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HELEN XANTHAKI

MJur Thesis - 1993

THE ESTABLISHMENT OF FOREIGN COMPANIES IN GREECE WITH PARTICULAR REFERENCE TO THE COMPLIANCE BY GREECE WITH EC LAW

This thesis deals with the conditions for the recognition and establishment of branches, agencies, off-shore units and subsidiaries of foreign public companies limited by shares in Greece. The relevant Greek laws are analysed in the first chapter, whereas chapter two deals with the comparative analysis of the Greek regime with the relevant provisions of EC law. In the third chapter (which is of particular interest due to the lack of relevant bibliography) reference is made to special Greek laws, that impose limitations on the activities of foreign companies in Greece, thus hindering their free establishment. Chapter four is devoted to the presentation of Greek law on the establishment of foreign maritime companies and the comparative analysis of the Greek regime with the regulations of the Treaty of Rome on this sphere. This analysis was considered necessary due to the vital importance of maritime companies and trade for the Greek economy and the particularly restrictive Greek regime on the establishment of foreign companies. Having concluded that Greek law violates the relevant EC regulations, an attempt is made to provide answers to the following questions: why did the EC fail to enforce its regulations in Greece and what is the protection offered to foreign companies that are prohibited from establishing there. The results of the thesis justify this research. Greece does not comply with EC law on the establishment of foreign companies. Furthermore, the enforcement of EC law in Greece seems impossible both on a Community and a national level. I only hope that the publication of more relevant analyses on the laws of member states will persuade the respective EC and national authorities that the passing of EC legislation does not suffice for the unification of Europe and the successful realization of the European ideal.

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HELEN XANTHAKI

MJUR THESIS

UNIVERSITY OF DURHAM

DEPARTMENT OF LAW

1993

**THE ESTABLISHMENT OF FOREIGN COMPANIES IN GREECE WITH PARTICULAR
REFERENCE TO THE COMPLIANCE BY GREECE WITH EC LAW**



30 JUN 1994

TABLE OF CONTENTS

INTRODUCTIONp.1

CHAPTER I:--SECONDARY ESTABLISHMENT OF FOREIGN COMPANIES IN GREECE AND THE INCORPORATION IN GREECE OF FOREIGN SUBSIDIARIES.

- Introduction.....6
- A. The Establishment of Branches and Agencies.....7
 - . Presentation of Art.50 of Law 2190/1920.....7
 - . Recognition of Foreign Companies.....8
 - . Foreign Companies.....13
 - . Public Companies Limited by Shares.....14
 - . Definition of "Branch" and "Agency".....15
 - . Copy of Representation Document.....17
 - . Other Conditions.....19
- B. Law 89/67 on the Establishment of Commercial/Industrial Off-shore Units.....21
 - . Presentation of Law 89/67.....21
 - . Foreign Companies of any Type Functioning Legally at their Seat.....22
 - . Activity of Companies under Law 89/67.....23
 - . Petition of the Company and Suretyship from a Recognized Bank.....25
 - . Other Conditions.....26
 - . The Choice of the "Right" Law.....27
- C. Subsidiaries.....29
 - . Definition.....30
 - . Nationality of the Subsidiary.....31
 - . Conditions for Establishment of Subsidiary..33
 - . Evaluation of Greek*Law on Subsidiaries.....34
- Conclusions.....35

FOOTNOTES (CHAPTER I).....39

CHAPTER II: FREEDOM OF ESTABLISHMENT

- Introduction.....57
- Recognition of Foreign Companies.....58
 - . Basic Principles of Recognition.....58
 - . The Theory of *Siege Reel* as Applied in the EC..59
 - . The Theory of Incorporation.....62
 - . The Hague Conference.....63
 - . The EC View on Recognition.....65
 - . Conformity of Greek Law with the Brussels Convention.....70
- Establishment within the EC.....73
 - . Definition of Secondary Establishment.....73
 - . *Ratione Personae* Application of the Freedom....77
 - . EC Subsidiaries of Non-EC Parent Companies.....80
 - . Territorial Scope of the Freedom.....83
- Conclusions.....84

FOOTNOTES (CHAPTER II).....87

CHAPTER III:APPLICATION *RATIONE MATERIAE* OF THE FREEDOM OF ESTABLISHMENT AND COMPARISON BETWEEN GREEK AND EC LAW.

- Introduction.....102
- A. Basic EC Legislation.....103
 - . Activities Liberalized Under the EEC Treaty103
 - . Exceptions to the Free Establishment.....105

- B. Greek Legislation Applying EC Provisions.....	110
. Formal Procedure for Establishment.....	110
. Frontier Regions. Prohibition of Acquisition of Real Property.....	112
. Limits to the Free Movement of Capital.....	114
. State Monopolies.....	118
. Establishment of Private Schools.....	120
. Self-employed Commercial Agents.....	121
. Establishment of Stock Exchange Companies..	123
. Establishment of Mining Companies.....	124
- Conclusions.....	126
FOOTNOTES (CHAPTER III).....	131
CHAPTER IV: SPECIAL REGULATIONS ON THE ESTABLISHMENT OF MARITIME COMPANIES.	
- Introduction.....	143
- Greek Laws on Establishment of Maritime Company.	144
- Law 378/1968 (Art.1).....	144
- Law 27/75 Modified by Laws 814/78 and 1892/90...	148
- Law 791/78.....	150
- Relationship Between Transport and Freedom of Establishment.....	153
- Greek Laws on Maritime Companies and Their Freedom of Establishment.....	156
- Access to the Greek Flag.....	158
- The "Shipping Company".....	160
- Cabotage.....	162
- Conclusions.....	168
FOOTNOTES (CHAPTER IV).....	173
CHAPTER V: ENFORCEMENT MECHANISMS OF EC LAW.	
- Introduction.....	188
- Infringement Proceedings by Commission.....	189
- Infringement Procedures by Member-States.....	192
- Art.171 and the Enforcement of ECJ Judgements...	194
- Preliminary Rulings.....	196
- Interim Measures.....	198
- Restitution of Damages by ECJ.....	199
- Enforcement of EC Law in Greece.....	201
- Causes of Greek Non-compliance; Outlook for the Future.....	209
- Future Developments on the Free Establishment...	215
- Conclusions.....	217
FOOTNOTES (CHAPTER V).....	219
CONCLUSIONS.....	236
TABLES AND APPENDICES	
- Table on Greek Laws on Maritime Companies.....	242
- Appendix 1: The Greek Legal System.....	244
- Appendix 2: Art.50 of Law 2190/1920 (translated in English)	247
- Appendix 3: Arts 10 and 11 of the Greek Civil Code).....	250
- Appendix 4: Law 89/67 (translated in English).....	252
- Appendix 5: Law 378/68 (translated in English).....	255
- Appendix 6: Law 791/78 (translated in English).....	258
LIST OF GREEK COURTS' PRECEDENTS USED IN THE THESIS.....	261
LIST OF ECJ JUDGEMENTS USED IN THE THESIS.....	263
BIBLIOGRAPHY.....	267

DECLARATION

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Abbreviations

CMLR: Common Market Law Review

EC: European Communities

ECJ: European Court of Justice

EDi.: Elliniki Dikaiosi

EED; Epitheorisi Ellinikou Dikaiou

EEED: Epitheorisi Ellinikou Evropaikou Dikaiou

ELR: European Law Review

ICLQ: International and Comparative Law Quarterly

JCMS: Journal of Common Market Studies

LIEI: Legal Issues of European Integration

NoV: Nomiko Vima

RTDE: Revue Trimestrielle de Droit Europeen,

INTRODUCTION

The main aim of this thesis is the examination of the conditions for the secondary establishment of companies limited by shares in Greece, which are owned by companies or persons domiciled in an EC country other than Greece.

The opening of the European Communities' (EC) internal market has undoubtedly changed the lives of the Europeans considerably. The abolition of barriers to the free movement of goods, persons and services has significant practical value both for European citizens and for companies registered in EC states. The latter are now able to establish anywhere within the EC under the conditions set for domestic companies. Thus they may exercise any kind of financial activity wherever they wish, import and export their capital or their products anywhere within the EC without obstacles (e.g. taxation, maximum limits etc.). In other words, EC companies can now choose their place of establishment (within their states of origin or anywhere else within the EC) based exclusively on their wishes and interests and not on possible prohibitions or restrictions. Thus, the first aim of this research is to describe the new status conferred upon EC companies by EC legislation.

Few people realise, however, that it takes more than the enactment of the relevant EC legal text to create an internal market between EC member states. In fact, if these states do not implement the relevant laws within their territories, the internal market will lack practical effect. Thus, the second aim



of this thesis is to assess whether Greece (an EC member state) does implement EC law on the establishment of foreign companies, as well as to describe which of the relevant Greek laws are in breach of EC legislation on company establishment.

The third aim of the thesis is to guide EC companies wishing to establish in Greece through the mechanisms of the Greek bureaucracy, by presenting the basic Greek laws on the conditions for establishment, by criticising the relevant Greek laws and by helping these companies select the "right" law for their needs.

In order to reach these goals, we shall comparatively analyse EC and Greek law on recognition and establishment. The first chapter of the thesis deals with basic Greek laws on the conditions for the establishment of foreign commercial companies. The second chapter analyses Arts.52-58 of the Treaty of Rome on the freedom of establishment. The third chapter presents, and briefly investigates, Greek laws which hinder the freedom of establishment of EC companies in Greece. Due to the importance of maritime trade to the Greek economy, I have devoted a whole chapter (chapter 4) to an examination of EC and Greek law on the establishment of maritime companies, and the numerous breaches of the freedom of establishment by Greece in this sphere. The fifth and last chapter of the thesis refers to the enforcement mechanisms of EC law in an attempt to justify the EC's reluctance to impose the implementation of the relevant EC regulations in Greece.

It should be noted that this research concentrates on the

secondary establishment of EC companies (i.e. the creation of branches, agencies and subsidiaries), forms of establishment that permit the expansion of a company without transferring the parent company's control elsewhere. The thesis deals exclusively with public companies limited by shares; since this is the legal form chosen by the overwhelming majority of financially strong international companies. Moreover, it should be noted that the choice of Greece was not made at random. Setting aside my personal interest on the subject, and the notable lack of relevant research, the current developments within the EC (under the "1992" banner) and Greece's unique position as the EC's bridge to the markets of the Middle East and the Balkans makes this analysis extremely topical.

This thesis will show that Greece has consistently made a specific effort to attract foreign companies because its weak economy benefits from injection of foreign exchange and capital. Laws 89/67 on the establishment of off-shore units of commercial/industrial companies and 378/68 on the establishment of off-shore units of foreign maritime companies are typical examples of legislative texts which seek to attract foreign companies to Greece by offering them beneficial taxation status. However, this observation must not lead to the assumption that the Greek position on the establishment of foreign companies is extremely liberal. Like other European countries, in an attempt to help domestic companies survive the competition from large foreign enterprises, Greece has often passed restrictive laws (creating state monopolies or prohibiting the execution of

certain activities), which has directly interfered with the establishment and normal functioning of foreign companies.

Before we proceed with this analysis, it should be noted that Greek laws cannot be challenged by foreign countries (this would directly abolish the Greek sovereignty). However, in view of Greece's membership of the EC, Greek law on the establishment of EC companies can not be a purely domestic matter. The EC has the legal right, as well as the obligation, to ensure that EC companies enjoy the advantages awarded to them by the *acquis Communautaire*. Consequently, this analysis of Greece's obligation to abolish all restrictions on the establishment of companies refers strictly to the establishment of companies owned by companies or persons domiciled in another EC state. As far as companies of third countries (of non-EC origin) are concerned, Greece has the right to pass any kind of restriction it finds suitable (provided that this is not contradictory to international agreements, e.g GATT).

After these observations, we begin our analysis with the presentation of basic Greek laws on the conditions for the secondary establishment of foreign public companies limited by shares in Greece. These laws make no discrimination between foreign companies from EC member states or foreign companies from non EC states. Our immediate concern will be to map out the Greek legal regime in respect of foreign companies wherever they be registered. Subsequently, attention will turn to the question whether this regime complies with EC legal norms in relation to the establishment in Greece of companies owned by companies or

persons domiciled in other EC states.

CHAPTER 1

SECONDARY ESTABLISHMENT OF FOREIGN COMPANIES IN GREECE AND THE
INCORPORATION IN GREECE OF FOREIGN OWNED SUBSIDIARIES

INTRODUCTION

In 1920, the relatively young Greek state, located in an underdeveloped area of Europe (the Balkans) and still at war with Turkey, realised, that effective modernization required the financial and material support of the powerful states of Europe. This realization became the basis and substance of modern Greek policy concerning the status and establishment of foreign companies in Greece, a policy that has survived both time and several governmental and constitutional changes. Indeed, one of the few common points between dictatorship, democracy and socialism in Greece is the importance awarded to the establishment of foreign companies on Greek territory. The basic concept behind this policy is that the creation of foreign "vested interests" serves Greece as an indirect guarantee of external support for the country's continuous struggle against impoverishment and its ambitious neighbours.

At the same time, being a bridge from Europe to the markets of Asia and Africa, Greece offers the financially and politically powerful European companies a convenient base for trade in

Asia and Africa.

The aim of this chapter is to analyse the basic Greek legislation (Laws 2190/1920 and 89/67) on the conditions for the secondary establishment of foreign commercial public companies limited by shares in Greece, i.e. the conditions for the establishment of branches, agencies and subsidiary companies.

A. THE ESTABLISHMENT OF BRANCHES AND AGENCIES

Presentation of Art.50 of Law 2190/1920

According to Law 2190/1920 (art.50, par.1), 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^[1].

The law indicates both the substantive as well as the procedural conditions^[2] for the establishment of foreign companies in Greece. To be precise, Article 50 of Law 2190/1920 is applicable: 1. to companies which:

- a. have the right to function legally in Greece;
- b. are foreign;
- c. are public companies limited by shares; and

2. only if they have submitted to the Greek Ministry of Commerce

a copy of a "document of representation" ratified by the Greek Consulate; this document should include:

- a. appointment of the company's representative or agent;
- b. appointment of a person authorised by the company to accept service of documents on its behalf;
- c. the year of the company's foundation; and
- d. the names of the persons representing the company at its seat.

My analysis will include all the conditions indicated by Art.50 Law 2190/1920, focusing on the provisions which are more significant to legal theory and practice.

Recognition of Foreign Companies

According to Law 2190/1920, companies wishing to establish in Greece must "have the right to function legally within the boundaries of the Greek state". In other words, companies must be subject to obligations and rights, i.e. have a legal personality, under Greek law. This means that, in order to establish in Greece, foreign companies must be recognized by the Greek state [3].⁴

The problem of the recognition of foreign companies by foreign national laws covers the following two issues⁴[4]:

- a. whether the legal system of the state of reception generally recognizes foreign legal entities as such; and
- b. which law is considered to be the company's *lex fori*.

Several legal theories have attempted to resolve the first

question. According to Krispis⁴[5] the most fundamental of the above 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 recognize 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; therefore, as all natural persons are recognized by all legal systems without any further requirements so legal entities must be recognized *ipso jure* all around the world.

As far as the establishment of branches or agencies of foreign companies is concerned, Greece follows the liberal theory, according to which foreign companies are recognized as legal entities, provided that they were legally formed according to their *lex fori*. Indeed, article 10 of the new⁴[6] Civil Code regulates that "the legal capacity of the legal entity is ruled by the law of its seat" ⁴[7]. It follows from this general principle that the conditions set by Greek law for the establishment of Greek public companies⁴[8] are not applicable in the case of foreign companies. Therefore, Greek courts⁴[9] cannot declare a foreign company invalid on the grounds that the provisions of Greek law⁴[10] on the company's establishment have

not been met⁴[11].

This assumption, however, does not solve the problem. The issue of which law should regulate the conditions for the establishment of the foreign company is still unresolved. The matter is of significant theoretical and practical interest, because the company's *lex fori* shall also regulate the company's validity, legal formation, function and dissolution⁴[12], internal administration (attorneyship, valid decisions etc), external relations (legal transaction signing, liability, representation, etc.) and its nationality.

Experts on private international law⁴[13] have proposed several criteria for the determination of the companies' *lex fori*:

- 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 location, where all necessary legal actions for the company's formation took place (theory of formation);
- d. the location, where the company's main commercial activity takes place;
- e. the nationality of the persons controlling the company (theory of control);
- f. the company's main activity (*siege 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 were completed"⁴[14]. 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";

h. the company's seat (theory of the seat, which includes two doctrines: the theory of the statutory seat and the *siege reel* doctrine⁴[15]).

The "written will" of the Greek legislator in Article 10 of the Civil Code, Greek courts' precedents⁴[16], as well as Greek bibliography⁴[17] confirm that the *lex fori* of legal persons derives from the law of their seat⁴[18]. The major problem concerning the interpretation of this doctrine [19],⁴as applied in Greek legal theory and practice, derives from the failure of Greek laws to clarify whether the legislator wanted to relate the *lex fori* of a company to its statutory seat (the one declared in its Articles) or to its true seat⁴[20]. As the Pireus Court of First Instance 1152/1969 (Introductory Report) noted, "the seat of the company is the location, where its administration really takes place and not the location stated in the company's Articles of Association". The Greek Supreme Court 46/1905 and Krispis⁴[21] also note that the *lex fori* of public companies limited by shares is determined by the location where:

- a. basic decisions on the company's actions are reached;
- b. basic guidelines and orders for the company's operation are produced;
- c. the company's control is exercised;
- d. the results of the company's operation are gathered.

The question arising at this point concerns the status of a foreign public company limited by shares, which was not legally founded (under its *lex fori*) yet operated a branch or agency in

Greece. According to Pireus Multi-member Court of First Instance 2075/84 and Patras Multi-member Court of First Instance 2278/86, such a company is considered valid⁴[22] for the period of its functioning in Greece. However, it can not be considered a public limited company, because it has not fulfilled the legal requirements for its establishment. Therefore, it must be considered as a *de facto* partnership (a type of partnership best known in Greece as *afanis eteria*) [23].⁴ 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 generally agreed that all transactions of such companies must be considered valid. Moreover, 191/1925 of the Patras Court of Appeal provides that the rescinding of the Decree on the company's establishment does not prohibit it from demanding the compulsory execution of its debts⁴[24] in the Greek Courts of Law.

The results of the company's recognition by the Greek state are the following:

a. the foreign legal person is considered a legal entity by Greek law; and

b. the company acquires the right to present itself before the Greek courts and public authorities for the support of any disputes deriving from its legal actions and relationships (even those that took place abroad). However, judicial protection is offered under the conditions and procedure set by Greek law⁴[25] for the protection of foreign persons.

After its recognition, the company does not acquire Greek

nationality. It remains foreign and is subject to Greek laws on foreign corporate bodies. The result of the company's recognition is the permission to exercise commercial activity in Greece while maintaining the powers awarded to it by its *lex fori*.

Foreign Companies

The company's *lex fori*, determined by its *siege reel* also regulates the company's nationality⁴[26], which "represents the bond of the company to the state, whose legal status is its *lex fori*". [27].⁴If the company's *lex fori* is Greek law, the company is considered Greek. If, however, the company is bound to the legal system of another state, then it derives its nationality from that state⁴[28] and in Greece it is considered to be "foreign".

Adopting the standpoint taken by private international law's theory of the *siege reel* and Article 10 of the Civil Code, the Greek legislator included the same provision in Law 2190/20. This stipulates that "Greek public companies limited by shares must be seated in a city or community of the Greek state" (art. 6). Thus, it is assumed that companies not seated within Greece are not Greek and are considered foreign (*argumentum a contrario*). However, according to the Introductory Report of Piraeus 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 and Article 50 of Law 2190/1920 is not applicable

on their establishment in Greece".

Public Companies Limited by Shares

Law 2190/1920 rules the Greek *Anonimos Eteria*. Determining the analogous British company type is complicated in view of the radical differences between Greek and British law (the *lex fori* of British companies). The slight difference⁴[29] between English public and private limited companies⁴[30] complicates our analysis even more.

In the United Kingdom a public company limited by shares is the company, whose "members' liability is limited by the company's memorandum to the amount unpaid on their shares"⁴[31]. A public company limited by shares is:

- a. a registered company with legal personality;
- b. a public company (the company should register as such);
- c. a company limited by shares (i.e. the liability of a member to contribute to the company's assets is limited to the amount, if any, unpaid on his shares)⁴[32].

Along the same basic lines, Rokas⁴[33] defines the *Anonimos Eteria* as a commercial company which:

- a. has legal personality;
- b. its capital is divided in equal pieces, called shares;
- c. only the company, as a separate legal person, is liable for its debts; the shareholders in the company are liable only to the extent of whatever amount remains unpaid on their shares.

From the above, it seems that British public companies

limited by shares correspond to the Greek *Anonimos Eteria* [34].⁴ The EC harmonization of national company laws has prompted examination of the subject of the relationship between the United Kingdom "Public Company Limited by Shares" and the civil law type of company, which in Greece is called *Anonimos Eteria* [35].⁴ The result of this research as well as the terminology used in the relevant EC Directives supports the view that these two company forms are analogous⁴[36].

Consequently, only companies belonging to the category of Public Limited by Shares, or *anonymes* or *Aktiengesellschaften* are subject to Law 2190/1920.

Definition of "Branch" and "Agency"

After determining the type of companies whose establishment is regulated by Law 2190/1920, we shall analyse the two forms of establishment in Greece: branches and agencies.

According to Greek legal theory neither branches nor agencies constitute legal entities⁴[37] separate from the foreign company that followed the procedures for their establishment in Greece⁴[38]. Consequently, branches and agencies act and enter into contracts in the name of the main company. Branches and agencies are types of permanent establishment⁴[39]; this characteristic distinguishes them from "representatives"⁴[40].

Although branches and agencies seem identical legal forms, their difference lies in their relationship to the main office. Georgakopoulos⁴[41] notes that the agency's relationship to the

company's seat (ruled by commercial law) indicates a commercial representation, whereas the branches' relationship to the company's seat (ruled by civil law) indicates an employer-employee bond⁴[42]. However, both forms of establishment have their own employees and material establishment (address). They also have identical rights and obligations. According to Courts' precedents, agency is the office, which conducts business in a specified location⁴[43]. The agent is a merchant (Commercial Law, art. 2), a characteristic distinguishing him from the representative, who acts in the name of a merchant as his employee⁴[44].

Experts on Greek international law agree that branches and agencies inherit the main company's *lex fori*, due to their lack of legal personality⁴[45].

This leads to a consideration of any jurisdictional difficulties which may arise. It is argued that cases deriving from the activity of the branch or agency in Greece may be judged by Greek courts⁴[46]. Thus, the formal legal obstacle of the branch's lack of legal personality (that could lead to its inability to present itself before Greek courts) is put aside by the need of third parties to be able to sue the company in Greece. This regulation protects the branch as well as third parts dealing with it, because it prevents them from following an unknown judicial procedure and meet the high expenses of suing the branch in the courts of the state where the main company is seated.

After the analysis of the substantive requirements for the

establishment of foreign companies in Greece, we shall look closer at the formal conditions.

Copy of Representation Document

In order to become formally recognized the companies must submit to the Ministry of Commerce a copy of the document of representation of their agent or representative ratified by the Greek Consulate; this document should include:

- a. appointment of a person authorised to accept service of documents on behalf of the company;
- b. the year of the company's formation; and
- c. the names of its representatives at seat (Article 50).

The first issue to be analysed concerns the elements of the "document of representation" ⁴[47]. The vagueness of the Law concerning the form of the document allows several interpretations of the legislator's will, who regulated this issue in Article 11 of the Greek Civil Code. As Fragistas notes, Article 11 regulates that several national laws can be applicable for the determination of the document's form⁴[48]:

- a. the law of the state, where the interested parties declare their will to enter into the contract (*locus regit actum*), as the representation is a unilateral declaration of legal will; or
- b. the *lex patriae* of the represented company, i.e. the company's *lex forum*; or
- c. the law of the state where the branch is located⁴[49],

i.e. Greek law.

The law chosen by the company is important because it regulates the form of the document, its content and the extent of the representatives' powers⁴[50].

In case of the establishment of an agency the document, ratified by the Greek Consulate⁴[51], should also include the appointment of the company's representative, whereas when establishing a branch, the company must submit a document, naming the person responsible for the functioning of the branch⁴[52].

Moreover, the document must include the appointment of a person authorised to accept service of documents. Providing an exemption to the general rule of Article 142 of the Greek Code of Civil Procedure -which requires official declaration of the the attorney receiving service of documents to the Secretariat of the Athens Court of First Instance- Article 50 of Law 2190 requires only the submission of the document of representation to the Greek Ministry of Commerce. Theodoropoulos⁴[53] 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.

The document must include the year of the company's foundation and the names of the company's representatives at its seat. This regulation prohibits a foreign company not yet founded abroad from establishing in Greece. Moreover, it offers security to the 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 company itself, if suing the branch is impossible. "Representative of the company at its seat" is "the member, who according to the company's Articles expresses the will of the company as a legal entity and represents it in front of the Courts of Law. Their relationship is an organic representation" [Council of the State 4815/1983].

Before concluding the analysis on the conditions for the establishment of branches or agencies of foreign public companies limited by shares in Greece, we shall refer to two additional conditions set by other Greek laws.

Other Conditions

First, as the legislator expressed categorically in Article 4a of Law 2190/1920, "the public company limited by shares is invalid, if its aim is either illegal, or opposite to the Greek public order" [54]. Thus, "the Greek Minister of Commerce has the right to reject the company's petition for permission to establish in Greece, if it is judged that the company's activities and aims as stated in the company's Articles are prohibited in Greece" [Council of the State 3395/1971]. Even if only some of the company's activities are illegal under Greek law, the Minister of Commerce has the right to prohibit the company's establishment. As this regulation (voted to protect Greek public order) is valid for Greek and foreign companies, it is not

discriminatory against foreign companies [Council of the State 3395/1971].

Second, under Article 1 of the Presidential Decree 16/22. 1.1930, 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. From the combination of the above Decree and Law 2190/1920 it is inferred that only after the publication of the Minister's Decision^[55] is the company legally established [Council of the State 3395/1971]. The refusal of the Minister to publish his decision -preventing the company from establishing in Greece- is an administrative act, against which any interested party may appeal to the Council of State.

This concludes our reference to the conditions set by Greek law for the establishment of branches or agencies of foreign companies. Before proceeding to further analysis, we must state that the aim of Law 2190/1920 is twofold:

- a. stipulation of a simple procedure for the establishment of foreign companies in Greece, and
- b. regulation of a status protective for both the Greek public and the foreign companies themselves.

Greek law protects foreign companies from the bureaucratic procedure regulating 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^[56]. On the other hand, the attention

given to the legality of the company's establishment⁴[57] combined with the need for the publication of the Ministerial Decision indicates the second aim of the Law, which is the protection of the Greek public and the third parts⁴[58]. The surprising longevity of this old commercial law is probably due to the rigidity of the legislative procedure in Greece and the fact that the basic reasons for the passing of the Law still prevail.

B. LAW 89/67 ON THE ESTABLISHMENT OF COMMERCIAL/INDUSTRIAL OFF-SHORE UNITS

In spite of Law's 2190/1920 initial efficiency, the desire of the 1967-1973 dictatorship to lure foreign companies to Greece (in order to use capital imports for internal propaganda and the stabilisation of Greek economy) led to the implementation of Law 89/67⁴[59]. Law 89/1967 provides for foreign companies wishing to use their Greek office exclusively for the supervision of their commercial activities abroad to establish in Greece⁴[60].

Law 89/1967 applies to all types of foreign companies, including public limited companies. The analysis of Article 1 of this Law and the determination of the law applicable to the establishment of foreign public companies limited by shares -the older but special Law 2190/1920 or the general but more recent Law 89/1967- will be the subject of our analysis.

Presentation of Law 89/1967

Article 1 of Law 89/1967 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 relevant petition, submitted to the Service for External Capital (*Ipiresia Kefaleon Exoterikou*) must include a declaration of the nationality of the company, the type 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 Greek branch's administrator. The company must also submit a surety from a recognized national or foreign bank, which shall forfeit in favour of the Greek State, if the company's staff breaks any of the above regulations. The Minister decides on the petition for establishment within eight days.

Foreign Companies of any Type Functioning Legally at their Seat

Law 89/67 applies to foreign companies, i.e. companies, whose *siege reel* [61] lies in a country other than Greece. Foreign companies are considered valid, provided they are legally founded according to their *lex fori* [62]. The recognition of foreign companies, even if the procedure for their formation differs from the one required by Greek law, is another expression of the theory of *ipso jure* recognition [63].

The legislator's will to attract the largest possible num-

ber of companies, led to the stipulation that Law 89/67 applies to all known forms of commercial/industrial companies. 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 respective Minister lacks the authority to determine whether the company belongs to a type known to Greek law⁴[64]. However, the Minister may inquire of the company's legal formation and functioning at its seat, in order to protect the Greek public from fraudulent companies⁴[65]

The Activity of Foreign Companies under Law 89/67

Another problem concerns the determination of "commercial/industrial companies"⁴[66], as this term is new to Greek legal theory⁴[67]. This broad term (by Greek standards) indicates the legislator's intention to apply this law on the majority of foreign companies in Greece⁴[68].

Rokas defines "commerce" as every activity⁴[69], whose aim is profit and "commercial" as the companies which act as mediators between production and consumption. The aim of the legislator who stipulated this term, was clearly not to distinguish between civil (a type of partnership regulated mainly by the Civil Code) and commercial companies (partnerships and limited companies) [70].⁴ The legal nature of the company is regulated by another provision of Law 89/67, stipulating that foreign companies wishing to establish in Greece under Law 89/1967 may belong to all types and categories of companies. The

legislator clearly refers to the activity of the company. If the company's activity (as described in its Articles) is trade, the company is characterized as commercial⁴[71].

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 specialized machinery and staff is essential⁴[72]. Although the characterization of a company as industrial derives mainly from the declaration of the company's aim and activities in its Articles⁴[73], the latter must be able to prove the reality of its declaration with proof admissible to the Greek Courts⁴[74]. Thus, it can be stated that the activity of foreign companies establishing under L.89/67 may belong to either of the above two categories (commerce or industry) or be a mixture of both⁴[75].

Furthermore, the company's activity must exclusively be "the execution of commercial business, located outside the boundaries of Greece". The interpretation of this phrase is given by Article 2 and 3 of the Ministerial Decisions approving the establishment of foreign companies in Greece under Law 89/67, according to which "the branch, office or agency will deal exclusively with the coordination, supervision, control, observation and promotion of the company's activities that take place outside Greece". Conducting commercial business within Greece is "categorically forbidden"⁴[76]. This type of arrangement is described as "off-shore" and involves companies whose capital and activities are located outside of the country of

their establishment. Again this regulation is an expression of the government's desire to attract foreign companies⁴[77].

Petition of the Company and Suretyship from a Recognized Bank

According to Law 89/67, foreign companies wishing to establish under its terms in Greece must submit⁴[78] a petition for establishment and (after the approval of the petition) a document of suretyship from a recognized bank.

The petition must include the 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 office, branch or agency. The company must also declare within two months the name of an attorney authorised to accept service of documents.

The suretyship is forfeited in favour of the Greek State [79],⁴if the company or its personnel violate the conditions of its establishment or Greek taxation laws (Laws 378/68, 27/75, 1262/82 and 160/83). The suretyship document certifies the bank's parallel liability for the company's debts to the Greek State up to the amount stated in the document⁴[80]. 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 itself and this procedure proved fruitless" [Pireus Single-member Court of First Instance 1026/86]. The bank's objection to pay is inadmissible, if the execution against the company is obviously useless [Athens Court

of Appeal 3196/83]. In any case, the Minister^L[81] must decide on the company's petition for establishment in Greece within eight days.

Other Conditions

Apart from the conditions set by Law 89/67 there are some additional conditions for the establishment of foreign companies in Greece, set by Greek legal theory and legal texts.

First, the company is legally established only after the publication of the Ministerial Decision on the approval of the company's petition. Only then does the branch, agency or office begin to exist and "enjoy" tax and import privileges^L[82]. The publication's date is the date of the actual circulation of the relevant Government Gazette's issue and not the formal date printed on the issue^L[83].

Second, the establishment and functioning of the company is prohibited^L[84], if its object is unlawful or contrary to public policy (Article 33 of the Greek Civil Code). However, this prohibition is limited to the cases that the object of the company is prohibited by a Greek law set to protect exclusively the Greek public or vital Greek interests^L[85].

Third, as Law 4310/1929 prohibits foreign natural persons from working without permission; the company must submit^L[86] formal documentation issued by the Greek authorities, permitting the company's agent or representative to work in Greece [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 EC nationals.

The Choice of the "Right" Law on the Establishment of Companies

Having analysed Law 2190/1920 and Law 89/67 it becomes apparent that commercial/industrial public companies limited by shares are subject to both Laws. The problem arising at this point concerns the choice of the "right" law in each case^L[87]. The issue has more than theoretical significance. Aside from the practical (procedural) difficulties which this "duality" can and does pose for foreign companies wishing to establish in Greece, the problem becomes more complicated for companies, whose *lex fori* is radically different from Greek law, i.e. British companies. The latter are called to choose between two forms of establishment, both regulated by a legal system completely different from the one of their *lex fori*.

According to the principle^L[88] of *lex posterior derogat lex priori*, Law 89/67 as a newer law might have implicitly abolished the older Law 2190/1920, as far as the establishment of foreign commercial/industrial public limited companies are concerned. 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) and, according to the principal of *lex posterior generalis non derogat legi priori speciali* [89],^Lthe newer but general Law 89/67 does not abolish the older but special Law 2190/1920. Moreover, Art.4

of Law 89/67 categorically provides that it does not abolish Law 2190/1920. Since both laws are legally applicable in the case of establishment of commercial/industrial public companies limited by shares, the choice of the "right" law must be based on other criteria.

Indeed, the choice of the "right law" must be based on the activities that the Greek establishments of foreign companies are to deal with in Greece. Although Law 2190/1920 does not prohibit (and therefore allows) any activity within and outside Greece, Law 89/67 prohibits the Greek branch or agency's engagement in commercial business in Greece [90]. Consequently, if the company's Greek establishment aims to execute commercial transactions within Greece, the foreign company must follow the procedure introduced by Law 2190/1920. However, if the activities of the Greek establishment are limited to the coordination and control of the company's activity abroad, Law 89/67 is applicable.

To conclude, one may state that Law 89/67 is applicable in the following cases:

a. establishment of branches or agencies of foreign commercial/industrial companies of any type or form establishing in Greece solely for the coordination of their business abroad; and

b. establishment of foreign commercial/industrial public companies limited by shares, when the branch's activity exclusively deals with trade abroad.

Law 2190/1920 is applicable in the following cases:

a. establishment of foreign public companies doing business

within and outside Greece;

b. establishment of all commercial/industrial public limited companies not subject to Law 89/67.

Law 89/67 creates ideal taxation and commercial status for all companies establishing in Greece and ensures their favourable treatment⁴[91]. Its efficiency is proved by the large number of foreign companies establishing in Greece⁴[92]. Foreign companies prefer the status of Law 89/67 from that offered by Law 2190/1920, because their main interest is clearly not commercial activity within Greece, but the supervision of their international trade.

C. SUBSIDIARIES

After the analysis of the conditions for the establishment of branches, agencies and off-shore units of commercial/industrial public companies limited by shares, we shall discuss another form of establishment: subsidiary companies. In spite of its common use in the majority of developed countries, and certainly within the EC, Greek legal theory and commercial practice is unfamiliar with this form. This is most probably due to the long, complicated procedure set for such establishment and the lack of taxation and other advantages. A further disadvantage of this form of establishment concerns the Greek regime on the export of the companies' profits and capital: the relevant Greek laws prevent the export of more than 10% of the companies' capital and 12% of their annual profits. Although Act

2022/28.1.92 of the Director of the National Bank of Greece abolishes the above limitations for a period of one year, the relevant restrictive laws have not been abolished and the regime applicable after the Act's expiry date (31.12.1992) is far from certain^[93].

These disadvantages combined with the limited (in terms of volume) commercial activity in Greece lead foreign companies towards the creation of branches, agencies or off-shore units, which present remarkable advantages compared to subsidiaries. However, after the implementation of Presidential Decree 409/1986 (adopting Directive 83/349/1983 of the EC Council), which sets the basis for the harmonization of Greek with EC law and the modernization of Greek law on subsidiary companies, the frequency of their establishment is increasing. In this respect, the analysis of this issue is noteworthy, especially in view of the lack of relevant research in Greece.

Definition

Presidential Decree 409/1986 (which supplemented Law 2190/1920^[94] on the establishment of public companies limited by shares by the addition of paragraph e5, article 42) stipulates that a company is the subsidiary of a parent company, if the latter controls the majority of the subsidiary's shares or exercise a dominant influence over its administration, either directly or through third parties (accumulation principle).

A parent-subsidary relationship exists when the parent

company:

a. controls at least 50% of the votes of the subsidiary's shareholders or members, either by ownership or by authorization of third members⁴[95];

b. controls the majority of shareholders' or members' votes through an agreement for cooperation with third parties;

c. participates in the capital of the subsidiary and has influence in the appointment and removal of the majority of the subsidiary's directors; and

d. exercises dominant influence over the subsidiary, i.e. possesses at least 20% of the votes and influences the subsidiary's management⁴[96].

Nationality of the Subsidiary

It is widely agreed that the subsidiary, albeit dependent on its parent company, has its own legal personality⁴[97]. The problem arising at this point concerns the nationality of the subsidiary. Rokas⁴[98] notes that the latter must be considered a separate Greek company, because its seat is located in Greece. This view is enforced by the legislator's categorical regulation that Presidential Decree 409/1986 on the harmonization of Greek with EC law on subsidiaries supplements Article 42 and not article 50 of Law 2190/1920 (on the establishment of foreign companies), thus indirectly characterising foreign subsidiaries as Greek companies.

The subjection of subsidiaries to article 42 would be na-

tural if Greece followed the theory of incorporation. In that case, the subsidiary -registered in Greece and incorporated there- would clearly be Greek. However, the implementation of the *siege reel doctrine* by the Greek legal system leads to a contrast. Subsidiaries are controlled or dominantly influenced by their parent company and consequently their *siege reel* lies in the state where the parent company is seated. Since we are referring to the subsidiary of a foreign company, the subsidiary should normally be considered foreign. Thus, the stipulation that foreign subsidiaries must be considered Greek is a profound violation of the general rule of Article 10 of the Greek Civil Code on the application of the *siege reel* doctrine. The lack of a categorical stipulation on this issue led Pamboukis⁴[99] 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 Article 50 of Law 2190/1920 on foreign companies.

Following the analysis of this issue, it is clear that Presidential Decree 409/1986 (as a newer and special legislative text) derogates from Article 10 of the Civil Code in the case of the establishment of subsidiaries. Although Pamboukis would be right to apply the prevailing theory of the *siege reel*, by doing so in this particular case, Pamboukis contradicts the expressed will of the legislator which is to treat subsidiaries as Greek companies⁴[100]. In view of their Greek "nationality" subsidiaries need not seek recognition under Greek law. Moreover, as far as the conditions for their establishment are concerned,

they are formed according to Greek law under the procedure regulated by Law 2190/1920 on the formation of Greek companies.

Conditions for the Establishment of Subsidiaries

In order to form a subsidiary public company limited by shares four stages of incorporation must be completed:

a. adoption of the company's Articles of Association, which is a transaction under the form of a "notary" document⁴[101] between two⁴[102] natural or legal persons (Law 2190/20 art.4a, par.1c; art.8, par.1) or their representatives;⁴[103]

b. subscription of the share capital (the Law indicates two ways for the company's formation: either the founders keep all the shares, or a number of them is offered to the public ("public subscription"), who can pay for them in a bank between the signing of the company's statutes and the third stage of the company's formation;

c. administrative authorization (after administrative control of the company's legality and expediency⁴[104], the respective County governor [Legislative Decree 532/1970] permits⁴[105] the establishment of the company); and

d. publication (Legislative Decree 406/86 imposed the harmonization of Greek Company Law with the regulations of the relevant EC law: the company must include the permission for its establishment and its Articles of Association to the Registry of Public Limited Companies, as well as publish a notification of the above registration 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, because only published regulations of its Articles of Association are admissible to the Greek Courts^L[106] as submissions on behalf of the company [Art. 7b, par.14, no 2,3 of Law 2190/1920]. However, third parties may rely on all particulars (published or unpublished), that have been entered in the Register. It should also be noted that modifications of the company's Articles are published according to the same procedure.

Evaluation of Greek Law on Subsidiaries

It is clear that the procedure followed for the establishment of subsidiaries of foreign companies (which is identical to the one followed for the establishment of Greek companies) is very complicated compared with the one stipulated for branches, agencies and off-shore units, where only the last two formation stages are necessary. The extent of state administrative control on the formation of subsidiaries is broad compared to that exercised on the formation of branches, agencies and off-shore units. The latter are established with the legal authorization of the respective Ministers (officials hierarchically superior to the governor, who permits the establishment of subsidiaries. This is due to the fact that the legality of a subsidiary is

already supervised by the notary on the first stage of formation. The formal control of the legality of the company can be effectively done by the governor. On the other hand, the legality of the establishment of branches, agencies and off-shore units is supervised solely by the central administration and the scrutiny of its administrative instruments is necessary. The publication of the granting of the company's establishment and its Articles -imposed to all forms of establishment- covers the need of third parties to be sure of the company's legality and allows familiarity with the basic provisions of its Articles.

It should be noted that the Greek authorities may not decline permission of establishment to a foreign company without sufficient legal justification. When the company believes that the refusal of the Greek authorities is illegal or that the justification provided is inadequate or incomplete, the company or its representatives may bring the matter before the Greek administrative courts. The latter may abolish the relevant act of the Minister or the governor and order the Greek authorities to issue an act permitting the company's establishment.

CONCLUSIONS

Greek Company Law regulates three basic forms of establishment of foreign public companies limited by shares in Greece:

- a. branches or agencies (ruled by art. 50 of Law 2190/20);
- b. off-shore units (ruled by Law 89/67); and

c. subsidiaries (ruled by art. 42 of Law 2190/20).

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 legally establishing in Greece- must be recognized by Greek law. Although no prerequisites are set for their recognition (theory of *ipso jure* recognition), foreign companies (especially those, whose *lex fori* applies the incorporation theory) face serious problems in determining their *lex fori*, as Greece follows the *siege reel* doctrine. It is thus possible for a British company to be considered Greek or German, under Greek private international law. This is not only a theoretical issue: the company's *lex fori* regulates not only its nationality, but also its legal formation, its external and internal relations. Thus, the British company in our example may be considered invalid (for not following the Greek or German formation procedure), or its legal relations with other persons (transactions, agreements, etc.) may be ruled by Greek or German law. In either case, the functioning of the company in Greece would be difficult. However there are two exceptions to the rule of the theory of the seat. The following categories of companies are ruled by the law of their statutory seat:

a. maritime companies; and

b. subsidiaries (Law 2190/1920, as modified by Presidential Decree 409/86)..

