PROHIBITION OF DISCRIMINATION: LAW AND LAW CASES

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I. INTRODUCTION

The "prohibition of discrimination" as a rule of law is a result of historical continuity and negation of existing discrimination. According to various criteria it resulted in more "negative discrimination" for some salary workers (workers providing dependant labor) than for others.

The term "discrimination" characterizes the less favorable treatment of a one person compared to the treatment another person enjoys, enjoyed, or would enjoy in similar circumstances. Generally we define discrimination as "the application of different rules in different circumstances." This definition has been adopted by both the Court of Justice of the European Communities (ECJ)[1] and the European Court of Human Rights.[2]

According to the predominant social beliefs of European in the labor relations, negative discriminations have been tolerated against workers on the basis of sex, marital status, sex, race, religious or other beliefs, disability, age, or sexual orientation. Some of the discriminations were endowed with a legal basis whereas others were manifested in practice.

The gradual change of these beliefs after the Second World War—as well as after EU policy and legislation in the field of social law, specifically in Labor Law and Social Insurance Law—resulted in the creation of a new legislation aiming to abolish negative discrimination, thus serving as the objective of equal treatment, both institutional and real, to all workers. An additional factor serving the same purpose, was the engagement of all European states with the

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1. 1998 E.C.R. 411/96; 1995 E.C.R. 279/93; 1995 E.C.R. 279/93.
2. Eur. Ct. H.R. 252, ¶ 10.

International Conventions they signed, regulating issues intended to eliminate discrimination.

This new legislation not only has a regulative function, but also an educative one. Within its context, the idea that the workers are entitled to equal treatment irrespective the above reasons (sex, age, etc.) is effectively promoted.

II. DISCRIMINATION BASED ON GENDER

In Greece, under the influence of social beliefs that mentioned above, negative discrimination against workers on the basis of sex, marital status, foreign origin, and age has been a reality. These discriminations were sometimes provided by the law (institutional) or were manifested in practice.

On the basis of sex, institutional negative discriminations against women were related to:

- denying access to certain occupations;
- denying promotion to higher ranks;
- lesser wages compared to men; and,
- younger age of retirement.

In practice, negative discriminations against women were made more obvious when they were denied access to managerial positions or when they were not promoted to higher ranks.

Discrimination on the basis of sex was abolished by the Constitution of 1975, which included the following articles. Article 4, paragraph 2, defines that "Greek men and women have equal rights and obligations." In light of the institutional negative discrimination that existed against women, it is obvious that this provision virtually prohibited its continuance. This provision is applied to people with Hellenic citizenship and its general formulation makes it applicable in all legal relationships, consequently also in labor relations.[3] According to this provision, the rules—legislative provisions, collective agreements, or other kinds of regulations—that establish negative discrimination on the basis of sex are deemed unconstitutional and consequently are not applicable. As a result, the terms of contracts that included negative discrimination on the basis of sex were deemed illegal. Article 116, which defines that:

> 1. Existing provision contrary to article 4 paragraph 2 shall remain in force pending their abolition by law not later than December 31, 1982.

3. Symboulion Epikrateias [SE] [Supreme Administrative Court] 1917/1998 (Greece); ElDic 1998.1050; SE 3217/1977; To Syntagma [ToS], 459 (1977).

> 2. Divergencies from the provisions of article 4 paragraph 2 shall be permitted only for sufficiently justified reasons, in cases specified by law.
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> 3. Ministerial decisions of regulatory nature as well as provisions of collective agreements or arbitration decisions pertaining to the settlement of remuneration for labour which are contrary to the provisions of article 22 paragraph 1 shall remain in force until they are replaced not later than three years from the date of enforcement of this Constitution.

During the revision of the Constitution in 2001, paragraph 2 was replaced, as seen below:

> The adoption of positive measures for the promotion of equality between men and women it is not discrimination on the basis of sex. The state must take care for the abolition of inequalities that remain in practice, especially against women.

The objective of article 116 is to abolish the institutional and practical inequality that has existed against women as well as to promote not just the institutional equality of women and men, but also the equal treatment of sexes in practice. Further, it also aims to provide possibilities for the women to have equal opportunities as those of men.

Article 22, paragraph 1, subparagraph b specifies that "All working people, irrespective of sex or other distinctions, shall be entitled to equal pay for work of equal value rendered." The aim of this provision, which is applied directly to the labor relations and that directly generates rights and obligations to the employer,[4] is to prohibit the differentiation of remuneration on the basis of sex or other distinctions.

