

# Greek Council of State

## Judgment 3470/2011

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### INTRODUCTION

Ever since the days of *Van Gend en Loos*<sup>1</sup> and *Costa*,<sup>2</sup> national attitudes to the unilaterally proclaimed supremacy of EU law have invariably captured a great deal of academic and political attention. Since the mid-1990s<sup>3</sup> most national constitutional courts have converged to the interpretative orthodoxy of a qualified acceptance of primacy,<sup>4</sup> couched in a pluralist vision of the relationship between the EU and its Member States.<sup>5</sup> As things stand at the moment, and especially against the backdrop of Declaration 17 of the Lisbon Treaty, primacy is expected to be the constitutionally recognised conflict resolution norm that national courts shall turn to in almost all circumstances.

The Greek Council of State in its Judgment 3470/2011 does not break this pattern, even in the face of a politically sensitive issue. When considering whether an irrebuttable presumption of incompatibility between tenderers for public works contracts and owners or main shareholders of media corporations is permissible under EU law, the Greek court unequivocally accepts the relevant ECJ pre-

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<sup>1</sup> ECJ 5 Feb. 1963, Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*.

<sup>2</sup> ECJ 15 July 1964, Case 6-64, *Flaminio Costa v. E.N.E.L.*

<sup>3</sup> In 1996 the German Constitutional Court set the tone for the qualified acceptance of primacy post-Maastricht with its seminal *Brunner* decision. See Bundesverfassungsgericht (2. Senat) (Federal Constitutional Court, 2nd Chamber) 12 Oct. 1993, Cases 2 BvR 2134/92 & 2159/92, *Manfred Brunner and Others v. The European Union Treaty* [1994] 1 CMLR 57.

<sup>4</sup> Instead of many see D. Chalmers et al., *European Union Law: Cases and Materials* (CUP 2010), p. 194 et seq.

<sup>5</sup> On constitutional pluralism within a European Union context see generally M. Avbelj and J. Komárek (eds.), *Constitutional pluralism in the European Union and beyond* (Hart 2012).

liminary ruling in *Michaniki*<sup>6</sup> and recalibrates its interpretation of the national constitution accordingly. In doing so, however, the Council of State reads an obligation for consistent interpretation into the constitution itself, thus turning the doctrine of indirect effect into a pragmatic tool for constitutional pluralism in action.

## LEGAL BACKGROUND<sup>7</sup>

Legal proceedings before Greek administrative courts started with the applicant, *Michaniki*, seeking annulment of the certificate of financial independence issued to Erga OSE<sup>8</sup> by the ESR.<sup>9</sup> The competent fourth Chamber of the Greek Council of State, which was first seized, decided to refer the case to the Plenary<sup>10</sup> due to the importance of the matter at hand.<sup>11</sup> In doing so, however, the chamber was divided both on the correct interpretation of Directive 93/37/EEC<sup>12</sup> and, most significantly, on the permissibility<sup>13</sup> or usefulness of a preliminary reference to the Court of Justice under the circumstances. The majority opinion reasoned that there is no possibility of conflict between Article 24 of the Directive,<sup>14</sup> which enumerates the grounds on which a contractor may be excluded from participation in public works contracts, and Article 14(9) of the Greek Constitution,<sup>15</sup> which

<sup>6</sup> ECJ 16 Dec. 2008, Case C-213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis and Ipourgós Epikratias* [hereinafter *Michaniki*].

<sup>7</sup> For a factual background of the case see V. Kosta, 'European Court of Justice Case C213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis, Ipourgós Epikratias*', 5 *EuConst* (2009) p. 501 516, at p. 501-503.

<sup>8</sup> Erga OSE is a Greek public undertaking and a subsidiary of OSE, the Greek (national) Railway Organisation. It was set up in 1996 with the aim of managing the OSE group's investment plans.

<sup>9</sup> Greek National Council for Radio and Television.

<sup>10</sup> According to Art. 14 para. 2, Presidential Decree 18/1989, FEK A/8 [Official Journal], 9 Jan. 1989.

<sup>11</sup> Greek Council of State (4th chamber), judgment 3242/2004, 16 Nov. 2004.

<sup>12</sup> Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts, OJ [1993] L 199, 14.6.1993, as amended by European Parliament and Council Directive 97/52/EC, OJ [1997] L 328, 13 Oct. 1997.

<sup>13</sup> Under Greek constitutional rules and especially in view of Art. 110 of the Greek Constitution.

<sup>14</sup> The Directive was incorporated into the domestic legal order through Law 3021/2002.