There is no doubt that the theory of the *siege reel*, as applied in Greece, can hinder the legal establishment of foreign

companies. However, it does prevent companies from exploiting favourable aspects of the law without reciprocation. Since Greek law tends to be highly protective as far as the state's interests are concerned, the theory of the *siege reel* would be the one expected to prevail. However, the provision of the above two exceptions is an indication of the legislator's acceptance of the theory's limitations, at least in the case of subsidiary and maritime companies, and is an attempt to protect such companies from these limitations.

The procedure stipulated for the establishment of branches, agencies and off-shore units in Greece is fairly simple and brief. The protection of foreign companies from the bureaucratic formation procedure imposed upon Greek companies and the favourable status provided for foreign companies, indicates the aim of the legislator, which clearly is the attraction of foreign companies. What is anomalous, however, is the difference in the treatment of subsidiary companies.

The conditions set by Greek law on the establishment of Greek subsidiaries of foreign companies form a complicated and time-consuming procedure, which can have negative effects on the number of foreign companies wishing to establish in Greece. Indeed, high taxation and the ambiguous Greek regime on the export of the companies' profits abroad imply that the Greek legislator chose to attract the non-incorporated presence of foreign companies in Greece. 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 autonomous (at least legally) subsidiaries may pose a danger to the persons that do business with them. However, this view ignores the fact that, in practice, subsidiaries are also financially and organically dependent on their (usually successful) parent companies.

To conclude, it can be stated that Greek law on the conditions for the establishment of foreign public companies limited by shares has adapted to contemporary needs of foreign companies and is effective. However, certain regulations need to be modified: regulations aimed at the protection of state interests must be replaced by stipulations aiming at protecting foreign companies. Thus, instead of targeting the establishment of foreign companies in Greece, the Greek state should start concentrate on their legal and unhindered functioning.

FOOTNOTES

[1] For the full text of Law 2190/1920, see appendix 2.

[2] 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, Article 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.

[3] See Streit-Vallindas, *Private International Law*, (1937, Sakkoulas, Athens), p.90.

[4] Jadaud and Plaisant, *Droit de commerce international*, (1991, Dalloz, Paris), p.34, note that the issue of recognition is analysed in the following two questions, which -at least in France- have affirmative answers:

a."...Do we accept the existence of foreign companies?"; and

b."...Do we recognise foreign companies?".

Boukouras [*Recognition of companies and the right of their establishment in the EC*, (1984, Sakkoulas, Athens), pp.29-30] sets the same questions. Considering that the answer to the first question is obvious, Boukouras notes that "...there is no doubt that the first question must have an affirmative answer".

[5] See Krispis, *Legal persons and plcs in specific in Private International Law* (1950, Sakkoulas, Athens), p.7.

[6] Before 1946, the problem of the recognition of foreign companies in Greece was the subject of numerous scientific debates, prompt to to Laws XΠA/1861 and KA/1881, which stipulated that French companies had the privilege to establish freely in Greece without the need for further recognition by the Greek law. A few legal experts [Spiropoulos, *Private International Law*, (1938, Sakkoulas, Athens), p.187; Fragistas, [*Representation of foreign companies limited by shares*, (1940, Athens), p.281] and Court's decisions [Athens Court of Appeal 1002/1892, 1137/1898, 1416/1911 and Patras Court of Appeal 789/1896] expressed the opinion that the *ipso jure* recognition applied exclusively to French companies. On the other hand, there were others [Streit-Vallindas, op.cit.] who, considered the Laws' reference to French companies indicative and applied the *ipso jure* recognition to all entities.

Megglidou ["On the establishment of foreign companies in Greece", [1971] Armenopoulos, pp.204-208, 202] notes that "...The *ipso jure* recognition was a theory based on certain regulations of Greek law [Art.13 Civil Law of 1856, Art.28 of the Code of Civil Procedure, applicable only to natural persons,

but applied to legal entities and especially commercial companies, too. Regulations X/TA/1861 and KA/1881 violated the rules of Greek legal system concerning foreign companies".

After 1945 the vast majority of the courts' precedents follow the theory of the *ipso jure* recognition of foreign companies [Thessaloniki Court of First Instance 4911/65; Thessaloniki Court of First Instance 4868/60; Council of the State 3395/71; Plenary Meeting of the Council of the State 722/54; and Supreme Court 406/67].

[7] For the full text of Article 10 of the Greek Civil Code see appendix 3.

[8] 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."

[9] For further analysis of the Greek legal system and the structure of Greek courts, see appendix 1.

[10] 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 the Greek law in addition to the ones stipulated by the law of the company's seat".

[11] See Dizis, *Precedents of Commercial Law 1845-1933*, 1933, Athens, p.133.

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

[13] Krispis, *op.cit.*, p.31; Wooldridge, *Company Law in the United Kingdom and the European Community, Its Harmonization and Unification* (1991, The Athlone Press, London and Atlantic Highlands), p.137], Boukouras [*op.cit.*, pp.29-40], Cath ["Freedom of establishment of companies: a new step towards completion of the Internal Market", [1986] YEL pp.249-252], Jadaud et Plaisant [*op.cit.*, pp.39-41], Goldmann [*op.cit.*, 1973, pp.187-190] and Perakis [*Law of the Public Limited Company*, (1992, H. Karatzas Legal Library, Athens), p.435].

[14] See Goldmann, *European Community Law* [(1973, Stevens and Sons, London), p.69].

Megglidou [*op.cit.*, p.201] notes that "the theory of incorporation is adopted in the Treaty of Friendship between Greece and the U.S.A. signed in Athens on 3.8.1951 and ratified by Law 2893/1954, [and in] the treaty between Greece and Argentina signed in Buenos Aires on 23.11.1938 and ratified by Law 1939".

[15] The controversy between the theory of the seat and the theory of incorporation basically lies in the issue of the extent of commercial liberalism of the respective national legal system. If the respective national legal system is liberal, then it offers the companies the right to decide freely and determine without legislative interference their *lex fori*. If, on the other hand, the respective legal system tends to be conservative at times, this right is offered not to the interested party (the company), but to the respective national law. Usually, the justification for this deprivation is public order (a notion found in all international legal texts concerning recognition and establishment).

[16] Decision of the Supreme Court 461/1978 ["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 ["The nationality derives by the state, where a company is seated"]; see also Athens Court of Appeal 117/1982; Supreme Court 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; Supreme Court 1070/76; Supreme Court 59/1989; Pireus Court of Appeal 1633/1989; Athens Court of Appeal 2135/1987; Pireus Multi-member Court of First Instance 494/1987; Supreme Court 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; Supreme Court 616/1976; Supreme Court 439/1954; Supreme Court 21/1934; Supreme Court 171/1907; *contra*: Supreme Court 358/1966.

[17] Dizis [op.cit., pp. 128-133]: "The nationality of a company is judged by the state, where its main office is located"; Voutsis [*Companies of Commercial Law*, (1986, Sakkoulas, Athens), p. 138: "Criterion of the nationality of a public company limited by shares is mainly its seat"; and Megglidou [op.cit., p.201]: "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".

[18] The theory of the seat is widely supported in France [Jadaud et Plaisant, op.cit., p.35], Cyprus [Irakleous, *Companies and real insurance*, (1988, Nicosia), p.96] and Germany [Wolff, 1954, p.115].

[19] Krispis [op.cit., p.64] mentions that the "seat of the company is not a legal term, but a fact. This means that there is no legal text stipulating a rule to be followed by a judge wishing to determine where the seat of a company is located; in order to achieve this, the judge has to order the litigants to prove their allegation regarding on the seat's location with facts during a separate proceeding".

[20] Some commentators fail to see the distinction between the statutory and the true seat of the company, as the law demands an accurate declaration of the company's true seat in its Articles. Krispis [ibid, p.72] notes that "we should not distinguish between the true and the statutory seat of a company, but between the true and the fictitious or circumvented -*in fraudem legis legis agere*- seat". However, the precedents of the Greek courts and most legal authors have a different view.

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. A company has to choose between the law imposing lighter taxation and the law attributing it more freedom. The company must also lie in a flourishing market. The problem is that all advantages rarely appear in one country. In any case, the law is not always followed in practice. As the role of legal theories and the courts' decisions is mainly the clarification of the law and the adaptation of the legislator's will to contemporary needs, a teleological interpretation of this regulation is necessary.

[21] See Krispis, op.cit., p.61.

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 centre 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 [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 *siege reel* [Streit-Vallindas, Dizis, Maridakis, Pamboukis, Levandis] and decisions [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 etc.).

[22] Athens Court of Appeal 175/1988: "...Foreign aviation company functioning in Greece may be legally sued in the Greek courts, even if it has no independent legal personality according its *lex fori* [Code of Civil Procedure, Art.66]. Only in the extreme case that, according to its *lex fori* the foreigner wishing to present himself in front of 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."

[23] This view is based on the principal of Greek Company law, according to which the formation of a partnership consists of a limited number of legal actions, whereas the formation of a

public company limited by shares requires many public documents as well as legal actions.

[24] 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 (Krispis, *op.cit.*, p.103).

[25] See Krispis, *op.cit.*, p.21.

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."

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 the Greek law in addition to the ones stipulated by the law of the company's seat".

[26] Vrellis [*Private International Law*, (1988, Sakkoulas, Athens), p.99: "...The nationality of legal persons is analogous to the nationality of natural ones..."

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

[28] See Jadaud and Plaisant, *op.cit.*, p.34

[29] The clarification of this problem is important, due to the implementation of Law 3190/55 [Art. 57-52] regulating the conditions for the establishment of branches or agencies of foreign private limited companies - known as *Eteria Periorismenis Efthinis*. According to this law, companies must comply with one of the Greek company forms.

[30] Georgakopoulos [*op.cit.*, 1985, p. 362: "...Distinguishing between a public and a private limited company can be extremely difficult in British Company Law; in Britain both companies are called limited; their difference is that the first is called public, whereas the second is called private." The almost uniform provision of the British legal system on public and private companies limited by shares, as opposed to the attempt of the Greek legislator to distinguish the two company forms and the conditions for the establishment of companies of each type in Greece, led L. Georgakopoulos [*ibid*, p.362] to note, that there is really no point in maintaining two different legal statuses for the regulation of two similar cases.

[31] See Oliver, *Company Law* (1987, Longman, London), p.25.

[32] Morse in *Charlesworth and Morse Company Law* (1991, Sweet and Maxwell, London), p.45 notes that "A company which is not a public company is a private company. Thus the private company is the residual class of companies, without any special requirements. This is a complete reversal of the position prior to 1980 whereby all companies were public companies unless their articles contained three restrictions: viz. as to the transferability of shares, the number of members, and invitations to the public to invest in the company: 1948 Act, s.28, repealed by the 1980 Act. The reason for this change was the necessity to define more clearly the public company category so that the United Kingdom's obligations under the Second EC Directive (control of the finances of public companies) and subsequent directives could be applied only to such companies."

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

[34] 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*."

[35] The Proposal of the Fifth Directive on the structure of public limited companies stipulates that it applies to:

- a. "public limited companies" in the U.K.;
- b. *Societe Anonyme* in France; and
- c. *Aktiengesellschaft* in Germany.

From the above one may conclude that the Directive treats these three national company forms as analogous. Similar reference are made by Directive 77/91/EC.

Analogous companies in other EC member states are:
Societe Anonyme-naamloze vennootschap in Belgium;
aktieselkebet in Denmark;
societe anonyme in Luxembourg;
societa per azioni in Italy;
naamloze venootschap in the Netherlands;
public company limited by shares in Ireland;
sociedad anonima in Spain; and
sociedade anonima de responsabilidade limitada in Portugal.
[See Perakis, op.cit., p.437].

[36] 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), p.106 notes that "Due to differences in legal tradition, private and public companies in the U.K. are not completely equivalent or analogous to private and public companies on continental jurisdictions".

[37] As Georgakopoulos states [*Company Law, Volume III: The public company limited by shares*, (1972, Sakkoulas, Greece),

p.135] 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".

[38] As Kribas [*Commercial Companies*, (1986, Sakkoulas, Athens), pp.137-138] notes: "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".

Krispis [op.cit., p.29] agrees: "Various legal relationships develop between the company's seat and its branch functioning abroad. However, in all possible cases, the branch is never a legal entity".

Georgakopoulos expresses the same opinion [op.cit., 1972, p.135].

Several Courts' precedents confirm that neither the branch [Athens Court of First Instance 6857/77] nor the agency are legal entities.

[39] Krispis [op.cit, p.25] : "...the activity of a foreign corporate body in Greece can take the form of a more permanent establishment, either as a branch or an agency...".

[40] 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" [Athens Court of Appeal 5779/1982].

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

[42] In the case where staff working in the company's established office are not considered employees, but authorised representatives, then this office is an agency. Still, the office must deal with customers and exercise independent commercial activity; if this is not the case, then the legal relationship is either simple representation or mandate [Georgakopoulos, op.cit., 1972, p.135].

[43] See Supreme Court 179/1936, Athens Court of Appeal 1088/1908.

Perifanakis [*Company Law*, (1956, Sakkoulas, Athens), p.96] 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".

[44] The decisions of the Supreme Court 55/1945 and 145/1947 provide, that "an agent acting exclusively as a company's or a merchant's employee, without exercising independent trade, is not a merchant". In order to clarify this point, one may cite the following two examples from caselaw:

a. The "agent" of some aviation companies is their employee [Thessaloniki Court of Appeal 419/1955] and is not considered as a merchant according to Greek Commercial Law, whereas

b. the travel agent exercises trade and is therefore considered a merchant [Supreme Court 284/1935].

[45] See Spiropoulos, *op.cit.*, p.187.

[46] This opinion is expressed in 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 [Article 25, par.2 of the Code of Civil Procedure and Article 51 of the Civil Code]".

[47] It must be noted at this point, that the submission of this document is necessary for the establishment of all types of foreign companies wishing to establish in Greece [Law 3190/1955, Presidential Decree 400/1970].

[48] For the full text of Article 11, see appendix 3.

It should be stated that Fragistas, *op.cit.*, p.281 notes: "The representation document provided by the foreign public limited company to its representatives in Greece is valid, provided that one of the following three national laws are followed:

- a. The law of the state, where the representation was given
- b. The law of the company's seat; and
- c. Greek law.

Furthermore, this law (Greek law) 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."

[49] Megglidou [*op.cit.*, p.206] notes: "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 the form of public document." Megglidou adds: "We may use a private document as long as it may take the form of a public one according to the law of the state of the servant, who edited it"

[50] Fragistas [op.cit., p. 283] adds: "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."

[51] Kiandos [op.cit., p.27] specifies that this ratification is valid if done by any kind of authorised Greek authority abroad, which includes the Greek Embassy, the General Consulate, any Consulate as well as any honorary Greek consul.

[52] See Kiandos, *Private Law of International Trade*, (1987, Sakkoulas, Athens), p.27].

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

[54] 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 [Civil Code 33]. 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.

[55] Kiandos [ibid, pp.28-29] notes: "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 Government Gazette. Therefore, the decision of the Minister is in force after its publication in the Gazette".

[56] Oliver [op.cit., p.24] notes: "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."

[57] 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.

[58] For the full text of Law 89/67, see appendix 3.

[59] According to the Draft of the Law, Article 50 ensures that both foreign companies and the Greek public wishing to enter in contracts with the branches are protected from persons fraudulently appearing as representatives of foreign companies or real representatives who either act without company authorization on this specific occasion, or exceed the limits of their representation. "With this article, we intend to minimize the loss of the companies in question and the loss of the Greek public, from persons appearing as representatives or agents of foreign companies and acting without or beyond their representation powers" [Proposal of Article 50 of Law 2190/1920 to the Members of the Greek Parliament].

[60] The regime's will towards the stability and continuity of this treatment led the dictators to include a relevant Article in their "Constitution" of 1968. According to Art.23, par.3 of the 1968 "Constitution", Law 89/67 and the relevant Law 378/1968 on maritime companies is not to be modified by subsequent laws. Only if the subsequent law treats the issue of the status for the establishment of foreign companies in Greece in a more favourable way, may Law 89/67 be modified or abolished. However, after the abolition of the 1968 "Constitution" Law 89/67 lost its increased value in the Greek legal system and may be abolished or modified either expressly or impliedly by another law. The fact, that Law 89/67 was not abolished by Greek governments after 1973 (as many other legal texts of the dictatorship were) and still continues to be in force, is a proof of the efficiency of this Law, "which is of utmost importance for the financial progress of Greece" [Megglidou, op.cit., p.207].

[61] In order to briefly remind the reader about the theory of the true seat in Greek Private International Law, I shall refer to a decision of the Greek Supreme Court, which summarizes the issue as follows: "...According to Article 10 of the Greek Civil Code the legal ability of the legal person is stipulated by the Law of its seat. According to this regulation that follows the so-called European theory, the seat of the company is the location of the legal person's administration. From this seat derives the company's nationality. Consequently, Greek are the legal persons whose administration takes place in Greece, even if their Articles of Association mention that the seat of the company is located out of the boundaries of the Greek state. The regulation of Article 64 of the Greek Civil Code according to which "If the Articles of Association of the legal person does not categorically refer to the location of its seat, the seat of the company is located in the country of its administration" applies only to Greek companies for the determination of their seat in Greece." ..."However, eight members of the Court had the opinion that the meaning of the term "seat" is identical to the two Articles and that consequently the seat of the company is the one mentioned in its

Articles of Association" [Decision 461/1978].

[62] 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*. Greek law applies only if:

- a. These companies have their true seat in Greece, and
- b. If they have been illegally founded according to the law of their statutory seat or if they have not followed the regulations of Law 89/1967.

[63] "Companies established in Greece under Law 89/1967 and founded according to foreign laws are not considered to be either silent partnerships or *de facto* Greek, if they have not followed the Greek procedure for their foundation" [Athens Multimember Court of First Instance 11.428/1981].

[64] In the past, foreign companies and the Greek authorities faced many difficulties trying to categorize 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 Coordination when deciding on the company's petition to establish in Greece adopts the company's type, as it is expressed in its Articles and characterized by the company's *lex fori*.

[65] 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.

From 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 have 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" [Decision IE/23636/11093], Liberian companies submit a document from the General Consulate of Liberia in Greece [Decision IE/63515/11094], American companies submit a document from the "Secretariat of Public Limited Companies" of the state where the company is seated [Decision IE/28316/11099] or the Minister of External Affairs of the State [Decision IE/27749/11098]. British companies tend to submit a certificate from the Secretary of Companies of the town where the company's seat is located ("Conarpo Limited" submitted this document from the Secretary of Companies of Cardiff).

[66] Giannitsis [op.cit., pp.59-95] notes that the conditions for the establishment of foreign banking companies in Greece are set by a large number of Ministerial Decisions and special Laws. The basic regulation however, is par.1 Article 15 of Law 876/1979 under which an Article concerning banking companies was added in Law 89/1967. Under this Article, a foreign company wishing to establish a branch or an agency in Greece must take the permission of the Greek Monetary Committee, which will determine the bank's powers, activities and conditions of establishment. The penalty for breaking any of the regulations of the Committee is the recall of the relevant permission for establishment of the company in question.

The conditions for the establishment as well as the general status of foreign insurance companies in Greece is the subject of Chapter III, Articles 20-24 of Law 400/70, which was recently modified by a number of Laws. This Law distinguishes between EC companies and companies of countries which are not members of the Community. EC companies are practically free to establish in Greece, as soon as their legal functioning in an EC country is proved. Non EC companies must take the relevant permission of the Minister of Commerce, whose decision is published in the Government Gazette.

[67] Greek commercial legal theory and legal texts distinguish between maritime, commercial, industrial, banking companies, insurance, technical, cooperative, investment-portfolio companies and football (soccer) public companies limited by shares.

[68] In order to emphasise 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.

[69] See 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: "Commercial are all financial activities, whose subject is the production, modification and the disposition of goods or services ... credit ... or navigation."

[70] Kotsiris [*Greek Company Law* (1989, Sakkoulas, Athens), p.35] refers to the substantive criterion for the classification of companies and notes: "...On the substantive criterion of the "object" of the association one classifies companies in a broad sense, as commercial or civil companies. Commercial companies are those which have as an object a "commercial undertaking". Companies formed to engage in "commercial acts" or "commercial activities" such as business are considered as commercial under art.1 of Greek Commercial Code. "Commercial acts" or "commercial 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 ship-ownership. Civil companies carry on a civil object, such as farming, home leasing and buying and selling land."

[71] 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..." [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 [Ministerial Decision IE/63515/11094 of February 1991].

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

[72] Council of the State 1147/1984 offers the determination of the industrial enterprise as follows: "...According to these Laws, industrial is an enterprise, that using a large amount of capitals, specialized machinery and staff and elaborating natural or other materials, either produces new products or improves the already existing ones by improving their quality and with the aim to offer them to further industrialization."

[73] SERVICE-MASTER MIDDLE EAST L.T.D. 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." [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 [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 [Ministerial Decision IE/52175/11095 of March 1991].

[74] 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: "...The characterization 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."

[75] 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" [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 [Ministerial Decision IE/27749/11098 of May 1991].

[76] 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 cooperation, same seat or accounting books".

[77] Giannitsis [*Foreign banks in Greece*, (1982, Gutenberg, Athens), p.106] 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.

[78] 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 Coordination. This Ministry, however, ceased to exist in 1985 and its responsibilities were transferred to various 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. Consequently, the petition of the companies must be addressed to the Greek "Ministry of National Economy, Service of Foreign Capitals".

[79] According to Megglidou [op.cit, p.207] 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.

[80] The amount of money stated in the bank's suretyship is determined by Ministerial Decisions. In 1991 this amount is determined to be \$50,000 (USA).

[81] It must be mentioned here, that after the 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.

[82] Megglidou [op.cit., p.207] states that after the publication of the Ministerial Decision in the Government Gazette other privileges may be attributed to specific companies after the relevant Decision of the Minister.

[83] Decision of the Council of the State 3289/1980 regulates: "...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."

[84] The Legal Advice of the Ministry of Commerce (by Argiropoulos St.) 1027/1983, regulates: "...the company's aim must be an insult to the Greek public order".

[85] Because 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 Article 33 of the Greek Civil Code should be "strictly" interpreted.

[86] This permission must be given before the establishment of the company's office, branch or agency.

[87] The problem becomes more complex and serious, if one bares in mind that the category of commercial/industrial companies under Law 89/67 is extremely broad, including all types of companies whose activity is commercial, industrial or something in between. In addition, public companies limited by shares are financially the most powerful type of companies, which makes them the most likely to plan supplementary establishment outside of the state of their seat.

[88] Simandiras [*General Principles of Civil Law*, 3rd edition, Semivolume A, (1980, Sakkoulas, Athens), p.91] states: "...The abolition of the 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 [Plenary Supreme Court

310/1966], or when the newer law is opposed, or incompatible to the older one. This is the case, when the newer law regulates the same issue either exclusively or in a way completely different from the previous law [Supreme Court 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." It should be noted that in British law this is known as "express" or "implied repeal of a statute".

[89] Georgiadis-Stathopoulos *Civil Code, General Principles*, (1978, Sakkoulas, Athens), pp.7-8] note: "...Newer general law does not abolish the older but special law (*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 [Supreme Court 221/48, 661/61]".

[90] 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.

[91] Julian Maitland-Walker, in the *Guide to European Company Laws* (1993, Sweet and Maxwell, London, p.189) notes 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".

[92] Even in the period of the dictatorship, which was characterized 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 [op.cit., p.207] the financial press estimated that many hundreds of companies had already established in Greece by 1971.

Furthermore, 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).

[93] For further analysis of the Greek regime on export of capital, see chapter 3. For further analysis on the legal value of administrative acts and their relationship with laws, see appendix 1.

[94] Perakis [op.cit., p.442] notes that 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.

Pamboukis [op.cit., p.25] on the other hand 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 article 50.

[95] See Rokas, op.cit., 1990, p.183.

[96] The last two conditions are added by Kotsiris in *Greek Company Law*, (1989, Sakkoulas, Athens), p.79.

[97] This view is also supported by Mihalopoulos ["Protection of creditors of subsidiary companies", (1981) 32 EED, pp.33-41, 356] and Rokas, op.cit., 1990. p.183].

[98] See Rokas, op.cit., 1990, p.16.

[99] See Pamboukis, *Introduction of a Plc to a multi-national group*, (1989, Sakkoulas, Thessaloniki), p.25.

[100] Kiandos [op.cit., p.51] 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.

[101] 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.

[102] 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.

[103] The company's Articles of Association include:

- a. the name of the company;
- b. the aim of the company;
- c. its duration (prevailing view);
- d. the seat of the company;
- e. the amount of the share capital;
- f. details on the company's shares (number, worth, type);
- g. the identity of the company's founders.

[104] 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 forma-

tion), 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 authorization 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 authorization is necessary for the company's legal formation, but the administration controls only the legality of the company [Dagtoglou, Legal Tribune 1979, p.1556]. In certain cases, however, the administration may judge on the expediency [Rokas, 1990, p.112] of the company's statutes (for example banks, insurance companies and real estate agencies).

[105] 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 [413/1950, 3167/1968].

[106] Even published regulations are admissible 15 days after their publication, if third parties can prove that they could not possibly learn about them earlier [art. 7b, par.13].

CHAPTER 2

FREEDOM OF ESTABLISHMENT

Introduction

After examining the conditions for the establishment of foreign companies in Greece, we shall now proceed to discuss the problems of recognition and establishment under EC law.

The freedom of establishment of companies from one EC member state to another is expressly dealt with by Articles 52-58 of the Treaty of Rome. The basis of the freedom of establishment lies in Article 7 of the Treaty of Rome, which prohibits "any discrimination due to nationality". It is thus stipulated that the conditions under which a company of one EC member state can establish in another must not differ from the conditions imposed by the relevant national law to domestic companies.

Equal treatment of foreign and domestic companies within the EC includes not only the companies' freedom of establishment, but also their recognition as legal entities. Indeed, freedom of establishment of foreign companies would be meaningless if these companies were not recognized in the host (receiving) country. In such a case, the unrecognized company would have the right to establish freely in another EC member state, but this right would lack practical content, as the

company would not have a legal personality [1], i.e. it would be non-existent as far as the receiving country's national law was concerned. On the other hand, if the host country is willing to recognize legal entities as such, one has to determine the legal system applied to the company (its *lex fori*) which shall also determine the company's internal functioning and external relations with third parties.

The aim of this chapter is to clarify the conditions for recognition and establishment of foreign companies under EC law, as well as to assess whether Greece (an EC member state) has complied with EC legislation. In order to do so, we shall compare Greek law (as presented in our Chapter 1) and EC legislative texts. This analysis is particularly germane, because of the lack of thorough theoretical research in this particular field of EC law [2], and more importantly because of the lack of relevant precedents of the ECJ.

In view of the fact that recognition is really a prerequisite of the freedom of establishment, the first part of this chapter shall examine the present legal status for the recognition of foreign companies under EC law, whereas the second part shall deal with the analysis of the freedom of establishment itself.

RECOGNITION OF FOREIGN COMPANIES

Basic Principles on Recognition

In all EC member states prevails the theory of *ipso jure*

recognition of foreign companies. Thus, the minimum requirement in EC countries for "a company to exist and function is a document of incorporation" [3].

The issue of the determination of the law under which recognition is to be made, however, is still in debate. Within the EC (as well as in international legal theory) there are two theories: the theory of the *siege reel* and the theory of incorporation [4]. In order to identify, which one forms the basis of EC legal theory and legislation, it is essential that we first look closer at both theories in an attempt to identify their elements (if any) in the relevant texts. The theory of the *siege reel* has already been analysed in the first chapter on Greek law. However, we must refer to the theory as applied in other EC member states.

The Theory of the *Siege Reel* as Applied in the EC

An overwhelming majority of continental countries adopt the theory of the *siege reel* [5], according to which the company's *lex fori* is the law of the state where the company's seat or main office is located. The problem arising at this point is the determination of the company's "seat". Several criteria have been used, suggesting that the company's *siege reel* is the location where:

- a. the basic decisions on the company's operation and functioning are reached;
- b. the basic guidelines and orders for operation and

functioning are produced [6];

c. the management of the company is located, i.e. where the meetings of the company's board of directors take place, or where the shareholders' general meetings occur, or where the single controlling shareholder resides [7].

Some legal experts have attempted to produce one single criterion, which could successfully determine the companies' *siege reel*. Commenting on the futility of such efforts, Krispis [8] notes that the seat of the company is not a legal term, but a question of fact. In this sense, one can not possibly produce any single criterion. The determination of a company's seat can be achieved only after relevant evidence, applicable only to that particular case, is submitted to the respective court.

It should be mentioned, however, that very recently a new advanced version of the theory of the *siege reel* has emerged in France; the theory of the *siege social*. According to this theory two criteria should apply. These are:

- a. a basic criterion: the real seat; and
- b. a corrective criterion: control.

Consequently, the *siege social* of a company is the place where:

- a. the company's administrative organs meet; and
- b. all necessary decisions for the achievement of the company's aim are taken.

Jadaud and Plaisant [9] point to an additional criterion: that the company must also have a "financial bond" with the relevant national community. The notion of the financial bond is

also found in Article 58 of the Treaty of Rome under the term of *but lucratif*.

The theory of the seat has several advantages compared to the other theories in private international law. According to Boukouras it succeeds in distinguishing between a company's formal and its real seat, that is between the location where a company has registered and the place where legal, financial or other control is exercised. By doing so, it prevents the company from exploiting the beneficial registration regulations of one country by formally registering there and then functioning in another country with beneficial establishment conditions. Essentially, it prevents a situation where a company would enjoy the privileges of each system without being submitted to the counterbalancing obligations (taxation etc.) of either of the two [10].

However, the theory of the seat may lead to total chaos, as it is impossible to predict either the manner of the theory's practical application or the proper interpretation of the "seat" in each national law. Since no precise criterion can be 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 law. Moreover, a company incorporated in one state and established in another may have to comply with two different laws, the law of the state of its incorporation and the law of the state of reception. If the company has not complied with one of the two

laws, it would be considered non-existent in the other state.

The Theory of Incorporation

Common law legal systems adopt the theory of incorporation, according to which the *lex fori* of a legal person derives from the law of the jurisdiction where the company was incorporated. Since the country of the company's incorporation and the one of its domicile are identical according to English Law [11], this theory is also known as the theory of domicile. It should be mentioned here that the theory of domicile does not relate in any way the domicile of the company's members (share-holders etc.), to the domicile of the company as a legal entity (which determines the company's *lex fori* as well as the system applied for the company's recognition). 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 [12].

The main advantage of the theory of incorporation (compared with the *siege reel* doctrine) lies in the precise and clear criterion for determining the companies' *lex fori*: the law of the country, where the company's incorporation took place. Since the incorporation of a company takes place in one concrete location, it can not be argued either that the incorporation did not actually take place, or that it occurred in a location different from the country in whose jurisdiction the company was incorporated. Thus, the phenomenon of foreign companies being

considered either non-existent or imperfectly founded is unknown to legal systems applying the theory of incorporation. Moreover, the company itself is assured about its validity and legal foundation in whichever country of the world it wishes to establish. The liberalism of the theory of incorporation is profound and it really comes as no surprise to discover that it is applicable in countries with a long-standing commercial maritime tradition, whereas the protectionist theory of the seat is encountered in countries with a more mercantilist tradition.

The different theories, concerning the recognition of foreign companies, have caused many difficulties in international trade. The existence of two contradicting theories which may result to a country's refusal of recognition, essentially contradicts the very notion of a Common Market. For this reason, the European countries attempted to agree on the multilateral application of a single concrete system of recognition, first sought in the 1956 Hague Convention on the Mutual recognition of Companies and the 1963 Brussels Convention of Mutual Recognition of Companies and Legal Entities.

The 1956 Hague Conference

The need for a multilateral agreement on the conditions for recognition of foreign companies as legal entities became more pressing after the Second World War, when commercial and financial relationships were being rebuilt. International trade was considered essential for the weak postwar European

economies. It was in the first postwar session of the Hague Conference on Private International Law [13] in 1951 [14], that the issue of the recognition of foreign companies, associations and foundations as legal entities was discussed. A draft Convention was adopted and finally signed in 1956. Although the Hague Conference is not yet in force [15], the participation of the vast majority of EC countries [16] makes a brief analysis of its regulations noteworthy, because it reflects the general desire for non-discrimination between foreign and domestic companies (a desire clearly expressed in Art.7 EEC) and puts forward the different views on the recognition of foreign companies (which are to be found unaltered in the 1968 European Convention). The importance of the Hague Convention lies more with the fact that relevant issues were finally put forward, than with the actual results of the meeting.

Foreign companies [17], associations and foundations [18] are recognized as legal entities by the contracting countries, provided that recognition is not withheld for reasons of public policy [Article 8] and that according to the law of their *lex fori* they can have possessions, make contracts and perform other legal acts. This provision creates the problem of the definition of the company's *lex fori*. The Convention tried to compromise the two prevailing theories of incorporation and of the *siege reel*. Thus it provided that the company's *lex fori* is the law of the state where "formalities of registration and publication have been complied with" [19], while at the same time it gave the countries of the *siege reel* system the opportunity to refuse

recognition to companies which -complying with the text of the Convention 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 [20].

In their effort to succeed in signing a multilateral agreement on the recognition of foreign companies, the signatories of the Convention neglected to concentrate on the substance of the problem. Thus, they only confirmed the existence of a contradiction between the two theories without proceeding to the choice of one of the two, or the production of a compromise (which probably explains why the Convention was not ratified). However, the Convention was far from useless. It was the first international legal text regulating the *ipso jure* recognition of foreign companies. Moreover, it stipulated that countries adhering the *siege reel* doctrine could not refuse to recognize a foreign company whose incorporation took place in a country different from the one of the company's real headquarters, provided that both countries adopted the theory of incorporation [21]. Furthermore, since the majority of EC countries had already participated in the Hague Conference. it can be argued that the latter facilitated agreement on the text of the 1968 Brussels Convention on the Mutual Recognition of Companies and Legal Entities.

The EC View on Recognition

Art.220 of the Treaty of Rome imposes an obligation on EC

member states to "enter into negotiations with each other" in order to secure the mutual recognition of companies, which some consider a prerequisite [22] and others a course of action [23] towards the freedom of establishment. After the failure of the Hague Convention to meet the needs of EC member states [24], further agreement on the issue of recognition of companies was sought by the then six EC member states. This effort resulted in the 1968 [25] Brussels "Convention of Companies and Legal Entities", which, unfortunately, is not yet ratified by the Netherlands and is still not in force. In spite of the improbability of the enforcement of the Convention in the near future [26], an analysis of its text is necessary, for three reasons. First, it illustrates the general attitude towards the recognition of foreign companies within the EC; second, it is the only relevant EC legislative text; and third it can be considered as an authentic interpretation of the vague and confusing Art.220 EEC.

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 the actual abolition of this doctrine in favour of the doctrine of the *siege reel*. The basic concept of the Convention lies in the statement that all legal entities [27] are *ipso jure* recognized within the EC, provided that (Arts.1 and 2) they:

a. were formed under the regulations of either the commercial or civil law of their *lex fori*;

b. were formed under the law of any member of the EC, or, in other words, have been incorporated in accordance with the laws of any member state;

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

d. are entitled to legal rights and subject to legal obligations according to their *lex fori*; however, according to Art.8 [28], they are not required to have legal personality;

e. aim to exercise economic activity normally in exchange for remuneration within the EC [29].

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. The exceptions to the rules are:

a. 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 [30] with the economy of one of the EC member states (Art.3); the definition of the company's real seat is provided in Art.5, which determines it as the location of the person's central administration;

b. the *ipso jure* recognition may also be refused in the event that the real seat of the legal entity is located in the state, from which recognition is sought; in this case, the respective authorities are obliged to offer recognition, but

reserve the right to offer it under the condition of the implementation of national mandatory [31] provisions [32] by the interested legal entities (Arts.4);

c. the regulations of the Brussels Convention may not apply in the event that the respective state's *ordre public* [33] is harmed (Arts.9 and 10).

At this point it may be noted that the first exception to the theory of incorporation is phrased in such a vague and general manner that certain legal experts believe that "it leaves very little room to the theory of incorporation" [34]. Moreover, 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 [35].

The effect of the national law of the host country is very important. Apart from awarding the company -in a general and theoretical way- the right to exercise commercial activity in the state of reception, the recognition of a company also determines the extent and the limits to its rights and powers (within the boundaries of the host country). According to Arts.6, 7 and 8 of the Convention it is the company's *lex fori* (that is, the law of incorporation or of the *siege reel*), which determines its capacity. The host country may deny the company specific rights (granted by the company's *lex fori*) that are not accorded to

domestic companies of a corresponding type [36]. However, it can only do so provided that this denial is not a violation of private international law [37] and that this act does not diminish the company's capacity to have rights and obligations to enter into contracts or to undertake other legal acts, and to take part in legal proceedings (Art.7). Such denial, however, may not be used by the companies accorded recognition as a defence in law; this right is reserved to domestic companies only [38]. Moreover, it is stated that the capacity, rights and powers of the company awarded by the Convention may not be denied (either wholly or partially) solely because of the company's lack of personality according to its *lex fori* (Art.8).

Arts.6-8 provide us with another demonstration of the efforts of all signatories towards a compromise doctrine on recognition. However, due to the reluctance of the participating states to concede parts of their sovereignty (that is, the imposition of national mandatory rules applicable to both domestic as well as 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. This is hardly the way to promote the freedom of establishment of companies.

Although the Convention's failure to meet the needs of EC member states concerning the recognition of foreign companies as legal entities is unanimously accepted, it can be argued that, as the Convention was the first of its kind within the EC, it

was an important step towards the adoption of common legislative measures in the field of mutual recognition of companies.

However, an optimistic view may be that due to the continuing harmonization of company law, the need for the Convention "may perhaps have been lessened" [39].

Conformity of Greek law with Brussels Convention

After the brief analysis of EC legislative proposals concerning the recognition of foreign companies, we shall proceed to compare Greek and EC law, in an attempt to assess, whether Greece (a case study) is willing to adopt EC regulations.

At first glance, a comparison between EC and Greek law seems pointless, because while Greek law has decided upon the underlying doctrine to be used for the recognition of foreign companies (*siege reel*), EC law has not.

Although this is true as far as the general prevailing doctrine is concerned, it should also be noted that EC regulations on certain particular issues are quite clear. Ironic as it may seem, EC member states did not manage to agree on the general doctrine to be used for the determination of the company's *lex fori*, but they have produced several stipulations on particular aspects of recognition. Thus, the only way to judge whether Greece has adopted (or if Greece is willing to adopt) EC law on recognition, is to concentrate on these particular aspects, without limiting our analysis to the evaluation

of compatibility.

As far as the similarities between Greek and EC law are concerned, it has become clear that Greece adopts the theory of *ipso jure* recognition, which is unanimously adopted by EC law. The adoption of the *siège réel* theory can not be judged as Greece's reluctance to adopt the theory of incorporation stipulated in Art.1 of the Convention, because (as noted in the analysis of the EC view) Arts.2, 3 and 4 of the Brussels Convention introduce so many exceptions to the incorporation doctrine, that they indirectly nullify its implementation. It is worth noting that in an effort to diminish the disadvantage of the *siège réel* doctrine the Greek legislator has produced a combination of criteria. One of these is the notion of control, common to Article 52 EEC (concerning both recognition as well as establishment). An additional similarity between Greek and EC law concerns the effects of recognition, as both laws confer upon the recognized companies the same powers awarded to them by their *lex fori*. Greece has adopted the same reservation clauses found in the Convention, that is, international law regulations and domestic *order public*.

However, Greek and EC legislation differ on the issue of the status of companies incorporated abroad which have their true seat in Greece. Under Art.4 of the Brussels Convention, these companies should be recognized 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

[40]. 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 EC, whereas Greek law does not really distinguish between EC and non-EC companies.

To conclude, it can be stated that Greek law is compatible with EC regulations on the recognition of companies from other EC member states. However, this is not a direct result of Greece's membership of the EC, because the relevant Greek legislation was passed well before Greece entered the EC. Furthermore, Greece has not signed the Brussels Convention. This adaptability is probably due to the fact that the Brussels Convention is really a written report of the prevailing international law and Greece (in its effort to lure foreign companies within its dominion) has always been ready to keep up with relevant international legal principles. In order to verify this view, however, an analysis of the compatibility of Greek and EC law on the establishment of companies is also necessary.

ESTABLISHMENT WITHIN THE EC

Definition of Secondary Establishment

One aspect of recognition of foreign companies is their permanent establishment abroad. The freedom of establishment of foreign legal entities is not synonymous with their recognition in a foreign state. Indeed, a state can recognize a foreign legal entity as such, but set limitations or prohibit its establishment or functioning within its boundaries. Thus, EC legislation may impose the *ipso jure* recognition of companies, but prohibit the unhindered establishment of the recognized companies within its boundaries. Our analysis shall deal with basic EC legislation on the establishment of companies and its comparison with the relevant Greek laws.

Freedom of establishment within the EC is regulated by Arts.52-58 of the Treaty of Rome, according to which the restrictions set by national laws for the establishment of companies owned and/or controlled by companies or persons from other member states must be abolished [41]. This is clearly an expression of the basic non-discrimination principle of Art.7 which is considered *lex generalis* compared to Art.52 [42].

Before analysing the content of the freedom of establishment, we shall discuss its meaning and legal nature, as suggested by legal theory, since the Treaty of Rome does not offer an authoritative interpretation of the term.

As far as Art.52 of the Treaty of Rome is concerned [43],

legal or natural persons, beneficiaries of the freedom of establishment within the EC, 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 [44] they;

a. are settled in a material arrangement or have a "steady and permanent residence" [45] in the host country; and [46]

b. their financial activity is integrated in the financial life of the receiving country.

The nature of the freedom of establishment in Articles 52-58 of the Treaty of Rome is still in debate. The use of different terms in the text of the Treaty as translated in each official language [47] leads to different interpretations. Three basic [48] theories have been produced for the determination of the nature of the freedom of establishment:

a. it is a personal right [49];

b. it is a *Programmsatz*, i.e. a general guideline [50]; and

c. it is a basic freedom of EC law [51].

