*
Chapter 1	*Chapter 1*
Article 102a	Article 98
Article 103	Article 99
Article 103a	Article 100
Article 104	Article 101
Article 104a	Article 102
Article 104b	Article 103
Article 104c	Article 104
Chapter 2	*Chapter 2*
Article 105	Article 105
Article 105a	Article 106
Article 106	Article 107
Article 107	Article 108
Article 108	Article 109
Article 108a	Article 110
Article 109	Article 111
Chapter 3	*Chapter 3*
Article 109a	Article 112
Article 109b	Article 113
Article 109c	Article 114
Article 109d	Article 115
Chapter 4	*Chapter 4*
Article 109e	Article 116
Article 109f	Article 117
Article 109g	Article 118
Article 109h	Article 119
Article 109i	Article 120
Article 109j	Article 121
Article 109k	Article 122
Article 109l	Article 123
Article 109m	Article 124
Title VIa (**)	*Title VIII*
Article 109n *	Article 125
Article 109o *	Article 126
Article 109p *	Article 127
Article 109q *	Article 128
Article 109r *	Article 129

Article 109s *	Article 130
Title VII	*Title IX*
Article 110	Article 131
Article 111 (repealed)	–
Article 112	Article 132
Article 113	Article 133
Article 114 (repealed)	–
Article 115	Article 134
Title VIIa **	*Title X*
Article 116 *	Article 135
Title VIII	*Title XI*
Chapter 1 ***	*Chapter 1*
Article 117	Article 136
Article 118	Article 137
Article 118a	Article 138
Article 118b	Article 139
Article 118c	Article 140
Article 119	Article 141
Article 119a	Article 142
Article 120	Article 143
Article 121	Article 144
Article 122	Article 145
Chapter 2	*Chapter 2*
Article 123	Article 146
Article 124	Article 147
Article 125	Article 148
Chapter 3	*Chapter 3*
Article 126	Article 149
Article 127	Article 150
Title IX	*Title XII*
Article 128	Article 151
Title X	*Title XIII*
Article 129	Article 152
Title XI	*Title XIV*
Article 129a	Article 153
Title XII	*Title XV*
Article 129b	Article 154
Article 129c	Article 155
Article 129d	Article 156
Title XIII	*Title XVI*
Article 130	Article 157
Title XIV	*Title XVII*
Article 130a	Article 158
Article 130b	Article 159
Article 130c	Article 160
Article 130d	Article 161
Article 130e	Article 162
Title XV	*Title XVIII*
Article 130f	Article 163
Article 130g	Article 164
Article 130h	Article 165
Article 130i	Article 166
Article 130j	Article 167
Article 130k	Article 168
Article 130l	Article 169
Article 130m	Article 170
Article 130n	Article 171
Article 130o	Article 172

Article 130p	Article 173
Article 130q (repealed)	–
Title XVI	*Title XIX*
Article 130r	Article 174
Article 130s	Article 175
Article 130t	Article 176
Title XVII	*Title XX*
Article 130u	Article 177
Article 130v	Article 178
Article 130w	Article 179
Article 130x	Article 180
Article 130y	Article 181
Part Four	*Part Four*
Article 131	Article 182
Article 132	Article 183
Article 133	Article 184
Article 134	Article 185
Article 135	Article 186
Article 136	Article 187
Article 136a	Article 188
Part Five	*Part Five*
Title I	*Title I*
Chapter 1	*Chapter 1*
Section 1	*Section 1*
Article 137	Article 189
Article 138	Article 190
Article 138a	Article 191
Article 138b	Article 192
Article 138c	Article 193
Article 138d	Article 194
Article 138e	Article 195
Article 139	Article 196
Article 140	Article 197
Article 141	Article 198
Article 142	Article 199
Article 143	Article 200
Article 144	Article 201
Section 2	*Section 2*
Article 145	Article 202
Article 146	Article 203
Article 147	Article 204
Article 148	Article 205
Article 149 (repealed)	–
Article 150	Article 206
Article 151	Article 207
Article 152	Article 208
Article 153	Article 209
Article 154	Article 210
Section 3	*Section 3*
Article 155	Article 211
Article 156	Article 212
Article 157	Article 213
Article 158	Article 214
Article 159	Article 215
Article 160	Article 216
Article 161	Article 217
Article 162	Article 218
Article 163	Article 219