<sup>15</sup> The relevant section of Art. 14(9) of the Greek Constitution reads as follows: '[...] The capacity of owner, partner, major shareholder or managing director of an information media enterprise, is incompatible with the capacity of owner, partner, major shareholder or managing director of an enterprise that undertakes towards the Public Administration or towards a legal entity of the wider public sector to perform works or to supply goods or services. The prohibition of the previous section extends also over all types of intermediary persons, such as spouses, relatives, financially dependent persons or companies. The specific regulations, the sanctions, which may extend to the

introduces an irrebuttable presumption of incompatibility between tenderers for public works contracts and owners or main shareholders of media corporations, because there is no regulatory overlap in the material scope of the two provisions. The grounds of exclusion of tenderers provided for in Article 24, in this view, relate solely to instances of ‘*professional incompatibility*’ [emphasis added],<sup>16</sup> while the Greek Constitution creates an incompatibility of a ‘different nature’ for reasons of overriding public interest.<sup>17</sup> This would fall outside the scope of Article 24 and remain permissible insofar as neither the Directive nor any other secondary EU law instrument has harmonised public procurement rules in their entirety.

This line of argument, however, was not unanimously accepted. In a thorough and well-considered dissenting opinion, two members of the chamber argued that Article 24 of the Directive appears to lay down an exhaustive list of grounds for the exclusion of tenderers according to the authoritative interpretation of the Court of Justice.<sup>18</sup> As a result, the dissenting judges observed that a preliminary reference was necessary in order to clarify whether the Greek system that established an *absolute incompatibility* on different grounds was, in fact, compatible with EU law. The majority in the chamber responded by pointing out that a preliminary reference is ‘inconceivable’ when the national rule in question is of constitutional nature.<sup>19</sup> According to this view, the authority of EU law in the domestic legal order stems from Article 28 of the Greek Constitution,<sup>20</sup> which makes it normatively impossible for either primary or secondary European rules to take precedence over national constitutional provisions.

The Plenary of the Council of State followed a different interpretative route to the chamber judgment, which had already attracted a great deal of academic criticism in Greece.<sup>21</sup> The Plenary decided that a preliminary reference to the Court

point of revocation of the license of a radio or television station and to the annulment of the pertinent contract [...] shall be determined by law.’

<sup>16</sup> Greek Council of State (4th chamber), judgment 3242/2004, *supra* n. 11, para. 18.

<sup>17</sup> *Ibid.*

<sup>18</sup> ECJ 10 Feb. 1982, Case 76/81, *SA Transporoute et travaux v. Minister of Public Works*; ECJ 17 Nov. 1993, Case C-71/92, *Commission v. Spain*; ECJ 26 Sept. 2000, Case 225/98, *Commission v. France*.

<sup>19</sup> Greek Council of State (4th chamber), judgment 3242/2004, *supra* n. 11, para. 19.

<sup>20</sup> Which forms the constitutional basis of Greece’s accession to the European Union through Law 945/1979 (FEK 170A).

<sup>21</sup> Instead of many *see* E. Venizelos, ‘Ερμηνευτικός σχετικισμός, δικονομικοί καταναγκασμοί, δογματικές αντιφάσεις και πολιτικά διλήμματα στη νομολογία του Συμβουλίου της Επικρατείας για τις σχέσεις εθνικού συντάγματος και ευρωπαϊκού κοινοτικού δικαίου – Η “παραδειγματική” λειτουργία της ΣτΕ (ολ.) 3670/2006 για το άρθρο 14 παρ. 9 Σ’ [‘Interpretative Relativism, Procedural Constraints, Dogmatic Contradictions and Political Dilemmas in the Case Law of the Council of State on the Relationship between the National Constitution and Community Law – The “Exemplary” Function of the Council of State judgment 3670/2006 on Article 14(9) Greek Constitution’], 1 *Efimerida Dioikitikou Dikaiou* (2008) p. 85.

of Justice was essential at least for reasons of procedural economy,<sup>22</sup> as Article 24 of the Directive could not be regarded as an *acte clair*.<sup>23</sup> In doing so, it accepted that the application of national rules to the case at issue would depend on their compatibility with EU law<sup>24</sup> and it dismissed the argument of the chamber that questions of application of national constitutional rules are *ipso facto* exempt from the preliminary reference procedure.<sup>25</sup> Regarding Article 14(9) of the Greek Constitution the majority in the Plenary took the view that it established an irrebuttable presumption of incompatibility between owners, main shareholders or management executives of media undertakings and tenderers of public contracts.<sup>26</sup>

It is the irrebuttable nature of the presumption, in fact, that renders national law incompatible with EU law according to the preliminary ruling of the Court of Justice in *Michaniki*.<sup>27</sup> The Court explained that, in principle, Article 24 of the Directive provides an exhaustive list of grounds for exclusion of tenderers,<sup>28</sup> but it accepted that member states have a certain discretion to adopt additional measures,<sup>29</sup> insofar as these aim at safeguarding the general principles of equal treatment and transparency in public procurement.<sup>30</sup> Although this was found to be the case with the Greek system,<sup>31</sup> the latter failed to satisfy the proportionality principle<sup>32</sup> due to the ‘automatic and absolute nature’<sup>33</sup> of the presumption of incompatibility that it established.