The practical significance of this debate lies in the fact that the first two theories relate the implementation of Article 52 in practice by further express regulation of its content and the penalties for its violation by the EC or national authorities. On the contrary, in the case of the third theory (which prevails in Greece [52]) Art.52 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 discri-

minations), as well as the fact that in practice no specific regulations on the freedom of establishment have been passed so far. This theory is also supported by the direct effect of Art.52 which is considered to be self-sufficient and self executing [53]. It should be noted, however, that the Commission in its written observations in case 107/83 stated that the freedom of establishment is "a fundamental right which exists regardless of whether the directives provided for by Art.57 of the EEC Treaty have been adopted" [54]. This declaration leads to the view that, within the EC, the freedom of establishment is neither a "right" nor a "freedom" in the classical sense which national Civil Laws attach to this notion. Rather, the freedom of establishment must be considered as a particular kind of "European legal right" which is to be applied even if no relevant specific regulations on its imposition are passed.

The freedom of establishment in its commercial aspect [55] may take the form of a primary or secondary establishment. The 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 the legal entity is transferred from one country to another, i.e. from the country of origin to the host country. The secondary establishment takes place, when the legal entity retains its home office in one country and establishes a form "of financial activity dependent from the main office" in another [56]. Secondary establishment will be the subject of our

analysis, because it involves the formation of branches, agencies, offices and subsidiaries.

In EC law, the office or agency is a secondary establishment without separate legal personality; it is exploited by an agent or a *mandataire* and deals with the sales, correspondence with third parties interested in doing business with the parent company, as well as relevant administrative functions. The 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. The subsidiary of a foreign company is a separate legal entity, set up under the law of the host country (at least in countries following the *siege reel* doctrine) [57], controlled by the foreign company through ownership of a substantial part of its capital, or of the whole company (in jurisdictions where one-man companies are legal). Although no official definitions of the above terms have as yet been established, the ECJ [58] defined the subsidiary, agency or any other establishment as operational centres with the power, authority and means to conduct business with third parties, which, 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, i.e. with its agency, branch, office [59] or subsidiary [60].

After analysing the content of the freedom of establishment we shall determine the legal entities which may benefit from the freedom of establishment.

Ratione Personae Application of the Freedom of Establishment

According to par.1 Art.58 EEC foreign companies or firms (English version) *associations* (French version) or *Gesellschaften* (German version) enjoy the same privileges as natural persons (Arts.52-58). *Ratione personae* the above terms include "companies constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit making". The aim of the legislator is clearly to include as many forms of legal entities as possible [61]. Since public companies limited by shares (which are the type of companies examined for the purpose of this thesis) are undoubtedly [62] within the scope of Art.58, further analysis of the beneficiaries of the freedom of establishment is unnecessary. However, we must determine the conditions under which foreign public companies limited by shares may form a secondary establishment in other countries of the EC. They include the following [63]:

- a. the company must be profit-aiming;
- b. the company must be formed under the law of a member state and have its registered office, central administration or principal place of business within the EC; and
- c. the company should have an effective and continuous link with the economy of a member-state.

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 nationalized 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 [64]. Since the aim of the legislator was clearly to include in Article 58 as many types of legal entities as possible, the term profit-aiming should have a broad meaning. According to Wooldridge [65], 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". Thus, only organizations whose objectives are gratuitous, i.e. organizations with humanistic, religious, or cultural aims as well as public law organizations dealing with activities different from the aims of the Treaty, are excluded.

As far as public companies limited by shares are concerned, this first condition seems meaningless, because in the majority of EC member states, one of the basic elements that characterise this type of company is the pursuit of profit [66]. However, the failure of the legislator to avoid the use of a clearer term should be noted. Instead of referring to the types of companies which aim to profit (which vary according to different legal systems), the legislator could easily have delineated the scope of the freedom of establishment provisions by reference to legal entities' participating in financial and commercial activity.

The second condition imposed by Article 58 of the Treaty of

Rome can be analysed in two elements [67]:

1. the company must be formed under the law of an EC member state; and
2. the company's registered office, central administration or principal place of business [68] must be located in the EC.

It is clear that these two conditions refer to the company's *lex fori*. The Treaty (applying the non-discrimination principle) rejects [69] the theory of control (according to which the company's *lex fori* derives from the law of the nationality of its members), but at the same time it avoids the choice between one of the two prevailing international legal theories, i.e. incorporation and *siege reel* [70], in an attempt to avoid problems in the application of Art.58 by those EC member-states which follow another system for the determination of the *lex fori*). In fact, as Goldmann puts it, 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 [71].

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 is situated in a member state, its main establishment is situated in a member state". 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" [72]. These Decisions

introduce us to the third condition for the establishment of legal persons within the Community, i.e. the effective and continuous link with the economy of a member-state [73]. A "real economic link" is evidenced by either the amount of gross business done within the Community or by the permanent nature of the investments within the Community [74]. A "continuous link" is to be viewed as "the opposite of occasional" [75] and is defined as "a history of commerce or production" in one of the EC member-states [76]. To conclude, it can be stated that the General Program requires a real and continuous link with the economy of a member-state, which exists when the company "already maintains a secondary establishment within the Community" or when the Common Market is the company's "primary field of action" [77].

The issue of EC subsidiaries of non-EC parent companies

The third condition -imposed by The General Program on the Suppression of Restrictions on the Freedom of Establishment of 18 December 1961 [JO 1962, pp.32-62]- has been criticised [78] as giving the benefit of freedom of establishment to subsidiaries of non-EC companies with a registered office within the EC. Thus a situation has developed where a non-EC company can maintain a fictitious, non-productive office within the EC and demand to import in terms of taxes and dumping [79] regulations its non-EC products under the same conditions stipulated for EC products [80]. Although in the past and especially in Greece the danger of third countries penetrating the Common Market through

the formation of subsidiaries within the EC seemed only theoretical [81]. It was commonly believed that the demand of an efficient economic link of the company with the economy of an EC member-state would diminish all possibilities of circumvention [82]. Maestriperi [83] 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".

Despite the application of the third corrective criterion, and following the signing of the GATT agreements by the EC, companies from third countries were still able to penetrate the EC market by establishing European subsidiaries. For member states with traditionally protective economic regimes, such as France and Italy [84], this was a blatant circumvention of EC legislation on freedom of establishment. For other member states such as Britain and Eire, which had more liberal economic regime [85] (and enjoyed more benefits from this development as many US and Japanese subsidiaries established there) the prevention of European subsidiaries from freely circulating their products in the EC contradicted the freedom of establishment.

Despite British opposition, the "protectionist" majority within the EC pressed on to establish a fourth criterion based on local content [86], which in 1988 with the "Nissan case" [87] triggered a controversy within the EC concerning the extent of local content. Based on the regulations of the Kyoto Convention [88], the EC has passed Regulation 2423/88 [89] (widely known as "anti-screwdriver" regulation) according to which a product is

not subject to dumping penalties (that is, it is considered European), if at least 50% [90] of its value (i.e. of its parts or materials [91] etc.) originate from EC member states [92]. This Regulation has led to numerous debates between EC and third countries, centering both on the method of determination of the percentage of local content [93] and on the legality of such discrimination [94] in view of GATT regulations [95]. Although this debate has not been resolved, the Community has proceeded to draft "rules of origin" for specific categories of products [96].

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, i.e. they must manufacture their products according to the "rules of origin" or the special antidumping regulations of the EC [97]. In terms of the legality of local content requirements, it must be stated that GATT does not oblige the Community to treat third countries equally to its members [98]. Moreover, circumventions 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 Community) can not be legalized by any kind of international treaty. In terms of expediency, the prevention of non-EC companies from establishing in Europe is a conservative measure, which only helps widen the gap between EC, U.S. and Japanese manufacturers [99]. Thus, the EC 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 intra-EC agreement on the issue must be achieved as soon as possible, because the circulation of a product within one EC member state automatically leads to its free circulation in all EC member states [100].

Territorial Scope of the Freedom of Establishment

The territorial limits of the freedom of establishment are set by Article 227 of the Treaty of Rome, which determines the *rationae loci* implementation of the Treaty in general. Since Article 58(1) relates the companies' free establishment with a statutory seat or their centre of administration within one of the countries of the Community, the determination of these countries becomes necessary. The Treaty (and consequently the freedom of establishment) applies to the twelve member states of the EC [101]. Under Arts. 227, 132 (3) and 131 (1), the Treaty also applies to countries and territories with a special relationship with France [102], Italy and The Netherlands. This category includes the French Guadelup, Guiana, Martinic and Reinon [103].

Another issue on the *rationae loci* application of the freedom of establishment concerns the continental shelf of EC member states. EC officials have repeatedly insisted that the application of the freedom of establishment should include

continental shelves, based on Art. 227 EEC. 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" [104]. The issue is extremely interesting in legal theory. However, it lacks practical importance in so far as this present analysis is concerned, as Greece tends to reserve the exploitation of its continental shelf to governmental organizations, for obvious reasons of national security.

Conclusions

The freedom of establishment of companies within the EC is dealt with in Arts.52-58 EEC. In order to benefit from the freedom of establishment, recognized companies must fulfil four conditions:

1. the company must be profit-aiming;
2. the company must be formed under the law of a member state and have its registered office, central administration, or principal place of business within the EC;
3. the company must have an effective and continuous link with the economy of a member state; and
4. the materials used for the company's products must have originated in the EC in a percentage of at least 50% [105].

The analysis of the conditions set by EC law for the establishment of companies reflects a protectionist attitude, which

contradicts the liberalism shown by the EC towards the recognition of companies. This liberalism is only epidermic. The *ipso jure* recognition of all legal entities by the legal order of the Community is meaningless, since only a small number of the recognized companies may benefit from the freedom of establishment. Even subsidiaries (which, having a separate legal personality, are considered domestic companies) are not beneficiaries of the freedom of establishment, unless they fulfil the third and fourth of the criteria mentioned above. The protectionism of the EC can only emanate from a false sense of short-term domestic interest. However, it should also be noted that extreme liberalism (allowing every company to benefit from the freedom of establishment) would also contradict the aim of the Treaty, which was the creation of a Common Market for its member states only.

The problem could be solved in two different ways. The member states could either impose local content requirements of a percentage stipulated for each and every product (a practice followed by the EC at the moment) or they could produce a general stipulation preventing any kind of circumvention of EC legislation. This general rule can take either the form of a prohibitory legal stipulation [106], or the form of a set of criteria determining which companies can be considered European. These criteria could refer either to the company's nationality or to a product's European origin (in terms of a variable percentage of local content). The extend of local content could help decide whether the company in question fulfils its obliga-

tions to the Community (for example, contribution to the EC's development and prosperity, use of EC workers in order to reduce unemployment, productive industry units within the EC for the benefit of the relevant EC member state etc.), so as to fairly demand beneficiary treatment for its products. If this is the case (that is, if the company can demonstrate an effective and continuous link with the Community), the company should be considered to benefit from the freedom of establishment. If not, the EC may apply the international regulations of the GATT on the company's products. It should be stated that after the ineffective use of the first method (the imposition of local content requirements) the EC is now in the process of producing "rules of origin", which shall serve as general guidelines for the characterization of a product as EC or non-EC.

This concludes our brief analysis of EC legislation concerning the conditions for the establishment of public companies limited by shares within the Community. Before reaching a conclusion on the adaptability of Greek to EC law on company establishment, we must look closer to the activities permitted to the established companies by the two legal systems. We must also analyse the limits set by Greek and EC law to the companies' activities, as these may form additional conditions of establishment.

FOOTNOTES

[1] Thus, an unrecognized company would be unable to rent or buy a building, hire employees, or engage in any kind of transactions.

[2] Cath, op.cit., p.251, mentions that "...However, it is surprising that these and related issues have hardly ever been approached (and then only by a few writers) -in so far as they relate to intra-Community cross-border establishment- from the angle of the Treaty".

[3] See Cath, ibid, p.248.

[4] Krispis, op.cit., p.31; Wooldridge, op.cit., p.137; Boukouras, op.cit., pp.29-40; Cath, op.cit., pp.249-252; Jadaud and Plaisant, op.cit., pp.39-41; Goldmann, op.cit., pp.187-190.

[5] The theory of the *siege reel* is widely supported in France, Germany, Italy, Belgium, Luxembourg, and in Cyprus.

See respectively, Jadaud at Plaisant, op.cit., p.35; also Supreme Court, S. 1870.1.373; S. 1901.1.70; Wolff, *Das internationale Privatrecht Deutschlands*, 1954, p.115; 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; Luxembourgish Law on Commercial Companies of 10th August 1915, art.159; and Irakleous, op.cit., p.96.

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

[7] 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, London), pp.98-99; and Boukouras, op.cit., pp.32-33.

[8] op.cit., p.64.

[9] op.cit., p.34-35.

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

[11] For an extensive analysis of the theory of incorporation, see Pennington, op.cit., p.98; Morse, op.cit., p.196; 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 British 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 *siege reel* is located elsewhere). Since the company shall then be incorporated in England, the company's place of incorporation and its domicile

are identical.

[12] Vrellis, *op.cit.*, p.99 refers to maritime companies, as one of the few cases where Greek law applies the theory of incorporation. A second case concerns subsidiary companies.

[13] 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 organization with a permanent secretariat.

[14] Goldman, *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 at the next session. The proposal was accepted and the issue was brought up at the next session, which took place a few decades later, in 1951.

[15] 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.

[16] The following countries participated in the relevant session of the Hague Conference: Austria, Finland, Japan, Spain, Great Britain, Italy, France, Luxembourg, Portugal and the Netherlands. Yugoslavia sent an observer.

[17] According to Goldman [*op.cit.*, p.70] the Conference is applicable exclusively to private companies.

[18] Art.1 provides that the Conference is applicable not only to companies, but to associations and foundations as well. Since the domestic law in several countries does not consider the foundations or associations to be 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, no disagreements did appear.

[19] Art.1 of the Convention provides that the legal personality acquired by a company, association or foundation by virtue of the law of the contracting state where the formalities of registration and publication have been complied with (and where) it has its statutory office, shall be recognized as of right in the other contracting states.

[20] Art.2 of the Convention states that "personality acquired under the provisions of Article 1 need not be recognized in another contracting state whose law takes the real headquarters into consideration, if these are considered as being on its territory".

[21] Goldmann, op.cit., p.72 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 recognize it".

[22] Boukouras, op.cit., pp.43-44 adopts the view of Wyatt and Dashwood, who noted that the refusal for recognition of a company could lead to the refusal of the company's right of establishment within the EC. He also states that Art.58 of the Treaty indirectly regulates the members' obligation to recognize foreign companies as legal entities, since without recognition the content of the freedom of establishment would be "deceptive".

[23] Lipstein, op.cit., p.248 states that the Treaty's main aim (which is the free movement of persons within the EC) can only be accomplished through two courses of action:

- a. the recognition of foreign companies; or
- b. the adoption of a common system of Company Law.

[24] Goldmann and Lyon-Caen, op.cit., p.192, 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 *siege reel*. On the contrary, Arts. 52-58 of the Treaty of Rome 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.

[25] Preparations for the Convention began in June 1962. The final text was laid open for signature on January, 20 1966, at Strasbourg and was finally signed in Brussels on February, 29, 1968. However, it is not yet in force due to the Netherlands' refusal to proceed with its ratification.

[26] Wooldridge, op.cit., p.135, notes that it "appears highly unlikely" that the Convention will come into force. Because "of the prolonged failure" 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", it appears quite likely that the Convention will never come into force.

[27] Since the Convention undoubtedly applies to public companies limited by shares (which are the subject of this analysis) there is really no point in analysing the Convention's field of application. However, a brief reference to legal entities benefiting from the Convention is noteworthy. It is accepted that the Convention applies to civil and commercial law

companies (Article 1) and public organizations with profit-making object. See Goldmann, *op.cit.*, p.74.

[28] According to Lipstein, *The law of the EEC* (1974, Butterworths, London), 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*).

[29] See Roblot *Traite elementaire de droit commercial* (1984, Paris), p.1135; and Cath, *op.cit.*, p.252.

It should be noted that according to 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.52 EEC, 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.58 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 than the Treaty's.

It should be noted, however, that public companies limited by shares always aim to make profit (at least under Greek law) which makes the problem mentioned above insignificant for this analysis.

[30] The issue of the interpretation of the "genuine link" is still debatable. According to Stein, *op.cit.*, p.397, note 202 this term is vague and unclear, but was included to prevent companies from non-EC countries from demanding recognition on the grounds of possessing "a P.O. Box within the Community".

This term shall be the subject of further analysis in the second part of this chapter, in reference to Art.58 EEC.

[31] 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 Boukouras, *op.cit.*, p.51, if the Convention is ratified, the ECJ shall have to interpret these "mandatory rules".

[32] Lipstein, *op.cit.*, p.251 and Boukouras, *op.cit.*, p.53, state that non-mandatory rules are applied only if:

- a. there is no contradicting provision in the companies' Articles of Association (Art.4, par.2.i);
- b. if the company can prove that it has operated for a substantial period of time within the state of its incorporation (Art.4, par.2.ii).

[33] The *ordre public* or "public policy" of the host state

may be an obstacle to recognition of a legal entity within the EC. 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 Lipstein, op.cit., p.253; Boukouras, op.cit., p.58; Goldmann, op.cit., p.76; Morse, op.cit., p.202; Goldmann & Lyon-Caen, op.cit., p.200; Wooldridge, op.cit., p.140.

It is argued that such a justification for exclusion applies only in the following cases:

- a. the one-man company;
- b. rules contradicting the regulations of the EC Treaties;
- c. companies or other entities, whose aim is believed to be other than profit-making, for example political or propagandist;
- d. companies whose object, aim or activity may harm the host states' public health, morality or other vital interests.

For further analysis of these three elements, see Goldmann, op.cit., p.76; Goldmann and Lyon-Caen, op.cit., p.200.

[34] See Cath, op.cit., p.253.

[35] See Stein, *Harmonization of European Company Law* (1971, Bobbs and Merril, U.K.), p.411-412.

[36] Cath, op.cit., p.252, notes that Art.7 must be considered as another exception to the general prevalence rule of the incorporation theory.

[37] Lipstein, op.cit., p.252, notes that Art.7 is clearly an extension of Art.4.

[38] Cath, op.cit., p.253 notes: "Here again, the classical argument in favour of the *siege reel* 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".

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 cannot be considered privileged *vis-a-vis* domestic companies.

[39] See Wooldridge, op.cit., p. 134; Papagiannindis-Christogiannopoulos, *Clarification of the Treaty of Rome* (1981, Sakoulas, Athens), p.558.

[40] The mandatory provisions implemented under Article 4 for these companies are not identical to the obligations applied to domestic companies. If this was the case, Article 4 of the Convention would abolish the general recognition rule, which is clearly not the wish of EC member states.

[41] See cases 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.

[42] See Papagiannidis-Christogiannopoulos, *op.cit.*, p.137 and ECJ 90/76 Van Ameyde v UCI [1977] ECR 1091; [1977] 2 CMLR 478.

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

[43] This definition is a synthesis of relevant elements found in Bournous, *op.cit.*, p.40; Alexiou, *op.cit.*, p.371; Maestrepieri, "Freedom of establishment and freedom to supply services" (1973) 10 CMLR p.150; Boukouras, *op.cit.*, p.71; and Burrows *Free movement in European Community Law* (1987, Clarendon Press, Oxford), p.186.

[44] Clarotti, *op.cit.*, p.203, 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".

It should also be noted at this point that the permanence of the base set up in other member states is the element which distinguishes between the freedom of establishment and the freedom to provide services. See FG 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".

[45] See Maestrepieri, *op.cit.*, p.150; Bournous, *op.cit.*, p.40; Directive 65/1/EEC, 7 Dec. 14, 1964, third paragraph of the preamble], where they intend to stay for an "indefinite" period of time; also see Boukouras, *op.cit.*, p.71.

[46] Burrows, *op.cit.*, 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".

[47] The English text uses the term "freedom of establishment". So does the German (*Niederlassungsfreiheit*) and the Greek text (*eleftheria egatastaseos*). On the contrary, the Ita-

lian, French and Dutch texts use the term "right" (*droit d'établissement*, *diritto di stabilimento*, *recht van vestiging*).

[48] According to Smit and Herzog, *op.cit.*, p.537, the Treaty rejects two other techniques, the reciprocity rule and the most-favoured-nation clause.

[49] This view is supported by Parry and Hardy (as reported by Boukouras, *op.cit.*, p.70); Everling, *Das Niederlassungsfreiheit in GM* (1963, Berlin-Frankfurt), p.15; Cassese, "Il diritto di stabilimento nel trattato istitutivo della CEE", [1959] RTDP, p.316; Arduini, "Limiti derivanti del trattato CEE agli ordinamenti interni degli stati membri", [1961] RDE, p.277; van Gerven *Le droit d'établissement et la libre prestation des services*, (1969, Bruxelles); Claroti, *op.cit.*, p.201; Smit and Herzog, *op.cit.*, p.537.

[50] This view is adopted by Baumann, "Die Harmonisierung des Niederlassungsrecht in verschiedenen Staatengruppen", in *Deutsche Landesreferate zum VI. Internationalen Kongress fuer Rechtsgleichung in Hamburg*, (1962, Hamburg), p.166; Schlachter, "Das Recht der freien Niederlassung in CM", in *Persoenlichkeitsrechtliche Fragen des internationalen Rechts* (1962), p.61; Kalavros, *op.cit.*, 1983, p.119.

[51] See Froelich, *Niederlassungsfreiheit und Freizugigkeit in der EWG und EFTA*, (1965, Zuerich) p.42; Moehring, *Aktuelle Wirkungen des EWG auf des Kartellrecht, das Niederlassungsrecht und das Agrarrecht*, (1965), p.1638.

[52] For further reference on Greek authors supporting this view, see Kalavros, *op.cit.*, 1983, p.120; also see Kanelopoulos, *op.cit.*, 1990, p.125.

[53] The direct effect of Article 52 is also supported by Kalavros, *op.cit.*, p.221; 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.

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

[55] 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 organizations.

[56] The elements of these definitions were found in Kalavros, *The right of establishment under the Treaty of Rome* (1983, Sakkoulas, Athens), p.125; Alexiou, *op.cit.*, p.373; Egana, *La comunidad economica europea* (1967, Caracas), p.89; Leleux, "The

establishment of foreign subsidiaries in the European Community" in *Ten Years of European Integration* (1968, Montreal), p.2; and Goldmann, *op.cit.*, p.57.

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

[58]. 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; 218/86; 14/76.

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.58 EEC.

[59] Steiner, *EEC Law*, (1991, Blackstone Press Limited, Great Britain), p.186, notes that in the German Insurance case (205/84, Commission v. Germany [1986] ECR 3755, [1987] 2 CMLR 69) 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".

[60] For further analysis of the definitions of branches, agencies and subsidiaries under EC law, see Goldmann-Lyon Caen, *Droit commercial europeen* (1983, Dalloz, Paris), p.143; Goldman, *op.cit.*, p.60; Kalavros, *op.cit.*, 127; Claroti, "Progress and future development of establishment and services in the EC in relation to banking" (1983-1984) 22 CMLR, p.200; and Smit and Herzog, *The law of the European Economic Community, A Commentary on the EEC Treaty*, (1976-1992, Mathew Bender and Co), p.540.

[61] Papanagiotou, *op.cit.*, p.309] notes that this expression is very broad, in order to include all possible types of companies. Lipstein, *op.cit.*, p.231] notes that the associations and *Gesellschaften* have a broader sense than English companies.

According to 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 nationa-

lized industries.

According to Kalavros, *op.cit.*, p.165, the following French companies are included in the provision of Article 58: *societes civiles, societes en nom collectif, societes en commendite simple, societes en commendites par action, societes anonymes, societes d'assurance en forme limites, societes mutuelles d'assurance, societes d'economie mixte, etablissements publics de caractere industriel et commercial.*

In Germany the following legal entities are beneficiaries of the freedom of establishment: *Aktiengesellschaften, Kommanditgesellschaften auf Aktien, Gesellschaften mit beschraenkten Haftung, Reedereien, offenen Handgesellschaften, Kommanditgesellschaften, Gesellschaften des buergerliches Rechts, Versicherungsvereine auf Gegenseitigkeit, begrechtlichen Gewerkschaften, Genossenschaften, Stiftungen, Koerperschaften, Anstalte des oefentliches Rechts mit Aufgaben gewerblicher Art* [Gide-Lourette-Nouel, *Dictionnaire du Marche Commune* (1975, Dictionnaires du Andre Jolly, Paris)].

[62] The view that public companies limited by shares may benefit from the freedom of establishment is also supported by Fikentscher, "The proposed directive on company law" (1964-1965) 2 CMLR, p.259; Papagiannidis-Christogiannopoulos, *op.cit.*, p.153; Maestrepieri, *op.cit.*, p.162; Lousouarn, "Le droit d'etablissement des societes" [1990] 26 RTDE, p.237; Lipstein, *op.cit.*, p.232; Plender, *Plender and Usher's cases and materials on the law of the European Community* (1989, Butterworth, London) p.360; Zaphiriou, *op.cit.*, p.13; Lipstein, *op.cit.*, p.136; van Gerven, *op.cit.*, p.350; Alexiou, *op.cit.*, p.381; Goldmann and Lyon-Caen, *op.cit.*, p.157; Goldmann, *op.cit.*, pp.85-87; Boukouras, *op.cit.*, p.780; Wooldridge, *op.cit.*, p.2; Steiner, *op.cit.*, p.185; Bournous, *op.cit.*, p.42.

[63] See Cath, *op.cit.*, p.252; Bournous, *op.cit.*, p.41; and Smit and Herzog, *op.cit.*, p.641-642.

[64] For a further analysis on the possible dangers arising from strict interpretation of the term "profit-aiming", see Bournous, *op.cit.*, p.42; Kalavros, *op.cit.*, pp.164-165; and Boukouras, *op.cit.*, p.85.

[65] See Wooldridge, *op.cit.*, p.2.

[66] For further analysis of the elements of public companies limited by shares within member states of the EC, see Zaphiriou, *European Business Law* (1970, Sweet and Maxwell, London) p.18; Papanagiotou, "The right of establishment of foreign companies in Greece in view of the status quo in the European Community", [1964] EED, p.309; Lipstein, *op.cit.*, p.232; and Bournous, *op.cit.*, p.85.

[67] Loussouarn, *op.cit.*, p.236, notes that these two conditions are practically one, since companies are always formed according to the law of their statutory seat.

[68] 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" (Smit and Herzog, *op.cit.*, p.644).

[69] 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.

[70] Loussouarn, *op.cit.*, p.236, states that this phrase practically abolishes the theory of the true seat, since its application as a criterion for the determination of the company's *lex fori* is not obligatory.

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.

Smit and 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". Moreover, it is noted [*ibid.*, p.644] 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".

[71] See Goldmann, *op.cit.*, p.88.

[72] For the above three quotes, see case 270/83 Commission v French Republic [1986] ECR 273; 1 CMLR 401; also see case 81/87 *ex. p.* Daily Mail and General Trust plc [1988] ECR 5483; [1988] 3 CMLR 713.

[73] It should be noted at this point that under the General Program of 1961 nationality (especially the nationality of the company's administrative organs, its shareholders or members do not form the link required for the fulfilment of this third requirement under Article 58.

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

[75] See Smit and Herzog, *op.cit.* p.646.

[76] See Boukouras, *op.cit.*, p.123.

[77] See Kalavros, *op.cit.*, p.173

[78] Maestriperi [1973, 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 in the Community.

[79] 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 EC-US and Japan. See Flamm, "Semi-conductors", in Hufbauer, *Europe 1992: An American Perspective*, (1990, The Brookings Institution, Washington D.C., p.273, foot.69.

[80] The problem is acute in countries following the incorporation theory, because it is only there that a registered office suffices for the characterization of a subsidiary company as "domestic". Countries following the *siege reel* doctrine however would demand that the subsidiary has autonomy from the parent company. The issue affects Greece too, especially after the enactment of the Presidential Decree 409/87, under which subsidiaries are considered to be Greek companies.

[81] Papagiannidis-Christogiannopoulos, op.cit., p.152; Papanagiotou, op.cit., pp.308-309; Goldman, op.cit., p.89; and Alexiou, op.cit., pp.372-372.

[82] Bournous, op.cit., p.44 notes that companies with only a constitutional seat within the Community are not benefited, because the General Program for the abolition of the relevant limits has set a third corrective condition. The same remark is also made by Cath, op.cit., p.254; Loussouarn, op.cit., p.236; van Gerven, op.cit., p.351.

[83] See Maestripiერი, op.cit., p.163.

[84] Micossi and Viesti, op.cit., 211 note that the ingredients of Japanese superiority in manufacturing includes: "more extensive, flexible and integrated (system design) use of automation, shorter product circles, just-in-time methods, tight quality control, ability to change production flexibility to meet demand, great simplification of product design (fewer components), a pyramidal system of subcontracting..., ...superior productivity and quality control are complemented by greater product differentiation and aggressive marketing and after-sales tactics (Dunning, 1986)".

[85] Micossi and Viesti, *ibid*, p.216, 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".

[86] The issue of local content started in 1982, when BL launched export production of its Triumph Acclaim under the li-

cence of Honda. Italy impeded imports claiming that the car was non European, as the British content was only 60%.

[87] In the autumn of 1988 Nissan Motor started to export its British built Bluebird cars in the other EC 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 Ishikawa, *Japan and the challenge of Europe*, (1990, Pinters Publishers, London), pp.77-79].

For further analysis of the arguments of France, Italy and the U.K. on the Nissan case, see R. Eccles, "When a British car is not a British car? Issues raised by Nissan", [1989] ECR, pp.1-3.

It should also be noted that the conflict between Japan and the EC was not limited to the Nissan case. Very recently Japan insisted that the EC has violated the GATT in six instances and the USA in nine. For further reports on the issue, see *Naf-temboriki*, 17.7.1992, p.96.

[88] The International Convention on the Simplification and Harmonization 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 Ishikawa, *ibid*, p.80].

[89] 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 subsidized imports from countries which are not members of the EC. "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" [Bulletin of the European Communities, Commission, no 3, 1988, p.86, paragraph 2.2.3].

According to the Proposal of the Commission [COM (88) 112 final], the modernization 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.

[90] Non-EC nationals criticize the application of the Regulation: "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 or value" [See Flamm, op.cit., pp.274].

[91] Micossi and Viesti, op.cit., p.213, note that Japan is widely known to "rely upon their traditional suppliers in Japan and import from them parts and components. Over time this attitude has given rise to complaints in the host countries..."

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

[93] It suffices to say that 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%.

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 or value".

It should also be noted that recently 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.

[94] 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".

[95] 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 antiscrewdriver regulation violates the 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.6 in particular) and the 1979 GATT Anti-dumping Code.

[96] In February 1989 the Commission passed new rules of origin, according to which non-EC companies must conduct key manufacturing of the front-end process in the Community. 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 EC [See Ishikawa, *op.cit.*, p.91].

[97] Kalavros, *op.cit.*, p.240-241, refers to the relationship between competition and freedom of establishment and notes that the concept of competition can not exist without freedom of establishment and vice versa.

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

[99] See Micossi and Vesti, "Japanese direct manufacturing investment in Europe" in Winters and Venables *European Integration: trade and industry* (1991, University Press), p.222.

[100] The theoretical problem deriving from the Nissan case is whether the restrictive recognition theory of the *siege reel* 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".

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

[102] The Treaty does not apply to Algeria, which became an independent state in 1962.

[103] The Treaty does not apply to Monaco, San Marino, Andorra and the Vatican, because these states exercise their external relations independently [Article 227, par.4]. However, the customs' union apply to Monaco (which is united with France since 1861) as well as San Marino (which has signed with Italian Treaties of Friendship and Cooperation in 1939 and 1953).

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

[105] It should be noted that the 40% threshold applies to cars. For other products EC has determined different percentages [see Table 27 in Ishikawa, *op.cit.*, p.93].

Moreover, it should be stated that in the application of this provision "account shall be taken of the circumventions of each case" [Article 10, par.a of Regulation 2423/88. In cases

133/87, 150/87 and 156/87 the European Court of Justice held that the discretion of the institutions (for excluding or not from the Community industry producers who are related to exporters or importers, or are themselves importers of dumped products) must be exercised on a case to case basis, with reference to all relevant facts [Ninth Annual Report of the Commission on the Community's Anti-dumping and Anti-subsidy Activities, 1990, p.28].

[106] This stipulation could take the form of Article 281 of the Greek Civil Code, which provides that all legal rights are abolished if they are exercised in a way that circumvents a legal regulation.



CHAPTER III

APPLICATION RATIONE MATERIAE OF THE FREEDOM OF ESTABLISHMENT AND
COMPARISON BETWEEN GREEK AND EC LAW

Introduction

In the first chapter of the thesis we discussed basic Greek regulations on recognition and establishment of foreign public companies limited by shares. Since these provisions were passed long before Greece's accession to the Community, they do not discriminate between EC and non-EC companies. The question arising at this point is whether these provisions, intending to regulate the status of all foreign companies in Greece, comply with the Treaty of Rome on the freedom of establishment of EC companies.

In order to answer the above question, we shall examine the conditions for the establishment of EC companies within Greece and discuss whether the relevant Greek laws are compatible with EC provisions (as they were presented in chapter two of the thesis). Our analysis shall not be limited to the formal conditions, which determine whether or not the company will be allowed to establish in Greece. We shall mainly discuss the rights enjoyed by foreign companies for the exploitation of their freedom of establishment in practice. Since EC freedom of

establishment emphasises both the simplification of administrative procedure, as well as the liberalisation of the functioning and general status of EC companies, we must also view the activities that EC companies are permitted to exercise within Greece.

The aim of this chapter is to assess whether Greece has applied EC law on establishment. This involves outlining which activities are liberalised by the Treaty of Rome and then discussing whether Greek legislation constitutes a violation of the Treaty or not. Particular reference shall be made to ECJ caselaw, albeit limited, concerning Greece's failure to adopt EC stipulations on establishment. The above is of particular practical interest, as no relevant research has been published so far in this area.

A. BASIC EC LEGISLATION ON THE RATONE MATERIAE APPLICATION OF THE FREEDOM OF ESTABLISHMENT.

Activities Liberalised Under the Treaty of Rome

In an attempt to avoid a -possibly restrictive- reference to the precise activities covered by the freedom of establishment, the Treaty of Rome mentions in detail those activities excluded from its application. However, the basic principles concerning the determination of the above activities are set by the classification of persons in three categories [1], among which only the self-employed are considered to enjoy the right of

establishment, as well as by the doctrine that the non-discrimination principle of Art.7 applies to all independent activities and services that can be characterized as financial and commercial [2]. Since the Common Market covers all it can be stated that the freedom of establishment covers all possible kinds of financial and commercial independent activities [3].

To be more precise, the right of establishment embraces all sectors of economic life, i.e. industry, commerce (wholesale and retail trade), finance, agriculture, public works, crafts and the professions, coal and steel, atomic energy, fishery, mining and quarrying, electricity, gas and sanitary services, food and beverages, manufacturing and proceeding industries, real estate and business, as well as personal services (restaurants and the like) [4] as long as they aim to financial activity in its broadest sense, that is to: "business or professional activity pursued for profit or remuneration" [5].

The freedom of establishment also covers the collateral incidents of the above activities. As far as companies are concerned, the right of establishment covers their administration, as well as their foundation under any form considered suitable by their founders, i.e. branch, agency, or subsidiary. This regulation also implies the prohibition of any restrictions concerning the acquisition of shares and the participation in existing firms or companies under the same conditions as nationals. It should also be mentioned that the above restrictions may take the form either of "a prohibition of foreign companies carrying on certain kinds of businesses", or "a requirement that

they shall obtain government consent" before establishing in the receiving state [6].

Before examining the limits set by EC law on the liberalisation of economic activities, it should be noted that the freedom of establishment does not cover activities exclusively internal [7] in a member-state. It goes without saying that the freedom of establishment -an expression of the non-discrimination principle of Article 7- does not cover restrictions on the above activities (which also apply to nationals of the receiving state).

The Exceptions to the Freedom of Establishment

The Treaty of Rome (following the example of almost all international treaties) includes a number of reservation clauses, i.e. provisions that allow parties to legally breach their obligation to follow the stipulations of the Treaty [8]. 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, EC nationals cannot claim breach of the Rome Treaty, because foreign natural or legal persons exercise their activities under the same conditions and restrictions imposed upon nationals of the host country.

In an attempt to prevent foreigners [9] from exercising activities connected with the *imperium* of the host country, the

Treaty of Rome introduces the second exception to the freedom of establishment, which concerns activities connected, either permanently or occasionally [10] with the exercise of official authority, i.e. 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. 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" [11] and must act in that capacity. This exception refers to specific activities [12] and not to entire professions [13]. The implementation of this exception may not lead to the destruction of the *effet utile* of the freedom of establishment.

Art.56 (1) EEC provides the third set of exceptions -found in all international conventions- which permit special treatment for foreign natural or legal persons [14] on grounds of "public policy [15], public security and public health" [16]. 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 by EC law, refers to all basic (and not only essential) principles of the ethical, political and economic order of the state and includes basic principles of the organization of the state. 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" (Directive 64/221, Article 2). 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" in Art.36. In the context of Art.48 EEC "public health" includes all establishments whose activities cause pollution or produce commodities hazardous to health [17].

The fourth exception to the freedom of establishment (restrictions concerning commerce and production of weapons and war materials) derives from Art.223 (1)(b) EEC, according to which each member state may take all necessary measures to protect basic interests of national security, which concern the production, purchase and sale of weapons, ammunition and war materials. It goes without saying that these measures must be necessary for the host country's well-being [18] and that their implementation must not harm competition on products not intended to serve exclusively military activities. 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" [19], whereas material which can be used both in military action and for other purposes is not subject *eo jure* to the above exception. A *stricto sensu* interpretation of this regulation is also indicated by Directive 68/363, which liberalises retail trade for certain kinds of weapons restrictively mentioned in its text.

According to Art.52 (2) EEC the Council may follow the relevant proposal of the Commission and exclude certain activities from the freedom of establishment. These exclusions -if passed [20]- would apply to all member states. As the Council has never used this power, the question, "what type of measures can the Council utilize?", is purely hypothetical. Smit and Herzog [21] mention regulations (which are considered "more appropriate" in view of the "scope of the whole paragraph") and directives.

The last two exceptions to the freedom of establishment refer to two very important chapters of the Treaty of Rome, the free movement of capital and monopolies. Although these issues deserve detailed analysis, the scope of this research allows only a basic treatment. However, they shall be examined more closely in the analysis of breaches of the Treaty of Rome by the Greek state.

Art.52 (2) EEC introduces the sixth -often considered "practically non-existent" [22]- exception to the freedom of establishment, which refers to the free movement of capital. The EEC Treaty recognizing the close relationship between the two freedoms [23] and the possibility of indirect violations of the freedom of establishment under the form of restrictions to the free movement of capital [24], states that the freedom of establishment shall be implemented "subject to the provisions of the Chapter relating to capital". Since EC companies wishing to establish in other member states obviously need to import and export capital, freedom of establishment is not really achieved,

implemented, if capital is not able to move freely at the same time [25].

The last exception to the freedom of establishment concerns state monopolies and is of particular interest in the case of Greece [26]. According to Art.37 EEC, monopolies of a commercial character must be abolished [27]. Moreover, Art.90 (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, i.e. companies which are closely connected to the state or municipal organizations [28]. "State monopoly" is defined as "the exclusive possession of the trade in some commodity", or better as "every organization 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 states [29]. 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, i.e. it must not serve a limited number of persons and must pursue social, educational or cultural aims.

Attention must now turn to the activities forbidden to natural or legal persons under Greek law. An important issue in this context is whether these restrictions comply with the stipulations of the Treaty of Rome concerning the freedom of establishment.

B. GREEK LEGISLATION APPLYING EC PROVISIONS ON ESTABLISHMENT

Art.4 of the Greek Civil Code under which "foreigners enjoy the same civil rights [30] as nationals" expresses the will of the Greek legislator to offer equal treatment to Greek and non-Greek natural and legal persons. However, due to the vagueness of this text [31] and traditionally protectionist Greek commercial policy [32], Greece has in practice has not met new demands for substantial freedom of establishment within its territory. Since the aim of this thesis is to evaluate the adoption of EC regulations in practice, we shall ignore such basic but vague laws promising equal treatment and refer to specific Greek laws, which tend to be discriminatory against foreigners. We shall then assess whether these special laws negate the freedom of establishment in practice and must therefore be modified by Greece.

The Formal Procedure for the Establishment of Foreign Public Companies Limited by Shares: an Indirect Restriction?

As far as recognition is concerned, Greece (which follows the theory of *ipso jure* recognition) seems to have fully adopted Art.220 EEC concerning the recognition of foreign companies. However, circumventions of the freedom of establishment may arise from the application of the *siege reel* doctrine the determination of the companies' nationality. Due to the lack of

precise criteria for determining a company's real seat (i.e. the company's main administrative centre), Greece is offered a pretext to regard any of the company's establishments as its main administrative centre and attribute nationality accordingly [33]. Although the Greek stance may lead to possible breaches of Treaty regulations on establishment Greece can not be accused of indirectly hindering the free establishment of foreign companies, in view of the text of the Treaty (which leaves room for the application of both the incorporation and the *siege reel* theories) and the status attributed to foreign companies not founded legally in their seat [34].

Greek legislation on secondary establishment of foreign companies was discussed above in chapter 1. Laws 2190/1920 and 89/67 on the establishment of branches or agencies of foreign companies require the submission of a representation document with basic information on the company's foreign affairs. These are purely administrative measures, which are seek to protect both foreign companies themselves and the Greek public and do not violate the companies' freedom of establishment. The only conspicuous point concerns the authority of the respective Minister to forbid establishment to companies, whose aim is considered to be illegal, or detrimental to the Greek public policy. The Greek Council of the State appears to support the validity of this law [35]. It should be stated that this regulation is compatible with EC legislation only if "public policy" is interpreted in the sense of Art.56 EEC [36]. It must also be mentioned that Greek law on subsidiary companies, which

is essentially identical to the relevant EC directive, is fully compatible with EC law. Nor is the bureaucratic procedure for the establishment of subsidiaries discriminatory (in the sense of Arts.7 and 52 EEC), because it applies equally to domestic and foreign companies,

After the analysis of the formal conditions for recognition and establishment of foreign public companies limited by shares in Greece (which do not violate articles 52-58 of the Treaty of Rome) we shall look into Greek laws, which (by prohibiting certain activities to non-Greek companies) constitute profound violations of Arts.52-58 EEC.

Frontier Regions. Prohibition of Acquisition of Real Property.

Until recently, one of the activities forbidden to foreigners concerned the acquisition of any kind of real rights (except mortgage) on immovable property situated in frontier regions of Greece (Legislative Decree of 3. 9.1924 as ratified by Law 3250/1924 and modified by Legislative Decrees 5/24.5.1926 and 22/24.6.1927), or Greek coastal regions which the Greek administrative authorities (Art.1 of Law 1366/1938) have designated as frontier regions (Law 1366/1938 as modified and supplemented by Law 1629/1939). Leasing or any other kind of transfer of the use of rural immovable property, forests etc. to foreign legal or natural persons was also prohibited. However, the Ministers of Agriculture and Defence could permit such transactions, enabling foreign persons to lease urban immovable property for a

period no longer than three years.