In the field of application, articles 116 and 22, paragraph 1, subparagraph b are subjected to all the employees, irrespective of their citizenship. According to these provisions, the provisions establishing discrimination against women have been abolished since 1982. A series of laws, especially in the 1980s, promoted the equality of opportunities for women. The most important of these include:

- Act 1342/1983 of the Convention "on the Elimination of all forms of Discrimination against Women," which was adopted by the UN General Assembly on December 18, 1979, and was signed by Greece on March 2, 1982 in United Nations.

4. Areios Pagos [AP] [Supreme Court] 1745/1998 (Greece). Deltio Ergatikes Nomothesias [DEN] 545 (1999); AP 414/1994 (Greece); DEN 815 (1995); AP 140/1993 (Greece);Nomikon Vema [N.V.], 183 (1994); AP 210/1992 (Greece); DEN 672 (1992); AP 108/1990 (Greece); DEN 74 (1991).

- The Optional Protocol to the Convention was ratified and got legal force under the Act 2952/2001, which was drafted on October 6, 1999 under the auspices of the UN General Assembly.
- Act 1414/1984, under which any kind of discrimination against women was prohibited. This law has already been replaced by Act 3448/2006, under which the Directive 2002/73/EC came into force.
- Act 1483/1984, which established the provisions for the encouragement of employees with family obligations in order to harmonize the family and professional life.
- Act 1576/1985, the International Labor Convention No. 156 on Equal Opportunities and Equal Treatment for Men and Women Workers with family Responsibilities was voted by the International Labor Organization General Conference during its 67th session in Geneva in 1981.
- Presidential decree 176/1997, which implemented the EC Pregnant Workers Directive 92/85/EC, introduced measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding.
- Presidential decree 87/2002, which includes the Directives 96/97/EC and 86/378/EC, established provisions to implement principles of equal treatment for men and women in occupational social security schemes.

The latest law on the control of the negative discrimination against women is Act 3488/2006 on the "implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment, vocational training and promotion, working conditions and other relative provisions," which includes Directive 2006/54.

Regulations aiming to harmonize professional and family life are included in many other provisions such as article 9 of Act 2224/1994, article 25 of Act 2639/1998, and article 7 of Act 3144/2003, whereas favorable regulations for the employment of members of families with several children includes Act 2643/1998.

Other criteria, such as foreign origin, in certain cases caused negative discrimination of workers coming from the general labor space. Article 107 of the emergency law 2783/1941 of the Civil Code Introductory Law specified that "The leadership of the trade unions has to be Greek citizens. With regard to a trade union in which, because of its purpose, necessarily foreigners take part, can be

permitted, by a decree subjected to withdrawal, the participation of foreigners in the trade union's board in equal number to the Greeks," and was abolished in 1974 for constituting a breach of articles 11 and 14 of the European Convention on Human Rights[5] (ECHR).[6] Under Act 1264/1982 article 7, paragraph 1, such a restriction does not exist. It is firmly accepted that the domestic law in force, namely the provisions of the Constitution, the Rome Convention, and the CC provisions, permits the establishment of a union with foreign members, possessing the possibility for sole management by foreigners.[7] The relevant provision of article 107 CC Introductory Law was abolished for constituting a breach of articles 11 and 14 of the Rome Convention, which forms the domestic law with increased formal validity and establishes the equality of individual freedoms against discrimination.

Act 3304/2005 on the "Application of the principle of equal treatment between persons irrespective of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation" (which included the Directives 2000/43/EC and 2000/78/EC), established provisions prohibiting the discrimination on the basis of racial or ethnic origin, religious or other beliefs, disability, age, and sexual orientation. Other favorable regulations for the employment of the disable are included in Act 2643/1998.

Acts 3304/2005[8] and 3488/2006 are the general applied law for the prohibition of discrimination on the basis of the criteria that each refers to. However, taking into account their recent implementation, the court derives there is no case law from their application.

The schemes that are structured with each of these laws serve the same philosophy, and generally the same regulations, and introduce new notions in the field of discrimination as well as new safety schemes.

Their objective is to insure the application of the equal treatment principle by prohibiting discrimination against workers, taking into account the aforementioned criteria. Discriminations constitute

5. Greece ratified it with Act 2329/1953, it was denounced on Dec. 12, 1969, and was ratified again with legislative decree 53/1974.

6. Single Judge First Instance Court of Thessaloniki 5251/2004 Arm 2004.987.

7. Bench of Judges First Instance Court of Thessaloniki 6297/1993 Arm 1993.1131; Single Judge First Instance Court of Thessaloniki 5251/2004; Single Judge First Instance Court of Thessaloniki 4300/1996 NoV 1997.253.