<sup>22</sup> Greek Council of State (Plenary), judgment 3670/2006, para. 20.

<sup>23</sup> ECJ 6 Oct. 1982, Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*.

<sup>24</sup> Greek Council of State (Plenary), Judgment 3670/2006, para. 20.

<sup>25</sup> Three members of the Plenary dissented, siding with the hard line of the majority in the chamber judgment that denied the possibility of a preliminary reference when the potential conflict involves a national constitutional rule, on grounds of Arts. 87 paras. 2 and 93 para. 4 of the Greek Constitution (Greek Council of State (Plenary), Judgment 3670/2006, para. 21).

<sup>26</sup> Greek Council of State (Plenary), judgment 3670/2006, para. 14. The majority in the Plenary did, however, go on to suggest that the presumption of incompatibility for intermediary persons (relatives of owners, main shareholders etc.) was, in fact, rebuttable both under the Constitution and under its implementing Law 3021/2002.

<sup>27</sup> ECJ 16 Feb. 2008, Case C-213/07, *Michaniki AE v. Ethniko Simvoulio Radioteleorasis, Ipourgos Epikratias*.

<sup>28</sup> *Ibid.*, para. 43.

<sup>29</sup> *Ibid.*, para. 55. AG Maduro in his Opinion explains that Art. 24 of the Directive ‘has not effected a total harmonisation in the field of public works contracts’. See Opinion AG Maduro of 8 Oct. 2008, ECJ 16 Feb. 2008, Case C-213/07, *Michaniki AE v. Ethniko Simvoulio Radioteleorasis, Ipourgos Epikratias*, para. 20.

<sup>30</sup> *Ibid.*, para. 44.

<sup>31</sup> *Ibid.*, para. 60.

<sup>32</sup> *Ibid.*, paras. 61 et seq.

<sup>33</sup> *Ibid.*, para. 66.

## THE JUDGMENT 3470/2011 OF THE GREEK COUNCIL OF STATE

The judgment of the Greek Council of State is effectively divided into three parts. The first part<sup>34</sup> offers a brief overview of the factual background, as well as a summary of the domestic legal proceedings up to and including the decision to send a preliminary reference to the ECJ. The second part<sup>35</sup> consists in a relatively detailed summary of the ECJ preliminary ruling in *Michaniki*, with translated sections of the reasoning quoted verbatim. In the final part<sup>36</sup> the Greek Court develops its reasoning on the application of relevant national law, taking into account the preliminary ruling and focusing on the correct interpretation of the relevant provisions of the Greek Constitution.

In this latter part of the judgment the Greek Court explains that exclusion from or nullity of the public works contract<sup>37</sup> is not envisaged in Article 14(9) of the Greek Constitution as a *compulsory* sanction when the incompatibility occurs.<sup>38</sup> In fact, a textual interpretation of the constitutional provision<sup>39</sup> reveals that the ordinary legislature is entrusted with discretion to determine the appropriate sanctions in cases of incompatibility, 'in view of the developing social and economic circumstances [...] and of the State's obligations as a Member State of the European Union'.<sup>40</sup> The Court went on to observe that the objective of Article 14(9) is to ensure that the process of awarding public works contracts is free from 'undue influence' from bidders that also have financial interests in the media sector.<sup>41</sup> The provision, however, does not aim at curtailing 'any general influence' of media groups on the exercise of political power, which is part and parcel of their role in modern democratic societies. Consequently, Article 14 (9) allows the ordinary legislature to impose the sanction of exclusion or nullity *only* when the tenderer satisfying the conditions of incompatibility has 'also acted in an unlawful or unfair manner during the process in order to be awarded the public contract'.<sup>42</sup>

<sup>34</sup> Greek Council of State (Plenary), judgment 3470/2011, paras. 1-5.

<sup>35</sup> *Ibid.*, paras. 6-7.

<sup>36</sup> *Ibid.*, paras. 7-10, with the operative part of the judgment in para. 11.

<sup>37</sup> In view of the presumption of incompatibility that Art. 14 para. 9 of the Greek Constitution establishes.

<sup>38</sup> *Ibid.*, para. 9.

<sup>39</sup> Which, in the Court's view, coincides with the intentions of the constitutional legislator as expressed in the parliamentary discussions during the constitutional amendment proceedings in 2001.

