

1. The public tender for the attribution of television licences, which took place in the Summer 2016, was of great importance for the legal science and praxis but also for the political controversy in Greece. The legal and political framework of the case is as follows:

2. In 1989 the law 1866/1989 allowed for the first time in Greece the start-up and operation of private television stations, but only after public authorization (licence). In 1989 started indeed the broadcasting of several private television stations, but without any licence. Since then, the television stations are functioning in Greece without any licence because the respective public procedures which were provided by the above-mentioned but also by numerous subsequent laws, have never been completed. However, through successive relevant law provisions during decades the operation of these television channels without any licence has been seen als legal. In his Judgment 3578 of 2010, but also in subsequent other Judgments the Council of State examined the constitutionality of these law provisions and held that the toleration of the operation of the television channels without the necessary licence for an infinite period of time infringes the principle of the rule of law and the principle of equality since it allows the use of a public good, which are the radio frequencies, from persons who are exploiting them for years without having any authorization. Despite these judicial decisions during the five following years no licences have been attributed to any private television company and, in consequence, the private television stations continued broadcasting without any authorization. Finally on 29 October 2015 the law 4339/2015 was published. This law laid down a new system of attribution of licenses to television stations for digital terrestrial broadcasting, i.e. through a public auction carried out by the Independant Authority, which is provided in Article 15 paragraph 2 of the Greek Constitution in order to control the proper functioning of the radio and television programmes (National Radio and Television Council).

3. However, at the time of the publishment of the law 4339/2015, the National Radio and Television Council was not properly formed. The reason for this was that the term of office of some of its 7 members had expired and the Government did not follow the praxis of the former Governments, which successively had extended per law the expired term of office of the members of several Independent Authorities. In order to justify its denial to legislatively extend the expired terms of office the Government invoked the Judgment 3515/2013 of the Council of State (in Plenum), which had ruled that the legislative prolongation of the term of office of the members of the Independent Authorities in excess of a reasonable period of time infringes the Greek Constitution. At the same time the parliamentary committe, which is competent to choose the members of the National Radio and Television Council, failed successively to fulfil this mission because of the lack of consensus between the different parlementary parties, to which belong the members of the Committee. The denial of the Government to expire per law the term of office of the members of the National Radio

and Television Council had as a result that this constitutional authority was unable to comply with any of its legal duties.

4. Based on these facts but also on the alleged imperative need to initiate and complete a public tender in order to finally attribute the first television licences in Greece, the Government achieved an amendment of the law 4339/2015. According to the new wording of this law, the first public auction for the attribution of television licences should be carried out by the Minister of State (who is competent for matters related to Press and Media). Furthermore according to the amended law through this auction there should be attributed four (4) licences for digital terrestrial high definition (hd) broadcasting for a period of 10 years and the starting price of the auction should be set out by the Minister of State.

5. It is within this framework that the Minister of State adopted several preparatory acts for the public auction. Among them the act of setting out the starting price of the auction at 3.000.000 euro. On 17.5.2016 the call for tenders was published and eleven (11) companies took part in the tender: seven (7) of them were already owners of a television station, whereas four (4) of them aimed at entering for the first time in the television market.

6. Nonetheless, six (6) of the companies already owning a television station, despite the fact that they had taken part in the tender, brought actions before the Council of State and claimed that the Court should annul the preparatory acts of the public auction because they were adopted on the basis of provisions of the amended law 4339/2015 which are contrary to the Constitution. The main complaint of all applicants was that the provision under which, instead of the National Radio and Television Council the Minister of State should carry out the tender to the attribution of the television licences, was contrary to respective provisions of the Greek Constitution.

7. The first issue to be decided by the Court was the admissibility of the claims. The actions against the preparatory acts of the public tender were held to be admissible on the grounds that the applicants were companies, which already owned and operated television stations and definitely expressed their intention to acquire a television licence by taking part to the tender. Furthermore the Council of State held that the applications were not submitted too early against the preparatory acts of the procurement because the applicants had the right to require adequate judicial protection in order to prevent their damage, even before this damage has occurred. The Court also noted that the fact that the applicants were companies which operated television stations without any licence does not deprive them from their right to contest the legality of the tender for two reasons: on the one hand, pursuant to the relevant procedural provisions, the Court is not authorized to decide incidentally about the legality of the operation of the existing television stations, on the other hand the legality of the operation of the existing television stations is not included among the imposed conditions for participation in the tender. Finally, the admissibility of the actions is not affected by the fact that, if

the tender is annulled by the Court due to the unconstitutionality of the provisions of the law 4339/2015, there will be a legislative gap and, consequently, it will be impossible to complete the public tender and, so, there will be no chance for the applicants to acquire any television licences at all.