Section 4	*Section 4*
Article 164	Article 220
Article 165	Article 221
Article 166	Article 222
Article 167	Article 223
Article 168	Article 224
Article 168 a	Article 225
Article 169	Article 226
Article 170	Article 227
Article 171	Article 228
Article 172	Article 229
Article 173	Article 230
Article 174	Article 231
Article 175	Article 232
Article 176	Article 233
Article 177	Article 234
Article 178	Article 235
Article 179	Article 236
Article 180	Article 237
Article 181	Article 238
Article 182	Article 239
Article 183	Article 240
Article 184	Article 241
Article 185	Article 242
Article 186	Article 243
Article 187	Article 244
Article 188	Article 245
Section 5	*Section 5*
Article 188a	Article 246
Article 188b	Article 247
Article 188c	Article 248
Chapter 2	*Chapter 2*
Article 189	Article 249
Article 189a	Article 250
Article 189b	Article 251
Article 189c	Article 252
Article 190	Article 253
Article 191	Article 254
Article 191a *	Article 255
Article 192	Article 256
Chapter 3	*Chapter 3*
Article 193	Article 257
Article 194	Article 258
Article 195	Article 259
Article 196	Article 260
Article 197	Article 261
Article 198	Article 262
Chapter 4	*Chapter 4*
Article 198a	Article 263
Article 198b	Article 264
Article 198c	Article 265
Chapter 5	*Chapter 5*
Article 198d	Article 266
Article 198e	Article 267
Title II	*Title II*
Article 199	Article 268
Article 200 (repealed)	–
Article 201	Article 269

Article 201a	Article 270
Article 202	Article 271
Article 203	Article 272
Article 204	Article 273
Article 205	Article 274
Article 205a	Article 275
Article 206	Article 276
Article 206a (repealed)	–
Article 207	Article 277
Article 208	Article 278
Article 209	Article 279
Article 209a	Article 280
Part Six	*Part Six*
Article 210	Article 281
Article 211	Article 282
Article 212 *	Article 283
Article 213	Article 284
Article 213a *	Article 285
Article 213b *	Article 286
Article 214	Article 287
Article 215	Article 288
Article 216	Article 289
Article 217	Article 290
Article 218 *	Article 291
Article 219	Article 292
Article 220	Article 293
Article 221	Article 294
Article 222	Article 295
Article 223	Article 296
Article 224	Article 297
Article 225	Article 298
Article 226 (repealed)	–
Article 227	Article 299
Article 228	Article 300
Article 228a	Article 301
Article 229	Article 302
Article 230	Article 303
Article 231	Article 304
Article 232	Article 305
Article 233	Article 306
Article 234	Article 307
Article 235	Article 308
Article 236 *	Article 309
Article 237 (repealed)	–
Article 238	Article 310
Article 239	Article 311
Article 240	Article 312
Article 241 (repealed)	–
Article 242 (repealed)	–
Article 243 (repealed)	–
Article 244 (repealed)	–
Article 245 (repealed)	–
Article 246 (repealed)	–
Final Provisions	*Final Provisions*
Article 247	Article 313
Article 248	Article 314

List of cases – National Courts

A. FRANCE

Supreme Courts

Cassation civil, 13 février 1923, *DP*, 1923, 1, 52

Civ. 25 July 1933, *DP*, 1936, 1, 121

Civ. 7 July 1947, *D.*, 1948, Somm., 9; *JCP* 1947, II, 3871, note J. L

Civ. 30 March 1971, *Rev. crit. dr. inter. privé*, 1971, 451, note Lagarde, *JCP*, 1972.2.17101 and 17140, note Oppetit, J. Clunet, 1972, 834, note Loussouarn

Civ. 1, 17 October 1972, *Bull. civ.* I, no 204; *Rev. cr. dr. inter. privé*, 1973, 520, note Batiffol; *Rev. sociétés* 1974, 127, note Bismuth

Civ., 10 March 1976, *Rev.crit.dr.pr.*, 1976, 658

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Com. 16 December 1958, Bull. civ., III, no 438