<sup>40</sup> *Ibid.*

<sup>41</sup> On the objectives of the constitutional amendment of Art. 14 see E. Venizelos, 'Οι εγγυήσεις πολυφωνίας και διαφάνειας στα ΜΜΕ κατά το άρθρο 14 παρ. 9. Οι κανόνες ερμηνείας του Συντάγματος και οι σχέσεις Συντάγματος και Κοινοτικού Δικαίου' ['The Guarantees of Media Pluralism and Transparency in Article 14 (9). The Rules of Interpretation of the Constitution and the Relationship between the Constitution and Community Law'], *Nomiko Vima* (2005), p. 425.

<sup>42</sup> *Ibid.*

The Court pointed out that this interpretation of Article 14(9) resonates with the obligation to harmonise national constitutional provisions with rules of EU law, which stems from the interpretative declaration added to Article 28 of the Greek Constitution.<sup>43</sup> Excluding tenderers solely on the basis of the presumption of incompatibility would fall foul of proportionality, which is a general principle common to both EU law and the national legal order.<sup>44</sup> The Court concluded that Law 3021/2002 was unconstitutional as a whole<sup>45</sup> because of the general and absolute exclusion of tenderers for whom the presumption of incompatibility applied.<sup>46</sup>

## COMMENTARY

*A Greek study in constitutional pluralism: primacy through consistent interpretation*

*Michaniki* has been criticised for the ‘striking’,<sup>47</sup> albeit apparently deliberate<sup>48</sup> failure of the ECJ to acknowledge the constitutional dimension of the matter at hand.<sup>49</sup> Finding that the Greek rules in question were in breach of EU law was, in fact, ‘unsurprising’,<sup>50</sup> in view of previous case-law.<sup>51</sup> Nonetheless, there is no denying that the breach in the present case is more closely connected to, even if not directly stemming from,<sup>52</sup> a ‘national constitutional assessment’.<sup>53</sup> Leaving aside the technical aspects of the specific legal enquiry for the moment, one cannot

<sup>43</sup>The interpretative declaration added to Art. 28 in the 2001 constitutional amendment reads as follows: ‘Article 28 constitutes the foundation for the participation of Greece in the process of European integration’ [translated by the author from Greek].

<sup>44</sup>Art. 25 para. 1 of the Greek Constitution.

<sup>45</sup>Although it should be noted that, while legal proceedings were pending before Greek administrative courts, two new implementing laws of Art. 14(9) entered into force (Law 3310/2005, FEK 30/A, 14-2-2005; Law 3414/2005, FEK 279/A, 10-11-2005), in an attempt to rationalise the relevant normative framework and streamline it with European law. See V. Tzemos, Ο ‘βασιικός μέτοχος’ [‘The Main Shareholder’] (Ant. N. Sakkoulas, 2006) p. 93-182.

<sup>46</sup>Greek Council of State (Plenary), judgment 3470/2011, para. 10.

<sup>47</sup>Kosta, *supra* n. 7, p. 509.

<sup>48</sup>V. Tzevelekos and S. Vetsika, ‘Report on Greece’, in G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Constitutional Comparative Perspective* (Groningen, Europa Law Publishing 2010), p. 225-251, at p. 13.

<sup>49</sup>*Ibid.*, p. 506.

<sup>50</sup>D. McGowan, ‘Exclusion of Bidders on Grounds of Holding Media Interests: *Michaniki AE v Ethniko Simvoulio Radiotileorasis and Ipourgos Epikratias* (C-213/07)’, 3 *Public Procurement Law Review* (2009) p. 79 at p. 80.

<sup>51</sup>ECJ 3 March 2005 C-34/03, *Fabricom SA v. État belge*, para. 26.

<sup>52</sup>This was, in fact, the interpretative route adopted by the Greek Council of State in its Judgment 3470/2011.

<sup>53</sup>Opinion AG Maduro of 8 Oct. 2008, ECJ 16 Feb. 2008, Case C-213/07, *Michaniki AE v. Ethniko Simvoulio Radiotileorasis, Ipourgos Epikratias*, para. 30.

but wonder why the Court of Justice did not find it necessary or appropriate to make an explicit reference to the notion of primacy of EU Law,<sup>54</sup> reminding its Greek counterpart of the long-established obligation to set aside conflicting national provisions<sup>55</sup> even of constitutional normative calibre.<sup>56</sup> The Luxembourg Court's alleged choice to sweep the constitutional question under the proverbial carpet is further evidenced, according to this view, by the choice not to follow Advocate General Maduro<sup>57</sup> in reiterating the Union obligation to respect the constitutional identity of its member states.<sup>58</sup>