8. On the contrary, according to the dissenting opinion of 9 Judges, the applications are not admissible. The main argument of this opinion is that the applicants are asking for judicial protection too early by seeking the annulment of preparatory acts, although their real damage will only occur after the publication of the call for tender, i.e. the official starting of the tender. Furthermore, pursuant to the dissenting opinion, the companies which illegally operate television stations have no legal interest in seeking the annulment of the tender, because such an annulment would result to the perpetuation of the illegal operation of television stations without any licence.

9. As to the substance the Council of State held that, according to the Constitution, the carrying out of the procedure to the attribution of the television licences falls within the exclusive competence of the Independent Authority which has the competence to control the proper functioning of the Radio and Television programmes (National Radio and Television Council – E.Σ.P.). The Court came to this conclusion taking into account first of all the need to ensure the objectivity and impartiality of the procedure resulting to the attribution of the television licenses, which should be free from any intervention from the Government, in order to guarantee the media pluralism, which is an essential element of the democratic political dialogue. For this reason the procedure should be organised and carried out by an independent authority and in no case by a Minister. This competence cannot be conferred by the law upon a Minister even if, following the expiry of the term of office of the majority of its members, the new members of the Radio and Television Council have not yet been properly designated by the competent Parliament's Committee. The Court laid down a rule, according to which the constitutional competences of an Independent Authority cannot be delegated to any other public organ because this Authority is not properly formed. This consideration is also relevant for the competences of the Radio and Television Council. More specifically, the competences provided for the Radio and Television Council cannot be delegated to any other public organ (for instance to a Minister), even if the Government is invoking the imperative need to start and complete the public tender for the attribution of television licences in order to finally terminate the broadcasting of television stations without any licences, which is a situation contrary to the Constitution.

10. About this substantial consideration eleven (11) Judges of the Court have expressed their dissenting opinion. Nine (9) of them followed a literal interpretation of the Article 15 paragraph 2 of the Constitution and maintained that the competence of carrying out a public tender to the attribution of television licences is not included among the competences that are literally assigned to the Radio and Television Council from the Constitution. That is why this competence can be conferred by the

law upon any other public organ (for example upon a Minister). Furthermore, according to this dissenting opinion even if it is accepted that the attribution of television licences falls, according to the Greek Constitution, within the exclusive competence of the Radio and Television Council, under the circumstances of this case the breach of the Constitution should be tolerated because the Radio and Television Council was, at that time, not properly formed and could not fulfil its tasks, in order to establish the legal operation of the television stations.

11. On the basis of the foregoing considerations the Court annulled the preparative acts of the public tender. A small number of Judges argued that the Court could deliver a Reserved Judgment in order to grant to the competent Parliament's Committee a period of three months to complete the selection of the members of the Radio and Television Council. According to this opinion the Council should subsequently control the procedure of the public tender as a whole. Should the procedure be free of any errors in law, the Council should validate it. In any other case, the Council should repeat the procedure from the point, where the error in law has been found. Nonetheless this opinion did not prevail.

12. In this context and given the Greek procedural law, the Court did not proceed with the examination of the validity of other claims provided by the applicants. The main claim among them was that the restriction of the number of the television licences to be granted (4 television licences for high definition nationwide digital terrestrial broadcasting) is neither necessary nor proportionate in this age of digital technology and under the circumstances of this case. For this reason, the applicants claimed that this restriction is contrary to the media pluralism, which is enshrined in both the Greek Constitution and in the Article 10 of the European Convention of Human Rights (ECHR).

13. After the Court's Decision the public tender has been retroactively withdrawn and subsequently a new law was adopted, which amended the crucial parts of the law 4339/2015. On the basis of these amended law provisions a new call for tenders for the granting of seven (7) television licences for nationwide high definition television broadcasting was published on 27.11.2017. Five companies owning television stations brought actions before the Council of State seeking the annulment of the tender. The public hearing of this case will be held on 4.5.2018 and the new decision of the Court is awaited with great interest.