Com. 12 December 1972, *Bull. cass.* 1972, 4, p.307

Com., 21 December 1987, *J.C.P.*, 198, II, 21113, note Montanier

Com., 9 April 1991, *RJDA*, 7/91, 613

Com., 9 March 1993, *RJDA*, 7/93, 617

Com., 21 February 1995, *Dalloz*, 1995, IR 100

Cassation Crim., 9 October 1875, *Gazz. Pal.*, 1976, 1.4

Crim. 4 August 1906, J. Clunet, 1907, 151

Crim., 3 November 1983, *JCP*, 1985, II, 20360

Crim., 10 May 1984, *D.*, 1985, 256, note Penneau

Crim 12 November 1990, Extraco Anstalt, *Rev.crit.*, 1991, 667, 2

Cass. req. 22 December 1986, *S.* 1987, 1.84

Conseil d'Etat, 6 February 1903, *Gr. Ar.*, no 12, concl. Romieu, *Rec.*, p.94

C.E., 4 March 1910, *Thérond*, *Gr. Ar.*, no 24

C.E., 31 July 1912, *Sté des granits prophyroïdes des Vosges*, *Gr. Ar.*, no 29

C.E., 27 June 1919, *Viallat et fils*, *Rec. Lebon*, 561

C.E., 30 November 1923, *Couitéas*, *G.A.*, 247

C.E., 14 January 1938, *La Fleurette*, *Leb.*, 1938, 25

C.E., 22 October 1943, *Ste. des Etablissements Lacaussade*, *Leb.*, 1943, 231

C.E., 21 June 1944, *Caucheteux et Desmond*, *Leb.*, 1944, 222

CE, 7 February 1947, *d'Aillières*, *G. Ar.*, no 68

C.E., 23 January 1953, *Audoin*, *J.C.P.*, 1954, II, no 7916, note Vedel

C.E., 5 February 1954, *El Hamidia*, *J.C.P.*, 1954, ii, NO 8136

C.E., 20 April 1956, *Epoux Bertin*, *Gr. Ar.*, no 91, concl. Long, note Waline, *R.D.P.*, 1956, p.869

C.E., 9 July 1956, *Trassard*, p.310.

C.E., 19 October 1956, *Soc.Le Béton*, *Gr. Ar.*, no 92, concl. Long, *D.*, 1956, p.81

C.E., 12 April 1957, *Mimouni*, *D.*, 1957, p.413, concl. Talcot, note P.L.J.

C.E., Ass. plén., 6 March 1959, *Secrétaire d' Etat à l'agriculture c/ Sté Fros Frères*, *Rec. Leb.*, 157

C.E., 22 February 1960, *D.*, 1960, 671, note Blancher

C.E., 21 April 1962, *Dame Agnesi*, D. 1962, p.535

C.E., 13 July 1962, *Bréart de Boisanger*, *D.*, 1962, p.664

C.E., 5 January 1963, *Bovero*, *Leb.*, 1963, 53

C.E., 15 March 1963, *Centre hospitalier régional de Grenoble c/ Bossé*, *Rec. Lebon*, p.173

C.E., 28 June 1963, *Narcy*, *R.D.P.*, 1963, p.1188

C.E., 13 July 1967, *Allegretto*, *A.J.*, 1967, p.538

C.E., 5 February 1969, *Port autonome de Bordeaux*, *D.A..*, 1969, 109

C.E., 3 November 1971, *Dlle Cannac*, 650

C.E., 17 March 1972, *Dlle Jarrige*, 222

C.E., 13 October 1973, *A.D.A.S.E.A. du Rhône*, *D.*, 1979, p.249, note Amselek et Waline

C.E., 6 February 1974, *Gomez*, *AJ*, 456

C.E., 22 November 1974, *Fédération des industries du sport*, *J.C.P.*, 1975, I, NO 2724

C.E., 11 May 1979, *Boulanger*, 202

C.E., 18 December 1981, *Ministre de la Culture et de la Communiction, Leb.*, 1981, 478

C.E., 23 March 1984, *Alivar, Rec. Lebon*, 1984, p.127, *RTDE*, 1984, 341

C.E., 19 April 1985, *Comm. de Vitrolles, RDP*, 1985, 1701

C.E., 17 May 1985, *Mme Menneret, A.J.D.A.*, 1985, p.454

C.E., 22 January 1986, *Dlle Grellier, AJ*, 1986, 694

C.E., 15 October 1986, *Mme Leroux, A.J.D.A.*, 1986, p.716

C.E., 27 May 1987, *Legoff*

C.E., 20 January 1988, *Aubin, Rec. Lebon*, 1988, 20; *JCP*, 1989, II, 21169, note Moderne, *AJDA*, 1988, 418, note Prétot

C.E., 23 December 1988, *Martin, Leb.*, 1988, 470

C.E., 29 June 1990, *GISTI*, unreported

C.E., Ass., 28 February 1992, *Société Arizona Tabaco Products, A.J.*, 1992, 210, concl. Laboque; [1993] 1 *CMLRev.* 252