Since restrictions to the freedom of establishment also include national regulations "concerning various possibilities serving the exercise of the relevant activities" and the above stipulation made the establishment and functioning of foreign companies impossible in a area representing 55% of the Greek dominion [37], it should be considered as a breach of Arts. 7, 52 [38] and 54 (2e) [39] EEC [40]. It should be noted that Arts. 5, 47 and 48 of the Greek Accession Treaty (based on Arts. 52-56 and 58 EEC) required the abolition of restrictions on the freedom of establishment. Thus Greece should have abolished restrictions on ownership of land long before 1.1.1981 [41].

In order to justify its retention of such legislation, Greece claimed reasons of public policy [42] and security [43]. However, in view of the narrow interpretation of these exceptions, the variation of the interpretation of public security according to time and place [44], the need for concrete justification of the exception concerning serious danger of fundamental interests of the country and the fact that the exception must be based on personal behaviour, Greece was unable to justify its reluctance to abolish the above laws. Thus, in *Commission v Hellenic Republic*, Greek legislation was declared to be incompatible with EC law by the ECJ [45].

Thus it became clear that Greece's restrictive legislation on property acquisition should no longer apply to EC nationals. Greek concerns about possible "invasion of Turkish capital and nationals in sensitive areas of the country" [46] were unfounded

as Greece's application of the *siege reel* doctrine minimizes the risk of such circumventions. Furthermore, Greece can always exclude from the application of the freedom of establishment those transactions which present exceptional danger to its public security or policy.

In 1990 (nine whole years after the Greek accession to the Community and more than one year after Greece's reprimand by the ECJ), Greece passed Law 1892/1990, which provides that previous restrictions on the acquisition of real property rights in borderline regions were no longer applicable to EC nationals. However, Greece still maintains the right to "de-characterize" Greek regions as borderline, as well as to characterize other regions as such. It goes without saying that this does not affect in any way the rights of EC nationals, but refers to citizens of non-EC countries. It should also be noted that even after the passing of this law, Greek notaries were reluctant to apply it. Thus, they referred the matter to the then Attorney General of the Supreme Court (Hon. Plagiannakos), who made it quite clear that the law was indeed applicable and that their reservations (which were based on the old legal status) were "groundless" [47].

Limits to the Free Movement of Capital

Free movement of capital is a fundamental freedom closely connected with the right of establishment. To be more precise, 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. Often member states use restrictions to the free movement of capital to control freedom of establishment. Indeed, EC nationals would be unable to use their right to freely establish in another member state, if they did not have the right to transfer sufficient capital to that member state. This regulation implies that both imports and exports of capital must be liberalized; thus, EC nationals should be able to acquire the necessary premises and operational facilities and use the profits of their Greek branch in whichever EC member state they choose [48].

Art.67 (2) EEC (which provides 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) introduces an obligation imposed upon the member states which does not require the issuing of pertinent directives. However, the Council did adopt the First Council Directive of 11.5.60 and the Second Council Directive of 18.12.62 "for the implementation of Article 67 of the EEC Treaty", which lay down liberalization arrangements which vary according to categories of transaction, grouped together into separate lists. List A covers regulations on the repatriation of liquidated profits from direct investments. These EC regulations in combination with Art.52 [49] of the Greek Act of Accession (stipulating that blocked funds of EC nationals must be abolished on 1.1.86) underlaid the basic arguments of the Commission which identified Greece as the only EC member state

which prohibited export of funds belonging to foreign natural and legal persons [Law 1704/ 1939], thereby violating EC legislation [50] on free capital movement. The European Court decided that Greece "was under the duty to release...all blocked funds [51]...including [52] such funds arising from operations which were not personal". Consequently, funds of EC legal and natural persons arising from any legal transaction or activity must be 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 acquire [53] 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. It goes without saying that EC law on the free movement of capital imposes the abolition of these (admittedly limited) restrictions on the import and export of capital [54].

Recently, in an attempt to comply with the relevant EC legislation, the Director of the National Bank of Greece issued Act 2022/28.1.1992, according to which foreign companies subject

to Law 2687/1953 may export foreign exchange equal to the amount of their 1991 profits [55], 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 regulations, allowing free movement of capital for both EC and non-EC nationals, aim to harmonize Greek and EC legislation and to create a liberal market for both EC and non-EC nationals. 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.

The practical 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 (one year only). It does not abolish the previous existing Greek law, but merely modifies it for the set period of time. If after the expiry of this act, no further relevant acts are passed, the restrictive Greek laws will be back into force. It should be noted that there is no guarantee that similar Acts shall be passed in the future. Moreover, Greece's obligation to comply with the Treaty of Rome can not be determined by simple administrative acts, because these are changeable according to the will of the respective government [56].

Therefore, it can be stated that Greece's restrictive status on import and export of foreign exchange does not comply with the relevant EC legislation. Although recent administrative

measures tend to be positive, they do not cover all the activities liberalized under the Treaty of Rome, since they apply only to one category of foreign company (those founded under Law 2687/ 1953) and abolish restrictions concerning only one category of funds (i.e. profits). All other restrictions, which are still in force, violate the Treaty of Rome, the Directives of 1960 and 1962, as well as the Greek Act of Accession and must not apply to EC nationals.

State monopolies

In order to provide equal opportunities to trade, and to ensure the uniform application of the fundamental freedom of the free movement of goods within the Common Market, Art.37 EEC requires the abolition of state monopolies of commercial [57] character, which (taking the form of an exclusive [58] right) constitute an obstacle to the creation of the Common Market. It goes without saying that the existence of a state [59] monopoly of commercial [60] character, i.e. every organization [61] with whom a member state, legally or practically, controls, directs, or substantially influences imports or exports [62] between member states, hinders the freedom of establishment of EC natural and legal persons, who wish to establish in the host country and produce, import or export their products [63].

It should be noted that Art.40 of the Greek Accession Act deals with state monopolies and requires Greece to "achieve the same result by December 31, 1985" [64]. Par.2, Art.40 of the

Greek Accession Act provides for immediate abolition of the exclusive rights for 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. In order to comply with EC regulations on state monopolies, Greece passed Presidential Decree 604/1985, which abolished state monopolies [65] on sugar, matches, salt, tracing paper and decks of playing cards.

However, because of the direct effect of Art.37 and the regulation of Art.40 of the Greek Act of Accession for the abolition of state monopolies by 1986, all other Greek state monopolies of commercial character must be considered abolished from 31.12.1985. However, the persistence of state monopolies in drugs, fertilisers and fuel [66] is indicative of Greece's reluctance to surrender monopolies deemed to be important for its national economy. It should also be noted that the ECJ has issued a Judgement stipulating that Law 1571/85 (which provides for limited retention of exclusive rights of import and trade in oil) is a violation of Arts.30, 34 and 37 (1) of the Treaty of Rome [67].

At this point it should also be noted that according to Art.37 (2) of Council Directive 90/531/EEC Greece must abolish all restrictions on procurement procedures in the water, energy, transport and telecommunication sectors, by 1.1.1998. The Greek government has already liberalized urban transport in the City of Athens, air transport and is committed to the liberalization of telecommunications and electricity [68]. The problem arising

at this point, however, is that (at least at time of writing) the Greek government is reluctant to offer more than 49% of the above enterprises. Thus, another Treaty violation might take place after the relevant Directive comes into force.

Establishment of Private Schools

Another breach of the regulations on the freedom of establishment on behalf of the Hellenic Republic concerns the restrictive Greek legal regime on the establishment of teaching institutes, i.e. enterprises which organize and perform the teaching of persons in groups (of more than 5) in a specific place and aim to supplement and consolidate knowledge in lessons of basic, higher or university education, in foreign languages, music, dance or general education in no more than three hours daily. Such activity is forbidden to foreign legal and natural persons. As a result, the Commission has accused Greece of violating Arts.52, 59 and 43 EEC. It should be noted that this case concerns mainly restrictions to the free movement of persons and provision of services. However, it is also a breach of the freedom of establishment, because Greek law on the prohibition of foundation of institutes or private schools by foreign legal persons falls within the application field of Art.52 on the exercise of independent (non wage-earning) activities [69].

The two main justifications for maintaining this legislation were that the establishment of private institutes

should be excluded from the application of the Treaty as an activity related to public authority [70] and that in practice Greek authorities avoid enforcing its regulation and do permit the establishment of foreign educational companies. However, in view of the fact that the term "public authority" must have a narrow European (not national) interpretation and that simple administrative acts do not constitute compliance with the demands of the Treaty, the arguments of the Greek state were considered groundless [71]. As far as restrictions on professional education are concerned, the ECJ accepted that they do not constitute a violation of the Treaty, because they apply equally to Greeks and foreigners.

In spite of the above Judgement of the ECJ, Greece has failed to adopt a liberal law on the establishment of such schools. This national regulation is obviously a violation of the Treaty of Rome, since it introduces unjustified discrimination against non-nationals.

Self-employed Commercial Agents

The term "self-employed commercial agents" was introduced into EC law by Directive 86/653 on the coordination of laws relating to self-employed commercial agents. The Directive concerns laws governing relations 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, it provides an authentic definition

of the term. A commercial agent is defined as a self-employed intermediary, who has continuing authority to negotiate the sale or purchase of goods on behalf of a principal or to negotiate and conclude transactions on behalf of and in the name of that principal. The establishment of commercial agents is covered by Art.52 and must be liberalized. In Greece two kinds of "commercial agents" are reserved to persons of Greek nationality: agents of civil transactions and emigration agents.

In Greece, the establishment of persons dealing with the agency of civil transactions is covered by Law 308/1976. According to Art.1 of the Law, the activities of such agents concern intervention for the signing of civil transactions (sale exchange, renting, transfer of other real rights on immovables or cession of the use of immovables) as well as suggestion of opportunities for the signing of such transactions. According to Art.2 of the Law, for the exercise of these activities, natural persons must acquire official permission from the relevant administrative authorities, which is given to persons of Greek nationality only. Thus, companies wishing to establish in Greece and employ agents to effect civil transactions must hire Greek nationals (the only natural persons with access to the relevant profession) an obligation which makes the establishment and functioning of such companies almost impossible in Greece. It must be stated therefore, that Law 308/76 hinders the establishment of companies entering into civil transactions in Greece and must be considered a violation of Arts.48 and 52 EEC.

According to Art.12 of Law 2475/1920 all transactions

concerning the transfer of emigrants are exercised by persons with the relevant official permission, which is given to persons of Greek nationality only. However, Art.13, introducing an exception to this restriction, provides that foreign companies may acquire the relevant permission under the condition of reciprocity. Since the regulations of the Treaty of Rome on the freedom of establishment must be implemented without any restrictions set by national law and since the condition of reciprocity is an indirect obstacle to free establishment leading to discrimination based on nationality, Law 2475/1920 violates the Treaty of Rome.

The Establishment of Foreign Stock Exchange Companies

Reciprocity is also the main condition set by Law 1806/1988 for the establishment of foreign stock exchange companies. Since finance is within the field of application of Art.52 and the condition of reciprocity is considered an obstacle to the companies' freedom of establishment, it goes without saying that Law 1806/1988 violates the freedom of establishment of foreign EC companies wishing to establish in Greece. Stock exchange companies must also prove that they are already members of a foreign Stock Exchange Market. In addition, they must acquire permission for establishment by the Commission of Capital Markets, which has authorization to control the legality and expediency of the company's establishment in Greece. This last stipulation is another breach of Art.52 EEC, because it leaves

room for circumvention of the Treaty by the Greek Commission of Capital Markets, which has the right to block the companies' establishment in Greece on grounds of Greek "public policy" in its national meaning (for example, the Commission may reject a company's application because it considers that the Greek economy would be harmed from its establishment). Since these restrictions constitute a "governmental consent requirement" [72], they clearly violate the companies' free establishment and must not apply to EC legal persons. Attention must also be drawn to the fact that this law was passed in 1988, long after Greece's accession.

The restrictive legal status on the functioning of stock exchange companies is intensified by the obligation of such companies to employ Greek brokers, since according to Art.1 of Law 3078/1954 (as supplemented by Royal Decree 221/1971) only persons of Greek nationality can become members of the Greek Stock Exchange. Apart from the contradiction of this Article to Art.48 EEC, it must also be considered a breach of the freedom of establishment of foreign stock exchange companies because it hinders collateral activities of the companies, thus making their establishment in Greece almost impossible.

The Establishment of Mining Companies

Mining is another activity which should be liberalized under Art.52 EEC. The freedom of establishment also includes "the acquisition of shares" and "participation to already

established national [mining] companies" [73]. However, Greece has always maintained extremely restrictive legislation covering every activity relating to mining.

According to Art.8(1) of Legislative Decree 210 of 3/5. 10.1973 "On the Mining Code" the transfer of any kind of real rights over mines to foreign legal and natural persons is illegal, without permission from the Greek Ministerial Council. Foreign persons must obtain relevant permission to acquire shares in existing domestic companies [Art.8(2)], to participate in any auction concerning rights on mines [Art.3(4)], as well as to transfer rights on mines due to inheritance [74] [Art.9(1)]. The Minister of National Economy, who takes part in the Greek Ministerial Council, is authorized to refuse such permission or grant it subject to certain conditions [Art.10(1)]. Foreign companies are even prohibited from establishing subsidiaries, since companies seated in Greece are considered foreign, if they are legally or financially controlled by foreigners [Art.11]. Foreign mining companies are also prohibited from conducting research in Greece [Art.20].

Under these regulations foreign mining companies are prohibited from establishing in Greece (they may not buy, lease or rent Greek mines), participating in existing Greek mining companies or conducting research related to mining. Discrimination against foreign legal persons in this way and the subsequent violation of the freedom of establishment of foreign mining companies is more than profound. The restrictions imposed upon foreign persons are so extensive that the functioning of

such companies in Greece is absolutely impossible. The requirement of Ministerial permission for the establishment of a company or a participation in an already existing Greek company is a breach of the Treaty of Rome. One possible explanation as to why the ECJ has not dealt with the case of these regulations of the Greek Mining Code till now, could be that Greece has limited mineral wealth. Consequently, the issue of the establishment of foreign mining companies was of little practical use. However, it should be stated that Greek regulations concerning the establishment of foreign mining companies in Greece must not apply to EC companies, whose establishment and functioning must be regulated in the same way as domestic companies.

CONCLUSIONS

In most cases Greek Company Law is characterised by its lack of adaptability to contemporary social and financial needs and its mercantilist, protectionist attitude towards domestic companies [75]. However, basic Greek regulations on the legal status (art.4 Civil Code), the conditions for recognition (art.11 Civil Code) and establishment (Laws 2190/20 and 89/67) of foreign public companies limited by shares in Greece seem to belie these characterizations. Indeed, the conditions for the establishment of foreign public companies seem to be an ideal application of the general provision of Art.4 of the Civil Code, which requires equal treatment between domestic and foreign

natural and legal persons.

The sole substantial condition for the establishment of foreign companies in Greece seems to be their recognition by the Greek legal system. As Greece follows the system of the *ipso jure* recognition for all kinds of foreign legal entities, all foreign companies seem to have the right to establish within the Greek dominion. The danger of possible circumventions of the principle of unhindered recognition and establishment, deriving from the application of the *siege reel* doctrine for the determination of the companies' nationality, are obviously acceptable by EC law, which accepts both the incorporation and the *siege reel* theories.

The formal condition for the establishment of foreign public companies limited by shares, i.e. the submission of a representation document including basic information on the companies' functioning abroad, is considered a purely administrative measure, similar to the one imposed on domestic companies [76]. Consequently, it does not hinder the companies' freedom of establishment. Even if the submission of the representation document was considered to indirectly hinder the companies' free establishment [77] it would be justified as a measure aiming to protect public policy, because the objective of these regulations is clearly the protection of the companies and third parts from possible fraudulent representatives.

In view of the provisions examined so far, Greece seems to have adopted all relevant EC regulations for unhindered establishment within its territory. However, a closer look at

special laws on the activities forbidden to foreign entities leads to completely different conclusions. Special Greek laws on the maximum amount of foreign exchange that foreign companies are allowed to repatriate, the prohibition of foreign persons to participate in the Greek stock exchange market and mining companies, private teaching institutes, state monopolies (commercial, water, sewage, electricity, transport, gas, etc.) and commercial agencies leave little room to hope for free establishment and unhindered functioning of foreign companies in Greece. Indeed, the Greek state sets restrictions to both the activities that should be liberalized under Art.52 EEC, as well as to their collateral activities. Obviously this is hardly the ideal situation described by the basic Greek provisions on the establishment of foreign companies in Greece [78].

It should be noted that for a proper appreciation of Greece's will to adapt to Community regulations, two factors are relevant. First, there is only one legislative text introducing liberal regulations for companies of EC nationality and this was passed after a relevant decision of the ECJ (on private schools). On the contrary, the few liberal Greek laws apply to companies seated both within the Community and in third countries. A rational explanation of this situation is that Greece's steps towards a free Common Market have been limited to measures which, being harmless to domestic trade and necessary for the attraction of foreign investments, would have been taken even if Greece was not a member of the EC.

Second, in the vast majority of cases in which the Hellenic

Republic was brought before the ECJ for breach of EC legislation on the establishment of foreign companies, Greece repeatedly tried to gain time claiming that appropriate provisions were on the way. Even after judgement against Greece by the ECJ, Greece did not comply with the relevant EC legislation by revoking Greek laws found to be in controvention of EC requirements. Instead of resolving the matter in a positive and definite manner, the Greek state would either ignore its obligations (e.g. to abolish restrictions on stock exchange) or merely take administrative measures (e.g. to abolish restrictions on mines and capital movement). It should be noted that these administrative acts are considered inadequate for a member state's compliance with EC regulations, because they have limited effect and duration. Again, these measures apply to EC and non-EC nationals.

To conclude, it can be stated that Greece complies with EC regulations on the freedom of establishment only in theory. In practice, Greece continues to protect domestic companies against foreign legal entities. It should be noted however, that this attitude, albeit contradictory to the Treaty of Rome, is quite common among EC member states [79]. Indeed, it is common knowledge that practically all national governments tend to use national legislation for the maintenance of their sovereign power and the protection of national interests, even if this attitude leads to an obvious breach of the Treaty of Rome and the prevention of the creation of the Common Market [80]. Despite the fact that this situation is commonplace within the

EC, Greece's obligation to follow the regulations of the Treaty of Rome does not become any less important. Greece's reluctance to comply with EC stipulations leads to the conclusion that Greece is consciously sacrificing the materialization of the basic freedom of establishment of foreign companies within its territory in the name of short-term national interests.

FOOTNOTES

[1] The Treaty of Rome divides persons into three categories, i.e. workers, self-employed and providers of services. See O'Keefe, "The free movement of persons and the Single Market", [1992] ELR, p.4.

[2] See O'Keefe, *ibid*, p.4; Maestriperi, *op.cit.*, p.151; 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, pp.262-263; Papanagiotou, *op.cit.*, pp.309-310; Wyatt and Dashwood, *European Community Law*, (1993, Sweet and Maxwell, London), p.298-299; also see cases 36/74; 90/76; 221/85.

[3] See Goldman-Lyon Caen, *op.cit.*, p.306; 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, *op.cit.*, p.33].

[4] See Papagiannidis-Christogiannopoulos, *op.cit.*, p.139; Smit & Herzog, *op.cit.*, p.538; Bronkhorst, "Freedom of establishment and freedom to provide services under the EEC Treaty, three judgements of the Court of Justice", [1975] CMLR, p.246; Lasok and Bridge, *Law and Institutions of the European Community*, (1987, Butterworths, London), p.408.

[5] See Steiner, *op.cit.*, p.185; also see Goldman-Lyon Caen *op.cit.*, p.308; Smit and Herzog, *op.cit.*, p.539; case 36/74.

[6] See Pennington, *op.cit.*, p.104; also see Smit and Herzog, *op.cit.*, p. 539; Egana, *op.cit.*, p.89; Alexiou, *op.cit.*, p.371; Papagiannidis-Christogiannopoulos, *op.cit.*, p.140; Lous-souarn, *op.cit.*, p.237; cases 221/85; 90/76; 197/84.

[7] See cases 115/78; 175/78 Saunders; 35 and 36/82; 180/83.

It should be noted that Art.52 refers to establishment in "another member-state". This phrase 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 *siege reel*), a broad "communautaire" approach should prevail. This approach "would suggest that for the purpose of applying Article 52 to companies, Article 53 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" [Burrows, *op.cit.*, p.182].

[8] 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 [Goldman, *op.cit.*, p.74].

[9] It should be noted that according to Zontanos [1987, p. 113] the importance of this exception has reduced considerably due to the fact that independent (non wage-earning) activities involved with the exercise of official authority are nowadays "very rare".

[10] See Smit and Herzog, *op.cit.*, p.539; Papanagiotou, *op.cit.*, p.311; Mathijssen, *A guide to EC law*, (1975, Sweet and Maxwell, London), p.70; Maestripiერი, *op.cit.*, p.164; Bournous, *op.cit.*, p.92; also see case 2/74.

It should be noted that Smit and Herzog, *op.cit.*, p.607, note that since the Treaty refers to activities and not entire professions, the term "occasionally" seems "redundant". It is possible, however, that even an activity may occasionally 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".

[11] 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" [Smit and Herzog, *op.cit.*, p.605].

[12] 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 [Simitis, *op.cit.*, p.549].

[13] The state can not monopolise a whole profession related to public authority, unless the activities related to the *imperium* are obligatory for the exercise of this profession [Kalavros, *op.cit.*, p.179].

Also see Zontanos, *Champ d'application rationae materiae des regles du Traite CEE relatives a la libre circulation des personnes, des services et des capitaux*, (1987, Sakkoulas, Athens), p.116; case 2/74.

[14] Zontanos, 1987, *op.cit.*, pp.127-128, notes that these

can not be characterized as exceptions to the freedom of establishment, "since they do not permit the exclusion of certain activities from the freedom of establishment".

Also see O'Keefe, *op.cit.*, pp.4-5; Papanagiotou, *op.cit.*, p.310; Simitis, "The effect of the participation to the EEC on Company Law", [1962] NoV p.49.

[15] Difficulties have risen as 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 "public good", which is broader and comprises all basic principles of the ethical, political and economic order of a state [Smit and Herzog, *op.cit.*, p.617].

[16] 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 coordinates the legislations of EC member states in the public policy, security and health sectors.

Also see Alexiou, *op.cit.*, p.378; cases 36/75; 30/77.

[17] My analysis of the three exemptions was based on elements found in Cath, *op.cit.*, p.254; Smit and Herzog, *op.cit.*, p.617; Maestriperi, *op.cit.*, p.166; Zontanos, *op.cit.*, p.142; Kalavros, *op.cit.*, p.183; Burrows, *op.cit.*, p.208.

[18] 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 [Zontanos, *op.cit.*, p.122].

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

[20] Till the present day the Council has never used the authority conferred by this regulation. Zontanos, *op.cit.*, pp.124-125, refers to the view of Goldman, Lyon Caen and Cerehxe, who believe that after the completion of the transitional period, the Council has lost this authorization. According to them "the Council has no authority to limit the content of this liberalization since such a measure would turn against the regulations of the Treaty, which are now directly applicable".

[21] See Smit and Herzog, *op.cit.*, p.613; also see Papagiannidis-Christogiannopoulos, *op.cit.*, p.147.

[22] Burrows [1987, 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 Articles 67-73 rather than Articles 52-58. However, since the movement of capital "for this purpose was liberalized 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".

[23] Zontanos, *op.cit.*, p.169, notes that the free movement of capital is a necessary prerequisite of the freedoms created by the Treaty and especially of the freedom of establishment.

[24] Zontanos, *ibid*, p.169, adopts the view of Maestripieri who notes 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.

[25] The position of the EC on the free movement of capital and its relationship with the freedom of establishment shall be subsequently discussed in more detail in our reference to the Greek position on the matter (chapter 3).

[26] Burrows, *op.cit.*, p.88, comments on the particular interest that this regulation has for Greece and notes that Article 40 of the Greek Act of Accession deals with state monopolies and requires Greece to achieve the same result by 31 December 1985.

I would add that state monopolies are particularly important in the case of Greece due to the great number of nationalised industries (telecommunications, transport, water, electricity, gas etc.).

[27] Two principle methods of interpretation of Article 37 have been advanced:

a. 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

b. a teleological interpretation, according to which "the *a priori* abolition of exclusive rights is discriminatory *per se*. See Christoforou, "The rules governing state monopolies of a commercial character under EEC law", [1981] EED, p.535.

[28] 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 Papagiannidis-Christogiannopoulos, *op.cit.*, p.235.

[29] See respectively Burrows, *op.cit.*, p.89; Nestor-Papastamkos-Ioannidis, 1990, p.64; also see Christoforou, *op.cit.*, p.505; Papagiannidis-Christogiannopoulos, *op.cit.*, p.84; Kalavros, *op.cit.*, p.144.

[30] According to Krispis, *op.cit.*, pp.91-93, the terminology used in this regulation is not accurate. The term "rights" must be interpreted as "rights and obligations", whereas the term "civil rights" refers to private rights (a term

including commercial rights too).

[31] There are two interpretations of Art.4 in Greece. According to the first, Article 4 -being a provision of private international law- means that both nationals and foreigners have to comply with the same international law regulations. This means, that in case of a land purchase both Greeks and have to comply with the *lex rei sitae* of the transaction, i.e. Greek law. Whether this law introduces beneficial provisions for nationals has nothing to do with equality as suggested in Article 4. The second interpretation (which prevails in view of Greece's participation in the EC) suggests that Article 4 is a general rule of civil law, which requires equal treatment (in a broad and substantial sense) for Greeks and foreigners See Bournous, op.cit., pp.139-140.

[32] Even contemporary Greek legal authors justify the state's violations of the freedom of establishment in the name of the "protection of the economy and welfare of Greece", although in theory all agree that violations of the Treaty of Rome must cease. See Bounous, *ibid*, p.140.

[33] If Greece chooses to consider that a certain company is Greek, it may well claim that the company's true seat is in Greece. This would be particularly convenient in cases where the company's products are of value (as tax, technology etc.) to the Greek state or competitive for Greek products. For further comments, see O'Keefe, op.cit., p.19.

[34] Such companies are considered *de facto* obscure partnerships (a type of partnership best known in Greece as *afanis ete-ria*) or *quasi* public limited companies.

[35] As this regulation (voted to protect Greek public order) is valid for Greek and foreign companies, it does not discriminate against foreign companies [Council of the State 3395/1971].

[36] Papanagiotou, op.cit., p.324, notes that this stipulation contradicts the Treaty of Rome. However, this regulation is only a text, which may leave room for violations by the respective Greek Minister. I believe that the law is only a reservation clause to the freedom of establishment also met in the Treaty of Rome (Article 56). However, circumventions of this clause are possible; anyway, such doubtful cases may be controlled by the European Court.

[37] Bournous, op.cit., p.142] notes that 51% of the Greek dominion was characterized as borderline region. However, the ECJ in case 305/87, Commission v Hellenic Republic [1989] ECR 1461; [1991] 1 CMLR 611, refers to a percentage of 55%. Since this percentage was not argued by Greek representatives in the proceedings of this case, this number should be considered accurate.

[38] See Papanagiotou, *op.cit.*, p.323; also see cases 305/87; 63/86.

--Kalavros, *op.cit.*, p.264, notes that the restrictions on the acquisition of land within Greece contradicts basic EC legislation only when it hinders activities liberated by the Treaty of Rome. This means that only when a company wishes to use the land or building for its unhindered functioning in Greece must the restrictions be abolished. The civil transaction on the acquisition of land not related to some kind of economic independent activity is clearly not covered by EC regulations.

[39] Although this Article of the Treaty has not been mentioned in the Judgement of the ECJ, Burrows, *op.cit.*, p.197 and Christogiannidis-Papagiannopoulos, *op.cit.*, p.145, refer to it as a regulation for the abolition of restrictions concerning the acquisition, use or disposal of movable and immovable property or rights therein. It is true that nowadays the stipulations of the relevant programme for the implementation of the freedom of establishment are considered to lack binding effect in member states [Dagtoglou, *op.cit.*, p.561] and have been "replaced" by the direct effect of Articles 52-58. However, this regulation indicates the importance of the liberation of all transactions concerning the acquisition of land in the territories of other member states for the realisation of the freedom of establishment in practice.

[40] It should be noted that Article 222 is not relevant in this case, since it "cannot be interpreted as excluding the rules in Member States governing the system of property ownership from the field of application of the general principles of Community law". See Dagtoglou, *ibid*, p.560.

[41] Greece should have complied with the relevant EC regulations after the Athens Treaty of 1962 (see Dagtoglou, *ibid*, p. 576). It should be noted that after the voting of the 1975 Constitution, the text of the Athens Treaty became part of national legislation (Art.28 of the 1975 Constitution). However, even after 1.1.1981, when Greece became a full member of the Community, Greek courts failed to follow EC regulations on the ownership of land by EC nationals [See Corfu Court of Appeal 75/81; Supreme Court 425/83].

[42] In the Preliminary Report of Law 1629/1939 it is noted that the prohibition imposed by the Legislative Decree of 3.9.1924 as ratified by Law 3250/1924 "was imposed for reasons of Public interest, that is for the prevention of the cutting of rural estate into pieces, which at the time were being expropriated in favour of Greek farmers who did not own land as well as refugees". See Sifneos, *op.cit.*, p.351.

[43] In the Preliminary Report of Law 1629/1939 [Sifneos, *ibid*, pp.350-352] it is mentioned that "Law 1366/1938 was passed for reasons of national security".

In the Preliminary Report of Law 1366/1938 [Sifneos, *ibid*, pp.1180-1182] it is mentioned that "reasons of national security

mentioned analytically in the relevant Preliminary Report, have lead to the passing of Law 1031/1938". However, such Preliminary Report was never written [Sifneos, *ibid.*, p.45].

[44] See cases 7/68; 41/74; 46/76; 113/80; 118/75; 30/77.

It should be noted that the Greek Tourist Organization (the official expression of tourist policy of the Greek state) in an English brochure published in July 1969 invited foreigners to buy property in Corfu (a frontier region) through "a Greek nominee" in order to comply with Greek legislation on borderline regions. They then mentioned that "for commercial enterprises such limitations do not exist provided that the company is founded as a local Greek company, which functions under the same status with a Greek national, even if it has foreign administration". See Dagtoglou, "The prohibition of acquisition by foreign persons of ownership on immovables in borderline regions under EC law", [1986] *EEvD*, p.579.

[45] See case 305/87 *Commission v Hellenic Republic* [1989] *ECR* 1461, [1991] 1 *CMLR* 611; also see Kalavros, *op.cit.*, p.264.

[46] See Bournous, *op.cit.*, p.143.

[47] See Legal Opinion of Mr G. Plagiannakos, Attorney General of the Supreme Court no 7/1990 [1991] *NoV*, p.1419.

[48] For further analysis of the close relationship between freedom of establishment and free movement of capital, see Burrows, *op.cit.*, p.271; Papagiannidis-Christogiannopoulos, *op.cit.*, p.163; Zontanos, *op.cit.*, p.169; Oliver and Bache, "Free movement of capital between the member states: recent developments", [1989] *CMLR* p.62; also see case 203/80.

[49] Article 52 of the Greek Act of Accession regulates 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 and Herzog, *op.cit.*, p.726, note that "those payments are thus to be liberalized as of the date of accession".

[50] Greece argued that Article 52 of the Act of Accession requires 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. This obviously unfounded argument was rejected by the ECJ.

[51] The definition of "blocked funds" was also the subject of debate. Greece referred to such funds as "funds arising from the sale of real estate situated in Greece; revenue from assets not acquired by means of foreign exchange converted into drachmas on the free market; compensation for expropriation of real estate; sums awarded by a judgment of a court of law; refunds of unduly paid taxes and amounts related to inherited

property, provided that such taxes were not paid or such amounts acquired by means of foreign exchange converted into drachmas on the free market" [1987] ECR, p.4741. However, the Court in its Judgement of 3.12.87 accepts the "generally accepted definition of blocked funds", which is "deposits of money belonging to non-residents which, in particular, may not be freely transferred out of the country" [ECR, 1987, p.4749].

[52] The Court decided that the directives' reference to "personal capital movements" is not restrictive and "it does not follow that only such funds must be liberalized" [ECR, 1987, p.4751].

[53] Companies acquire permission to establish from the Ministers of Coordination, Economics and the relevant Minister for each specific case.

[54] 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.

[55] See relevant articles in [*Imerisia*, 31.1.1992, p.3; and *Kerdos*, 31.1.1992, p.4.

It should be noted that companies may export an amount equal to their annual profits minus the amount relating to the companies' taxation or commercial debts.

[56] See case 147/86.

As far as the development of the liberalisation of exchange market in Greece is concerned, H. Papadimitriou ["Where will the liberalization of exchange bought get stuck?", *Vima*, 4.4. 1993, p.D2], notes that there are three factors that may jeopardise the evolution of the liberalization process:

a. the two basic authorities, the Ministry of National Economy and the National Bank of Greece, do not agree on the way, the time and the duration of the process.

b. the ability of the Greek banking system to administer this procedure according to the rules is questionable; and

c. there is a lack of clear and categorical promise on behalf of the other Greek parties, that they shall continue the process, if they are elected in the future.

For further analysis of the value of these Acts and their function in the Greek legal system, see appendix 1.

[57] For further analysis on monopolies, see Kalavros, *Lectures on EC law, II/2: Competition Law*, (1989, Sakkoulas, Athens), pp.79-89; Christoforou, "The rules governing state monopolies of a commercial character under EEC law" [1981] EED, pp.503-505; also see cases 59/75; 91/78.

Burrows, *op.cit.*, p.88, notes that "given that in most, if not at all, cases there is a commercial aspect to state monopolies, and that they are usually capable of being exploited for profit, it is not easy to see what is excluded by the

qualifications implied by the words of a commercial character".

[58] Steiner, *op.cit.*, p.94, notes that "to qualify as a monopoly it is not necessary to exert total control of the market in particular goods; it is sufficient if the bodies concentrated have as their object transactions regarding a commercial product capable of being the subject of trade between member states and play an effective part in such trade".

[59] The characterization of a monopoly as "a state monopoly" derives from its source, that is from the fact that it is based on activities of public authorities. See Papagiannidis-Christogiannopoulos, *op.cit.*, p.84.

[60] The commercial character of a monopoly does accept a wider interpretation. Thus, the crucial element is not whether the exclusive rights given to a state monopoly refer directly to commerce, but whether the monopolistic activities influence intra-EC trade [See Nestor-Papastamkos-Ioannidou, *op.cit.*, p.66].

[61] The Treaty of Rome refers to every organization whose activities are influenced by the state, either *de jure* or *de facto* [Papagiannidis-Christogiannopoulos, *op.cit.*, p.84].

[62] Member states must also abolish restrictions on the use of imported products in the production of goods covered by state monopolies. See case 119/78.

[63] Agricultural products are excluded from the application of the Treaty of Rome [Papagiannidis-Christogiannopoulos, *op.cit.*, p.85]. The second exception to the provision on state monopolies concerns previously signed international treaties.

[64] See Burrows, *op.cit.*, p.88.

It should be noted that Art.37 (1) EEC has direct effect after the end of the transitional period (see case 59/75).

[65] The Greek laws which establish state monopolies are:

1. Law ΓΙ' of 28/28.4.1904 "On the Prohibition and use of Saccharine" as silently abolished by Law ΓΦΙΑ of 4/14.1.1910 "On the Monopoly of Saccharine", as modified and supplemented by legislative Decree 1674 of 30.7/22.8/1942.
2. Decree of 11/23.4.1833 "On the Monopoly of Salt" as supplemented and modified by Laws ΧΟΦ of 10/11.8.1861 and Law 399/1914 also "On the Monopoly of Salt".
3. Law ΓΦΙΑ of 4/14.1.1910, as modified by Legislative Decree 1674/1943 "On the Monopoly of Saccharine and other Sweeteners".
4. Law ΑΡΕΗ of 27.3/24.5.1884 "On the Monopoly of Production, Import and Sale of Matches".
5. Law ΑΡΕΖ of 22.3/22.5.1884 "On the Exclusive Right of Production, Import and Sale of Decks of Playing Cards to the State" as modified by Legislative Decree 99 of 13/15.2.1969.
6. Law ΑΡΚΑ of 29/30.4.1883 "On the Monopoly of Tracing Paper".
7. Law ΡΝΕ of 12/17.4.1850 "On the Excavation and Sale of the Smyris of Naxos", as modified by Legislative Decree of 15/17

9.1935.

8. Law 20/22 of 14/17.10.1939 "On the Trade and Supply of Sulphate of Copper and other products", as modified by Law 2083/39.

9. Law 527 of 27/31.12.1914 "On the Trade of Chemical Fertilizers", as supplemented and modified by Laws 1274/1918 and 750/1948.

10. Law 2107 of 11/14.3.1920 "On the Prohibition of cultivation, trade and consumption of Indian Cannabis" and Legislative Decree of 14/27.10.1925 "On the Monopoly of Narcotic Medicines" as modified by Law 5539 of 15/23.6.1932.

[66] The monopoly of oil was based in Law ΑΕΕΤ 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 permits the import of oil after special permission of the Financial Supervisor). The sale of all liquid fuel is permitted after relevant decision of the respective Minister. However, permission for only gas station is given to each person, a provision that constitutes a breach of Article 30 of the Treaty of Rome [see case 347/88].

[67] See case 374/88.

It should be noted that the Greek government -estimating that the market of diesel and petroleum functions in a status of free competition [*Naftemboriki*, 5.8.92, p.3]- aims to liberalise trade in oil and other liquid fuels. The respective authorities are working on a new law, which would permit the establishment of oil companies, which shall have the right to acquire permission for more than one gas stations [*Naftemboriki*, 5.8.92, p.29]. Moreover, the Greek government is in the process of modifying Law 1571/85 according to which the minimum amount of capital for the foundation of a public oil company limited by shares is reduced from 80 to 50 million drachmas (*Naftemboriki*, 6.8.1992, pp.1 and 6].

[68] See Directive 90/531/EEC [OJ L297/11]; for the liberalization of urban transport, see *Apogevmatini*, 13.8.1992, p.11. For the liberalization of telecommunications see *Kerdos*, 17.7.1992, p.11; *Kathimerini*, 4.4.1993, p.43; *Kathimerini*, 4.4.1993, p.41; *Express*, 13.11.1992, p.11. For electricity see *Kerdos*, 17.7.1992, p.1. For air transport see *Vima*, 4.4.1993, p.45.

It should also be noted that Greece, in an attempt to comply with EC law on the liberalization of aerial transport (it shall start on January 1993 and must be finished by 1997), has permitted the establishment of private airline companies in Greece [*Naftemboriki*, 5.8.1992, p.5]. According to *Express* [17.7.1992, p.2], Aegian Airlines has already acquired permission to transport within Greece and was expected to start operations by August 1992. The following companies have acquired governmental permission, but are not ready to start yet: "Ikaros Mediterranean Airlines", "Lamda Air", "Sky Trans", "Hellenic Air", "Athenian Airways" [*Express*, 17.7.1992, p.2]. It should be noted that after the publication of this article (in April 1993), SEEA

in cooperation with Virgin Atlantic has begun daily return flights from Athens to London.

[69] See case 147/86.

[70] It is true that the Greek Constitution considers education as the basic preserve of the Greek state and forbids the establishment of private universities.

[71] It should be noted that the Hellenic Association of Institute Owners has unsuccessfully tried to appeal against the judgement of the European Court.

[72] See Pennington, *op.cit.*, p.104; on the issue of the Greek violation of EC law concerning the establishment of stock exchange companies, also see Papagiannidis-Christogiannopoulos, *op.cit.*, pp.139 and 15.

[73] See respectfully, Papagiannidis-Christogiannopoulos, *op.cit.*, p.140; and cases 90/76; 197/84.

For the subjection of mining to Art.52 EEC, see Lasok and Bridge, *op.cit.*, p. 408.

[74] If the relevant permission for the acquisition of rights due to inheritance is not granted, they are inherited by the Greek state [Article 9(1)].

[75] See Loukopoulos, "The status of our commercial legislation today and its harmonization with the law of the European Communities", [1980] *Piraiiki Nomologia*, p.7.

According to Buckley and Artisien, *op.cit.*, p.221, "incentives and legislation are still fluid as the host country [Greece] tries to reconcile its needs with the need to be seen as an attractive investment location for multinationals".

[76] This is the conclusion reached by Perakis, *Law of the public limited company* (1992, H.Karatzas Legal Library, Athens), p.431; Bournous, *op.cit.*, p.146; Papanagiotou, *op.cit.*, p.324].

[77] "The Court has already stressed in its decisions, most recently in case 29/82 van Luipen [1983] ECR 151, that considerations of an administrative nature can not justify derogation by a member state from the rules of Community Law" [Plender, *op.cit.*, p.358].

[78] It should be noted that the Community is in the process of further simplifying the procedures towards the Common Market. See Ehlermann, "The internal market following the Single European Act", [1987] *CMLR*, p.376.

[79] The companies' freedom of establishment is often made difficult by "the frequent preeminence of the often incompatible national legislations and the difference between contract laws", which rarely derive from Community regulations. The freedom of establishment is usually restricted by unharmonized national

legislations. See Galvada and Parleani, "Liberte, egalite et fraternite en droit communautaire des societes", [1989] Revue des Societes, pp.453 and 455.

[80] In the past this "protectionism" extended to the protection of national companies either because they were nationalized and therefore deemed crucial for the well-being of national economy, or simply because successive governments adhered to the "National Champion Company" principle. See Stefanou, "Greece-EEC: the challenge of 1992", [1988] Eleftheros Typos, 23.8.1988, p.22.

CHAPTER IV

SPECIAL REGULATIONS ON THE ESTABLISHMENT OF MARITIME COMPANIES

Introduction

After the comparative analysis of Greek and EC law on the conditions for the secondary establishment of foreign public companies limited by shares and the conclusion that Greece is reluctant to fulfil its obligation to implement EC legislation within its boundaries, the main focus of our study has been concluded. However, due to the importance of commercial shipping for the Greek economy, the existence of special Greek laws regulating the status of foreign maritime companies within Greece, as well as the important recent changes of EC legislation on the issue of cabotage, we must also look into the conditions for the establishment of maritime companies.