After the recent judgment of the Greek Council of State on the substance of the dispute, however, such attempts to decipher the intentions of the Court of Justice seem to be beside the point. In underplaying the (potentially) constitutional root of the problem with the irrebuttable presumption of incompatibility, the Court of Justice invited the national court to assume its rightful role as 'European court'.<sup>59</sup> The latter was, in fact, able to resolve the conflict through an understanding of the relationship between EU law and national constitutional law<sup>60</sup> that accords relative primacy<sup>61</sup> to the former, while retaining the ultimate supremacy of the Greek constitution. This is, of course, far from ground-breaking, as the Greek Court did little more than follow in the recent footsteps of many of its European counterparts, most notably those of the German Federal Constitu-

<sup>54</sup> ECJ 15 July 1964, Case 6/64, *Flaminio Costa v. E.N.E.L.*; ECJ 8 Sept. 2010, Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, paras. 53 et seq. With the entry into force of the Treaty of Lisbon on 1 Dec. 2009, one might also expect a direct reference to Declaration 17 that provides a textual basis for the doctrine of primacy. See Declaration 17 of the Final Act of the Intergovernmental Conference, OJ [2008], Case C-115/344.

<sup>55</sup> ECJ 9 March 1978, Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, paras. 21 et seq.

<sup>56</sup> ECJ 17 Dec. 1970, Case 11-70, *Internationale Handelsgesellschaft mbH. v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, para. 3; ECJ 5 March 1996, Joined Cases C-46 and 48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, para. 33.

<sup>57</sup> Opinion AG Maduro in *Michaniki*, *supra* n. 6, para. 31.

<sup>58</sup> Arts. 4(2) and 6(3) TFEU.

<sup>59</sup> On the role of national courts in the European judicial hierarchy see J. Komarek, 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure', 32 *European Law Review* (2007), p. 467; I. Maher, 'National Courts as European Community Courts', 14 *Legal Studies* (1994) p. 226.

<sup>60</sup> Instead of many see M.P. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Hart 2003), p. 501; N. Walker, 'The Idea of Constitutional Pluralism', *MLR* (2002) p. 317.

<sup>61</sup> Rather than 'absolute primacy'. See A. Bogdany and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', 48 *Common Market Law Review* (2011) p. 1 at p. 3.



tional Court.<sup>62</sup> What makes the *Michaniki* saga stand out, nonetheless, is the measured, albeit cryptic, way in which both the Court of Justice and the Greek Council of State appear to appreciate that the gap between the theory and practice of constitutional pluralism cannot be bridged without viewing primacy through the lens of indirect effect.<sup>63</sup>

Insofar as the Greek Council of State is concerned, such realisation came slowly and gradually. The initial position<sup>64</sup> was uncompromising and the fourth chamber appeared keen to sever any constitutional dialogue with the Court of Justice before it could even begin, by denying the very *possibility* of a preliminary reference that could question national constitutional supremacy. The chamber judgment was rightly criticised for completely disregarding the doctrine of primacy,<sup>65</sup> while unnecessarily elevating the conflict with EU law onto a constitutional level.<sup>66</sup> When the matter first came before the Plenary,<sup>67</sup> however, it became evident that leaving the Court of Justice out of the equation was not a viable position. As explained earlier, the majority in the Plenary maintained that Article 14(9) of the Greek Constitution in and of itself establishes an irrebuttable presumption of incompatibility.<sup>68</sup>

Nonetheless, the framing of the issue in the preliminary questions indicates that the Greek Court was, by that point, acutely aware of the need to avoid a direct conflict between the Greek Constitution and EU law. The key, in this regard, was not the irrebuttable nature of the presumption, but whether its very existence could be permitted under – or even despite of – the Directive. In its preliminary reference the Greek Court offered three possibilities<sup>69</sup> for reconciling the two legal systems.<sup>70</sup> Advocate General Maduro favoured the first solution, agreeing that the

<sup>62</sup> Lisbon (BVerfGE) 123, 267, 353 et seq. (English translation at <www.bverfg.de/en/decisions/es20090630\_2bve000208en.html>) (2009); Honeywell (BVerfGE), Decision of 6 July 2010, (2010) NJW, 3422, 3423 et seq. (English translation at <www.bverfg.de/entscheidungen/rs20100706\_2bvr266106en.html>).

<sup>63</sup> M. Ross, 'Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?', 31 *European Law Review* (2006) p. 476 at p. 493.

<sup>64</sup> Greek Council of State (4th chamber), judgment 3242/2004.

<sup>65</sup> S. Koukoulis-Spiliotopoulos, 'Από την απόφαση του Συμβουλίου της Επικρατείας (Δ' Τμ.) 3242/2004 στην απόφαση της Ολομέλειας του Συμβουλίου της Επικρατείας 3670/2006: Το Συμβούλιο της Επικρατείας και οι συνταγματικές αρχές της έννομης τάξης ΕΚ/ΕΕ' ['From Judgment 3242/2004 of the Council of State (Fourth Chamber) to Judgment 3670/2006 of the Plenary of the Council of State: the Council of State and the Constitutional Principles of the EC/EU Legal Order'], 3 *Efimerida Dioikitikou Dikaiou* (2007) p. 290.