C.E., 19 February 1988, *Association des proporiétaires riverains et plaisanciers du cingle de Tremolat-Cales-Mauzac et autres*, AJDA, 1988, 418

Tribunal des Conflits, 8 February 1873, *Blanco, Gr. Ar.*, 15

T.C., 29 February 1908, *Feutry, Gr. Ar.*, no 20

T.C.,13 April 1908, *de Fonscolombe, Rec.*, p.448

T.C., 22 January 1921, *Sté Commercile de l'Ouest africain, Gr. Ar.*, no 40

T.C., 22 January 1921, *Bac D' Eloka, Gr. Ar.*, no 40

T.C., 26 May 1954, *Moritz, J.C.P.*, 1954, II, no 8334, note Vedel

T.C., 23 November 1959, *JCP* 1960.II.11430, note Aymond

T.C., 10 July 1965, *Sté Bourgogne-Bois, Rec.*, p.586

T.C., 15 January 1968, *Air-France c. Epoux Barbier, R.D.P.*, 1968, p.393

Lower Courts

Rennes **Court d' Appel**, 8 July 1981, *Rev. crit. DIP*, 1982

Cour d'Appel, civ., 2, 13 January 1983, *Gaz. Pal.*, 1983, 444, note du Rusquec

TGI Seine, 1 February 1967, *JCP*, 1967, II, 15163, note Fabre

Tribunal Aix 23 October 1979, Bull. Aix 1979, 4, p.31

T. Colmar, 23 June 1950, *D.*, 1951, 62, note R. Savatier

T. civ. Metz, 22 February 1950, *D.*, 1950, *Somm.*, 46

T. civ. Mulhouse, 2 May 1950, *Rev. cr. dr. inter. privé* 1951, 157, note Niboyet

T. Paris, 20 March 1944, *D.*, 1945, 24, note Basdevant

T. Paris, 26 March 1966, *D.*, 1966, Somm. 103; *rev. crit. dr.inter. privé*, 1968, 58, note Loussouarn; *Gaz. Pal.*, 1966, 1, 400

T. Paris, 17 May 1967, *D.*, 1968, 313; *JCP*, 1968, II, 15427, note Oppetit

T. Paris 17 October 1980, JCP, 80, ed. G, IV, 374

Cour admin. d' appel de Lyon, 16 February 1989, *Bente*, *JCP*, 1990, II, 21521

Cour admin. d'appel de Nancy, 9 July 1991, *Ministre de l' économie, des finances et du buget v Société Lefebvre*, *Rec. Lebon*, 741

Cour admin. d'appel de Nantes, 20 June 1991, *Rec.Lebon*, 1991, 742

Cour administrative d'appel de Paris (form. plen.), 1 July 1992, *Sté Jacques Dangeville*, *AJ*, 1992, p.768

Cour admin. d' appel de Paris, 12 November 1992, *Rec. Lebon*, 1992, 790

Trib. admin. Dijon, 15 April 1986, *Société venicole Berard SA*, *Rec. Lebon*, 1986, 311, *RTDE* 1988, 112, note Soler-Couteaux

B. GREECE

Supreme Courts

Plenary Meeting of the **Council of the State** 722/54

ΣτΕ 3395/71, unreported

ΣτΕ 633/75, unreported

ΣτΕ 1218/78, *ΤοΣ*, 1978, 367

ΣτΕ 4677/83, unreported

ΣτΕ 1084/1984, NoB, 1985, 342

ΣτΕ 1955/87, *NoB*, 1987, 716.

ΣτΕ 2625/89, *ΕλλΔ*, 1989, 374.