The aim of this chapter is to present basic Greek laws stipulating the conditions for the establishment of foreign maritime public companies limited by shares in Greece and to assess whether these laws grant free establishment to foreign maritime companies. This conclusion, apart from its intrinsic interest may either confirm or modify our previous conclusion on the reluctance of Greece to implement EC law.

Greek Laws on the Establishment of Maritime Companies

Foreign maritime public limited companies can establish in Greece under Law 2190/1920 on the establishment of public limited companies in general, which was extensively analysed in the first chapter of the thesis. However, the large number of foreign maritime companies establishing in Greece and the importance of commercial shipping [1] to the Greek economy led to the regulation of special, flexible Laws applicable exclusively to maritime companies [2]. Thus, basic Law 89/67 on the establishment of branches or agencies of foreign commercial/ industrial companies of any type or form in Greece was supplemented by Law 378/68 [3], which provides that maritime companies may establish in Greece under the conditions of Law 89/67. It should be noted that Law 378/68 is applicable to all types and forms of foreign maritime companies wishing to establish in Greece. It goes without saying that it applies to foreign maritime public companies limited by shares and this is why it shall be examined in this chapter.

Law 378/1968 (art.1)

In an attempt to repeat the success of Law 89/67 with an equally effective special law on maritime companies [4], Law 89/67 was supplemented by Law 378/68 [5], which regulates that foreign maritime companies of any form and type can establish an [6] office or branch [7] in Greece under the conditions set by

Law 89/67. These companies enjoy all the advantages of Law 89/67, i.e. complete exemption from taxes and all duties including those imposed for postage of packages and letters to the company's seat, provided that they are engaged exclusively with activities approved by the Ministerial Decision permitting their establishment in Greece. The companies' application [8] for establishment includes the documents requested by Law 89/67 [9]. The application is then submitted to the Ministry of Mercantile Marine and is approved by a Joint Decision of the Minister of National Economy (who took up the authorities of the Minister of Coordination after the abolition of the respective Ministry) and the Minister of Mercantile Marine.

It is clear that the legislator did not wish to create a radically new framework for the establishment of foreign maritime companies; on the contrary, his aim was twofold:

- a. the categorical subjection of maritime companies to the legal status regulated by Law 89/67; and
- b. the adaptation of Law 89/67 to the special needs of maritime companies.

My analysis will concentrate on the issues that differentiate between Law 378/68 and the already analysed 89/67. I shall deal with:

- a. the maritime company;
- b. the activities allowed to the branches;
- c. the Ministerial Decision on the establishment of maritime companies in Greece; and
- d. the suretyship.

Maritime company is one whose exclusive aim is the possession, exploitation and administration of ships (par. 1 art.1 of Law 959/79) i.e. vessels [10] capable of circulating in the sea by themselves [Greek Code of Private Shipping Law, Article 4]. The nature and the activities of the branches [11] or offices [12] of foreign maritime companies [13] are individually determined in the Ministerial Decision allowing the establishment of each company [14]; however, they must also be allowed by the company's Articles [15].

According to the Ministerial Decisions published in the Government Gazette [16], branches and offices of foreign maritime companies established in Greece under Law 378/68 may perform the following activities:

- a. finding crew members for the company's ships;
- b. payment of the crew and of the company's debts to the families of the crew;
- c. payment of the company's debts, resulting from labour accidents suffered by the ship's crew;
- d. maintenance or repair of the ships;
- e. provision and equipping of the ships;
- f. appointment of the company's agents in any port;
- g. supervision of any issue on the social insurance of the ships' crew and the company's employees;
- h. maintenance and updating of the company's accounting books concerning the activities of the Greek branch or office;
- i. signing of transactions on behalf of the company;
- j. supervision of matters concerning the insurance of the

company's ships and the payment of the insurance fees.

Moreover, these activities are permitted exclusively to ships under foreign (non-Greek) flags belonging to foreign companies, as the branch is prohibited from dealing with other types of ships.

Law 378/68 imposes the obligation on foreign maritime companies to submit a document of suretyship [17]. Article 4 of Law 378/68 stipulates that "...the suretyship amount can not be lower than \$1,000 or higher than \$5,000; instead of a suretyship by a bank, the company may submit a private suretyship in favour of its staff..." [18]. The guarantor's liability is limited [19] to the amount specified on the suretyship document, even if the company's actual debt to the Greek state is higher [20]. The suretyship [21] forfeits only in the event of violations specifically mentioned in Laws 89/67 and 378/68 [22].

Law 378/68 led to the establishment of a large number of foreign maritime companies. In this sense the aim of the legislator was fulfilled as the benefit of this activity to the Greek economy became evident [23]. However, as Spartiotis notes, foreign companies began to exploit tax benefits without offering the Greek state the profits realised by their establishment (the import of large amounts of foreign exchange). In fact, some companies never functioned in Greece, although they acquired the right to do so. Consequently, the benefits offered by Greece seemed disproportionate to those offered by the companies [24].

Law 27/1975 as modified by Laws 814/78 and 1892/90

In an attempt to redress the balance and favour Greek interests, a new law was passed: Law 27/75 (applicable to companies established under Laws 89/67 and 378/68) provides that foreign companies enjoy tax benefits if they import an amount of foreign exchange, at least equal to the cost of the branch's functioning. Moreover, "only enterprises dealing exclusively with business outside Greece" or "enterprises whose activities are beneficial to the seafarer or Mediterranean shipping" could be subjected to Laws 378/67 and 27/75.

Law 27/75 had some distinct disadvantages [25]. A first, hastily prepared, Ministerial Decision 50141/75 was issued in order to clarify [26] and supplement [27] the existing laws on the establishment of foreign maritime companies in Greece. However, following the annulment of the Decision, the need for modification of the relevant laws led to the passing of Law 814/78, which stipulates that:

a. the branches' activities are :

"the administration, exploitation, chartering, insurance, the arrangement of load discharge, the brokerage of purchasing and selling or shipbuilding or chartering or the insurance of all ships (except passenger liners) under Greek or foreign flag, of total weight tonnage above 1,000, as well as the representation of enterprises dealing with the above activities"; [28]

b. foreign companies establishing in Greece may enjoy all privileges offered by Greek law, if they import at least \$50,000 annually [29];

c. the amount of the suretyship to the Greek state by a recognized bank "is determined by a Joint Ministerial Decision of the Ministers of Coordination, Economics and Mercantile Marine" [30] and "cannot be less than \$5,000" [31]; and

d. the Ministerial Decision permitting the establishment of a foreign maritime company in Greece is valid for 5 years and can be neither modified nor recalled before the end of this period without justified reason, i.e. violation of Laws 89/67, 378/68 or 814/78 from the company or its employees [32].

As stated in the Preliminary Report of the Law, clarification of the company's activities was necessary, because previous laws made the determination of activities, "whose subject is located outside Greece" difficult, as the location of the execution of a business deal or act can be disputed according to the laws of the countries involved. The past subjection of foreign maritime companies "offering services to the seafarer and Mediterranean shipping" to the regulations of Laws 89/67, 378/68 and 27/75 could benefit non-maritime companies. As the creation of a stable status for foreign maritime companies deciding to establish and invest in Greece was considered necessary [33], it was stipulated that the Ministerial Decision allowing the foundation of a branch or an agency was valid for 5 years.

Law 814/78 succeeded in creating a favourable and stable establishment framework for maritime companies. However,

companies dealing with ship ownership or administration considered the prohibition of their dealing with passenger liners and other ships of total weight tonnage under 1,000 restrictive and unfair. Indeed, this regulation practically prohibited any activity within Greece, as foreign companies were prohibited from dealing with passenger ships travelling exclusively between the Greek ports (passenger liners), as well as freighter ships of total weight tonnage above 1,000, which according to Greek law were prohibited from dealing with internal transportation. The Greek legislator, responding to the demands of the companies, passed Law 1892/1990, which reduced the minimum tonnage limit to 500, leaving all other regulations of Law 814/1978 unmodified [34].

Although the status of foreign maritime companies seemed permanently resolved, the Plenary Supreme Court Decision 461/78 managed to create confusion about the issue of their validity in Greece.

Law 791/78

Plenary Supreme Court Decision 461/78, confirmed the Pireus Multi-member Court of First Instance Decision 549/70, which applied the *siege reel* doctrine [35] to maritime companies. Thus, the formation, foundation and operation of such companies were regulated by the law of their true seat. As most foreign maritime companies in Greece were exploiting ships under Greek flag (registered under the relevant Art.13 of the Legislative

Decree 2687/53), they were considered to be administered in Greece and were therefore Greek companies. The problem was that these "Greek" companies, founded according to foreign laws, had not fulfilled the conditions set by Greek law for their legal foundation. Consequently, they were invalid and, as far as Greek law was concerned, should be liquidated [36].

This situation presented a serious danger for the development of Greek shipping. Foreign maritime companies could cease to establish in Greece, as they obviously prefer to establish in countries which provide a stable and pre-determined status, respecting the validity of transactions and other acts conforming with their *lex fori* [37]. Realizing the dangers deriving from this lack of clear regulation [38] concerning the validity of foreign maritime companies, the government passed Law 791/78 [39] which provided that the validity and legal capability of foreign maritime companies founded under foreign Laws and established in Greece under Laws 27/1975, 89/67 or 378/68 are governed by the law of the country of their Registered Offices, regardless of the place from where their affairs are being directed. However, companies dealing exclusively with pleasure vessels were excluded from the implementation of Law 791/78 [40].

Law 791/78 touched on a wider question of legal theory: Either it abolished Article 10 of the Greek Civil Code, or it created a special status for maritime companies. If it did abolish Article 10 the theory of the "true seat" would cease to regulate the *lex fori* of legal entities [41] and Greece would

adopt the theory of incorporation. However, the text of Law 791/78 categorically stipulates that it is applicable to maritime companies only.

Foreign companies subjected to Law 791/78 [42] are governed by the law of their statutory seat, even if the company's centre of administration is located elsewhere. Their *lex fori* [43] exclusively regulates the "legality of the company's foundation, the company's functioning, its internal relations, as well as the company's dissolution and its liquidation" [44]. However, Law 791/78 does not influence in any way the procedural periods (i.e. the appealing period), which according to Pireus Court of Appeal 358/1985 are judged by the law of the company's true seat. Moreover, according to Pireus Multi-member Court of First Instance 914/85, Law 791/78 does not stipulate exclusivity of jurisdiction for the Courts of the state of the company's *lex fori*; thus, Law 791/78 does not prohibit the acquisition of a special commercial seat in Greece and consequently the company can sue and be sued in the Greek courts [45]. In addition, Law 791/78 has retrospective effect, i.e. its regulations are also applicable to companies established in Greece before Law 791/78 [46], provided that they were not dissolved [47] before its implementation [48].

Law 791/78 bifurcates [49] the status of foreign companies by subjecting certain [50] companies and certain characteristics (validity and legal ability) to the law [51] of the companies' statutory seat (see Table 1), whereas in all other cases the *siege reel* doctrine prevails. Although the objections of

certain commentators [52] concerning the legality, expediency and constitutionality of this separation do not lack soundness, the undoubted expediency and efficiency of Law 791/78 does justify the unequal treatment of foreign maritime companies in Greece.

After the presentation of the conditions for the establishment of foreign maritime public companies limited by shares in Greece, we shall proceed to compare the relevant Greek legislative texts with the regulations of the Treaty of Rome, in order to assess whether Greece has implemented EC legislation in this sphere.

The Relationship Between Transport and Freedom of Establishment

A very important question arising at this point is whether the provisions of the Treaty of Rome concerning the freedom of establishment of companies are applicable to maritime companies, which (due to their activities being related mainly to transport) are also regulated by the special chapter of the Treaty of Rome on transport (Articles 74-84). The issue is of considerable importance. If the freedom of establishment was not applicable to maritime companies, our comparison between EC and Greek law would -for the purpose of this thesis- be meaningless, since the Greek state would have no legal obligation to introduce non-discriminatory laws on the establishment of foreign maritime companies within its territory. It should also be noted that this question is of general interest for three

main reasons:

a. it touches on the general issue of the application of the general principles introduced by the Treaty to the activities covered by Articles 74-84;

b. the European Court has not reached any decision on the particular issue of the application of Articles 52-58 to sea transport [see Calvet and Dintilhac, 1991, p.69]; and

c. the Greek Accession Act -following the insistence of Greek officials- does not regulate on the matter.

The theoretical basis of the view, that Articles 52-58 are not applicable as far as the establishment of foreign maritime companies within the EC is concerned, lies in an erroneous interpretation of Article 84, par.2 of the Treaty, which states that the Council shall decide whether the articles of the Treaty related to transport must apply to sea transport. Those who follow the negative view argue that, since the Council has not issued any relevant legislation, shipping has been excluded from the scope of the Treaty in general [53]. In spite of the lack of measures implementing Article 84, however, it is now unanimously accepted that sea transport is indeed covered by Arts.52-58 on the freedom of establishment [54].

According to the positive (the so-called extensive) view, adopted by the Commission and the vast majority of legal commentators, "even if the transport provisions were inapplicable for the time being, the rest of of the Treaty provisions did apply" [55]. The main argument of the second view is that the application of basic principles in sea transport is not

categorically excluded in the text of the Treaty. The validity of this argument is emphasised by the fact that par.1, Art.61 EEC does exclude the freedom to provide services from the sea transport sector. A second argument is the General Program of 18.12.1961 on the abolition of restrictions concerning the freedom of establishment includes measures clearly related to sea transport. The ECJ in case 16/78 stated that the general principles of the Treaty are both implemented and completed by the Common Transport Policy [56], indicating further support for the extensive view.

However, 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" [57], the Legal Service of the Commission issued a relevant internal document [58], according to which the freedom of establishment of legal entities is indeed applicable in sea transport.

Having established that Articles 52-58 of the Treaty are applicable to the establishment of maritime companies within the EC, we may now continue our comparative analysis of EC and Greek law. Before doing so, however, reference must be made to the content of this freedom in the particular case of maritime companies, which according to Straus [59] is "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"; in case of any national provisions

restricting the right of establishment of foreign maritime companies *vis-a-vis* national companies, all infringements must be brought before national courts [60].

Basic Greek Laws on Maritime Companies and Free Establishment

From the analysis of the special Greek laws on the establishment of foreign maritime companies in Greece it has become obvious that the formal conditions for the establishment of maritime companies are almost identical with those regulating the establishment of commercial companies. Thus, our previous assessment that Greek law appears to guarantee freedom of secondary establishment for commercial companies seems to apply to maritime companies too.

Indeed, the formal conditions for the establishment of branches, agencies and subsidiary companies under Laws 2190/1920 and 378/68 (as modified and supplemented by other Greek laws) do not clash in any way with the provisions of the Treaty of Rome concerning the freedom of establishment of companies within the EC. In fact, foreign maritime companies are entitled to a choice between establishing their Greek branch or agency under the rather bureaucratic procedure of Law 2190/1920 and establishing under the short and simple procedure regulated by Law 378/68. It should be noted that the restrictions to the company's activities (i.e. their dealing "exclusively with activities outside Greece") apply to the branches or agencies of Law 378/68 only. Since foreign companies wishing to deal with other sorts

of activity may do so by establishing under Law 2190/1920, the limits set by Law 378/68 do not obstruct free establishment, in general. Moreover, since these limitations are also applicable to Greek maritime companies established under Law 378/68, they do not violate the basic non-discrimination principle of the Treaty of Rome.

The official permission which foreign companies must acquire from the respective Greek Ministers before their establishing in Greece, as well as the suretyship document that they must submit to the respective Greek authorities are administrative measures imposed by the Greek state for the benefit of the Greek public and the foreign companies themselves. Thus, they do not circumvent the regulations of the Treaty of Rome. Furthermore, the application of the theory of incorporation for the determination of the law regulating the validity and legal capability of foreign companies (Law 378/68) is consistent with the Treaty of Rome which applies both theories, i.e. the theory of incorporation and the *siege reel* doctrine.

To conclude, it can be stated that the formal conditions for the establishment of foreign maritime companies in Greece do not violate the basic freedom of a company to establish anywhere in the EC. However, before the final conclusion on the compatibility of Greek with EC law is reached, it is necessary to analyse certain Greek laws regulating the companies' activities in Greece.

Access to the Greek flag

In order to determine which ships may sail under the Greek flag, article 5, par.1 of the Greek Code of Public Maritime Law provides that Greek ships, i.e. ships under Greek flag, must fulfil the following two conditions:

a. more than 50% of the ships must be owned by Greek natural or legal persons; and

b. more than 50% of their capital must be owned by Greek natural and legal persons" [61].

If these two conditions are not met, the ship loses its Greek nationality [Article 16, par.1 of the Greek Code of Public Maritime Law]. The law concerning access to the Greek flag are so strict that when 50% of a Greek ship is transferred to a foreign natural or legal person, "the transaction is invalid as far as 1% of the ownerships is concerned" and the foreign person may legally claim compensation for all damages in the Pireus Court [62] of First Instance under Art.16, par.2 of the Greek Code of Public Maritime Law.

Till recently, neither the Community itself nor the ECR had dealt with the question of whether ships under the flag of EC member states should have access to the flags of other member states; thus, there was no legislative text or decision which directly imposed an obligation on Member States to provide access to their national registers, for ships of Community flag. The issue was of particular importance, as ships under national flags tend to enjoy certain privileges compared to foreign ships

[63]. The existence of these privileges provided support for those who believed that exemption from access to the flag of other member states led to discriminatory status in favour of domestic ships. According to this view, this status hindered the freedom of establishment of maritime companies, because it led to the practical exclusion of foreign ships from a large number of activities within the boundaries of the receiving state. Those opposed to the liberation of national registers considered registration to be "an act of national sovereignty", which "escapes from the demands of Community Law" [64]. The logic behind this argument lies in the analogy between legal and natural persons. As natural persons may establish in a foreign state without automatically changing nationality, so can foreign companies establish freely in the other member states without having to change the flag of their ships.

Such an analogy is inapt in the light of the obvious difference in the extent of the restrictions on activities permitted within other member states (i.e. maritime companies are excluded from practically every activity within the receiving country). However, there is another argument in favour of the second view. Such limited access to national registries is not the cause, but a mere aspect of the discriminatory treatment of foreign maritime companies within the EC. If the member states decided to implement EC legislation on the freedom of establishment of foreign maritime companies by abolishing all discriminations based on nationality, the issue of which flag is flown, would have no practical interest.

The first positive step towards the abolition of the above limits was the Directive on the creation of the EUROS registry [65] and the European flag, which (when enforced) will set the basis for the distinction between ships under EC flag and ships from non-Member States. However, the most important step towards the abolition of these limits was the ECJ's decision on the Factortame case, where it is stated that, where at present it "falls to a member state to determine whether a vessel is entitled to be registered in that state, the member state is none the less bound to comply with the provisions of EC law"; in the same decision the ECJ held that it is contrary to EC law for a member state to stipulate as a requirement of a vessel's registration in its national registry that the owners or operators of the vessel fulfil nationality residence or domicile requirements [66].

Consequently, the exclusion of foreign ships from the Greek registries. Furthermore, these limitations may be considered as indirect hindrances of the maritime companies' freedom of establishment in Greece. In order to assess whether such a violation really exists, we must look into the issue of the activities that foreign maritime companies are allowed to pursue in Greece.

The "Shipping Company"

Law 959/1979 "on the Shipping Company" introduced in the Greek legal system a mixed type of maritime company with

characteristics borrowed from both private limited and public limited companies. Art.1 of Law 959/1979 states that a Shipping company is one which is established under the stipulations of that law and deals exclusively with the ownership, exploitation and management of Greek commercial ships.

Under Art.10, par.1 of the Law, foreign legal and natural persons are absolutely prohibited from acquiring real rights or shares in the Shipping Company. Even when the company's Articles of Association stipulate that the company's shares are transferable to foreign persons, the latter must hold less than half of the paid up capital [Art.10, par.1]. All shares in the Shipping Company must state in writing whether they can be transferred to foreigners or not [Art.10, par.2]. This statement is considered a *lettera letta* element of the text and in the event of a relevant clause, the share is invalid. Only in the case of share transfer due to inheritance or obligatory execution can foreign persons acquire shares not normally transferrable to foreigners. However, even then, foreigners may not own more than 50% of the company's shares [Art.10, par.4].

As regards the Shipping Company dealing exclusively with Greek ships, it should be noted that according to Art.5 of the Code of Public Maritime Law the capital leading to the acquisition of Greek ships must belong to Greek legal and natural persons. If this condition is not met, the ship loses its Greek nationality and is erased from the Greek register. The combination of this regulation with Law 959/1979 leads to the conclusion that if the Shipping Company's capital is (obviously

illegally) transferred to foreign persons, the company's ships lose their Greek nationality and, since the Shipping Company may deal exclusively with Greek ships, its further functioning becomes impossible and the company is indirectly led to dissolution.

The stipulations of Law 959/1979 are direct and profound violations of the Treaty of Rome. They introduce discriminatory treatment against foreign companies, which are prevented from taking part in a certain type of financial activity, i.e. to the establishment and functioning of the Shipping Company. It goes without saying that these prohibitions must be considered discriminatory as far as persons of EC "nationality" are concerned.

Cabotage

Law 959/1979 is not the most serious circumvention of the freedom of establishment. The Greek legal order has a far more restrictive regulation: Law 6059 of 14/20.2.1934, which introduced cabotage in Greek company law. By virtue of Article 2, par.1, the right to conduct transport of goods and passengers between Greek ports is exclusively awarded to the "legally recognized Greek ships". According to par.2 of the same article, foreign ships may disembark or unload in Greek ports "when coming from abroad" or load from Greek ports to other countries under the condition of reciprocity. In "extremely isolated cases and without this being a recognition of right" the Minister of

Commercial Shipping may allow the execution of transport between Greek ports [Article 2, par.3]. The following two kinds of ships are excluded from the privilege of transport of passengers by sea [Article 3. par.1]:

a. sailing vessels, moving either exclusively by sail or by machine; and

b. freighter steamships for ports suitable for vessels of total weight tonnage less than 100.

This regulation, a clear violation of the foreign maritime companies' freedom of establishment [67] is intensified by other Greek laws which introduce exclusive rights of towing, salvage and shipbuilding within Greece for ships under the Greek flag. However, before examining the relationship between these restrictions and EC legislation, we must discuss whether these activities are covered by Articles 52-58 of the Treaty of Rome. In other words, are these restrictions violating the companies' freedom to establish in Greece or are they pure circumventions of the relevant articles on the provision of services? If transport within member-states is subject to control of the regulations on free provision of services, the analysis of cabotage becomes irrelevant.

According to Bernitsas [68] transport of goods and passengers by sea can be subject to both the freedom to provide services and the freedom of establishment. Indeed, if a foreign company wishes to conduct certain activities in Greece without establishing in the country, the problem of cabotage is purely an issue of provision of services. On the other hand, if the

foreign company wishes to establish in Greece, transportation becomes a collateral activity of establishment and any restrictions to the activities of the company within the host country are considered limitations to its freedom of establishment. Consequently, an analysis on cabotage is relevant to this thesis, as far as companies established in Greece are concerned.

Before considering the relevant EC regulations, it should be noted that the issue of cabotage was brought to light by a decision of the ECJ [69], where it was concluded that the Council had failed to secure the freedom to provide services as regards international transport and to determine the conditions under which non-resident carriers may operate transport services within member states. In spite of the apparent ambiguity of this declaration [70], one thing became clear: immediate measures should be taken for the gradual abolition of all limitation concerning cabotage.

In one of the first official EC texts referring to this issue [71], cabotage is defined as "the carriage of passengers or goods by sea between any port in a member state including overseas territories of that state" [Art 2, par.1 of the proposed Regulation on the application of the freedom to provide services in maritime transport]. This proposed Regulation stipulated that any restriction to the above activities must be abolished "ten years after the adoption of this regulation" [Art.1, par.2] which was to enter into force on 1.7.1986 [Art.11].

However, Art.1 of a proposal of the Commission for a

relevant regulation [72] states that cabotage is to be liberalized by 1.1.1988. This stipulation is applicable to transporters under the following four conditions:

a. the transporter is established in a member state under the law of that state [Art.1];

b. the transporter has the right to execute international transportation of goods or passengers within his state of establishment [Art.1];

c. the transporter or the owner of the ship must be nationals of a member state [Art.2, par.1]; and

d. the transporter's company must be directed by EC nationals and the majority of its shares must belong to EC nationals [Art.2, par.1]. It should be noted that the proposal was modified in 16.12.1986, COM(86)744 final, in order to include maritime companies which, although established outside the Community, were controlled by EC nationals and owned ships registered within the Community.

The regulation that finally appeared in 22.12.1986, EC No 4055/986, stipulated that unilateral national restrictions in existence before 1.7.1986 on "the carriage of certain goods wholly or partly reserved for vessels flying the national flag" must be abolished by 31.12.1989 [Art.2].

However, three months after the supposed abolition of all restrictions related to cabotage and in view of the fact that no real progress in this matter has been made by the national legislatures, it was felt that until then the Community "lacked coherent and comprehensive policy for the maritime transport

sector" [73]. According to this proposal, Regulation 4055/86 marked only the first stage of a common shipping policy, but was inadequate as far as the final definition of a Community shipowner [74] and cabotage [75] were concerned. If the period between 1985 and 1990 was considered the first stage in the evolution of EC legislation on cabotage, the period between 1990 and November 1991 could be considered as the second stage, where EC officials realized the importance of maritime transport for the economies of the Community and started pressuring EC member states towards liberalization of transport [76]. The third and last period (December 1991 till the present day) is characterized by the agreement of member states and EC officials to finally abolish all relevant limitations.

The beginning of this third stage was marked by the enactment of Council Regulation (EEC) No 3921/1991 of 16.12.1991 on cabotage. The regulation defines cabotage as the "carriage of the national transport of goods or persons by inland waterway for hire or reward in a member state" in which the transporter is not established [Article 1]. Under this regulation cabotage is fully liberalized by 1.1.1993. Foreign maritime companies are subject to Regulation 3921/1991 if they fulfil the following four conditions:

- a. the transporter is established in an EC member state;
 - b. where appropriate, he is entitled there to carry out transport by inland waterway;
 - c. the relevant company has its registered place in the EC;
- and

d. the majority of the shareholders are EC nationals.

The question arising at this point is whether Greece has violated Council Regulation 3951/1991, since Greek law 959/1979 has not yet been modified. Although the reasons behind its repeated and categorical refusal to abolish this law are obvious [77], Greece has tried to justify its negative position on the issue by saying that cabotage plays an important role in maintaining its national security [78], and that transport between the mainland and certain isolated islands should be treated as work necessary to public interest [79]. Therefore, the relevant activities should be exempted from the application of the regulations of the Treaty of Rome on the freedom of establishment. In spite of the fact that these justifications lack theoretical and practical value (since public security and public interest should be interpreted according to Community and not national notions), Greece can not be accused of breaching the relevant EC laws, at least not before 1.1.1993 [30]. However, even after this date, Greece has no legal obligation to modify its present legislation as far as coasting cabotage, i.e. transport from mainland to islands or between islands, is concerned, since the Council, to the relief of the Greek public [81] has decided to exempt Greece from the application of EC regulations on coasting cabotage till 1.1.2004 [82]. However, transport by freighter ships between mainland ports is liberalized by 1.1.1993, although this stipulation does not apply to ships of total tonnage under 650 and ships carrying petroleum and drinkable water. Cruising from mainland to

mainland without mooring in islands i.e. cruising from Pireus to Thessaloniki, is liberalized by 1995.

Consequently, it can be stated that although Greek laws on cabotage violate the Treaty of Rome on the companies' freedom of establishment, at present Greece has no legal obligation to modify them as far as cruising from mainland to mainland and coastal cabotage are concerned. However, Greece should liberalize transport of freighter ships between mainland ports by 1.1.1993 as far as ships flying the flag of EC member states are concerned. However, because of Greece's reluctance to implement EC laws in general and especially on cabotage and in view of the fact that till now no such law has been passed in Greece, the Greek government's willingness to apply the relevant EC legislation is questionable.

Conclusions

This analysis of Greek law on the establishment of foreign maritime public limited companies in Greece has shown that foreign companies may chose between the following three forms of establishment:

- a. branch or agency under Law 2190/1920;
- b. branch or agency under Law 378/68 as supplemented by Laws 27/1975, 814/1978, 1829/1990 and 791/78; and
- c. subsidiary under Law 2190/1920.

Law 2190/1920 regulating the legal status of all kinds of public companies limited by shares in Greece is the basic

legislative text regulating the establishment of maritime companies of this type. Article 50 of Law 2190/1920 provides that the foreign company, in order to have the legal right to establish in Greece under this Law, must fulfil the following conditions:

a. it must have the right to function legally in Greece, i.e. it must be recognized as a legal entity (this condition lacks practical value, since the Greek legal system recognizes all legal entities *ipso jure*);

b. it must be considered foreign;

c. it must be characterized as public limited by shares;

d. it must submit to the respective authorities a copy of the representation document ratified by the respective Greek Consulate (including: the appointment of a Greek representative or agent and a person authorized to accept service of documents, the year of the company's foundation and the names of the company's representatives at its seat).

Law 387/67 (modified and supplemented by Laws 27/75, 814/78, 1829/90 and 791/78) stipulates that the conditions for the establishment of foreign maritime companies under its provisions are the following:

a. the foreign company may belong to any type or form, but must be functioning legally at its seat;

b. the Greek establishment must be exclusively engaged with business out of the boundaries of Greece;

c. it must submit to the respective Greek authorities a petition including: the declaration of its nationality, the type

under which it is functioning at its seat, a description of its activities and the name of the administrator of the Greek branch or agency; and

d. it must also submit a suretyship document either by the foreign company itself or by a recognized bank.

According to Article 42 of Law 2190/1920, foreign maritime public companies limited by shares may establish a subsidiary company, if they follow the following four stages:

- a. adoption of the company's Articles of Association;
- b. subscription of share capital;
- c. administrative authorization; and
- d. fulfilment of publication requirements.

Analysis of the formal conditions set by Greek law for the foundation of branches, agencies or subsidiaries of foreign maritime companies in Greece reveals that Greek law sets only administrative requirements, which do not violate the companies' freedom of establishment. However, the picture changes dramatically when we look further into the activities that these companies are allowed to pursue within the boundaries of Greece. There are restrictions concerning the acquisition of shares in "shipping companies". Since foreign companies are prohibited from possessing more than 50% of such companies, they can not own, inherit or legally control them.

More importantly, foreign companies are prohibited from owning Greek vessels, since the acquisition of Greek ships by foreign persons holding a percentage higher than 50% leads to the ship's loss of its Greek nationality. Although the loss of

the ship's nationality may not seem important, the exclusive privileges granted to ships flying the Greek flag renders the establishment of foreign companies in Greece rather pointless. Indeed, since foreign ships are prohibited from transporting goods and passengers between Greek ports both on the mainland and islands, the only activity permitted to foreign ships is to operate from foreign ports to Greek ports and vice-versa. If this is the case, however, one really has to wonder, if there is any need for the company's establishment in Greece. Then again, maybe the aim of the restrictive Greek laws is exactly that: to prevent the establishment of foreign maritime companies, so as to protect the domestic companies.

Law 959/1979 on the "shipping company" constitutes a circumvention of the Treaty of Rome, since it introduces a profound discrimination of foreign against domestic persons. Although the need for this modification is undoubted, at least as far as EC nationals are concerned, the overall status of foreign maritime companies in Greece abates its practical interest. If an EC company is permitted to participate in a shipping company in a percentage higher than 50%, the company would be led to dissolution, since the company's ships (along with their Greek nationality) shall lose their right to conduct transport within Greece. Thus, the key to maritime companies' free establishment lies in the abolition of restrictions concerning cabotage (regulated in Greece by Law 6059/34). We have already seen that cabotage has been gradually liberalized. The first operation to be liberalized was transport between

mainland ports conducted by freighter ships. Although the liberalization was to have taken place by 1.1.1993, nothing has yet been done by the Greek government. In view of the amount of time required for modification of Greek laws and the sluggishness of the Greek legislative machine, the abolition of cabotage (even partially) is not likely in the near future.

Consequently, our conclusion on the reluctance of Greece to grant freedom of establishment to foreign companies has not been disproved. However, the general restrictive status of transport within the EC does not permit us to declare that our conclusion was indeed justified.

FOOTNOTES

[1] In his speech of 1986 "Shipping and the Society", the Vice-President of the Greek Chamber of Shipping Mr Lanaras, Plc. and Ltd. Association Report, 1986, volume 1601, p.3-5, noted the advantages from shipping for Greece (one of the largest commercial fleets around the world and certainly the largest within the EC) which are:

a. maritime exchange (covering an important percentage of the balance of foreign payments of the country - in 1984 being 20,45%, in 1985 15,5%);

b. the number workers in ships (about 100,000) and maritime companies (100,000), which "around 1.000.000 people, 1/10 of the Greek population live on Greek ships"; and

c. import of foreign exchange and know-how.

In the Preliminary Report of Law 89/67 it is stated that Greece could now play the role of host country to companies, which (having established in Lebanon and importing more than \$80-100 million) faced the Middle East crisis and were interested in establishing in a country located near their previous establishment and simultaneously away from the war.

The same estimation led to Law 378/68. In Article 2 of its Preliminary Report it is stated that this Law was meant to supplement Law 89/67, as maritime companies have special problems and therefore need special regulation.

[2] Greek legislator never enacted special provisions on maritime public limited companies. The relevant laws apply to all forms of foreign maritime companies.

[3] Before Law 378/68 was enacted, maritime companies were established in Greece under Law 89/67. However, only one year after the implementation of Law 89/67, the dictatorship realising the important role that maritime companies could play in the developing Greek economy and in attracting foreign maritime companies to Greece (in order to strengthen both the Greek economy and its internal propaganda) passed Law 378/1968. Spartiotis, "Maritime companies under Law 89/67" (1989, Unpublished, Library of the Athens Bar Association), p.61 notes that two different opinions on the subjection of maritime companies to Law 89/67 were expressed. Both opinions agree that maritime companies can be considered as "commercial/industrial". The point of departure is the exact determination of "commercial" or "industrial".

In Article 2 of the Preliminary Report of Law 378/68 it is stated that this law was necessary, because maritime companies have different problems from commercial ones and Law 89/67 did not have the power to either create the suitable environment for maritime companies or provide solutions for their problems and special needs. Moreover, it was believed that foreign maritime companies would not establish in Greece, if the issue of their subjection (or not) under Law 89/67 was not categorically resolved.

[4] As Vavaretos in *The Greek 1968 Constitution* (1968, Sak-

koulas, Athens, p.100, notes that Article 23 of the 1968 "Constitution" aiming to attract foreign capital, prohibits the modification -and consequently the abolition- of Law 378/68. A modification is allowed only for the offer of more protection than the one given by Laws 89/67 and 378/68.

Megglidou, op.cit., p.207, notes that: "this constitutional regulation was dictated by the great importance of the above two laws for the financial progress of the Greek state".

[5] For the full text of Law 378/68, see appendix 5.

[6] In the text of the law there is no provision for the establishment of more than one office of foreign maritime companies. The issue was resolved by the affirmative opinion of the Ministry of Commercial Shipping and the Service of Private Investment of the Ministry of Coordination in 1977, which agreed that the establishment of more than one branch was legal. The Ministry of Coordination found no necessity for a categorical resolution of the issue with a relevant Ministerial Decision (as proposed by the Ministry of Commercial Shipping) and added that foreign companies with more than one establishment in Greece should inform the Ministry of Coordination within 15 days.

See Spartiotis, op.cit., p.127.

[7] The Legal Opinion of the Legal Council of the State 1309/1970 provides that "offices of supervision" by companies already established in Greece are subject to Laws 89/67 and 378/68. As many foreign companies with commercial activity worldwide felt the need of closer supervision of their affairs in the Mediterranean and the Middle East, the Legal Council of the State stipulated that they must be allowed to exercise that activity, even if they had already established a branch within Greece. However, permission for establishment "must be given with caution and only if the office serves the true need of the company to supervise its activities not only in Greece, but in a wider geographical region".

[8] The details on the company's application are determined in the 58101/4/78 Joint Decision of the Ministers of Coordination, of Finance and of Commercial Shipping. It is submitted to the Department of Maritime Substructure of the Ministry of Commercial Shipping and it includes "the precise name, registered office and nationality, the type of the company and its activities in its seat, the form of its establishment in Greece (Branch or Office of the Company), the precise subject of its activities in Greece, and its representative in Greece".

Moreover, according to the same Ministerial Decision, the company must submit the following documents:

- a. a copy of the Articles of Association and its official translation in Greek;
- b. a copy of the Minutes of the company's Council of Directors which includes the decision for the establishment;
- c. a certificate from the relevant authority of the country of the company's seat, stating that the company exists and functions legally at its seat;

- d. a declaration of the company's representative in Greece, stating that he accepts his appointment, that the company's activities are allowed in Greece and the names and flags of the company's ships (if any).

[9] One of the conditions set indirectly for the establishment of foreign companies in Greece under Law 89/67 was the appointment of a person authorised to accept service of documents. This appointment should also be made by maritime companies under Law 378/68. As the Supreme Court 1927/1985 states, "the appointment of an attorney authorized to accept service of documents, who lives permanently in the seat of the court is necessary and must be signed either by the legal representative of the maritime company or by his representative, who must necessarily possess a document of a special act of procurement".

[10] C.Rokas, *op.cit.*, pp.32-33, notes that according to Art.1 of the Greek Code of Private Maritime Law a "ship" is every object with the following characteristics:

- a. vessel (hollow object of any shape);
- b. that can move by itself (with an engine, sails etc.);
- c. that can move on the sea (that means on any kind of sea, such as lakes, oceans, seas, ports, open sea etc.).

[11] The branch or office of a foreign company is not a legal entity. As 50/85 Pireus Court of Appeal notes, the office or branch of foreign maritime companies established in Greece under Laws 89/67 and 378/68 is neither a person (natural or legal) nor an association of persons. Only the foreign company is a legal entity. However, the branch can sue or be sued in the courts of the state where it is located, if the dispute concerns an activity of the branch itself.

[12] Deloukas in *The commercial enterprise and its protection* (1977, Sakkoulas, Athens) pp.26-27, notes that the branch is a secondary establishment of an enterprise, that has limited administrative independence from the main office. The branch does not have its own legal personality and can not sue a third party on behalf of the branch itself.

Also see Supreme Court 219/54, Pireus Court of First Instance 3558/54 and Larissa Court of Appeal 149/1955.

[13] Law 378/68 does not expressly govern the establishment of agencies, because the legislator aimed to avoid the confusion that the inclusion of the word "agency" in a law on maritime companies could cause. According to Deloukas, *ibid*, p.24, agency of an enterprise can be:

- a. office (a company's secondary establishment) covering only part of the company's activities; or
- b. transaction known as maritime agency (agreement of two parts that the first will perform intermediacy actions for the second, who will be compelled to pay for the above actions); see Liakopoulos, "Agency" [1990] EED, p.561; or
- c. enterprise (an independent company) dealing through

agents and regulated by art.2 of the Royal Decree on the Jurisdiction of Commercial Courts of 2/4 May 1835).

As both agencies are related to maritime companies, for obvious reasons reference of the term was avoided, However, the agencies of foreign companies wishing to establish in Greece are subjected to Law 378/68.

[14] Decision 50/85 of the Pireus Court of Appeal expressly provides that "neither the company nor its branch may perform any other activity within the boundaries of Greece, than supervision of the approaching of the ships represented, administered or exploited by the company, in Greek ports."

[15] The taxation release under Laws 89/67 and 378/68 cover the profits of the foreign companies gained exclusively by the performance of these activities. See Spartiotis, *ibid*, pp.24/25.

[16] The Ministerial Decision is published in the Volume of Developmental Actions and Transactions (T.A.P.S.) of the Government Gazette. One of the bureaucratic problems of the establishment of foreign companies in Greece is the delay in the circulation of the relevant Issue of the Gazette. This may delay the legal establishment of the companies for months. After the "Plc. and Ltd. Association Report" [1986] volume 1599, p.19, submitted a memorandum to the respective Minister of Presidency the issue was resolved: the interested parties can receive a certificate by the Government Gazette Service and are able to establish right after the publication of the approval without having to wait for the actual circulation of the publication.

[17] The Legal Opinion of the Legal Council of the State regulates that the forfeit of the suretyship is obligatory in case of the violations of the law. This means, that the respective authorities do not have the option of not demanding the forfeit. If such an omission takes place, they can be charged with breach of duty.

[18] Pireus Single-member Court of First Instance 1026/86 regulates that the bank providing the document of suretyship has the right to deny payment to the Greek state, if the latter has not fruitlessly taken all possible legal actions for the satisfaction of its claims from the company itself. However, this objection would not be admissible in the Greek Courts, if it is obvious that the company is not in the position to settle its debts.

[19] The Legal Opinion of the Legal Council of the State 200/1969 regulates that the amount of the suretyship covers all the violations of the laws and the Ministerial Decision by all members of the company's staff. The Greek state is not entitled to compensation equal to the amount of the suretyship for the violations of every employee of the company. Moreover, the suretyship forfeits in favour of the Greek state even if the solid guarantor was unaware of the violations.

[20] The Legal Opinion of the Legal Council of the State 135/1975 stipulates that the suretyship forfeits only in case of the violation of the regulations of Law 89/67 and the Ministerial Decision on issues concerning the following:

- a. the dependence of the branch from the company and its lack of legal personality and self-sufficiency;
- b. the legality of the company's activities;
- c. the activities of the company, which must take place in a country other than Greece.

Only if the personnel of the company breaks these Laws may the Greek state demand the forfeit of the suretyship. The personal and private debts of the director of the company (even to the Greek state) can not be interpreted as violation of the conditions for the company's establishment in Greece.

[21] According to the Legal Opinion of the Legal Council of the State 84/1980, the Greek administration may not judge whether the surety shall actually forfeit. They shall only determine whether the violations took place and, if this is the case, start the legal procedure for the collection of the debts.

Moreover, according to the Legal Opinion of the Legal Council of the State 147/1981 the forfeiture of the suretyship is an administrative measure. In order to prevent the constant violation of the relevant legal texts, the administration inflicts a fine equal to the amount of the suretyship. This being the case, the forfeiture of the suretyship is always in the whole amount and not a fraction of the sum.

[22] It must be stated here that after the Prime Minister's Decision Y 1201/5.10.90 concerning the determination of the Deputy Minister of National Economy, the Ministerial Decision approving the establishment of foreign maritime companies can be taken by the Deputy Minister of National Economy along with the Minister of Mercantile Marine.

[23] Spartiotis in *Maritime companies under Law 89/67* (1989 Unpublished), p.26 p.26, refers to the benefits offered by Law 378/68, which are the following:

- a. "considerable rise to the import of foreign exchange";
- b. "the rise and flourishing of relevant activities in the port of Pireus";
- c. "the establishment and appearance of many enterprises and offices";
- d. "the creation of new working posts";
- e. "the international acclaim of Pireus and Greece";
- f. "the establishment of branches of foreign banks and the creation of new Greek banks"; and
- g. "the flourishing of tourism".