<sup>66</sup> Venizelos, *supra* n. 21, p. 98-99.

<sup>67</sup> Greek Council of State (Plenary), Judgment 3670/2006.

<sup>68</sup> *Ibid.*, para. 14.

<sup>69</sup> Corresponding to the three preliminary questions. See *Michaniki*, *supra* n. 6, para. 26.

<sup>70</sup> The three possibilities are as follows: a) the list of grounds for exclusion of tenderers under Art. 24 of the Directive is not exhaustive; b) the list of grounds is exhaustive, but a national provi-



list of grounds for exclusion of tenderers under Article 24 of the Directive is *not exhaustive*,<sup>71</sup> while the Court of Justice opted for the more complex second solution, whereby the exhaustive character of Article 24 extends *only* to ‘grounds for exclusion based on objective considerations of professional quality’.<sup>72</sup> Additional grounds of exclusion are, therefore, permissible insofar as they are unrelated to the professional qualities of tenderers and are designed to further safeguard equality of treatment and transparency.<sup>73</sup>

The importance of this finding cannot be overstated.<sup>74</sup> Insofar as additional grounds of incompatibility are permissible in principle, the ball is back in the Greek court. Had the ECJ not found room for additional grounds, ‘saving’ the constitutional provision without openly defying primacy would require nothing short of *contra legem* interpretation by the Council of State, which goes above and beyond the duty of consistent interpretation bestowed upon national courts.<sup>75</sup> The Council of State proved willing and able to employ all the tools in its arsenal in order to find a mutually acceptable compromise. Using a combined textual and historical interpretation of Article 14(9) Greek Constitution, the Greek Court concluded that neither the wording of the provision nor the intentions of the constitutional legislator imply that the sanction of exclusion or nullity can be imposed solely on grounds of the incompatibility.<sup>76</sup> This is further reinforced by a teleological interpretation of both Article 14(9), in view of its express aim to shield public procurement from ‘*undue influence*’ only,<sup>77</sup> and Article 28 Greek Constitution, in view of the interpretative declaration added to it with the constitutional amendment of 2001 that describes it as ‘the foundation for the participation of Greece in the process of European integration’. This enables the Council of State to read Article 28 as having a dual function. Article 28 is the

sion such as the one at issue can still be compatible with EU law insofar as it is designed to protect the general principles of equal treatment and transparency in public procurement; c) if neither of the above is the case, Art. 24 of the Directive itself is in breach of the general principles of equal treatment and transparency, as it restricts the discretion of national legislatures to establish a higher threshold of protection that may be necessary in a given national context.

<sup>71</sup> Opinion of AG Maduro in *Michaniki*, *supra* n. 6, para. 24.

<sup>72</sup> *Michaniki*, *supra* n. 6, para. 47.

<sup>73</sup> *Ibid.*, para. 44, where further references to: ECJ 7 Dec. 2000, Case C 94/99 *ARGE Gewässerschutz v. Bundesministerium für Land- und Forstwirtschaft*, para. 24; ECJ 16 Oct. 2003, Case C-421/01 *Traunfellner GmbH v. Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)*, para. 29.

<sup>74</sup> Incidentally this approach is, in essence, identical to the one developed by the fourth chamber of the Council of State in its much criticised initial Judgment 3242/2004.

<sup>75</sup> ECJ 13 Nov. 1990, Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentación SA*; ECJ 16 Dec. 1993, Case C-334-92 *Teodoro Wagner Miret v. Fondo de Garantía Salarial*.

<sup>76</sup> Greek Council of State (Plenary), judgment 3470/2011, para. 9.

<sup>77</sup> Undue influence, that is, that owners or main shareholders in the media sector may exert specifically with a view to achieving the award of a public works contract.

primary constitutional basis for legal approximation between the Greek and the EU legal order, but it also creates a *constitutional obligation to interpret all national law consistently with EU law*.

What the Council of State manages to do, therefore, is to effectively ‘transpose’ the doctrine of consistent interpretation into a domestic normative context and translate it into a *quasi-autonomous constitutional obligation*. From a doctrinal point of view, this entails that conflict between national constitutional rules and EU law is internalised. Competing rules are seen as entrenched in the constitutional legal order, with Article 28 ‘standing for’ the European rule. In this way, ultimate national constitutional supremacy remains intact in principle, with national courts expected to treat conflicts with EU law as ‘infra-constitutional’. Resolving such conflicts, then, is no longer an issue of conflicting sovereignties and can be dealt with through the standard methodological approach of *systematic interpretation* of constitutional provisions.<sup>78</sup>