ΣτΕ 1275/89, *ΔΔ*, 1989, 1285

ΣτΕ 531/89 and ΣτΕ 4664/84, *ΔΔ*, 1990, 786, note Papahatjis

ΣτΕ 75/90, *ΔΔ*, 1990, 788

ΣτΕ 173/90, *ΔΔ*, 1990, 714

ΟλΣτΕ 1470/90, *ΔΔ*, 1990, 713

ΣτΕ 3504/91, *ΔΔ*, 1991, 294

ΟλΣτΕ 654/93, *ΔΔ*, 1993, 67

ΣτΕ 1338/93, *ΔΔ*, 1993, 714

ΣτΕ 1648/93, *ΔΔ*, 1993, 714

ΣτΕ 2283/95, *ΔΔ*, 1995, 618

ΣτΕ 113/96, *ΔΔ*, 1996, 611

Supreme Court 64/1905, unreported

ΑΠ 171/1907, unreported

ΑΠ 315/1911, *Θεμ.*, ΚΓ, 81

ΑΠ 20/1929, *Θεμ.*, Μ, 277

ΑΠ 130/1932, *Θεμ.*, ΜΓ, 413

ΑΠ 21/1934, unreported

ΑΠ 115/1935, Θέμις ΜΒ', 1935, 333

ΑΠ 352/1953, *Θεμ.*, ΞΔ, 736

ΑΠ 439/1954, unreported

ΑΠ 864/1954, *Θεμ.*, ΞΣΤ, 68

ΑΠ 64/1955, NoB, 1955, 495

ΑΠ 37/1957, EEN, 1957, 483

ΑΠ 462/1957, NoB, 1957, 111

ΑΠ 358/1966, unreported

ΑΠ 406/67, unreported

ΑΠ 106/1969, NoB, 1969, 676

ΑΠ 466/1969, NoB, 1969, 50

ΟλΑΠ 108/71, NoB, 1971, 601

ΑΠ 665/75, ΤοΣ, 1976, 495

ΑΠ 616/1976, unreported

ΑΠ 1070/76, unreported

ΑΠ 461/1978, unreported

ΑΠ 132/79, *ΤοΣ*, 1986, 177

ΑΠ 515/1980, NoB, 1980, 1946

ΑΠ 729/1981, NoB, 1982, 231

ΑΠ 1616/1981, ΕΕΝ, 1981, 861

ΟλΑΠ 490/82 NoB, 1982, 204

ΟλΑΠ 488/82, *ΕλλΔνη*, 1982, 29

ΑΠ 316/1983, NoB, 1983, 1571

ΑΠ 595/85, *ΕλλΔνη*, 1985, 300

ΑΠ 1627/1986, unreported

ΑΠ 418/78, *NoB*, 1978, 192

ΑΠ 913/1988, ΕλΔνη, 1989, 1331

ΑΠ 59/1989, unreported

ΑΕΔ 1/91, *ΕλλΔνη*, 1991, 1480

Lower Courts

Athens **Court of Appeal** 1002/1892, unreported

Athens Court of Appeal 1137/1898, unreported

Athens Court of Appeal 1335/1899, *Θεμ.*, ΙΑ, 262

Athens Court of Appeal 446/1901, *Θεμ.*, ΙΓ, 38

Athens Court of Appeal 130/1904, *Θεμ.*, ΙΣΤ, 360

Athens Court of Appeal 2041/1906, *Θεμ.*, ΙΗ, 601

Athens Court of Appeal 1203/1910, *Θεμ.*, ΚΒ, 519

Athens Court of Appeal 1416/1911, unreported

Athens Court of Appeal 511/1912, unreported

Athens Court of Appeal 506/1915, *Θεμ.*, KZ, 548

Athens Court of Appeal 458/1934, *EEN*, A, 400

Athens Court of Appeal 262/1935, unreported

Athens Court of Appeal 1103/1953, *Θεμ.*, ΞΔ, 792

Athens Court of Appeal 523/1960, Δικ., 1960, 581

Athens Court of Appeal 5432/1979, NoB, 1979, 1638

Athens Court of Appeal 117/1982, unreported

Athens Court of Appeal 7261/86, *ΕλλΔνη*, 1986, 156

Athens Court of Appeal 2135/1987, unreported

Athens Court of Appeal 7711/87, *ΕλλΔνη*, 1987, 329

Athens Court of Appeal 4163/87, *ΕλλΔνη*, 1987, 942

Athens Court of Appeal 175/1988, unreported

Athens Court of Appeal 1878/88, *ΕλλΔνη*, 1988, 349

Athens Court of Appeal 13605/88, *ΕλλΔνη*, 1988, 361

Athens Court of Appeal 13613/1988, NoB, 1989, 1299

Corfu Court of Appeal 75/1981, unreported

Patras Court of Appeal 789/1896, unreported

Pireus Court of Appeal 65/1988, unreported

Pireus Court of Appeal 1633/1989, unreported

Athens Single-member **Court of First Instance** 1937/1974, unreported

Athens Single-member Court of First Instance 6990/78, *ΤοΣ*, 1979, 649

Athens Tri-member Court of First Instance 860/88, *ΔιΔικ*, 1, 122

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C-102/86 *Spie-Batignolles* v *Commission* [1990] 1 ECR 197

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208/90 *Theresa Emmott* v *Minister for Social Welfare and Attorney General* [1991] ECR 1

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