[24] See Spartiotis, *ibid*, pp.26-27.

Also note that the tax benefit of foreign maritime companies established in Greece under Laws 378/68, 27/75 as modified by Laws 814/78 and 1892/90 is the complete taxation release in favour of the Greek state or any other third party on the income of these companies deriving from its business or

services.

[25] Spartiotis, op.cit., p.33/34 writes that the prevention of large maritime companies dealing with other shipping business (such as freight brokerage, shipping or insurance agencies) from establishing in Greece, and the lack of confidence in the ability of Greece to adopt a stable status for foreign maritime companies were amongst the most obvious negative results of the Law. However, the unexpectedly large increase of imported exchange and the compulsion of the relatively small and medium enterprises to leave Greece lead to the view that Law 27/75 fulfilled the general purpose of its implementation.

In an attempt to increase the beneficial effects of the law, the Ministers of Coordination, Programming and Mercantile Marine made an attempt to modify it with the 50141/75 Joint Ministerial Decision, which stipulated that foreign maritime companies of any type or form establishing in Greece have the following two obligations:

- a. submission of a suretyship document for \$5,000; and
- b. import of at least \$30,000, to cover the costs for the functioning of their Greek branch.

This Decision presented very serious problems even from the very beginning of its implementation. Its legality and validity were disputed, as the respective Ministers did not have authority to modify Laws. Thus, after the deposition of a relevant application to the Council of the State, the interested parties succeeded in abrogating the Joint Ministerial Decision 50141/75 with Council of the State Decisions 3586/78 and 3648/78. However, because the laws do not determine the minimum limit of imported foreign exchange, the \$30,000 minimum set by the Ministerial Decision is unauthorized and, therefore, void.

[26] In the Preliminary Report of the Law the Minister refers to the need for modification of Law 27/75 to clarify the following issues:

- a. the vague determination of the exact activity allowed to foreign maritime companies in Greece; and
- b. the determination of companies "dealing with the offer of services to the seafarer or Mediterranean shipping".

The vagueness of the law raised justifiable suspicions concerning the criteria for the governmental permission of establishment to foreign companies, which certainly did not promote the Greek commercial policy at a time when the official Greek position made quite clear its wish to attract as many "serious" foreign maritime companies as possible and to promote Pireus to one of the largest international ports.

[27] In the Preliminary Report of the Law it was noted that the existing law needed supplementation on the issue of the suretyship. After the annulment of the Ministerial Decision, the matter remained unresolved and special regulations were still needed. As only a new law could modify or supplement Laws 89/67, 378/68 and 27/75, the Greek legislator had no option but to pass a new special law. Hence the enactment of Law 814/78.

[28] Spartiotis, op.cit., p.44 notes that the exception of passenger liners and the determination of the total weight tonnage to above 1.000, practically results to the exception of all ships occupied within the boundaries of Greece, because passenger ships travelling within the boundaries of Greece are considered to be "passenger liners" and freighter ships of total weight tonnage above 1.000 are prohibited to execute conveyances within Greece [art. 166 of the Code of Public Maritime Law].

[29] Apart from the amount of \$50,000 imported from each foreign company on a yearly basis, foreign companies must import foreign currency, "to cover their payments done in Greece on behalf of the company or third parties" [Law 814/78].

[30] After Presidential Decree 831 of 21 July/11 August 1981 (published in A' 211 Issue of the Government Gazette) the permission of establishment of foreign maritime companies is issued by the Ministers of Coordination and Mercantile Marine. As the Ministry of Coordination was abolished and its authority was transferred to the Ministry of National Economy, the Decisions are now issued by the Ministers of National Economy and Mercantile Marine.

[31] Paragraph 4, Article 25 of Law 814/78 regulates the issue of the suretyship of the company to the Greek state. The legislator sets only a minimum amount of \$5.000 and gives the Ministers of Coordination, Economics and Mercantile Marine the authorization to determine the exact amount required in each case. The Ministerial Decision 58101/5/27.11.78 [Issue of the Government Gazette 1064 B'/4.12.78] sets the amount of \$5.000 [in US dollars or converted in drachmas at the rate on the day that the suretyship forfeits]. This regulation created a similar status for all foreign companies, as far as the suretyship was concerned. This gave a precise solution to the public demand for equal treatment of all foreign companies having already established or establishing in Greece.

See Spartiotis, op.cit., p.44.

[32] All differences between the Greek state and foreign companies deriving from the Ministerial Decision on the company's establishment in Greece are resolved by a two-member Court of Arbitration. Each of the interested parties has the right to appoint one of the two members. It should be mentioned that there is no record of any case of arbitration.

[33] In the Preliminary Report of Law 814/78, it is noted: "The stability of the conditions for the establishment of foreign maritime companies in Greece will create a favourable situation for the establishment of these companies, which will lead to general benefits for our National Economy (raise of exchange, occupation of staff, flourishing of Pireus etc.)." See Sifneos, *Digest of Laws and Decrees* [1978] p.473.

[34] The conditions for the establishment of branches or

offices of foreign maritime enterprises of any kind or form in Greece are regulated by Laws 89/67 and 368/78, as well as Law 27/75 (modified by Article 28 of Law 814/78 as modified by Article 77 of Law 1892/1990).

[35] Plenary Supreme Court 461/78 states: "According to Art. 10 of the Civil Code, the legal ability of a legal person is ruled by the law of its seat. According to this legal text, which consecrates the so-called European theory, the seat of the company is the location, where the company is administered; from this seat one may judge the company's nationality. Greek legal persons are those, whose administration takes place in Greece, even if their Articles of Association determine that the company's seat is located abroad...". However, according to the opinion of eight members of the Court, the seat as regulated in Article 10 of the Greek Civil Code refers to the statutory seat.

[36] Tzifras, "Comments on Supreme Court 461/78", [1978] No V, p.349, notes that after the Plenary Supreme Court 461/78 foreign maritime companies founded according to the regulations of foreign laws, whose statutory seat is located abroad but are administered in Greece (which is the main reason for their establishment there anyway), are in a very awkward and dangerous position; one of their rivals may sue them in the Greek courts demanding their liquidation.

[37] See Tzifras, *ibid*, p.348.

[38] Tzifras, *ibid*, p.348, notes that there were two opinions concerning the solution to the vagueness of the Greek law (which led to the creation of such a dangerous situation). There were those who thought that certain relevant legal texts (Article 10 of the Greek Civil Code, Laws 89/67, 378/68 etc.) should be modified. There were others (especially ship-owners-both Greek and foreign) who demanded the resolution of the problem with a new law. I believe that the decision of the Greek state to proceed to the voting of a new law did not derive from the persistent demand of ship-owners. Although their pressure did play a role, I believe that the decision of the legislator was based on the wish to limit the appliance of the theory of the "statutory seat" to maritime companies only.

[39] According to the Preliminary Report of Law 791/78 the reason for the passing of the Law is the "security of transactions".

There have been several Courts' Decisions issued on Law 791/78. See Corfu Single-member Court of First Instance 354/1986 (on the establishment of companies dealing exclusively with pleasure vessels); Pireus Court of Appeal 423/1980; Supreme Court 1627/1986; Athens Court of Appeal 2135/1987; Pireus Court of Appeal 65/1988.

For the full text of Law 791/78, see appendix 6.

[40] The obvious question deriving from the text of the Law, is whether foreign companies may be owners of ships under

Greek flag. The answer to this question is offered by Article 13 of the Legislative Decree 2687/1953, which permits the acquisition of property of Greek ships to non-Greek persons, as long as these ships have been registered as foreign capital.

Moreover, Law 791/78 is applicable to foreign companies which own or exploit ships which rejected the Greek flag before the application of the Law.

[41] Vernardos, op.cit., p.376, refers to the various legal theories concerning the determination of the *lex forum* of legal persons, which can be ruled by the following laws:

- a. the law of incorporation;
- b. the law of the location of exploitation;
- c. the law of the principal place of business (known as the law of the person's true seat), and
- d. the law of the statutory seat.

[42] Before the application of Law 791/78, the seat of a company referred to the company's administrative centre [Athens Single-member Court of First Instance 1937/74, Athens Court of Appeal 2883/77].

[43] Due to the vagueness of the text of Law 791/78, the determination of the company's legal characteristics ruled by Law 791/78 has been the subject of numerous Court Decisions.

According to the Pireus Single-member Court of First Instance 3522/1984 it is only the company's foundation and legal ability that are ruled by the law of the company's statutory seat.

For example, according to Pireus Multi-member Court of First Instance 239/80, the lack of legal entity of a Nigerian company is judged according to Nigerian law. However, the procedure for proving of this deficiency in the Greek Courts of Law will be executed according to the Greek law.

Moreover, the company's bankruptcy ability is regulated by the law of the company's statutory seat [Pireus Court of Appeal 91/82, Athens Court of Appeal 3839/83].

[44] See Pireus Multi-member Court of First Instance 12/85, Athens Court of Appeal 117/82, Athens Multi-member Court of First Instance 11428/81.

[45] Pireus Single-member Court of First Instance 1087/84 and Pireus Court of Appeal 1633/89 provide that only after the application of Law 791/78 are foreign companies able to sue and be sued in Greece. Before the application of this Law the ability of foreign companies' branches or offices to sue and be sued in the Greek Courts was doubtful, as these branches were not legal entities. Pireus Single-member Court of First Instance 1087/84 provided that before the application of Law 791/78 the branches and offices of foreign companies were not able to sue and be sued in Greece.

[46] The legality of the company's foundation is judged by the law of its statutory seat, even if the company was founded

before the passing of Law 791/78 [Pireus Single-member Court of First Instance 3522/84].

[47] If the company was dissolved before the application of 791/78, the legality of its formation is ruled by the law of the state of its true seat. Consequently, it was judged that a Panamanian public company limited by shares established and dissolved before the application of Law 791/78, that has not fulfilled the conditions set by Greek law for its legal establishment should be treated as a *de facto afanis* partnership. See Pireus Multi-member Court of First Instance 2075/84.

[48] Pireus Court of Appeal 1034/79 decided that, if Law 791/78 was passed after the publication of the Decision of a First Instance Court, the Court of Appeal may apply the following laws:

- a. if the Court of Appeal decides to invalidate the decision of the Court of First Instance, the Court of Appeal must apply the newer law (Law 791/78); however,
- b. if the Court of Appeal investigates the validity of the First Instance decision, only the law that was valid at the time of the publication of the first-instance decision is applicable and the legality of the company's establishment must be judged by the law of the company's statutory seat.

[49] Consequently, it was judged that these companies were invalid in Greece, if they have not fulfilled the conditions of legal establishment set by Greek law and are therefore "non-existent" (Article 10 of the Greek Civil Code). Their possessions are considered to belong to the shareholders, who are treated as *de facto* associates [Corfu Single-member Court of First Instance 354/85].

[50] Anastasopoulou, "Maritime companies founded according to foreign laws: in which cases are they ruled according to the law of their statutory seat" [1985] TAE and EPE, p.20, elucidates that only foreign maritime companies are either ship-owners or administrators of ships under Greek flag or companies established in Greece under Laws 89/67, 378/68 and 27/75 (as modified by Laws 814/78 and 1892/90, that are subjected to Law 791/78).

[51] As the Greek legislation on the conditions for the establishment of foreign maritime companies in Greece tends to be quite complicated, reference to the application of the relevant laws in practice becomes necessary. I believe therefore that the best way to conclude this chapter is to report a recent Ministerial Decision permitting the establishment of a foreign maritime company in Greece. As all relevant Ministerial Decisions are identical, the selection of the specimen does not in any way influence the credibility of my report.

The 1241.1476/13/22557 Joint Ministerial Decision was issued by the Ministers of National Economy and Mercantile Marine and published in the Government Gazette on 9 September

1991 (p.1911-1912). It refers to the establishment of a Panamanian company under the name "NEDON SHIPPING COMPANY SA".

After the consideration of the relevant legislative texts and the submission of the relevant documents by the interested party, the respective Ministers of National Economy and Mercantile Marine permit the establishment of a company's branch or office in Greece under the following conditions:

- a. the company must deal exclusively with the chartering, the settlement of load discharge, the brokerage of general assignments or building or insurance of ships (except passenger liners) under Greek or foreign flag of total weight tonnage above 500, as well as with the representation of enterprises which deal with the activities mentioned above;
- b. NEDON SHIPPING COMPANY S.A., seated in Panama, must submit to the Ministry of National Economy (Service of Private Investments) a letter of suretyship from a recognized Greek or foreign bank for the amount of \$50.000 within a period of two months from the publication of the Ministerial Decision;
- c. the company must inform the Ministries of National Economy (Service of Private Investments), Economics (Service of Income Taxation) and Mercantile Marine (Service of Seafaring and Maritime Relations) on the establishment of the branch or office of the company, the names of the company's employees, the amount of the company's import of foreign exchange, as well as any modification or change of the company's functioning in Greece; and
- d. the company must import to Greece at least \$50.000 yearly, which may be used exclusively for the functioning of the company's Greek branch in Greece.

[52] See Venardos, "The legal status of foreign maritime companies of Law 791/78", [1979] *Piraiki Nomologia*, p.382.

[53] Close in "Article 84 EEC: the development of transport policy in the sea and air sectors" [1980] *ELR*, p.189, 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, Pablo Mendes de Leon in "Le cabotage aerien dans les Communautés Europeennes" [1992] *Revue de Marche Commun et de l'Union Europeenne*, p.632 clearly supports the positive view.

[54] A large number of Commission proposals have been made concerning the enactment of measures under Article 84. Smit and Herzog, *op.cit.*, p.833-834, refer to the Seventh General Report No 46 [1974]; Eighth General Report No 355 [1975] and ECR 167/73 [Commission v. French Republic].

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

[56] See case 16/78.

The case dealt with the question whether it was compatible with Community law that a member state would require a citizen of another member state to obtain a driving licence issued by the receiving state, although the citizen in question had already acquired a valid driving license in his country of origin. The issue arising at this point was whether Article 48 on the free movement of persons was applicable in this case of road transport. Although the Court 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.

[57] See Lipstein, *op.cit.*, p.177.

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

[59] See Straus, *op.cit.*, p.40.

[60] See Bredimas-Tzoannou, *op.cit.*, p.103.

[61] At this point it should be noted that Greek law is satisfied with these two conditions. Thus, it is considered liberal compared with the relevant EC laws, which add a third criterion. According to the "Proposal for a Council Regulation on a common definition of a Community shipowner" [COM(89) 266 final, in OJ C263/89, volume 32, 16.10.89], as amended by the Amended Proposal of a Regulation on maritime transport [COM(91) 54 final, in OJ C73/26, 19.3.1991], Community shipowners must also comply with the following condition: "...a majority of the board or of the directors are nationals of Member states having their domicile or usual residence in the Community...".

[62] The law does not determine whether the compensation is sought in the Single or the Multi-member Court of First Instance. The relevant issue is regulated by basic articles of the Code of Civil Procedure, according to which the Single member Courts of First Instance deal with claims of monetary value lower than 1.000.000 drachmas.

[63] Tzoannos in "European Community and the Greek shipping", Speech in the Financial Conference of 6-9 March 1979 (1980, Papazisis, Athens), pp.201-202, in his speech of 9 March 1979 in the Financial Conference of 6-9 March 1979 analyses the privileges that national ships usually enjoy. They are the following:

- a. exclusive carriage of certain goods by national ships;
- b. purchase of goods by foreign countries in F.O.B. or C.I. F. prices, which leads to the carriage of these goods by national ships only (this method was used by the countries belonging to the former eastern bloc);
- c. 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 (example given by the U.S.A. with the "Jones law" etc.; and, last but not least,

d. exemption of foreign ships from the execution of certain kinds of activities (i.e. cabotage).

[64] See respectively Bredimas, "The Common Shipping Policy" [1981] CMLR, p.21; and Bredimas and Tzoannos, op.cit., p.103. Also see Bernitsas, op.cit., p.189.

[65] According to the opinion of the Economic and Social Committee on the proposal of a Council Regulation establishing a Community ship Register and providing for the flying of the Community flag by seagoing vessels [90/C 55/18], the Committee "welcomes the concept of the Euros register and believes that its creation would, in itself, constitute a positive and significant step for Community shipping".

[66] See case C-221/89 Regina v Secretary of State for Transport ex parte Factortame Ltd and others (no 2) [1991] 3 CMLR 589. Also see case C-280/1989. For a different opinion on this issue, see case C-216/1987.

[67] There are those who argue that, although the restrictions concerning cabotage are indeed violating the foreign companies' freedom of establishment, the states imposing these limitations can not be accused of circumventing the Treaty of Rome, since the Common Market is not yet sufficiently developed. See Bernitsas, op.cit., p.189; and idib, "The Common Shipping Policy for the EEC" [1981] CMLR, p. 191. I believe that (at least now, almost 12 years after the writing of the relevant books) this argument lacks theoretical base. It was just an excuse for the maintenance of such a profound violation of the Treaty of Rome by countries with profound and deep interests for the preservation of these laws.

[68] See Bernitsas, op.cit., p.189.

[69] See case 13/83 European Parliament v Council [1985] ECR 1513; [1986] 1 CMLR 138.

[70] Close [1985, p.602] notes that "...this declaration is ambiguous; at first sight it looks as if freedom to provide services must be introduced for international transport while the Council is only obliged to fix the conditions for cabotage, a more limited concept. Considering the whole judgment, however, it is clear that the Court intended the principle of freedom to provide services to be introduced both for international transport and for cabotage, and moreover, that the declaration was intended to refer to inland transport only".

[71] Bulletin of the EC, Supplement 5/85, p.50-51.

It should be noted that Greaves in "Current developments of EC law, III. Transport" [1993] ICLQ, p.180, defines cabotage as "the right of a non-resident to operate a national transport

service within a member state".

[72] See COM (85) 610 final; 4.12.1985.

[73] See Opinion of the Economic and Social Committee on the proposal for a new Council Regulation on cabotage; 90/C/56/18/7.3.1990.

[74] The Economic and Social Committee stated that the definition put forward by the Commission "should be extended and should embrace all shipping services provided for remuneration in addition to the carriage of goods and passengers, with the exception of fishing". It is then proposed that "an acceptable definition would settle the vexed question of who should benefit from Community shipping policy and could prove to be the key to agreement on many issues with the positive measures package" [OJ C56/90, p.77].

[75] The Economic and Social Committee note that special national laws on cabotage which usually predate the Treaty of Rome must be harmonized towards liberalisation as soon as possible [OJ C56/90, pp.77-78].

[76] The importance of the issue is described in detail both in the Opinion of the Economic and Social Committee on a proposed regulation on cabotage [OJ C/56/90/ 7.3.1990], as well as in the announcement of the Commission to the Council, the European Parliament and the Economic and Social Committee [COM(91) 335 final; 14.10,1991].

[77] According to Button [1992, p.152] shipping is a major element of the national transport system. Thus, Greece is fearful of increased competition [Owen and Dynes, 1992, p.215].

According to Antipatis [1990, p.26] "cabotage is a protectionist measure and its aim is to promote national interest".

[78] Antipatis [1990, p.27] states that Greece is one of the countries that "most strongly contends" the lifting of cabotage. Antipatis then adds that "Greece presents another argument for the maintenance of cabotage: national security. Because of its various problems with its neighbour Turkey, it believes that commercial navigation between its islands, especially the ones in proximity with Turkey, should only be reserved to vessels carrying its national flag".

[79] With an identical text both P. Bernitsas, op.cit., p.189 and N. Bernitsas, op.cit., p.190 express their view that cabotage should be reserved to Greek ships, because transport between the mainland of Greece and certain isolated islands is a matter of public interests. In the analysis of their view they state that such transport is not profitable and that because of the liberalization of cabotage, parts of Greek dominion are in danger of complete isolation.

[80] See ECR C-17/90.

[81] The need for this exemption has repeatedly been expressed in Greek magazines. Magazine *Evropi ke emis* [January-February 1992, p.42] urged the Greek Minister of Transport A. Pavlidis to organize and coordinate the defence of Mediterranean countries towards the future implementation of EC legislation on the issue of cabotage.

After the exemption, numerous articles in Greek newspapers have expressed the Greek public's relief: *Naftemboriki*, 7.8.92, p.31; *Kritika Nea*, 29.7.1992, p.28]. This view is also reported by *The Times*, 6.11.1992, p.35.

[82] See 7281/Presse 123-G; 22/23.6.1992, p.13.

CHAPTER 5

ENFORCEMENT MECHANISMS OF EC LAW

Introduction

So far we assessed that Greek law on the establishment of foreign commercial and maritime public companies limited by shares violates their freedom of establishment. However, no sanctions (financial or other) have ever been imposed on Greece for not complying with EC law on the freedom of establishment.

This prompts the question why the Community has not effectively enforced Greek obligations in this area. Possible answers would be that either the EC has not perceived any such violations or that it has but lacks effective legal sanctions against member states which fail to comply with EC law.

The clarification of this matter is of great interest for this thesis. If the EC does possess effective enforcement machinery, then its reluctance to use them against Greece may be due to the lack of Greek violations. If, however, the current position the result of a lack of effective enforcement mechanisms and our assessment on the existence of Greek violations is proven correct, we still have to interpret the causes of the Greek omission to apply EC law.

The aims of this chapter are twofold: First, to verify our conclusions on Greek violations of Arts.52-58 EEC by proving

that the EC lacks the power, not the will, to impose sanctions against Greece. In order to achieve this aim, we shall refer to the procedures used to identify infringements of EC law and shall decide upon their effectiveness. Second, to reveal the reasons behind the Greek reluctance to apply EC law. We shall thus refer to the political situation in Greece during the last decade. This analysis will provide the basis for an attempt to predict the Greek attitude in the future.

Infringement Proceedings by the Commission

Art.155 EEC entrusts the supervision of the implementation of EC law within member states [1] to the Commission [2]. The basic means provided for this purpose [3] lies in Art.169, which empowers the Commission to deliver reasoned opinions on breaches of EC law by member states, to invite the respective states to comply with the law and, when states deny or omit to do so, to bring the matter before the ECJ [4].

The sources of the member states' obligations include the constitutive Treaties, their amending or supplementing treaties, the Accession Acts, EC laws enacted by the Treaties, Regulations, Directives and Decisions [5] and mixed agreements [6] concluded jointly by the Community and member states on one side and third countries on the other, provided that the relevant obligation falls within the jurisdiction of the Community [7]. The case of general principles of law and basic rights is still in dispute [8]. Obligations are covered by Art.169 only if they

derive from texts of direct effect [9] and existed prior to the decision [10].

Advocate General Myras [11] described a breach of a Treaty obligation as "either the action of a member state in enacting or maintaining legislation or regulations incompatible with the Treaty or the secondary Community law or else failure [12] on the part of the respective state to implement an incomplete or dilatory implementation of obligations which are imposed upon it under Community Regulations". Such breaches may take a variety of forms [13]. Repeated attempts of member states to justify violations with defences based on national factors were unsuccessful [14]. One common violation within member states is their failure to comply with the freedom of establishment [15].

Liability under Art.169 arises "whatever...the agency whose action or inaction is the cause of the failure to fulfil the obligation" [16]. It is thus accepted that the state is responsible for unlawful actions executed both by its legislative and its executive mechanisms.

When the Commission is informed [17] of a breach of EC law, it sends, to the respective state, a preliminary letter with its observations, clearly stating its intention to proceed under Art.169. After the expiry of the time-limit for the state's reply, the Commission "shall deliver" its reasoned opinion [18]. If the state fails to comply with the Commission's suggestions, the latter "may" bring the matter before the ECJ.

Problems arise from the two different expressions used by the legislator to describe the power of the Commission during

the two phases of Art.169. Although in the "administrative" stage the Commission has undoubtedly no discretion to decide whether it shall deliver the reasoned opinion, the existence of a relevant obligation in the "judicial" stage is in dispute [19]. The true position, expressed by Hartley, is that the Commission "has a discretion but is also subject to a duty; the duty is to take the most appropriate action to ensure that Community law is obeyed" [20].

The effect of the Commission's reasoned opinion is twofold:

a. by indicating the measures to be taken against the state's failure to comply with EC law, it serves as advice to member states; and

b. by compelling the state to take the recommended measures within a prescribed period of time, it has binding power over them; however, it lacks "obligatory effect" [21].

The procedure of Art.169 has profound advantages compared to similar procedures of international agreements [22]. However, the whole procedure is based on the certainty that the Commission will act "correctly". The procedure that can be followed when the Commission does not act in the proper way is far less satisfactory than the one introduced by the ECSC [23]. However, all compromises along these lines are based on the need for harmonic cooperation among member states for the evolution of the Common Market, which would be impossible to achieve if the relationship between the Commission and member states were jeopardised by endless Court proceedings [24]. The legislator's desire to avoid useless disputes is evidenced by the

introduction of two stages in the procedure of Art.169 and in the attempt to resolve most disputes in the administrative stage through the "quasi judicial function" of the Commission. However, the Commission is not granted absolute discretion to act against defaulting member states. In order to set a limit to its power, similar authority is also awarded to member states (Art.170).

Infringement Procedures by Member States

Art.170, introduces a procedure rarely used in practice [25]. It provides that member states may refer to the Commission for any infringement of EC law by other member states [26]. The Commission listens to the defensive arguments of the respective state and issues a reasoned opinion. After its delivery or -in case of the Commission's reluctance to issue an opinion- three months after the submission of their complaints, member states may turn to the ECJ. This procedure is divided in two stages, identical to those in Art.169. As the judicial stage of Art.170 is the same as in Art.169, only the administrative stage shall be considered here.

The procedure is opened by the complaint of a state, which clearly indicates that it acts under Art.170 [27]. The complainant need not claim damage to its personal interests. The rights of states in this procedure are more extensive than those awarded under Art.169. Not only can they identify the infringement, but they may also express their opinions [28] and

comment on the case presented by the other side. Given these rights, the Commission's reasoned opinion under Art.170 becomes less important than its reasoned opinion under Art.169, as it basically relates to the ECJ the Commission's "view" on the matter. Nevertheless, the extent and nature of the Commission's influence should not be underestimated [29].

If the Commission fails to issue an opinion within three months from the submission of the complaint, or after the expiry of the time-limit given to the defendant state for the abolition of its violations, the plaintiff state may turn to the ECJ [30]. The Commission's opinion is merely a formal prerequisite for the judicial phase of Art.170, since its sole substantial role seems to be to give the member states and the ECJ an indication of the Commission's views about the alleged infringement.

The problem arising at this point concerns the powers of a plaintiff state which disagrees with the extent of the time-limit or the effectiveness of the measures proposed in the Commission's opinion. The answer depends on the power of the ECJ in under Art.171, which deals with the situation where a member state does not comply with a previous ECJ judgement. If the ECJ can judge whether the state which complied with the terms of the reasoned opinion has effectively ended the breach, then states should also be able to address the ECJ for relevant complaints. Before we reach a final conclusion on this issue, we must examine Art.171.

Although the ECJ's decisions are "enforceable" against member states, they can not be executed against them [Art.191], since the liability of member states for not complying with its decisions is "purely political" [31]. This seems to leave the ECJ unable to enforce its judgments in practice. However, the exclusivity and plenitude of its jurisdiction in the procedures of Arts.169 and 170 indicate that Treaty makers envisaged the ECJ as an organ with an effective role. The controversy over the Court's role in theory and in practice is resolved by Art.171, which provides that states reluctant to implement its decisions may be brought before the ECJ.

Art.171, stipulating that the ECJ may take all appropriate measures for the abolition of violations [32] indicates that states disagreeing with the time limit and nature of the measures proposed by the Commission in its opinion under Art.170 may bring their case before the ECJ.

However, Smit and Herzog argue that this interpretation puts "too much strain on the language of Art.171 and involves the Court in the intra-State distribution of powers" [33]. This argument is of particular importance. The respect of national sovereignty is a basic element of Community practice, distinguishing the EC from a federation. This prevents it from delegating an independent organ to deal with the execution of the ECJ's decisions.

The states' liability for conformity with EC law is indeed political and in case of continuing failure of states to apply

it, no further sanctions can be traced in the EC legal system. However, a state's failure to fulfil its obligations may result in financial sanctions under international law [34].

Furthermore, after the specification of damages caused by illegal actions of the respective state by the Commission and, if the ECJ can not order another way of remedying effects of the violation, the damages can be awarded in the ECJ's judgements. If the state refuses to compensate the harmed party, the latter may invoke the procedure of Art.171. This relevant judgement of the ECJ "would hardly differ in substance from an order to pay damages" [35]. Apart from the above, Art.171 in combination with Art.177 on preliminary rulings may form the basis for judicial action before national courts. The relevant decision of the national court would be both enforceable and executable in the relevant member state [36].

Preliminary rulings

Under Art.177, the ECJ issues preliminary rulings, i.e. "authoritative pronouncements on a question of Community law which arises in proceedings before a national court and is referred to the Court for decision before the national court gives judgment, under the Treaty and several Conventions" [37].

Due to the variety of legal systems within the EC, problems arise on the type of "courts" that may refer issues to the ECJ. Art.177 provides that any *court* or *tribunal* of a member state may address questions to the ECJ. A national court need not [38]

be recognized as such under national law [61/65]. The characterization of a national organ as court depends on its (not necessarily pure) judicial function [39].

Under Art.177(3) national courts, whose decisions are not subject to judicial remedies under national law are obliged to refer to the ECJ [40], whereas all other courts may decide to either refer to the ECJ or reach their decision ignoring the procedure of Art.177 [41].

The conditions for the exercise of preliminary reference by courts with *pouvoir de renvoyer* are the following:

- a. trial before a national court;
- b. the court must be deciding on issues concerning either the interpretation of the EEC Treaty, the validity and interpretation of acts of EC institutions [42], or the interpretation of statutes of bodies established by an act of the Council; and
- c. the court must consider the preliminary judgment of the ECJ necessary for the evolution of the trial [43].

However, courts with the *pouvoir de renvoyer* may not refer to the ECJ, when the dispute between the litigants is not genuine [44], or when the provision of EC law submitted to the ECJ for interpretation cannot be applied in the case [45]. In addition, according to the *acte clair* doctrine, courts need not refer when previous decisions of the ECJ have dealt with the point of law in question, irrespective of the procedure that led to the previous decision [46].

The aim of Art. 177 is to fortify the enforcement of EC law [47] and unify EC law through the harmonization of national

precedents. Additionally, Art.177 is one of the few [43] Treaty regulations that establish the supremacy of EC law over national laws. Moreover, in spite of the Court's efforts not to interfere in purely national matters (i.e. in the way national governments can effectively implement EC law), Art.177 gives the ECJ a rare opportunity to set aside its "guise of passive cooperation" and to become "highly activist" [49]. The national courts' mandatory reference (at least for cases where national judicial remedies are exhausted) introduces an "obligatory" intervention and control of the implementation of EC law within member states by a constitutive EC institution.

National judges must ignore all contradictory national laws and implement EC law, thus becoming an organ of the Community within their own state. Their judgments may form the basis for actions under Arts.169 and 170. Moreover, Art.177 offers individuals the chance to claim compensation for damages caused by infringements of EC law. The relevant court's decision is both enforceable and executable within the relevant state. The above advantages of Art.177 compared with Arts.169 and 170 justifies its frequent use by EC nationals.

Interim Measures

In view of the increasing work-load of the ECJ and the time consuming pre-judicial procedures of Arts.169-171 and 177, the Treaty has introduced Art.186 EEC, designed to prevent the continuing breach of EC law until the ECJ reaches a judgement

[50]. Interim measures are important for the effectiveness of remedies. The effectiveness of a decision reached two or three years after the submission of a complaint would be doubtful if in the meantime member states were allowed to enjoy the profits of their violations. However, under certain conditions [51], the ECJ may prescribe measures to prevent this situation.

Although the imposition of interim measures does not affect the main case [Art.86 Rules of Procedure], judgment on the *prima facie* existence of a violation gives the litigants an idea of the ECJ's view. The legislator's will to resolve disputes between the Commission and member states and amongst member states without resorting to a humiliating final judgment is apparent. The profound advantages of Art.186 in comparison with Arts.169-171 and 177 (speed, simplified procedure, authority of the ECJ to regulate all appropriate measures) render interim measures one of the most successful enforcement mechanisms introduced by the Treaty [52].

Restitution of Damages by the National Courts

We have viewed the participation of national courts in the harmonization procedure through preliminary rulings. Without disregarding the importance and effectiveness of Art.177 we must state that the role of national courts is much more important [53]. They pressure on national authorities to comply with EC law [54] and establish a procedure leading to compensation for damages caused by illegal actions of member states or combined

actions of the Community and member states. For the purpose of this thesis, we shall only analyse damages resulting by infringements of EC law by member states, acting on their own and in "cooperation" with the Community.

The jurisdiction of national courts to judge on issues of EC law is based on the principle of direct effect and supremacy [55], which provide that EC law is part of the member states' internal law and overrides contradictory national laws [56]. The latter can only set the procedure [57] under which EC law is applied by national courts [58].

The illegal action of member states leading to compensation for damages [59] may arise either on the interpretation or the application of EC law by member states. The violation of the companies' freedom of establishment by national authorities must be considered as illegal action on the application of EC law. Therefore, claims of foreign persons for damage consisting in the loss of profits (which they would have obtained had the national authorities allowed their unhindered establishment) must be brought before the national courts which have the jurisdiction to order payment under national law.

Restitution of Damages by ECJ

The EEC Treaty provisions examined so far apply in case of infringement of EC law by national authorities. We shall now view the legal remedies available to individuals who have suffered damage as a result of actions of member states which

have been supported (actively or passively) by the Community [60]. We shall refer to the concurrent or joint liability of the EC and member states, which occurs when illegal application of EC law causes damage to natural or legal persons, for the restitution of which liable are both the Community under EC law and the member states under their national law. The damage caused to the plaintiff derives from two illegal acts [61], one under national law exercised by national authorities and one under EC law exercised by a Community organ.

The concept of Community liability embraces "a wrongful act or omission" [62], specific (not speculative) "damage to the plaintiff" [63] and a causative link between the two. Since determining the extent of damage caused by illegal Community actions (legislative or administrative) which violate the companies' freedom of establishment is a speculative exercise (consisting of the profits that the companies would have made if they had been permitted to establish within the Community), analysis of the concurrent liability would serve no purpose for the scope of this thesis [64].

However, this situation creates a serious problem. Under the principle of independent liability of the EC and member states, the latter could not be called to compensate foreign companies that are prohibited from establishing within the EC as a result of a wrongful Community Directive which is implemented by member states. Thus, these companies can receive compensation neither from the EC nor from member states. If, for example, the EC issues a directive which prohibits the exploitation of mines

by foreign companies within member states and Greece (implementing this wrongful Community act) refused permission for establishment to a German mining company, the latter would be unable to receive compensation for its losses both by Greece and the Community.

This state of affairs creates a twofold problem. The first concerns the injustice done to companies, which are left unable to claim restitution for significant profit loss. The second concerns the creation of barriers to trade, which defeats the object (if the object is the creation of a Common Market for goods, services and people). This injustice has an additional psychological effect on companies and the very idea of a Common Market [65]. Consequently, actions brought against the EC by companies harmed by wrongful EC acts implemented in member states must be considered admissible, even if the national law of the state prohibits their effective compensation before national courts.

The Enforcement of EC Law in Greece

The purpose of our reference to the enforcement mechanisms of EC law was to assess whether the Community has the power to impose the implementation of EC law in Greece or whether the lack of such a power justifies the alleged indifference of the Community towards Greek violations. However, the analysis led to the conclusion that the enforcement of EC law within member states lies mainly with national courts. Thus, before reaching a

final conclusion on the ability of the Community to enforce EC law in Greece, reference must be made in the role of Greek courts towards ensuring enforcement.

Greece's accession to the Community is based on Article 28, pars.2 and 3 of the 1975 Greek Constitution. According to par.2, powers awarded by the Constitution to national authorities may be transferred to organs of international organizations for purposes of "an important national interest" and for the promotion of international cooperation with other states. Par.3 provides that limits to Greek sovereignty may be set, provided that this is dictated by an important national interest, and that it does not affect either human rights or the foundations of the democratic process. Furthermore, it must be applied in conformity with the principles of equality and on the condition of reciprocity [66]. Thus, the Greek Constitution poses no obstacles to the implementation of the basic principles of supremacy and direct effect of EC law.

Since "the attitude of Greek courts towards international law and foreign legal conceptions has always been marked by a spirit of openness" [67], in principle, Greek courts should have no difficulty in applying the principle of supremacy of EC law. Indeed, the latter is accepted as a part of the Greek legal system, which prevails over any conflicting Greek law [68]. Furthermore, the Greek Council of the State categorically held that Greek laws violating the freedom of establishment are inapplicable (even when they are not formally repealed) from the date of accession. However, most decisions are based on Art. 28

of the Constitution, or on law 945/1979 which implements the accession Treaty [69] rather than the principle itself. Thus, Greek courts are being led in a "rather formalistic perception of Community law" [70]. The principle of direct effect is also recognized by most [71] Greek courts [72] and also that companies have been free to establish in Greece since 1.1.1981 [73].

In spite of this recognition of the supremacy and direct effect of EC law by Greek courts, Greece has repeatedly failed to comply with its requirements. Thus, in the past the Commission has brought Greece before the ECJ under Art.169 several times [74]. It should be noted however that the recent declaration of the Greek government, that Greece should stop being "the state of exceptions" [75] and apply EC law, was accompanied by an impressive decline in cases against Greece for violations of EC law on the establishment of the Common Market [76]. Other member states have ignored the opportunity to turn against Greece under Art.170, whereas the only time that Greece has been found guilty for failing to execute a prior judgment of the ECJ, was in case 328/90 on Greece's failure to implement judgments 147/86 (on the free establishment of foreign institutes of music and foreign languages within Greece) and judgement 38/87 (on the establishment in Greece of architects, political engineers and topographers) [77].

From the above it has become clear that there is a noticeable reduction in judicial actions against Greece both from the Commission and other member states. However, as stated in the first part of this Chapter, this is not due to an absence

of Greek infringements, but to the lack of effective enforcement mechanisms of EC law at the Community level. The seeming indifference of the EC and member states to the Greek violations is mainly due to their belief that Greece should be persuaded to comply with EC law without being subjected to the humiliating procedure before the ECJ. This general view is supported by Greece's relatively recent membership and its obvious financial problems.

However justified this attitude may be, it enables the companies' freedom of establishment to be circumvented. Thus, companies are unable to protect their rights at the EC level and can only seek protection at the national level (before Greek courts under Greek law). The former means of protection combines judicial procedures before national courts and the ECJ under Art.177 on preliminary rulings. The first Greek court to refer a case to the ECJ was the Athens Court of Appeal [78] (not a court of last instance) in 1985 (six years after the Greek accession to the EC). This step was followed by a reference of the Plenary Council of the State 2605/1986, the first Greek court of last instance to refer to the ECJ [79].

In order to evaluate the use of Art.177 by Greek courts, we must distinguish between courts of first instance and courts with mandatory jurisdiction. The relatively small number of preliminary rulings referred to the ECJ by the total of Greek courts up to the present time [80] indicates the reluctance of Greek judges to transfer their power to the ECJ [81]. However, the even smaller number of preliminary references from Greek

courts with mandatory jurisdiction [82] is even more important for the evaluation of the effectiveness of the companies' protection at the national level.

In fact, both the relevant Greek courts [83], the Greek Supreme Court (*Arios Pagos*) and the Council of the State, have been repeatedly neglecting Art.177 EEC. The Council of the State's reluctance to apply Art. 177 is evidenced by its refusal to make references in several cases [84], the application of the -now abolished- Law 1470/84 for several years (regulating that preliminary references to the ECJ are issued exclusively by the Plenary Council) as well as the continuing disproportion between the hundreds of administrative cases judged annually by the Council at last instance with the minimal number of cases referred to the ECJ. The statistics are even worse for the *Arios Pagos*. The application of Greek procedural laws that present obstacles to the unhindered implementation of Art.177 (the refusal of judges to apply EC law unless otherwise proposed by the litigants, coupled with the requirement that the litigant makes express reference to the precise EC legislative text to be applied in the case, as well as the need for a specific request for preliminary ruling on behalf of the litigant) renders the use of Art.177 quite difficult in practice.

More importantly, the lack of provision for the execution of the Supreme Court's decision on the reference to the ECJ [85] render the use of Art.177 impossible. It should be noted that under the usual procedure, the Secretariat of the Supreme Court receives an internal document, issued by the respective depart-

ment of the Ministry of Justice, determining the procedure followed in each case (form of the relevant document, number of copies submitted by the applicant, expenses and the respective receiving authority). However, no relevant actions have been taken by the Ministry in the case of referrals to the ECJ. Thus, the Secretariat of the Supreme Court (a court with mandatory jurisdiction) can not formally communicate with the Secretariat of the ECJ and the decisions of the Supreme Court judges ordering the reference of an issue to the ECJ can not be executed. The issue is of particular importance for the evaluation of the will of the Greek authorities to implement Art.177. It should be noted that a relevant procedure, regulating the participation of litigants -residents in foreign countries- in trials before the Greek courts, already exists. In these cases, the General Advocate of the Supreme Court sends the relevant legal documents to the litigant through the Greek Embassy of the country, which the litigant has declared as its country of residence. It thus becomes clear, that the only action required by the Ministry of Justice for the resolution of this situation would be to order the Secretariat of the Supreme Court to send the reference for preliminary ruling to the Advocate General, who would send the documents to the ECJ through the Greek Embassy in Brussels. The lack of relevant procedure and the lack of any reaction on behalf of the Supreme Court judges leads to the belief that both the judges and the Greek government are reluctant to implement Art.177. Thus, it has now become clear that the protection sought by individuals against illegal acts

of the Greek authorities at the national level cannot be found in the application of Art.177 by the Greek judges.

Another important form of enforcement of EC law at national level is the award of compensation to foreign individuals for damages caused by wrongful acts of the Greek state, which they can bring before Greek administrative and civil courts. The choice of the most appropriate court depends on the nature of the dispute in question. The criteria for characterization of a dispute as civil or administrative are: the type of the agency that performed the illegal act and the nature of the relationship or situation affected by the dispute. Greek administrative acts that hinder the companies' freedom of establishment are considered to be causes of administrative disputes [86] and are therefore heard before the administrative courts [87].

However, the refusal of both administrative and judicial organs to enforce the companies' right to freedom of establishment (which is considered part of the internal legal system) imposes parallel civil liability upon the Greek state and the relevant organ itself [Arts.104-105 of the Introductory Law of the Greek Civil Code]. Thus, companies may also claim compensation from both the Greek state and the relevant administrative organ on that basis [88].