Although this line of reasoning provides an interesting specimen of constitutional pluralism in action, it does raise doubts as to the limits of judicial power to second-guess constitutional arrangements. The Council of State seems to elevate Article 28 of the Greek Constitution into a *Grundnorm* that should serve as the basic guideline for constitutional interpretation, at least within the scope of EU law. Such a doctrinal position, even if not necessarily implying an undesirable infra-constitutional normative hierarchy,<sup>79</sup> does beg the question of how far national courts can push the European integration agenda without rewriting the constitution. In the present case, the Council of State *reverses the burden of proof* implied by Article 14 of the Constitution, through finding that a tenderer with financial or family links to the media sector can only be excluded if ‘he is proved to have acted unlawfully or unfairly’.<sup>80</sup> In theory,<sup>81</sup> the Greek Court could have simply read Article 14(9) as allowing the tenderer to *challenge the presumption of incompatibility* before the deciding authority (ESR) or national courts. Instead, it effectively writes the presumption off altogether and renders the incompatibility utterly meaningless. It is obvious that, if a tenderer acts unlawfully, the ‘stricter’ penalty of exclusion or nullity can be imposed regardless of whether the tenderer has any financial or family links to the media sector. In the light of this unavoid-

<sup>78</sup> On systematic interpretation as a methodological tool in European judicial orders see M.W. Hesselink, ‘A Toolbox for European Judges’, 17 *European Law Journal* (2011) p. 441 at p. 454.

<sup>79</sup> Whereby certain constitutional provisions, such as Art. 28, could be seen as being of a higher normative ‘value’ compared to others. For a discussion (and a rebuttal) of this theoretical position in Greek constitutional theory see F.K. Spyropoulos, *H Ερμηνεία του Συντάγματος* [*The Interpretation of the Constitution*] (Sakkoulas 1999), p. 136-143.

<sup>80</sup> Greek Council of State (Plenary), Judgment 3470/2011, para. 9.

<sup>81</sup> On whether this was a realistic possibility see the discussion on proportionality below.

able conclusion, the Council of State's proclamations of deference to the constitutional legislator scattered throughout the judgment are normatively empty.

#### CONSTITUTIONAL CONFLICT AND THE COMMON PRINCIPLE OF PROPORTIONALITY

The question that remains is whether the Council of State was, indeed, in a position to follow the interpretative route suggested above in view of the preliminary ruling in *Michaniki*. Once the substantive issue is stripped down to the bone, the legality of the Greek rules under scrutiny boils down to a question of proportionality. In theory, this enables the judicial dialogue between the ECJ and national courts to be carried out on the same normative register, given that proportionality is both a general principle of EU law<sup>82</sup> and an integral part of national constitutions,<sup>83</sup> including of course the Greek one. The Court of Justice often acknowledges that national courts may be better placed to apply the standard proportionality test<sup>84</sup> and gauge whether the particular measure is the least restrictive means of achieving the legitimate public aim it pursues.<sup>85</sup> In this case, however, the preliminary ruling seems to pre-empt a proportionality assessment at the national level, by proclaiming that an *automatic* and *absolute* exclusion of a category of tenderers is by default disproportionate.<sup>86</sup>

This reading of *Michaniki* enables the Council of State to argue that the irrebuttable presumption could not have been a genuine constitutional choice as it contravenes the principle of proportionality. On the same token, the Greek court did not discuss the possibility that the incompatibility *itself* was a necessary, suitable and not excessively restrictive means of achieving the desired objective.<sup>87</sup> It is conceivable, at least, that the presumption of incompatibility was, in fact, the least restrictive option available to the legislator at the time, given the Greek socio-political climate during the constitutional amendment of 2001.<sup>88</sup> The point was actually picked up by a member of the minority opinion in the referring judgment

<sup>82</sup> ECJ 17 Dec. 1970, Case C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*.

<sup>83</sup> N. Emilou, *The Principle of Proportionality in European Law* (Kluwer 1996), p. 47.

<sup>84</sup> ECJ 13 Nov. 1990, Case C-331-88, *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*.

<sup>85</sup> ECJ 20 May 1976, Case 104-75, *Adriaan de Peijper, Managing Director of Centrafarm BV*.

<sup>86</sup> *Michaniki*, *supra* n. 6, para. 66.

<sup>87</sup> On suitability, necessity and restrictiveness as the three dimensions of the proportionality test see G. De Burca, 'The Principle of Proportionality and its Application in EC Law', 13 *YEL* 105 (1993).

<sup>88</sup> See generally P. Eleftheriadis, 'Constitutional Reform and the Rule of Law in Greece', 28 *West European Politics* (2005) p. 317.

to the Court of Justice, who defends the proportionate character of the presumption as the *only* effective means of shielding public procurement from undue influences.<sup>89</sup> Disappointingly, the plenary of the Council of State in judgment 3470/2011 also fails to consider whether a *rebuttable presumption of incompatibility* would satisfy the proportionality test.