According to Greek law, disputes between natural or legal persons (domestic or foreign) and the Greek state must be tried in a court, where the state or its respective authority is seated [Code of Civil Procedure Arts.22 and 25]. During this trial, and if the foreign company proves that the illegal act

(in this case wrongful under EC law) caused moral or financial damage, the court may order the state (or, in cases of civil liability, the respective organ) to compensate the company [89] either *in natura* or financially [Art.297 Civil Code]. Compensation includes any positive damages (real loss) or "the profit that one must possibly expect according to the usual evolution of things or according to the special circumstances of the case and especially according to the preparatory measures already taken" [Art.298 Civil Code]. This means that the court may order the state to either permit the establishment of the company in Greece or order compensation equal to the profits the company would have earned had it functioned legally in Greece. Moreover, foreign companies may demand compensation for moral damage [Art.57 & Art.59 of the Greek Civil Code], on the grounds that Greece's refusal to permit their establishment in Greece has harmed their reputation as to the legality of their activities.

In an attempt to evaluate the enforcement mechanisms of EC law at the national level, we must take into account the small number of preliminary rulings ordered by Greek courts (even those with mandatory jurisdiction) and the lack of any civil or administrative decisions ordering compensation to foreign companies for the failure of the Greek state to comply with EC law. Thus, theoretically effective enforcement mechanisms of EC law at the national level are rendered powerless by the reluctance of Greek judges to comply with their role as EC organs.

Our analysis on the enforcement mechanisms of EC law both at Community and national level showed that the Community is practically unable to enforce EC law within member states. Thus, the lack of sanctions upon Greece is not due to the lack of violations of EC law and our assessment that Greece violates the companies' freedom of establishment is verified. Consequently, the first aim of the chapter is reached. However, the second aim (to reveal the reasons behind the Greek non-compliance) is still to be dealt with. This leads us to the analysis of the political situation in Greece during the last decade.

Causes of Greek Non-compliance and Outlook for the Future

Having concluded that Greece has repeatedly failed to comply with EC regulations on the freedom of establishment and that (due to the lack of effective enforcement mechanisms) the implementation of EC law in Greece (as in all EC member states) depends wholly on the consent of the state, we shall briefly look at the reasons of Greek reluctance to apply EC law.

It must be noted here that to some degree all member states at some point have been reluctant to implement EC law [90] either because it was deemed harmful to their economies or, rarely, because of an ideological aversion to a Council decision. In this sense the Greek approach does not constitute an isolated and exclusive phenomenon. The aim here is to assess if particular "causes" for Greek reluctance to implement EC law still exist and whether Greece is likely to rectify the existing

situation.

However, before proceeding to this analysis, we must take into account the following two facts:

a. Greek laws (both on the conditions for the establishment as well as the functioning of foreign companies in Greece) do not distinguish between companies originating from EC member states and companies from third, non-EC countries;

b. Since 1990 Greece has introduced numerous administrative (and a few legislative) measures enforcing EC regulations. Despite the inefficiency of the above administrative acts, the intention of the new Greek government of New Democracy to implement EC law is sincere.

These remarks are the key to discovering the reasons for the Greek reluctance to comply with EC law. The absence of Greek laws creating beneficial status for EC companies (compared with the status of non-EC firms) may be due to the fact that Greece is a relatively young EC member state, which has simply lacked the time to adjust its vast number of legislative texts to the large number of already existing EC provisions. In this sense Greece was simply unable to catch up with the rest of the EC. However, there are also instances where Greece refused to comply with EC legislation because it conflicted with certain domestic priorities which the government had set.

The Greek attitude towards the EC can be divided into three phases: [91]

a. 1960s and 1970s (government of Konstantinos Karamanlis, the prime minister who applied both for Greece's associate, as

well as its full membership to the Community);

b. 1980s: The "lost decade" [92] in Greek-EC relations (socialist government of PASOK, the party whose objections to the Greek membership became one of its main slogans in the 1981 elections); and

c. 1990s (neo-liberal government of New Democracy, which due to its continuing relationships with its former leader Karamanlis and its opposition to PASOK, always viewed Greek accession to the Community as the sole answer to the country's numerous financial problems).

Since the point of this research is to assess why Greece fails to comply with EC regulations, we shall refer to the last two periods of Greek politics, i.e. only when Greece had the legal obligation to implement EC law. The Greek reluctance to comply with its obligations as an EC member state in the 1980s must be viewed as an aspect of the intense anti-western propaganda of PASOK during a period where NATO's failure to intervene during the 1974 Turkish military invasion in Cyprus and the reluctance of the West to support Greece even after the positive decision of the Hague International Court left the Greeks disappointed by their Western allies. Following a campaign based on the "promise" to leave both NATO and the Community [93], the period of the PASOK administration (especially the first term) was marked by attempts to renegotiate the terms of the Greek accession to the Community [94]. A second feature of the PASOK administration was its refusal to "tow" the Community line on international issues [95].

Apart from this general anti-EEC policy of PASOK, the popularity of the Community in Greece was seriously harmed by the fact that EC membership "opened the floodgates to imports of European manufacturers of food" [96]. This highlighted Greece's severe financial crisis, in a period where the financial and political advantages of Greece's membership were not yet apparent. This was partly due to the fact that the EC's financial offers to Greece were still very limited. Moreover, even these limited resources of Community funds were often presented as governmental initiatives and used by the socialist government as means of internal propaganda. This situation considerably weakened support for the Community in Greece, where "getting money out of Europe was, and still is, the main preoccupation" [97].

Even within the EC, the PASOK government was opposed to any reforms until the differences between the EC rich and poor countries were diminished. As Stefanou [98] observed, the opening of the internal market is certainly not going to favour the perennially protected Greek industries. Thus, the Greek government was trying to buy some time and hinder trade liberalization by sticking to the traditional Greek mercantilist attitude, which left little ground for compliance with EC legislation [99]. This understandable Greek attitude to reforms within the EC was exaggerated by PASOK's left-wing ideological overtones, i.e. the fact that some economic aspects of reform were based on neoliberal notions regarded as unacceptable by the socialist Greek government.

It was in the late 1980's that the attitude of PASOK towards the EEC gradually began to change. More than twelve years after the 1974 invasion in Cyprus, the Greek people realized that Greece's marginalization would be catastrophic at an international level. Indeed, this realization combined with the radical political changes in Eastern Europe during the 1990's resulted in the "inevitable" lifting from Greek participation in the EC of the previously intense ideological burden [100]. The understanding that the Greek economy can become efficient only after its strengthening through EC financial aid (gradually increasing), the gradual decrease of the influence of Greek politicians in policy formation towards the EC through the creation of a group of technocrats responsible for decision-making in this field, as well as the fact that "1992" was fast approaching, gradually turned Greece towards active participation in the Common Market.

Obviously, this does not mean that Greece has suddenly decided to change its legislation overnight. The state is still trying to ensure that its implementation of EC legislation is executed in such a way so as to prevent as much financial loss as possible for the still weak Greek economy. Violations of EC law still take place and Greek officials are still trying to help and protect domestic companies. However, this is a perfectly normal and healthy attitude, which differs substantially from Greece's previous revulsion to the concept of the Common Market.

The new government's liberal non-protective commercial

approach leading to the abolition of protectionist mechanisms and state monopolies, and its firm belief that Greece can promote its financial and political interests only when actively participating in the EC, as well as the realization of the Greek people that the Greek membership to the Common Market is indeed the answer to the country's financial and commercial crisis, means that in the near future it is likely that Greece shall provide equal treatment of domestic and foreign (at least EC) companies.

Furthermore, in the unlikely event that Greece still refuses to implement EC law, the Community now holds strong political weapons to force Greece to comply with its obligations: the Delors packages (Greece's best chance to reach the financial level required for its participation in the EMU as the latter was expressed in the Maastricht Treaty), as well as the critical issue of Macedonia and Greece's need for non-recognition can be used as effective mechanisms for the enforcement of EC law in Greece.

To conclude, it can be stated that Greece's failure to apply EC legislation on the Common Market and the companies' freedom of establishment is expected to cease both due to internal reasons (i.e. the change in the country's domestic policy and public opinion), as well as due to other political reasons (peer pressure at an international level).

Future Developments on the Freedom of Establishment

Freedom of establishment is one of the rights expected to progress considerably in the near future. The opening of the EC's internal market and the consequent abolition of all obstacles and restrictions to the movement of goods, persons and services will facilitate the further expansion of EC companies in other EC member states. In order to exploit as many of the opportunities created by the new market as possible, EC companies shall need to exercise their activities in many EC countries. The sort of companies more likely to expand are public companies limited by shares, which usually are the most financially robust companies.

Secondary establishment is expected to be the most favourable solution, since the foundation of foreign branches, agencies and subsidiaries combines establishment abroad with maintenance of company control (i.e. administration, planning and decision-making) in the same country. The foundation of subsidiary companies is the form of establishment expected to prevail (at least in the near future), because this legal form combines maintenance of the company's control with the same people, with the added advantages which domestic companies enjoy in comparison with foreign ones. At this point, it should be mentioned that such discriminations can not be fully abolished throughout the Common Market, since the protection of domestic trade by most of EC member states is not expected to cease in the near future (at least in practice). It should also be noted

that the *Societas Europa* does not seem to be in a position to replace the secondary establishment in the known forms, at least in the near future.

As far as establishment in Greece is concerned, both the expected changes in the legal status of EC companies within Greek boundaries, as well as the need of EC companies to expand southwards and simultaneously acquire a passage to the markets of the Middle East and Asia, is expected to increase the number of foreign companies establishing there considerably.

From the above remarks it is clear that our analysis on the conditions for the secondary establishment of foreign public companies limited by shares in Greece has considerable practical value, especially now that the Common Market has "officially" opened. Market integration places Greece on the verge of radical change. The efforts of the new government to promote the idea of the European Union and to adapt to the new "Europe without frontiers" must be acknowledged and applauded.

Although this thesis did examine an area of European integration which has been forgotten for a number of years (after all Greece is neither a strong EC economy nor do foreign companies exactly rush to establish there), its limited length and the changing EC environment clearly indicate that more research is needed in this area. Let this be someone else's task.

Conclusions

The first feature of this Chapter was to highlight the lack of execution mechanisms of the ECJ's judgements, which are the main means of enforcement of EC law within member states. The lack of relevant mechanisms, along with the lack of regulations on the imposition of sanctions to violations of the Treaty and the merely political liability of member states that violate EC law, are the main reasons for the ineffectiveness of enforcement mechanisms at the EC level. However, the Treaty of Rome does not leave the application of EC law at the entire disposal of member states. Limits to possible immunity constitute both preliminary references to the ECJ and the national procedures for the restitution of damages caused to individuals by national authorities. The main advantage of procedures held before national courts lies in the fact that their decisions are enforceable.

In Greece the level of enforcement of EC law is also unsatisfactory. At the EC level, the reasons that apply to all member states (mentioned above) do not permit its effective enforcement. However, the recent reduction of the reported infringements of EC law by the Greek state should not go unnoticed. At the national level, the effectiveness of preliminary rulings and national procedures for the restitution of damages caused by illegal acts of the Greek authorities is reduced by the reluctance of Greek judges to act as Community organs. The absence of preliminary rulings from courts judging of last

instance (i.e. courts with mandatory jurisdiction) and the lack of available compensation of foreign persons injured by the Greek authorities' failure to implement EC law, indicates why enforcement of EC law in Greece at the national level is also ineffective.

Thus, the contradiction between the results produced by our research (that Greece has repeatedly violated the Treaty of Rome) with the fact that, neither the Community nor foreign companies have forced the Greek state to comply with EC law, is not due to an error in our results, but due to the lack of effective EC enforcement machinery within member states in general and in Greece in particular. The reasons behind Greek reluctance to apply EC law lie in the negative attitude of the PASOK administration (1981-1989) towards the Community. However, PASOK's gradual change of attitude towards the EC, along with the genuine commitment of the new government of New Democracy to substantial Greek participation to the EC, indicates that the violations of EC law by the Greek authorities shall soon come to an end.

FOOTNOTES

[1] Steiner, *op.cit.*, p.279, notes that the power provided to the Commission by Article 169 "is a specific example of the supranational nature of EEC law".

[2] Macrory in his "Enforcement of Community Environmental laws: some critical issues" [1992] CMLR, p.349, notes that the Commission's role in enforcement is one of its institutional duties, but it was only after the early 1980s that it began to act in this field.

[3] It should be noted that the aim of the provisions of the Treaty in general is to achieve the practical elimination of infringements and their consequences. See case 70/72.

[4] At this point it should be noted that "the most important weapon, which in classic international law states may resort to in order to frustrate a treaty, is interpretation. This weapon has been taken away from the signatories of the EEC Treaty and so they cannot resort to legal subterfuge. Though they can defy the Treaty by breaking it they can not go round it". See Lasok, *op.cit.*, 1987, pp.331.

[5] Barav notes that, since the judgment of the Court is binding from the date of its delivery [Article 65 of the Court's Rules of Procedures], the decisions of the Court must be considered part of EC law. Therefore, obligations deriving from these decisions fall into the category of "obligations" in Article 169. See Barav, "Failure of member states to fulfil their obligations under Community law", [1975] CMLR, p.376.

[6] However, obligations of member states deriving from international agreements do not normally fall within the scope of this Article, not even when they are binding on the Community. Hartley, *op.cit.*, p.286, expresses the opinion that even the GATT does not fall within the scope of Article 169. However, Steiner, *op.cit.*, p.280, states that "international agreements entered into by the Community and third countries, where the obligation lies within Community competence" must be considered sources of member states' obligations.

[7] Agreements between member states as well as subsidiary conventions are not covered by Article 169. Hartley states that only subsidiary conventions entered into by Article 220 are covered by Article 169. See Hartley, *op.cit.*, p. 287.

[8] Several commentators express the view that general principles of law recognized as part of EC law. Thus, the breach of these principles occurs within the context of an obligation of EC law. This view is also followed by the ECJ. See Kanellopoulos, *op.cit.*, p.118; de Wilmars and Veroungstaete, "Proceedings against member states for failure to fulfil their obligations", [1970] CMLR, p.388; Dashwood and Whyatt, *op.cit.*, p.390; also see cases 27/69; 230/78; 5/88.

However, other commentators express the view that general principles may not always be covered by Article 169. To be precise, Temple Lang in "The sphere in which member states are obliged to comply with the general principles" [1991] LIEI, p.30 notes that member states are bound by Community fundamental rights principle in the following three cases exclusively:

- a. when they implement Community measures;
- b. when they take measures affecting rights given or protected by EC law or in areas specifically covered by EC law; and
- c. when member states take measures on behalf of the EC.

On the same issue Hartley states that unless the general principles of the law "can be regarded as in some way inherent in the constitutive treaties, they would not fall within the scope of the enforcement action". See Hartley, *op. cit.*, p.238.

[9] Papagiannidis-Christogiannopoulos, *op.cit.*, p.421, however, notes that Article 169 covers "all obligations irrespective of their direct effect".

[10] See Barav, *op.cit.*, p.376.

[11] Case 39/72 Commission v Italy (Re Premiums for Reducing Dairy Production) [1973] ECR 101, [1973] CMLR 439.

[12] Barav, *op.cit.*, p.373, notes that what had been alleged against a member state was some kind of positive action. However, it is now accepted that even refusal or omission to execute a decision of the respective authority falls within the scope of Article 169.

Also see case 31/69 Commission v Italy [1970] ECR 25; [1970] CMLR 175.

[13] Such breaches may take the form of failure by member states to take legislative measures in compliance with EC law, the enactment or maintenance in force of legislation incompatible with provisions of Community law even when the legislation is not applied in practice, non-implementation, partial or faulty implementation of Community law, omission of adjustment of the national to EC law, omission of member states to inform the Commission on this adjustment, as well as non-fulfilment of the member state's obligation to transpose a directive into national law. See cases 96/81; 274/83; 97/81.

Moreover, failure of member states to fulfil their obligations constitute administrative actions within a framework of legislation, which is not in itself objectionable. However, it should be noted that mere administrative actions which by their nature may be altered at the whim of the administration do not amount to fulfilment of an obligation deriving from a directive. See case 77/69.

Other forms of breaches are:

- a. administrative actions in breach of EC law (case 42/82);
- b. over-narrow interpretations of Community law;
- c. conflicts of municipal jurisdiction *rationae materiae* between municipal and community authorities; see cases 6/69; 11 and 76/69; and

d. failure of member states to act within time limits indicated by the relevant legislative text.

Barav, op.cit., p.374, notes that "where the time limit for the execution of the obligation is not expressly laid down in the text, the Court will look into the nature of the obligation and the effective manner of implementation; it will determine whether a time limit should be implied and decide to what extent the dilatory measures or the delay should be considered as violation of Community law".

[14] Both the claim that the relevant violations were due to provisions, practices and circumstances relevant to the state's internal legal order (see case 293/85), as well as the claim of *force majeure* (see case 77/69) were rejected by the ECJ. Equally unsuccessful were claims that the same violations are also conducted by other member states (see case 325/82), or that this breach does not harm the Common Market. See case 95/77; also see cases 301/81; 353/85.

[15] See Kanellopoulos, *Introduction to EC Law* (1991, Sakoulas, Athens), p.119.

[16] See case 77/69 Commission v Belgium [1970] ECR 237; 1 CMLR 203.

It should also be mentioned that the problem arising at this point concerns the liability of member states from actions of their judicial mechanisms, for example from the refusal of national courts to award direct effect to EC legislative texts, or their refusal to make preliminary references under Article 177, or even their refusal to accept supremacy of EC to national laws. In various occasions [OJ 1967, No270, p.2; OJ 1968, C71, p.1] the Commission expressed the view that the violation of Article 177 on behalf of national courts must be considered a breach in the sense of Article 169. However, the vast majority of legal authors reject this view. It is argued that such a practice would harm the stability and unhindered development of the Community, whose future is based on the cooperation between the European and national courts, which are considered to be Community courts [Articles 183, 215 and 177]. It is also argued that this opinion would clash with the independence of the judicial power within member states, a principle highly valued by national order.

[17] In practice, the Commission is informed by individuals, companies, trade associations and governments about possible infringements. Dashwood and White [1989, p.396] note that Questions of the European Parliament may also suggest a line of enquiry and new legislation of member states is kept under review for the detection of possible infringements. This text is now easier, since member states must notify the Commission for any new laws or modifications of the old ones.

[18] At this point it should be noted that according to the letter of the law the Commission issues its opinion and then allows the member state to express its view. However, this prac-

tice would clash with the *audi alteram partem* doctrine. Thus, the correct order of events is the following: "first the observations; then the conclusion that there has been a violation; and finally the delivery of the opinion". See Hartley, *op.cit.*, p.291.

[19] Those in favour of the positive opinion (that, in case of the respective state's failure to comply with the opinion of the Commission, the Commission must in any case bring the matter in front of the Court) argue that Article 155 leaves no room for discretion (see case 142/80). Supporting this opinion, Kanellopoulos, *op.cit.*, p.122, notes that the obligation of the Community to bring the matter before the ECJ is not inconsistent with the principles of lenience and good will on behalf of the Commission. Where this is necessary, i.e. during the first period of adjustment of the new member states, the administrative procedure takes place in slower rhythms, so that the member state may have the time to comply with its obligations.

However, those in favour of the discretion of the Commission during the "judicial stage" of the procedure under Art.169 argue that this Community organ must have "discretion to consider the most appropriate means and time limits for this purpose, and when they should be taken" See Dashwood and White, *op.cit.*, p.399; also see cases 52 and 55/65; 167/73. Moreover, attention should be drawn to the political importance of this procedure, as well as to the reluctance of the European Court to confirm claims of Community liability in relevant cases (see case 40/75).

[20] See Hartley, *The foundations of European Community Law* (1988, Clarendon Law Series, London), p.293.

Hartley, *ibid.*, p.294, also notes that the Commission refrains from action in the following three categories of action:

- a. non generalized administrative acts of limited importance by national officials;
- b. national courts' decisions;
- c. politically sensitive situations; and
- d. other isolated cases.

[21] See Smit-Herzog, *op.cit.*, p.323.

It should be noted however, that the opinion is not a formal administrative act. Moreover, it should be noted that "by Art.173, the Court cannot determine upon the legality of Opinions of the Commission". See Valentine, *The Court of Justice of the European Communities* (1965, Steven Rothman, London), p. 274, Thus, the Commission's reasoned opinions can not be annulled under Article 173.

[22] Evans in "The enforcement procedure of Art.169: Commission discretion", [1979] ECR, p.443, notes that the characteristics of this procedure are the following four:

- a. it is quite novel, since it enables an independent Community body, the Commission, to invoke the compulsory jurisdiction of the European Court against the defaulting member states;

b. the procedure is of wide application and the sources of the member states' obligations are numerous;

c. the execution of a series of acts by Community institutions is envisaged by this procedure; and

d. the judgement delivered by the Court under the procedure of Article 169 is only declaratory.

[23] Valentine, *op.cit.*, p.276, notes that whereas under the ECSC the validity of the Commission's declaration can be challenged exclusively under the four justifications allowed for appeals against decisions, under the Commission's declaration can be challenged on the grounds on any reasons admissible in the European Court.

[24] Dashwood and White, *op.cit.*, p.412, refer to the opinion of the Commission on the usefulness of Article 169. The Commission notes that "Article 169 of the EEC Treaty is now an instrument for the achievement of policy and not solely an essential legal instrument. The objective of Article 8A of the Treaty, namely to achieve by 1992 an area without internal frontiers, is now the Commission's priority objective and requires a strict application of existing Community law. It is Article 169 which makes it possible to monitor this application and ensures its observance by the member states".

[25] According to Plender, *op.cit.*, pp.148-150, Art.169 is not the only Community legislative text regulating infringement procedures against member states by fellow member states. Article 89 ECSC introduced an identical procedure with the one of Article 170 EEC. However, both Articles were very rarely used in practice. One of the rare examples of ECJ cases based on Article 170 is case 141/78, whereas no judgement based on Article 89 ECSC has ever been issued. See case 141/78.

[26] Bebr in *Development of judicial control of the European Communities*, (1981, Martinus Nijhoff, The Hague), pp.304-305, notes that "this obligatory reference of the matter to the Commission stresses the Community character of the obligations of member states under the EEC Treaty. If they were obligations under international law, there would be no reason for such an obligatory reference and a member state could bring its action before the Court directly".

[27] If the respective member state fails to make clear that it is acting under Article 170, its complaint may be considered as a mere statement of information to the Commission, so that the latter will invoke the procedure of Article 169.

[28] Although the English text is somewhat ambiguous on the question as to whether the written and oral procedure applies to the observations on the other party's arguments or also to the submission of the state's own case, the French text makes it clear that it applies to both.

[29] There are those who argue that the Commission plays

the role of a legal arbitrator, since it is the relevant EC organ which, after hearing both sides, shall issue a reasoned opinion on the matter. It is argued that the action of the plaintiff member state before the ECJ during the second phase of this procedure should be considered as an appeal against the opinion of the Commission [Valentine, *op.cit.*, p.279]. There are others, however, who argue that in this procedure the Commission does not act as an arbitrator, because the EEC Treaty is not a bilateral agreement (thus, no arbitration is comprehensible). In addition, the function of an arbitrator would be inconsistent with "the task of the Community to ensure a respect of Community law" [Advocate General Mayras on case 123/78 Commission v United Kingdom [1979] ECR 419; [1979] 2 CMLR 45.

In any event it can be stated that "the role of the Commission in proceedings under Article 170 is that of an umpire and conciliator, not that of an accuser" [Dashwood and White, *op.cit.*, p.409].

[30] It is widely accepted that even if the Commission does reach the opinion that no infringement has taken place, the plaintiff state still has the right to go to court, since the formal prerequisites of the judicial stage (i.e. knowledge of the Commission, reasoned opinion) have been fulfilled. The same view applies in case that the Commission accepts the plaintiff's complaint only partially. The latter may bring the matter to Court as a whole.

[31] See case 323/80.

Also note that the term "enforceable" is used by the Commission in "Thirty Years of Community Law" (1985, European Communities, Luxemburg), p.100.

[32] See cases 314-316/81; and 83/82.

[33] See Smit and Herzog, *op.cit.*, p.349.

[34] See case 39/72; also see Papagiannidis-Christogianopoulos, *op.cit.*, p.29.

[35] See Dashwood and White, "Enforcement actions under Arts.169 and 170 EEC", [1989] ELR, p.407.

Also see Smit and Herzog, 1976-1992, pp. 349-350.

As for actions before national courts, note that the extent and type of this action depends on the nature of the infringement and the measures that can be provided by national law.

[36] In practice, the parties harmed by the failure of member states to fulfil their obligations address their national courts, which -accepting the judgment of the ECJ under Article 171- order the respective state to pay for the damages. If the national court has doubts on the issue, it may bring the matter before the ECJ under Art.177.

[37] See Lasok, *The European Court of Justice-Practice and Procedure*, (Butterworths, London), p.329.

[38] Delikostopoulos in *European Law of legal procedure* (1986, Sakkoulas, Athens), p.322, argues that the "Communitarian context" of the "court" indicates that the judges of the ECJ -who in most cases are unfamiliar with the national law of the respective court- need not judge whether the respective organ is indeed a court under national law. However, as Hartley, *op.cit.*, note 30, notes, the ECJ may -when necessary- be asked to offer its preliminary ruling on the issue of the subjection of a national organ to Article 177.

[39] In other words, national courts functioning as purely advisory, investigatory, conciliatory, legislative or executive organs are not considered courts under Community law. However, the respective organs must have some measure of official recognition.

For further analysis of the issue, see cases 61/65; 43/71; 70/77; 248/80.

[40] Arnulf in "Reflections on judicial attitudes of the European Court" [1985] ICLQ, p.168, notes that the object of this procedure is to guarantee the uniform application of Community law in all the member states, without which the Common Market could not function effectively.

[41] This regulation gave ground to a theoretical dispute. Those in favour of the abstract theory argue that the courts have mandatory jurisdiction when their decisions (in general) are not subject to judicial remedies. See Delikostopoulos, *op.cit.*, p.327; Papagiannidis-Christogiannopoulos, *op.cit.*, p.453.

Those in favour of the concrete theory argue that the essential matter is whether the concrete decision between these parts is subject to judicial remedies under national law. See Steiner, *op.cit.*, p.265; Hartley, *op.cit.*, p.262; also see case 6/64.

The following Greek courts must ask for preliminary rulings no matter which theory is implemented:

- a. the Council of the State (*Simvulio Epikratias*);
- b. the Supreme Court (*Arios Pagos*);
- c. Highest Special Court (*Anotato Idiko Dikastirio*); and
- d. *Elegtiko Sinedrio*.

[42] Steiner, *op.cit.*, p.260, notes that interpretation of the Treaty includes the EEC Treaty and all treaties amending or supplementing it, whereas "acts of the institutions" covers not only binding acts in the form of Regulations, Directives and Decisions, but even non-binding acts such as recommendations and opinions, since they may be relevant to the interpretation of domestic implementing measures.

[43] According to Lord Denning [in *H.B. Bulmer Ltd v J.Bolinger SA*; 1974; Ch 40, Court of Appeal] reference is not necessary in the following two cases:

- a. when the ECJ has already issued a judgement on the same issue; and

b. when the matter is clearly stated and leaves no doubts to the interpreter (theory of *acte clair*).

Also see case 244/80.

[44] This view was expressed by the ECJ in the well-known *Foglia v Novello* cases (see case *Foglia v Novello* [1981] ECR 3045; [1982] 1 CMLR 585; also see case 104/78 *Kupferberg* [1982] ECR 361).

However, in the more recent, similar *Margarine* case [261/81 *Walter Rau Lebensmittelwerke v De Smedt PvbA* [1982] ECR 3961], the ECJ did not refuse to judge. Comparing the above cases, Arnall, *op.cit.*, p.170 comments on the seeming similarity of the facts, but notes a basic difference. In the *Margarine* case, the importation of margarine into Belgium by the defendant in the main action was already the subject of criminal proceedings in Belgium. In *Foglia*, however, the carrier had taken no action to challenge the imposition of the disputed tax before the French courts, a factor which the ECJ regarded as calculated to place the French government at a procedural disadvantage.

Arnall then suggests that "once the national judge has decided that the proceedings before the national courts do not amount to an abuse of the process", its decision should not be subject to review by the ECJ, "as the national court is in the best position to assess this".

Beaumont, in "European Court of Justice and Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters", 1992, ICLQ, p.208, notes that in the context of the division of judicial functions between the ECJ and national courts the ECJ takes the view that "it gives preliminary rulings without, in principle, needing to enquire as to the circumstances which led the national court to submit questions to it".

[45] See cases 126/80 and C-296/83.

[46] Arnall, *op.cit.*, p.172 notes that a provision is considered unequivocal if national courts were satisfied that the meaning of the provision was obvious both to the ECJ and the national courts, in view of the different languages of EC texts, the different terminology and concepts of EC law under national laws and the teleological interpretation of EC law.

This doctrine (*acte clair*) first appeared in the *Da Costa* cases (case 28-30/62 *da Costa en Shaake* [1963] ECR 31, [1963] CMLR 224). In the *CILFIT* case (231/81 *Hauptzollamt Wurzburg v H. Weidemann GmbH and Co* [1982] ECR 2259) the doctrine developed even further. According to Wyatt, "Article 177(3)-the ECJ cautiously endorses the *acte clair* doctrine", ELR 1983, p.181, the evolution of the doctrine in the *CILFIT* case lies in the fact that for the first time the ECJ regulates that preliminary rulings are not necessary if the ECJ had already decided on the issue "in proceedings other than those instituted under Art.177, or when it had previously issued decisions "on questions which were not strictly identical".

Disagreeing with Arnall (*op.cit.*, p.172), Rasmussen, "The European Court's *Acte Clair* Strategy in the *CILFIT*", ELR 1984,

p.259, concludes that the real strategy of the CILFIT case is not to incorporate the acte clair doctrine concept into EC law, but "to call the national judiciaries to circumspection when they are faced with problems of interpretation and application of Community law" and "to warn that although the ECJ may have settled an issue once and for all, the existence of Court case law does not in any way ensure that this is the case".

[47] The ECJ has ruled that the exercise of preliminary reference is independent of the exercise of the procedures regulated by Articles 169 and 170. The fact that Articles 169 and 170 enable the Commission to bring infringement actions before the ECJ does not deprive individuals from the right to invoke Community law directly before a national court against a member state's alleged infringement of its obligation. See case 26/62; also see Rasmussen, *op.cit.*, p.177.

[48] Lasok, *op.cit.*, p.334, notes that the main difficulty in the enforcement of EC law is that apart from article 189 the EEC Treaty contains no formal and unequivocal assertion of the supremacy of Community law. The ECJ had to formulate and re-affirm this principle in a manner that would be easily accepted by member states. The solution to the problem was the application of Article 177.

[49] See Steiner, *op.cit.*, p.262; also see Usher, *European and national law: The irreversible transfer?* (1980, George Allen and Unwin, London), p.121.

[50] Apart from interim measures the following procedures were designed to serve the same purpose:

1. State aids [Art.93(2)(b)];
2. unilateral restrictions of the free movement of goods [Art. 100A(4)]; and
3. the distortion of conditions of competition within the Community [Article 225] by measures taken by member states for the protection of essential security interests [Art.203] and in the event of internal disturbances [Art. 204].

[51] The conditions for the prescription of interim measures are the following:

A. Formal conditions:

1. submission of the relevant petition by a litigants in a trial before the Court in the main case, to which the petition for interim measures must be referring [Article 83, par.1 Rules of Procedure];
2. submission of the petition separately from the main recourse [Art.83, par.3 Rules of Procedure; cases 108/63 *Offene Elektromeccaniche Ing. A. Merlini v High Authority of the ECSC* [1965] ECR 1; 32/64 *Government of the Italian Republic v Commission* [1965] ECR 365];
3. submission of the petition before the start of the oral procedure on the main recourse ;

4. already submitted recourse; and
 5. relationship between the petition and the recourse; however, the requests of the petition for interim measures must not be the same with the requests of the recourse [case 26/76 Metro v Commission (no 1) [1977] ECR 1875; [1978] 2 CMLR 1);
- B. Legal prerequisites [Art.83, par.2 Rules of Procedure]:
1. urgent character of interim measures;
 2. factual and legal ground establishing a *prima facie* case for these measures; and
 3. damage caused to the litigant by the continuing violation of EC law, that can not be subverted by a positive final judgement of the ECJ; see cases 31 and 53/77 Commission v United Kingdom [1977] ECR 921; [1977] 2 CMLR 359; 61/77 Commission v Ireland [1978] ECR 417; [1978] 2 CMLR 466.

[52] Indeed, the prescription of interim measures, albeit supportive to the main judgment, forces the circumventor of the Treaty to abolish the relevant national provisions without delay and negotiate with the other party for the resolution of their dispute.

[53] Judge Kakouris, "Issues related to the relationship between Community legal order and the legal orders of member states", 1987, *Elliniki Dikaiosini*, p.1060, notes that, when applying EC law, national courts become organs of the Community and national judges Community servants.

[54] On this issue Koukouli-Spiliotopoulou, "Issues deriving from the effect of EC law in the awarding of legal protection", *Nomiko Vima*, 1992, p.829, notes that the duty of national courts to guarantee the protection of the rights of individuals, that derive from EC regulations, within member states derives from Art.5 EEC on the principle of co-operation.

[55] According to Weatherhill in *Cases and materials on EC Law* (1992, Blackstone Press, London), p.548, three are the basic Community principles that justify the challenge of EC law by national courts:

- a. the principle of direct effect;
- b. the supremacy of Community law upon national law; and
- c. the procedure of Article 177.

Moreover, Lasok notes that "the recognition by national courts of the direct effect of certain rules of Community law and of its supremacy, is therefore, the most important factor in the process of enforcement of Community law at the member state level. See Lasok, *op.cit.*, p.336.

[56] The Treaty stipulations must thus be viewed as national legal texts, which (under the principle of the supremacy of EC law abolish all legislative and administrative acts that do not comply herewith. Essentially, national courts are expected to act as Community organs, charged with the supervision of the implementation of EC law. The Court argued

that claims of individuals regarding compensation from a member state can not be raised before the ECJ based on Articles 215, par.2 of the Treaty of Rome. This is considered an issue of national law and should therefore be brought before national courts. The will of the Treaty makers to award relevant duties and powers to national courts is also met during the procedure of Article 177.

See case 33/67.

[57] In the recent well-known Francovich case [C-6/90] the ECJ held that the substantial conditions for the individuals' right to compensation is ruled by EC law, whereas the procedural conditions are ruled by national law. However, the right of member states to set their own rules in the procedure, followed by its national courts in cases of claims for compensation for damages caused to individuals by illegal actions of national authorities, is limited by the following two limitations:

- a. the relevant procedures must not be different from the ones set for compensation from causes ruled by national law; and
- b. they should not render the acquisition of such compensation extremely difficult or impossible.

[58] The choice of the respective national court, the procedure to be followed by the litigants, the character and nature of the legal action and the rights of parts damaged by illegal actions of national authorities are ruled by national law provided that the relevant rules "are not less favourable than those governing the same right of action on an internal matter" and that they do not "make it impossible in practice to exercise rights which the national courts have the duty to protect" [cases 45/76R; 106/77R; 120/73R]. Weatherhill [1992, p.551] states that "it is becoming apparent that the requirement that the national system offers effective remedies in support of Community law ...has some potency before national courts and may force reassessment of national remedies law".

[59] It should be noted however that Plender [op.cit., p.150] feels that Community law does not "demand that damages should be available to compensate the victim of a breach of a member state of an obligation arising under the funding treaties, even when the article giving rise to the obligation produces direct effect". See Kanellopoulos, *Civil joint liability of the Community and a member state during the application of Community law* (1990, Sakkoulas, Athens), p.122.

[60] This would occur, if the Commission omits to issue its reasoned opinion under Art.169 or 170 EEC, or when the respective member state is merely applying a legally passed Community act, that sets limits to a basic principle of the Treaty of Rome (for example, the companies' freedom of establishment).

[61] The damage caused to the plaintiff by the EC and the respective state need not derive from the same action; joint liability may arise from two separate, yet related events.

[62] It is accepted that failures of the Community administration to adopt the appropriate measures against member states, negligent acts of Community officials in the performance of their duties and the adoption of wrongful acts with legal effect constitute Community liability.

It is also accepted that when the Community takes a wrongful legislative measure which involves choice of economic policy, liability arises only when a sufficiently serious breach of a superior Community rule set for the protection of the individual is violated [case 5/71].

[63] The damage claimed by the plaintiff before the ECJ must be specific, not speculative [cases 5/66; 7/66; 24/66]. This regulation is of particular importance in case of compensation claimed by companies for alleged limits to their free establishment. The damage caused to foreign companies by such an administrative or legislative act of the Community would amount to the profit that the company would have made in case that its unhindered establishment and functioning had been allowed. The amount claimed for such a loss would be only speculative and the ECJ would be reluctant to recognize any Community liability for the respective action.

[64] It must be stated, however, that in relevant cases of omission or wrongful actions of the EC or its institutions, the companies may not bring the matter before the ECJ and claim compensation for the restitution of damages by the Community. Instead, they should turn to their national courts and claim compensation by national authorities under national law.

This situation seems to be changing after *Francovich* (see joined cases C-6/90 and C-9/1990 *Francovich and Bonifaci v Italy* [1992] IRLR 84). However, due to the fact that this case involves obligations of member states deriving from directives, an analysis of the case would be out of the scope of this thesis. For an analysis of the new situation, see Curtin, "State liability under Community law: a new remedy for private parties" [1992] 1 *Industrial Law Journal*, pp.74-81; and Ross, "Beyond *Francovich*" [1993] *Modern Law Review*, pp.55-73.

[65] The question is: Could there be a different approach to this problem? Alternative approaches to this problem could involve:

a. Liability of the member state, which could be based on the omission of the state to ask for the annulment of this illegal Community act under Article 173 of the Treaty of Rome; however, the causation between this omission and the damages caused by the relevant Community act is very indirect;

b. Obligation of the member state to apply the general, hierarchically superior Arts.52-58 EEC and ignore the wrongful legislative text; although a similar argument is implemented in case of national anti-constitutional laws (the law is not applied by national authorities and courts) such an obligation does not derive from the contents of the Treaty;

c. A *contrario* application of the ECJ's argument [case 175/84] that the legal action of the plaintiffs is inadmissible

because there exist national measures effective for the compensation of the litigants. Consequently, it could be argued that in lack of relevant effective national measures before national courts, the ECJ should recognize Community liability and award compensation (even on a speculative basis).

[66] Since both paragraphs could be applicable in the accession of Greece, but only one could form the constitutional basis of the accession, problems arose on the choice of one of the two. The issue had immense practical value, because par.2 required a majority of three-fifths of the total number of members of Parliament (i.e.180 members), whereas par.3 required absolute majority (151 members). The issue was officially raised in Parliament and was finally resolved by a "politically and legally wise" decision [Evrigenis, "Legal and constitutional implications of Greek Accession to the European Communities" [1980] CMLR p.165] of the governing party (the New Democracy). The government stated that, in spite of its certainty that for the accession only 151 votes were required, it shall base the accession on par.2 of Article 28 and demand for 180 votes. Thus, the constitutionality of the Greek accession can not be challenged.

[67] See Evrigenis, *ibid*, p.166.

[68] Council of State Decision 4190/1983; 5259/1982 Athens Court of First Instance; 107/1984 Athens Administrative Court of Appeals.

Also see Sheridan and Cameron, *EC Legal systems, An introductory Guide* (1992, Butterworths, London), p.Greece-1, where it is stated that the Treaties establishing the Community have been ratified by the Parliament and thereafter incorporated into the Greek legal system; "where Community law is directly applicable, it does not need to be ratified in order to be applied directly by the courts".

[69] Decisions: 7907/1982 of the Athens Single-member Administrative Court of First Instance; 691/1983 of the Pireus Single-member Court of First Instance.

[70] See Kerameus and Kremlis, "The application of Community Law in Greece 1981-1987" [1988] CMLR, p.147; also see Anastopoulos, "Grece" in H.Siedentopf and J.Ziller (eds.), *Making European Policies work. L'Europe des Administrateurs*: (1988, European Institute of Public Administration Bruylant- SAGE publications, Brussels), pp.241-242.

[71] However, this attitude must not be considered uniform. Some judges, even of higher courts, do not accept the direct effect of EC law in Greece [see 3863/86 Athens Court of Appeal].

[72] See Decision: 9767/1984 Athens Multi-member Court of First Instance. For an exposition on Direct Effect in Greece see: Kerameus-Kremlis, 1986, pp.147-150.

[73] See 30/1981 Dodekanissos Court of Appeal; 2152/1986 Council of the State.

[74] Kerameus-Kremlis [1988, p.164] notes that up to 15 October 1987, 33 cases have been introduced before the ECJ by the Commission against Greece under Article 169 of the Treaty of Rome. In eleven of the above cases Greece has complied with EC law before the discussion of the issue before the Court, whereas in five cases the ECJ declared that Greece has failed to fulfil its obligations. The rest seventeen cases were still pending at the time the article was written.

Moreover, according to Kennon "The Single Market- A legislative perspective" [1992] 1 The Company Lawyer, p.30, till 1992 has not implemented 87 single market measures.

[75] This expression was used by the Greek Prime-Minister, Konstantinos Mitsotakis, in his speech during the Athens conference of the Greek Centre for European Studies in September 1991. This speech was published as an article under the title of "The European policy of Greece" in Greece in the EC: the challenge of adjustment, 1993, Papazisis, Athens.

[76] The Greek Prime Minister [op cite, p.36] stated that in the sector of establishment Greece (the state with the largest number of violations) was now in the fourth place of the statistics on the matter. It is notable that this dramatic reduction occurred only months after the election of Mr Mitsotakis as Prime Minister.

[77] See cases 147/86 Commission v Hellenic Republic [1988] ECR 1637, [1989] 2 CMLR 845; 38/87 Commission v Hellenic Republic [1988] ECR 4415.

[78] The reference was made with decision 1258/85 [Greek European Community Review, 1985, p.145].

It should be noted that in three occasions Greek courts have decided not to refer to the ECJ. In the first case, the Athens Multi-member Court of First Instance [1780/1985; Greek European Community Review 1985 p.192] decided that reference to the ECJ (as proposed by the litigants) was not necessary, as the relevant issue should be judged under Greek and not EC law.

In the second case, the Pireus Single-member Court of First Instance [556/1981; *Nomiko Vima*, 1982, p.499] refused to refer to the ECJ on the grounds that the court was judging under the procedure for interim measures and, therefore, the ECJ would not have jurisdiction to issue a decision.

In the third case, the Council of the State [1258/85; Greek European Community Review 1985, p.145] decided that reference should be made (as the Council of the State is a court of last instance), but the final decision on the issue should be made by the court in a Plenary discussion. This view was based on Art.1, par.5 of Law 1470/1984 that supplemented par.4, art.14 of Legislative Decree 170/1973. However, this regulation was abolished by art.19, par.3, Law 1738/1987 after a relevant letter of the Commission to the Greek state.

[79] Other decisions ordering preliminary rulings are the Athens Multi-member Court of First Instance [5737/1986], Athens Court of Appeal [9538/1986 *Elliniki Dikaiosisini* 1987, p.172], as well as a series of relevant decisions [Athens Multi-member Court of First Instance 7085-7099/86].

[80] According to the statistics issued in the Annual Report for the Application of EC law [Commission of the European Communities, COM (92) 136 final, p.110, 12.5.1992, Brussels], the number of cases referred to the ECJ by Greek courts are two (both in 1990). It should be noted that Germany referred 50 cases, France 24, Belgium 17, the Netherlands 17, Spain 4, Portugal 3, Denmark Greece and Luxembourg 2, whereas Ireland has 1 reference.

[81] Relevant excuses were the exclusive applicability of Greek law, the non-applicability of EC law, the court's sufficient interpretation of EC law, as well as sheer silence.

The exclusive applicability of Greek law was used in the Athens Multi-member Court of First Instance 1790/1985; the non-applicability of EC law in the Athens Administrative Multi-member Court of First Instance 1002/1985; the sufficient interpretation of EC law by the Greek court in the Athens Court of Appeal 1003/1985 and pure silence in the Athens Court of Appeal 7964/1982.

[82] In the last Annual Report for the Application of EC law [op.cit., p.110] Greece is reported to have no references by courts of final instance in 1989 and two references in 1990. The only countries that are doing worse on the field -at least till 1990- are Belgium (1), Italy (1), Denmark (0) and Portugal (0). German courts of last instance have referred 17 cases to the ECJ in 1989 and 12 in 1990.

According to the *Synopsis of the work of the Court of Justice and the Court of First Instance of the European Communities in 1988 and 1989 and record of formal sittings in 1988 and 1989* (1990, Luxembourg, EC), p.42, from 1981-1985 Greek courts ordered no preliminary references. In 1986 only two references were ordered, in 1987 seventeen (which were decided by the same court on the same issue) and none in 1988.

[83] Greek courts with mandatory jurisdiction are the *Arios Pagos* (Greek Court of Cassation), the Council of the State, the *Elenktiko Sinedrio* (only when judging as a court of last instance) and the Special Superior Court of Art.100 of the Greek Constitution. The latter has only judged once on the case of alleged penal crimes on behalf of A. Papandreou (verdict: innocent) and members of his cabinet (sentenced). The *Elenktiko Sinsdrio* judges on issues that do not concern the EC (control of the legality the budget and elections, issues concerning the legal and financial status of Greek civil servants etc.). Thus, their non-participation in the process of preliminary references is justified.

[84] One relevant example is given by Kakouris ["Introduction to Art.177 EEC during the ECJ's visit to the Athens Council of the State-15.6.1983", *Nomiko Vima*, 1983, p.1284]. The judge notes that case 520/83 Council of the State "should have been referred".

[85] Geraris ["The beginning of a dialogue between the Community and the Greek judge", *Nomiko Vima*, 1988, p.1037] notes that two years after *Arios Pagos* issued a decision on the reference of an issue to the ECJ [decision 1124/86] the Secretariat of the Court had not executed the Decision. According to the author, the Secretariat is waiting for action on behalf of the litigants, who however lack the legal power to exercise the necessary actions for the announcement of the decision to the relevant authority of the ECJ.

[86] Koukouli-Spiliotopoulou [op.cit., p.844] justifies the subjection of relevant disputes in the category of administrative disputes based on the following three factors:

a. the act or omission that caused the dispute between the Greek state and foreign companies are exercised by administrative organs of the state; and

b. the legal relationship between the state and companies, which was harmed by the respective acts, is ruled by administrative law; this condition is indeed fulfilled, because the relevant law on the freedom of establishment of foreign companies within Greece introduces "unilateral actions of the organs of the state".

[87] Koukouli-Spiliotopoulou [op cite, p.845] notes that violations of EC law that may cause administrative liability of Greek administrative organs are the following:

a. refusal or omission to take the appropriate measures for the compliance of Greek with EC law, for example "for the freedom of establishment within the EC";

b. refusal or omission of the Greek state to adopt measures on institutions responsible for the protection of the rights of individuals deriving from EC law;

c. the delayed implementation of EC regulations; and

d. the implementation of law contradictory to EC law.

[88] It should be noted that under Law 1046/1983 even this claim is brought before the Greek administrative courts.

[89] It should be noted that the claim for compensation is completely independent from claims for annulment of the respective act. This means that the claim for compensation may be brought before the Greek courts even if the claims for annulment of the act were not successful. Furthermore, the exercise of actions of judicial review are not a prerequisite for the legal exercise of the claim for compensation.

It should also be noted, however, the judicial practice indicates that in the vast majority of cases actions for compensation and judicial review are exercised in the same judicial procedure versus the Greek state and its organs.

[90] For recent cases of failure of member states to fulfil their obligations, see cases 337/89 and C-33/90.

[91] See Stefanou, "Reforming the European Communities: The role of the Single European Act in the Reform Process and the motives behind its making", (1993, Unpublished MPhil thesis, University of Essex, Department of Government). pp.202-204.

[92] See: K.Mitsotakis, "The Greek EC policy", in Loukas Tsoukalis (1993), Greece in the EC: The challenge of adaptation, EKEM-Papazisis, Athens.

[93] Greece's participation in two "Conventions of Piece" along with India, Tasmania and other countries of Asia and Africa, as well as the frequent visits of Arafat and Kadafi in Greece were expressions of this policy. For a good exposition of Greece's European and external policy during the PASOK administration see: Theodore Kouloubis (1987), "Karamanlis and Papandreou: Form and substance of leadership", *Dikaio kai Politiki*, Vol.16, pp.5-35.

[94] See Greek Memorandum to the Commission, EC-Bull, 3/82, point 2.4.1.; Financial Times 23-3-1982.

[95] As Vallinakis ["Greece in European Political Cooperation", in Tsoukalis (1993), op.cit., p.249] noted the governments of PASOK were called to take part in a mechanism which was based on a philosophy they did not believe in.

[96] See Economist, 15-1-83].

[97] See Stefanou, op.cit., 1993, p.207.

[98] See *ibid*, op.cit., 1988.

[99] This attitude was shared by Italy, Eire, Spain and Portugal who also pressed for a reduction of regional disparities. Eventually these member states managed to secure a section in the Single European Act (Cohesion) ensuring that the EC would actively pursue a reduction in regional disparities.

[100] See Ioakimidis, *Europe in search of a new architecture, evolution towards the European Union and Greece*, (Themelion, Athens), p.106.

CONCLUSIONS

This thesis examined the various aspects of the conditions for the secondary establishment of foreign public companies limited by shares in Greece. The comparative analysis of Greek and EC law has led to the following conclusions.

I. The legal forms under which foreign public companies limited by shares may establish in Greece are the following:

- a. branches or agencies (art. 50 of Law 2190/20);
- b. off-shore units (Laws 89/67, 373/68 etc.); and
- c. subsidiaries (art. 42 of Law 2190/20).

The conditions for the establishment of branches or agencies under Law 2190/1920 are the following:

1. the parent company must be foreign;
2. recognized under Greek law;
3. a public company limited by shares;
4. its aim must be legal and adherent to the public order;
5. it must submit to the Greek Ministry of Commerce a "representation document";
6. the Decision of the Minister of Commerce on the establishment of the company in Greece must be published in the Bulletin of Public Limited Companies of the Government Journal.

The conditions for the establishment of commercial/industrial off-shore units are the following:

1. company dealing with commercial/industrial activities;
2. belonging to any legal type or form;

3. functioning legally at its seat;
4. dealing exclusively with activities outside Greece;
5. acquisition of permission for establishment from the respective Greek Minister;
6. permission published in Government Gazette;
7. lawful aim and adherent to the public policy; and
8. working permission of the company's Greek agent.

The only condition for the establishment of subsidiaries is the completion of the following four stages of incorporation:

- a. adoption of the company's Articles of Association;
- b. subscription of the share
- c. administrative authorization; and
- d. publication.

II. Art.52 is applicable in the establishment of EC companies in Greece. It imposes the unhindered establishment of companies, the performance of financial activities and "collateral incidents", as well as the unhindered acquisition of shares and participation in existing firms under the conditions set for domestic companies. Moreover, it stipulates the abolition of restrictions in the form of "a prohibition of foreign companies carrying on certain kinds of businesses", or "a requirement that they shall obtain government consent" before establishing in the receiving state. The companies' freedom of establishment is lawfully limited in the following cases:

- a. implementation of measures imposing equally restrictive status for both nationals and foreigners;

b. prohibitions concerning the execution of activities connected with the *imperium* of the host state;

c. activities of the foreign company endangering the host country's public policy, public security and public health;

d. activities placing in danger the host state's security (i.e. production and commerce of weapons and war materials);

e. activities categorically excluded by a decision of the Council [Art.55];

f. activities prohibited by the stipulations on the free movement of capital; and

g. activities performed by enterprises entrusted with the operation of services of general economic interest or having the character of a revenue proceeding monopoly (these are granted a limited exemption from the application of the Treaty).

III. The implementation of the theory of *ipso jure* recognition of foreign legal entities in Greece, being adherent to Art. 220 EEC, constitutes the first step towards the companies' free establishment. However, the parallel application of the *siège réel* theory (although not contradictory to the text of the Treaty) can prohibit the unhindered recognition and establishment of companies whose *lex fori* applies the theory of incorporation.

The formal conditions for the establishment of foreign companies in Greece, as introduced by the relevant Greek laws, constitute mere administrative measures set to protect both the foreign companies themselves and the Greek public. Thus they do not violate the freedom of establishment. However, special Greek

laws on the activities permitted to foreign companies in Greece, constitute violations of Arts.52-58 EEC. Limits on the amounts imported and exported by foreign companies (abolished recently by an administrative act of doubtful legal value), existence of state monopolies and public procurements, laws prohibiting the foundation of private schools, mining, stock exchange companies and commercial agents, as well as limitations to the brokerage of civil transactions, all indirectly prohibit the establishment of foreign companies within Greece.

IV. Foreign maritime public companies limited by shares may establish in Greece either under Law 2190/1920 or under the form of off-shore units (Law 378/68). The conditions for this latter type of establishment are the following:

1. they must follow the procedure regulated by Law 89/67;
2. their Greek unit must deal exclusively with activities that are categorically approved by the permission of their establishment in Greece;
3. they must submit to the Greek Ministry of Mercantile Marine the application for establishment regulated by Law 89/67;
4. this application must be approved by a Joint Decision of the Ministers of Coordination and Mercantile Marine and must be published in the Government Gazette.

According to the "extensive view", transport is included in the activities liberalized by Arts.52-58 EEC. The formal conditions set for the establishment of foreign maritime companies in Greece do not interfere with their freedom of

establishment. However, the curtailment of certain activities by Greek law (e.g. the prohibition of access to the Greek flag for ships owned by foreigners by at least 50%, the exemption of these ships from a large number of privileges and activities within Greece, the prevention of foreigners to establish and even participate in the "Shipping Company" of Law 959/1979 and the law on cabotage) lead to the conclusion that the Greek legal framework on the establishment of foreign maritime companies is very restrictive (almost prohibiting) and constitutes a breach of the Treaty.

V. The lack of any provisions for sanctions to be imposed upon member states which violate EC law, the lack of execution mechanisms for ECJ decisions, as well as the reluctance of EC member states to take fellow members before the ECJ for breach of EC law, render the enforcement mechanisms within member states quite ineffective.

The reluctance of Greek judges (even when judging at the last instance) to apply Art.177, as well as order compensation for damage caused by the Greek authorities, means that there is little practical protection for foreign companies at the national level.

However, the tendency of younger judges serving in the courts of first instance to refer to the ECJ (in spite of the lack of relevant obligation) and the categorically declared devotion of the new Greek government of New Democracy to the effective participation of Greece in the creation of the Single

European Market indicates that Greek violations of EC law (especially the free establishment of foreign companies) will gradually diminish.

Although this thesis did examine an area of European integration which has been forgotten for a number of years (after all Greece lacks a strong C economy and foreign companies have been reluctant to establish there), its limited length and the changing EC environment clearly indicate that more research is needed in this area. Let this be someone else's task.

TABLES AND APPENDICES

TABLE A

GREEK LAWS REGULATING THE CONDITIONS FOR THE ESTABLISHMENT OF FOREIGN MARITIME COMPANIES IN GREECE

BASIC LAWS	MODIFICATIONS	
<u>LAW 2190/1920</u>		
<ul style="list-style-type: none"> - regulates the conditions for the establishment of branches, agencies and subsidiaries of all foreign public companies limited by shares 		
<u>LAW 39/67</u>	<u>LAW 373/68</u>	
<ul style="list-style-type: none"> - regulates the conditions for the establishment of foreign commercial/ industrial companies of any type or form in Greece 	<ul style="list-style-type: none"> - supplements Law 39/67 - subjects foreign maritime companies to Law 39/67 as supplemented by L.373/68 - the activities of foreign companies in Greece are determined by the Ministerial Decision permitting the company's establishment in Greece 	
<u>LAW 27/75</u>	<u>LAW 314/78</u>	<u>LAW 1332/78</u>
<ul style="list-style-type: none"> - regulates further taxation release to foreign maritime companies - stipulates the company's obligation the cost of the branch's functioning in Greece - determines the company's activities as "the execution of business, whose subject is located outside Greece", or the granting of services to the seafarer or mediterranean shipping 	<ul style="list-style-type: none"> - modifies law 27/75 - stipulates the obligation of each company to import at least 350.000 yearly - the conditions for the establishment of the company in Greece are not subject to change for 5 years - determines the activities of foreign companies as the administration, chartering, insurance and general dealing with ships of total weight tonnage above 1000 	<ul style="list-style-type: none"> - modifies Law 314/78 - reduces the total weight tonnage of the company's ships to 500 - all other issues continue to be regulated by Law 314/78
<u>LAW 791/78</u>		
<ul style="list-style-type: none"> - the legality of the foundation and the legal capability of companies established under Laws 39/67 and 27/75 (as modified or supplemented) are ruled by the law of the state, where the company's statutory seat is located 		

APPENDIX 1

THE GREEK LEGAL SYSTEM

In the text of this thesis frequent reference is made to decisions of Greek courts. For the non-Greek reader, who may be unfamiliar with the structure of the Greek legal system, an evaluation of the relevant decisions is impossible without a basic knowledge of the hierarchy of Greek courts and the legal effect of their decisions.

Art.93 (1) of the Greek Constitution distinguishes between the following three basic types of courts:

a. civil courts, which have jurisdiction to judge on civil disputes [1], cases of voluntary jurisdiction [2] or any other case subjected there by the law;

b. administrative courts, which have jurisdiction in substantial cases of administrative law (i.e. disputes involving the Greek state); and

c. penal courts, with jurisdiction to order punishment and all other appropriate measures for crimes included in the Greek penal laws.

Since penal courts have no jurisdiction over cases arising from disputes between foreign companies and the Greek state regarding violation of the companies' freedom of establishment, we need only refer to civil and administrative courts.

Civil courts are divided into:

A. Courts of First Instance,

(i) *Irinodikia* (Magistrates courts), which sit as courts of first instance on claims of no more than 300.000 drachmas and cases especially assigned to it by Greek laws;

(ii) *Monomeli Protodikia* (Single-member Courts of First Instance), which sit as courts of first instance on claims of between 300.000 to 1.000.000 drachmas, as well as cases especially assigned to it by the law; and

(iii) *Polimeli Protodikia* (Multi-member Courts of First Instance) sitting as courts of first instance on cases not assigned to the two other courts or cases where the claim is not financial, and as a court of second instance on appeals against decisions of the magistrates courts;

B. *Efelia* (Court of Appeals), hearing appeals against decisions of the Courts of First Instance; the Court of Appeals also acts as a court of first instance in cases of contractors' disputes or cases of expropriation; and

C. *Arios Pagos* (Supreme Court), judging on cassations against decisions of all civil courts [3].

Under similar criteria, the Greek administrative courts are divided into:

a. Single and Multi-member Administrative Courts of First Instance;

b. Administrative Courts of Appeal; and

c. the Council of the State.

The procedure before both the civil and the administrative courts is performed mainly in writing (as opposed to oral procedures in Penal Courts) [Art.106 Code of Civil Procedure]. The procedure evolves under the initiative of the litigants

[Art.108 Code of Civil Procedure]. For example, the judge can not take into account arguments or facts which were not introduced by the litigants, is prohibited from requesting the delivery of proof not requested by the litigants and may not proceed to further judicial acts, unless so requested by the litigants.

However, the most important difference between the British and Greek legal system concerns the effect of the courts' precedents. According to Greek law, the decisions of all Greek courts are exclusively binding upon the participants in the precise case, or their legal successors [Art.325 Code of Civil Procedure]. Thus, Greek precedents lack any form of legal effect on consequent cases. It should be noted however, that court precedents (especially decisions of the higher courts) are often very influential upon later decisions. Thus, it can be safely said that, although courts' precedents lack binding value, they may effectively support the litigants' arguments on the case.

Furthermore, in the text of the thesis reference is made to administrative acts and their relationship with the Greek laws. The issue is of particular importance in the case of the Greek regime on the export of the foreign companies' capital and profits. We must therefore determine the main sources of Greek law making particular reference to administrative acts and their relationship with the other sources of law.

Christofilopoulos [4] distinguishes between the following sources of written law:

- a. the Constitution of 1975 as modified in 1986;
- b. the laws; and
- c. the administrative acts.

The Constitution sets the basic principles of the Greek legal system. Its regulations are general and are usually interpreted and applied by laws. The regulations of the Constitution are hierarchically higher than all the other sources of law.

Greek laws are defined as regulations passed by the respective authorities under the procedure determined by the Constitution. They include laws and decrees (both legislative and Presidential). The latter are passed after special authorization of the Parliament under Art.43 of the Constitution. It should be noted that laws, legislative and presidential decrees have equal legal power. Therefore, decrees passed after the enforcement of previous laws can modify or abolish them and vice-versa.

The administrative acts include acts of the administration (the government, the Prime Minister, Ministers, Governors or other administrative organs), which set rules of law. These acts are specific: they regulate a specific issue concerning a specific circle of persons. In some cases (not usually), they regulate a matter of general interest for a specific period of time. The administrative acts are in the lowest place in the pyramid of the sources of Greek law. Therefore, they cannot abolish regulations of the Constitution, laws or decrees. They may only modify laws or decrees for a short period of time specified in the text of the act, provided that the respective administrative act has relevant authorization. When this happens, the modified law loses its legal value for the set period of time. If no subsequent act is passed, the law comes back into force after

the expiry of the act. The comparatively low legal value of administrative acts is due to the fact that they are not issued under the normal procedure set by the Constitution for the passing of Greek laws.

FOOTNOTES

[1] Civil disputes are defined as disputes between individuals who have legal relationships of a private nature. They are governed by Articles of the Greek Civil Code. It should be noted that civil disputes include disputes between individuals and the Greek state, when the latter acts in a private capacity (i.e. as the shareholder of a company, a tenant of a building etc.).

Private disputes include disputes of contract law, real rights law, family law and succession.

[2] Cases of voluntary jurisdiction are defined as cases "where the request is the court's order of a corrective measure or the recognition of a right" [Beys, C., 1984, *Lessons of Civil Procedure*, Sakkoulas, Athens]. Such disputes are ruled by the relevant Articles of the Greek Code of Civil Procedure and their distinguishing characteristic is that they involve the court appearance of only one party. This absence of adversarial argument indicates that in cases of voluntary jurisdiction the court borders between the exercise of judicial power and the exercise of administration.

Cases of voluntary jurisdiction include adoption, the correction of Greek birth certificates and the certification of successors.

[3] In Greece one can distinguish between courts of first and courts of last instance. The *Arios Pagos*, which judges exclusively on legal errors of the relevant decisions, does not belong in any of the two categories.

[4] See Christofilopoulos, *Introduction to Law, Basic Institutions of Private Law* (1988, Sakkoulas, Athens), pp.21-28.

APPENDIX 2

THE FULL TEXT OF ARTICLE 50 OF LAW 2190/1920 AS TRANSLATED BY
THE TRANSLATION OFFICE OF THE HELLENIC MINISTRY OF FOREIGN
AFFAIRS

(E X T R A C T)

GOVERNMENT GAZETTE OF THE KINGDOM

OF GREECEISSUE FIRSTNo. 144.- Athens, 30th June 1920C O N T E N T SL A W S

: : : :

Concerning Sociétés AnonymeLaw 2190

ALEXANDER

K I N G O F T H E H E L L E N S

Having-unanimously- voted along with the Parliament, We have decided and order :

: : : :

CAPITAL 7th.-

Foreign Sociétés Anonyme

Article 50.-

foreign 1.- The ^{*}Sociétés Anonyme having, in accordance with the Law, the right of operating in Greece are obligated- prior to their ----- establishing, here in Greece, a branch of office of agency of theirs to submit to the Ministry of National Economy, ratified by the competent Greek Consular Authority, a copy of the document of their representative's or agent's authorization, including-indispensably- also, the appointment of an attorney with special authority, and to mention the year of their establishment, along with the full names of those representing the Company in its Seat.- Any change of the

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de la République Hellénique, Athènes.

HELLENIC REPUBLIC MINISTRY OF FOREIGN AFFAIRS

TRANSLATION OFFICE - ATHENS

afore mentioned details, made afterwards-i.e after the aforesaid announcement- should be, immediately, served upon the Ministry of National Economy.-

2.- The afore mentioned Companies are, also, obligated - within three months after the approval, by the General Assembly, of the annual Balance Sheet of them- to submit to the Ministry of National Economy a copy of it along with the statement of the works of the Company in Greece , during the fiscal year to which the balance sheet refers.-

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G.M. Tambouras

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APPENDIX 3

THE FULL TEXT OF ARTICLES 10 AND 11 OF THE GREEK CIVIL CODE. AS
TRANSLATED BY C. TALIADOROS IN *CIVIL CODE* (1982, Sakkoulas,
Athens, p.2)

Article 10.- Juristic person. The capacity of a juristic person shall be governed by the law of its seat.

Article 11.- Form of acts. An act shall be formally valid if its form is in conformity with the provisions as to the form of the law governing the substance of the act or of the law of the place where the act was concluded or of the national law of all the parties to act.

APPENDIX 4

THE FULL TEXT OF LAW 89/67 AS TRANSLATED BY THE TRANSLATION OFFICE OF THE HELLENIC MINISTRY OF FOREIGN AFFAIRS

(E X R A C T)

GOVERNMENT GAZETTE OF THE

KINGDOM OF GREECE

FIRST ISSUE

No. 132.- Athens, 1st August 1967

COMPULSORY LAW No. 89

Concerning the establishment in Greece of foreign
Industrial & Trading Companies.-

CONSTANTINE

KING OF THE HELLENS

Upon the proposition of Our Cabinet Council, we have decided and
order the following:

Article 1.-

Foreign Trading & Industrial Companies, under any type or form, legally operating in their Registered Offices, and being exclusively occupied with the carrying out trading transactions the object of which is out of Greece, may be established in Greece, after a special permit granted through a decision of the Minister of Coordination.- The respective application is being submitted to the Service of Capitals abroad of the Ministry of Coordination. In the application there should be mentioned the nationality of the Company, the type under which it operates in the Country of its Seat (Registered Offices), the form under which it will be operated in Greece i.e. as a branch, agency or office of the affiliated Company, its object as well as the person of its Director in Greece.- The applicant Company should, also, declare whether it intends to deposit a banking guarantee of an accredited Bank in Greece or abroad, which will

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be forfeited in favour of the State, in case of violation of the provisions of these presents by its personnel. Within eight (8) days after the submittal of the application, the Minister of Coordination expresses its opinion by granting or not the permit of establishment.-

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Athens, 13th December 1991

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Th. Papadopoulos

Certified to be a true and correct translation.-

Athens, 14th Dec. 1991

G.M. Tambouras

Official Translator

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APPENDIX 5

THE FULL TEXT OF LAW 378/68 AS TRANSLATED BY THE TRANSLATION OFFICE OF THE HELLENIC MINISTRY OF FOREIGN AFFAIRS

GOVERNMENT GAZETTE OF THE
KINGDOM OF GREECE

ISSUE FIRST

No. 81.- Athens, 17th April 1968

C O N T E N T S

COMPULSORY LAWS

.....

COMPULSORY LAW No. 378

Concerning the completion of the Cabinet Council we, hereby, have decided and order :

Article 1.-

Foreign shipping enterprises of any form and type can be established in Greece in accordance with the provisions of the Compulsory Law 89/1967 and enjoy all the advantages of this Law and of those presents, for all their activities which would have been expressly approved by virtue of the decision granting the permit of the establishment.- The respective application that includes the details mentioned in the Article 1 of the Compulsory Law 89/1967, along with an exact mentioning of the activities of the enterprise, is submitted to the Ministry of Mercantile Marine, and it is being approved through a common decision of the Ministers of a) Coordination and b) Mercantile Marine.-Decisions of the Minister of the Coordination having approved the establishment of Foreign Shipping Companies, in accordance with the Compulsory Law 89/1967, are considered, legally, issued.-

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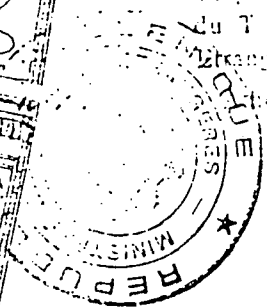
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Official Translator



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Vague translation of the
du 17 avril 1968, n° 81
étrangère, ayant trait à
23 ΔΕΚ. 1991
LE DIRECTEUR
A. LAPPA
SECRETAR

APPENDIX 6

THE FULL TEXT OF LAW 791/78 AS TRANSLATED BY THE TRANSLATION OFFICE OF THE HELLENIC MINISTRY OF FOREIGN AFFAIRS

(E X T R A C T)

GOVERNMENT GAZETTE OF THE HELLENIC

REPUBLIC

FIRST ISSUE

Bo. 108-164.- Athens, 1st July 1978.-

C O N T E N T S

.....

LAW No. 791 *

THE PRESIDENT OF THE

HELLENIC REPUBLIC

Having-unanimously- voted ,along we the Parliament

We have decided :

- 1.- Shipping Companies having been established in conformity with the Laws of the foreign State, provided that they are or have been shipowners or operators of vessels under the Greek flag or they are established or would be established in Greece, by virtue of the provisions of the Article 25 of the Law 27/1975 or the Compulsory Laws 89/1967 and 378/1968, are being governed- as for the establishment and the capability of Law- by the Law of the Country of their Registered Offices, regardless of the place from where their affairs are being directed or used to be directed, partially or wholly.-
- 2.- The provisions of the present Law have no implementation as far as Companies are concerned which are shipowners or operators of -exclusively and only- of pleasure vessels.-

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de la République Hellénique, Athènes.

HELLENIC REPUBLIC MINISTRY OF FOREIGN AFFAIRS

TRANSLATION OFFICE - ATHENS



Prot. No. 1562

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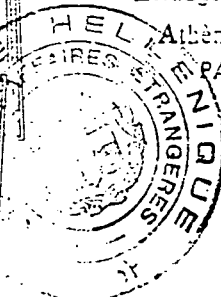
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G.M.Tambouras

Official Translator

* Concerning the provisions as regards the regime of the shipping Companies ,having been established in Greece ,in accordance with the Law of the foreign State.-



ΕΛΛΗΝΙΚΗ ΔΗΜΟΚΡΑΤΙΑ
ΥΠΟΥΡΓΕΙΟ ΕΞΩΤΕΡΙΚΩΝ
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A. LAPPAS
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Μεταφραστικό Γραφείο Υπουργείου Εξωτερικών, Αθήνα.
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HELLENIC REPUBLIC MINISTRY OF FOREIGN AFFAIRS
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GREEK COURTS' PRECEDENTS

SUPREME COURT

- 45/1905;
- 171/1907;
- 21/1934;
- 179/1936;
- 221/1948;
- 219/1954;
- 439/1954;
- 661/1961;
- 38/1966;
- 310/1966;
- 406/1967;
- 558/1969;
- 616/1976;
- 1070/1976;
- 461/1978;
- 1147/1984;
- 1627/1986;
- 59/1989.

COUNCIL OF THE STATE

- 413/1950;
- 722/1954 (Plenary);
- 3167/1968;
- 3395/1971;
- 3289/1980;
- 4815/1983;
- 1258/1985;
- 2152/1985.

COURTS OF APPEAL

- 1002/1892 (Athens);
- 789/1896 (Patras);
- 1137/1898 (Athens);
- 1088/1908 (Athens);
- 1416/1911 (Athens);
- 511/1912 (Athens);
- 191/1925 (Patras);
- 262/1935 (Athens);
- 149/1955 (Larissa);
- 419/1955 (Thessaloniki);
- 946/1971 (Athens);
- 2883/1977 (Athens);
- 1034/1979 (Pireus);
- 423/1980 (Pireus);
- 30/1981 (Dodekanissos);
- 75/1981 (Corfu);
- 91/1982 (Pireus);
- 117/1982 (Athens);
- 5779/1982 (Athens);
- 7964/1982 (Athens);
- 3196/1983 (Athens);
- 3839/1983 (Athens);
- 2779/1984 (Athens);

- 50/1985 (Pireus);
- 1003/1985 (Athens);
- 1258/1985 (Athens);
- 3863/1986 (Athens);
- 9538/1986 (Athens);
- 2135/1987 (Athens);
- 65/1988 (Pireus);
- 175/1988 (Athens);
- 1633/1989 (Pireus).

COURTS OF FIRST INSTANCE

- 3558/1954 (Pireus Multi-member);
- 4868/1960 (Thessaloniki Multi-member);
- 4911/1965 (Thessaloniki Multi-member);
- 1152/1969 (Pireus Multi-member);
- 1152/1969 (Athens Single-member);
- 1937/1974 (Athens Single-member);
- 1937/1974 (Pireus Multi-member);
- 6857/1977 (Athens Single-member);
- 1903/1979 (Pireus Multi-member);
- 239/1980 (Pireus Multi-member);
- 74/1981 (Sparta Single-member);
- 556/1981 (Pireus Single-member);
- 11428/1981 (Athens Multi-member);
- 7907/1982 (Athens Administrative Single-member);
- 691/1983 (Pireus Single-member);
- 2400/1983 (Pireus Multi-member);
- 1086/1984 (Pireus Single-member);
- 1087/1984 (Pireus Single-member);
- 3522/1984 (Pireus Single-member);
- 2075/1984 (Pireus Single-member);
- 9767/1984 (Athens Multi-member);
- 12/1985 (Pireus Multi-member);
- 1002/1985 (Athens Administrative Multi-member);
- 1780/1985 (Athens Administrative Multi-member);
- 354/1986 (Corfu Single-member);
- 1026/1986 (Pireus Single-member);
- 2075/1986 (Pireus Multi-member);
- 2278/1986 (Patras Multi-member);
- 5737/1986 (Athens Multi-member);
- 7085-7099/1986 (Athens Multi-member);
- 494/1987 (Pireus Multi-member).

... PRECEDENTS OF THE ECJ

- 26/62 van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1; [1963] CMLR 105;
- 28-30/63 Da Costa [1963] ECR 31; [1963] CMLR 224;
- 108/63 Merlini v High Authorities [1965] ECR 1;
- 6/64 Costa v ENEL [1964] ECR 585; [1964] CMLR 425;
- 32/64 Italy v Commission [1965] ECR 365;
- 52 and 55/65 Germany v Commission [1966] ECR 172;
- 53/65 Germany v Commission [1966] ECR 159; [1967] CMLR 22
- 61/65 Vaasen v Beamtenfonds Mijnbedrijf [1966] ECR 261; [1966] CMLR 508;
- 5, 7 and 13-24/66; Firma E. Kampffmeyer v Commission [1967] ECR 245;
- 33/67 Dietrich Kurrer v Council [1968] ECR 127;
- 34/67R Mokerei-Zentrale-Westfallen-Lippe v Hauptzollamt padertoor [1968] ECR 143, 154;
- 7/68 (Re Export Tax on Art Treasures no 1) Commission v Italy [1968] ECR 423; [1969] CMLR 1;
- 6/69 Commission v France [1969] ECR 523; [1970] CMLR 43;
- 11, 76/69 Commission v France [1969] ECR 523;
- 27/69; Assurance general ECR [1970] 405; [1970] CMLR 243;
- 31/69 (Re Payment of Export Rebates) Commission v Italy [1970] ECR 25; [1970] CMLR 175;
- 77/69 Commission v Belgium [1970] ECR 237; [1974] 1 CMLR 203; [1974] 1 CMLR 203;
- 97/69 [1970] ECR 237;
- 5/71 Zuckerfabrik Schoeppenstadt v Council [1972] ECR 975
- 43/71 Politi v Italy [1971] ECR 1039; [1973] CMLR 60;
- 30/72 Commission v Italy 8.2.1973;
- 39/72 Commission v Italy [1973] ECR 101; [1973] CMLR 439;
- 70/72 (Kohlegesetz) Commission v Germany; [1973] ECR 813; [1973] CMLR 741;
- 36/73 N V Nederlandse Spoorwegen v Ministern von Verkehr en Waterstaat [1973] ECR 1299; [1976] 2 CMLR 148;
- 110/73 Fiege v Caisse Regionale [1973] ECR 1001;
- 120/73R Lorenz v Germany [1973] ECR 1471;
- 146/73 Rheinmuehlen-Duesseldorf v Einfuhr- und Vorratsstelle fuer Getreide und Futtermittel [1974] ECR 139;
- 166/73 Rheinmeulen-Duesseldorf v Einfuhr- und Vorratsstelle fuer Getreide und Futtermittel (no 1) [1974] ECR 33;
- 167/73; Re French Merchand Seamen; Commission v France; [1974] ECR 359; [1974] 2 CMLR 216;
- 2/74 Reyners v Belgium [1974] ECR 631; [1974] 2 CMLR 305;
- 33/74 Van Binsbergen [1974] ECR 1299; [1975] 1 CMLR 298;
- 36/74 Walrave et autres v Association Union Cyclistes et autres [1974] ECR 1405; [1975] 1 CMLR 320;
- 41/74 Van Duyn v Home Office [1974] ECR 1337; [1975] 1 CMLR 1;
- 74/74 CNTA v Commission [1975] ECR 533;
- 99/74R Grands Moulins des Antilles [1975] ECR 1531;
- 36/75; Roland Rutili v Ministre de l'Interieure [1975] ECR 1219; [1976] 1 CMLR 140;
- 40/75 Produits Bertrand v Commission [1976] ECR 1; [1976] 1 CMLR 220;

- 48/75 Procureur du Roi v Royer [1976] ECR 497; [1976] 2 CMLR 619;
- 55/75 Balkan Import Export GmbH v Hauptzollamt Berlin Packhof [1976] ECR 19;
- 59/75 Pubblico Ministero v Manghera [1976] ECR 91; [1976] 1 CMLR 557;
- 118/75 The State v Watson and Belmann [1976] ECR 1185; [1976] 2 CMLR 552;
- 14/76 De Bloos v Boyer [1976] ECR 1510;
- 26/76 Metro v Commission (no 1) [1977] ECR 1875; [1978] 2 CMLR 1;
- 45/76 Comet v Produktschap [1976] ECR 2043; [1977] 1 CMLR 533;
- 46/76 Bauhuis v The Netherlands [1977] ECR 5;
- 90/76; van Ameyde v U.C.I. [1977] ECR 1091; [1986] 1 CMLR 53;
- 126/76 Dietz v Commission [1977] ECR 2431;
- 30/77; Regina v Pierre Bouchereau [1977] ECR 1999; [1977] 2 CMLR 800;
- 31/77R U.K. v Commission [1977] ECR 921; [1977] 2 CMLR 359;
- 53/77R U.K. v Commission [1977] ECR 921; [1977] 2 CMLR 359;
- 61/77 Commission v Ireland [1978] ECR 417; [1978] 2 CMLR 466;
- 70/77 Simmenthal v Italy [1978] ECR 1453; [1978] 3 CMLR 670;
- 95/77 Commission v The Netherlands [1978] ECR 863;
- 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629; [1978] 3 CMLR 263;
- 16/78 Criminal Proceedings v Choquet [1978] ECR 2293;
- 33/78 Somafer v Saar-Ferngas [1978] ECR 2193;
- 91/78 Hansen v Hauptzollamt Flensburg [1979] ECR 935; [1980] 1 CMLR 162;
- 104/78 Foglia v Novello (no 1) [1980] ECR 745; [1981] CMLR 45;
- 115/78; Knoors v Secrétaire d'Etat aux Affaires Economiques [1979] ECR 399; [1979] 2 CMLR 357;
- 119/78 Peureux II SA Grands Distilleries Peureux v Directeur des Services Fiscaux de la Haute-Saone [1979] ECR 975; [1980] 3 CMLR 337;
- 128/78 Commission v UK [1979] ECR 419; [1979] 2 CMLR 45;
- 141/78 France v UK [1979] ECR 2923; [1980] 1 CMLR 6;
- 175/78; Regina v Vera Ann Sanders [1979] ECR 1129; [1979] 2 CMLR 216;
- 230/78; Eridania Zuccheri [1979] ECR 2749;
- 232/78 (Re Restriction on Import of Lamb) Commission v France [1979] ECR 2729;
- 52/79 Procureur du Roi v Marc J.V.C. Debaeve et autres [1980] ECR 833; [1981] 2 CMLR 362;
- 113/80 (Re Restrictions on Importation of Souvenirs) Commission v Ireland [1981] ECR 1625; [1982] 1 CMLR 706;
- 126/80 Salonia [1981] ECR 1563;
- 142 and 143/80 Amministrazioni delle Finanze dello Stato v Essevi SPA [1981] ECR 1413;

- 203/80 Criminal Procedure v Guerrino Cassati [1981] ECR 2595;
- 244/80 Foglia v Novello (no 2) [1981] ECR 3045; [1982] 1 CMLR 91;
- 246/80 Broekemeulen v Huisarts Registratie Commissie [1981] ECR 2311; [1982] 1 CMLR 91;
- 52/81 Offene Handelsgesellschaft in Firma Werner Faust v Commission [1982] ECR 3745;
- 95/81; Commission v Italy [1982] ECR 2187;
- 96/81 Commission v The Netherlands [1982] ECR 1803;
- 97/81 Commission v The Netherlands [1982] ECR 1819;
- 231/81 CILFIT v Italian Ministry of Health [1983] CMLR (Italian) 472; [1982] ECR 2259;
- 261/81 Rau v de Smedt [1982] ECR 3961; [1983] CMLR 496;
- 301/81 Commission v Belgium [1983] ECR 467;
- 314-316/81 Procureur de la Republique et al v Waterbeyn et al [1982] ECR 4337; [1983] 2 CMLR 145;
- 35 and 36/82 Morson and Jhanjan v Staat der Nederlanden [1982] ECR 3723; [1983] 2 CMLR 401;
- 42/82 Commission v France [1983] ECR 1013;
- 83/82 Procureur de la Republique v Jean Cayard and al [1982] ECR 4337;
- 325/82 Commission v Germany [1984] ECR 777;
- 13/83 European Parliament v Council [1985] ECR 1513; [1986] 1 CMLR 138;
- 107/83 Kopp [1984] ECR 2971; [1985] 1 CMLR 99;
- 270/83 Commission v France [1986] ECR 273; [1987] 1 CMLR 401;
- 274/83 Commission v Italy [1985] ECR 1077; [1987] 1 CMLR 345;
- 180/83 Moser v Land Baden Wurtemberg [1984] ECR 2539 [1984] 3 CMLR 720;
- 182/83 Robert Fearon and Company Limited v The Irish Land Commission [1984] ECR 3677; [1981] 2 CMLR 362;
- 270/83 Commission v France [1986] ECR 273; [1987] 1 CMLR 401;
- 21/84 Commission v France [1985] ECR 1355;
- 194/84 Commission v Hellenic Republic [1987] ECR 4737; [1989] 2 CMLR 453;
- 197/84; Steinhauser v City of Biarritz [1985] ECR 1819; [1986] 1 CMLR 845;
- 205/84; Commission v Germany [1986] ECR 3755; [1987] 2 CMLR 69;
- 221/85; Commission v Belgium [1987] ECR 719; [1988] 1 CMLR 151;
- 236/85 Commission v Netherlands [1987] ECR 3989;
- 293/85 (Re University Dees) Commission v Belgium [1988] ECR 305; [1986] 1 CMLR 594;
- 353/85 Commission v UK [1988] ECR; The Times 24.2.1988;
- 14/86 Pretore di Salo v Person or Persons Unknown [1989] 1 CMLR 57; The Times, 20.6.1987;
- 63/86 Commission v Italy [1988] ECR 129; [1989] CMLR 611;
- 147/86 Commission v Hellenic Republic [1988] ECR 1637; [1989] 2 CMLR 845;
- C-147/86 POIFXG v Greece and Commission [1989] ECR 4103;

- [1989] 3 CMLR 942;
- 147/86 TO 2 PALS0 and Antonios Trehas v Hellenic Republic and Commission [1989] ECR 4111;
- 36/87 Commission v Greece [1988] ECR 4415;
- 38/87 Commission v Hellenic Republic [1988] ECR 4415;
- 81/87 Ex.p. Daily Mail and General Trust plc. [1988] ECR 5483; [1988] 3 CMLR 713;
- C-133/87 Nashua Corporation v Council [1990] 2 CMLR 6;
- 150/87 Nashua Corporation v Council (Intervantion of Commission and CECM) [1990] 2 CMLR 6;
- 158/87; Gestetner Holding PLC v Council and Commission; Judgement of 14.3.1990; in OJ no C 92, 11.4.90, p.12;
- 305/87; Commission v Hellenic Republic [1989] ECR 1461; [1991] 1 CMLR 611;
- 5/88 Hubert Waschauf v Bundesamt Ernährung und Forstwirtschaft [1989] ECR 2609; [1991] 1 CMLR 328;
- C-286/88 Falciola [1990] ECR 1;
- 305/87 Commission v Greece [1989] ECR 1461; [1991] 1 CMLR 611;
- 347/88 Commission v Greece; Judgement of 13.12.90;
- C-6/90 and C-9/90 Francovich and Bonifaci v Italy [1992] Revue Francaise du Droit Administratif 1;
- C-17/90; P. Wieger Spedition; Judgement of 7.11.1991.

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