The silence of the Council of State on the matter is at once illuminating and puzzling. A rebuttable presumption would not be *absolute* in nature, but it would still exclude a category of tenderers *automatically*. Although *Michaniki* is not explicit as to whether both characteristics need to be absent for the measure to pass the threshold of legality, the Council of State is clearly willing to opt for this ‘safer’ option and avoid the possibility of an interpretation that the ECJ might frown upon. Paradoxically, this cautious and conservative approach to the interpretation of EU law is coupled with an adventurous attitude towards the interpretation of the national constitution. What is puzzling, however, is that the objectives of European public procurement law may, in fact, be better served through a rebuttable presumption in the particular national context. The directives on public procurement essentially aim at fostering genuine competition in this field through removing national barriers to freedom of establishment and free movement of services.<sup>90</sup> Such barriers can, of course, go beyond protectionist legislation. They may also take the form of corruption, clientelism or favouritism towards tenderers that can yield considerable political influence through their position in the mass media sector.<sup>91</sup> The incompatibility established by Article 14(9) of the Greek Constitution was devised specifically as a safeguard against such distortions of competition, in the spirit of primary and secondary EU competition law. One cannot but wonder, then, how the Council of State, although better placed than the ECJ to appreciate the idiosyncrasies of the Greek situation, engaged with proportionality only superficially.

<sup>89</sup> Greek Council of State (Plenary), judgment 3670/2006, para. 29.

<sup>90</sup> ECJ 12 July 2001, Case C-399/98, *Ordine degli Architetti delle province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti and Leopoldo Freyre v. Comune di Milano, and Pirelli SpA, Milano Centrale Servizi SpA and Fondazione Teatro alla Scala*; ECJ 27 Nov. 2001, Joined Cases C-285/99 and C-286/99, *Impresa Lombardini SpA – Impresa Generale di Costruzioni v. ANAS – Ente nazionale per le strade and Società Italiana per Condotte d’Acqua SpA and Impresa Ing. Mantovani SpA v. ANAS*; ECJ 12 Dec. 2002, Case C-470/99, *Universale-Bau AG and Bietergemeinschaft 1. Hinterreger & Söhne Bauges.m.b.H 2. ÖSTU-STETTIN Hoch- und Tiefbau GmbH v. Entsorgungsbetriebe Simmering GmbH*; ECJ 7 Oct. 2004, Case C-247/02, *Sintesi SpA v. Autorità per la Vigilanza sui Lavori Pubblici*.

<sup>91</sup> For an excellent overview of the relevant arguments that dominated the political and academic discourse in Greece during the and after the 2001 constitutional amendment see Kosta, *supra* n. 7, p. 512-514, where further references.

## CONCLUSION

Judgment 3470/2011 of the Greek Council of State is an interesting specimen of how constitutional pluralism can inspire acceptable compromises in 'hard cases' of constitutional conflict. Admittedly, there is nothing revolutionary in the qualified acceptance of primacy on the part of the Greek Council of State. Nonetheless, the methodology employed by the Greek court in attempting to reconcile national constitutional supremacy with the effective rewriting of the Greek Constitution should provide food for thought to constitutional and European lawyers across the Union. By internalising indirect effect and treating it as an obligation emanating from the national constitution, the Council of State manages to situate itself within the European judicial hierarchy without openly defying the limits of its democratic mandate under the national constitutional order.

Elegant as this interpretative solution may seem, it does beg the question of whether the substantive legal issue was successfully resolved in this case. Primacy through indirect effect may be an intelligent legal construct to mitigate the tensions created when national judiciaries are seen as sidestepping constitutional arrangements in favour of EU law. However, the constitutional conflict here was not one born out of protectionist or anti-European national instincts, but out of the apparent zeal of the constitutional legislator to align with the fundamental principles of EU public procurement law in the face of substantially idiosyncratic national circumstances. Whether or not the irrebuttable presumption was a step too far, therefore, is a matter dealt with through the lens of proportionality, which is a common denominator in the constitutional traditions of Member States. Although proportionality may very well be the European mechanism *par excellence* to resolve constitutional conflicts of this sort,<sup>92</sup> the ECJ seems satisfied in this case with a formalistic application of the doctrine that allows for little more than a light-touch assessment of the national context. Despite the good intentions of the Greek court, then, it is difficult to see how the 'primacy through indirect effect' paradigm can serve its purpose without a simultaneous show of faith by the ECJ *vis-à-vis* its national counterparts.



<sup>92</sup>The general idea of proportionality as the most successful normative mechanism of resolving constitutional conflicts is borrowed from David Beatty. See D.M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2005).