8. It is not applied in cases where different treatment is prescribed due to citizenship, where it does not affect the provisions regulating the entrance and residence within the country, and of third country nationals or nationals without any citizenship in the territory (regardless of the treatment connected to their legal status as third country nationals or non-naturalized citizens).

violations of the equal treatment principle and are expressively prohibited. The fields governed by this prohibition are the following:

- the access to work and generally to employment, including the selection criteria and the terms of employment in all sectors of activity and in all levels of professional hierarchy; and,
- the terms and conditions of work and employment, including those regarding the terms of service and professional promotion, remuneration and dismissals.

Specifically regarding dismissal: a) it is unlawful for an employer to fail to comply with the equal treatment principle if it constitutes a reaction of the employer to a termination against him relevant to his undertaking, or the initiation of legal proceedings for not complying with the equal treatment principle;[9] b) the termination of the contract is prohibited if it is based on reasons of sex or marital status, when it is retaliatory behavior on behalf of the employer, because of the non-compliance of the worker in sexual or other harassment against him, or when it happens as a reaction of the employer because of testimony or other action on the part of the employee before a court of law or any other authority, which is relative to the application of this or other law.

Any abusive treatment based on sex or marital status, when it is a retaliatory behavior of the employer, because of worker non-compliance with sexual or other harassment against him, and when it takes place as a reaction by the employer because of a testimony or other action on the part of the employee before a court of law or any other authority, which is relative to the application of this or other law. Further, the employer may not prohibit:

- The access to all the kinds and all levels of professional orientation, vocational training, education, and professional reorientation, including the gaining of practical work experience.
- The obtaining and loss of membership in a trade union, participation in it, and benefits it is offering.

An important innovation in law is the amplification of the notion of discrimination, which is defined with the term "discrimination." Within its new content, "discrimination" is not only less favorable treatment that, for the above reasons, a person suffers in relative circumstances, as it was up to now accepted. Following the regulations of presidential decree 105/2003 on the "Adaptation of the domestic law to the provisions of the Directive 97/80/EC of the

9. Nr.11 p.d. 87/2002.

Council of 15.12.1997 'relatively to the burden of proof in cases of discriminatory treatment on the basis of sex.'" There is "Direct discrimination" when a person is subjected, for the aforementioned reasons, to a less favorable treatment than he or she otherwise would be subjected or that he or she would be subjected to in similar circumstances. "Indirect discrimination," when a *prima facie* neutral provision, criterion, or practice, could put a person in a disadvantaged position compared to workers of the opposite sex, except if this provision, criterion, or practice is objectively justified by a legal objective and the means to achieve it are relevant and necessary.

In the field of "discrimination" we also find "harassment" whether constituted as verbal, non-verbal, or physical is manifested as unwanted conduct relative to one of the above reasons and aims for or results in the offense of the worker's dignity by creating an intimidating, hostile, degrading, humiliating, or invasive environment. Specifying the notion of harassment, honest practices are taken into account. Especially in relation to the discrimination on the basis of sex, it is further specified as a discrimination as well as "sexual harassment," namely the harassment manifested in a sexual nature.

Finally, it is defined as a discrimination on the basis of sex the less-favorable treatment of a woman due to pregnancy or maternity, or the les favorable treatment of parents due to parental leave for child-rearing or child care.

On the contrary, it is not a breach of the equal treatment principle and is therefore a lawfully protected distinction when it:

a) is objectively justified by a legitimate purpose and the means to achieve it are legal and necessary, or when it regards the disabled and the measures taken for their protection, according to article 21, paragraph 6, of the Constitution;
b) is due to the adoption or maintenance of special measures aiming to prevent or compensate for the disadvantages caused for one of the above reasons;
c) regards women and refers to the taking or maintenance of special or positive measures aiming to eliminate discrimination against the less-represented sex and achievement of the substantial equality;
d) is based on a feature relative to one of the above reasons that, because of its nature or the framework of the specific professional activities, constitutes a substantial and determinative professional requirement and as long as the objective is legal and the requirement relative to it (e.g., the

sex for the model of woman's clothes, the vision for the driver of a vehicle, etc.);

e) regards the disabled and is relative to the protection of health and safety in the workplace or the measures aiming at the creation or perseverance of conditions or facilities for the safeguarding or encouragement of their integration in employment and work;
f) is due to taking or maintaining special measures aiming to prevent or compensate disadvantages, on the basis of religious or other beliefs, disability, age, or sexual orientation;
g) regards the disabled and is due to the establishment or perseverance of provisions relative to the protection of health and safety in the workplace or measures aiming at the creation or perseverance of conditions or facilities for the safeguarding or encouragement of their integration in employment and work;
h) regards the different treatment on the basis of age, as long as this treatment is provided by law and serves the purposes of the employment policy, the job market, and the professional vocation, when the means for achieving these purposes are legal and necessary; and,
i) regards the different treatment on the basis of age, as long as it is relative to the professional social insurance schemes, the specification of age for the integration or the acceptance, in retirement or disability benefits, also including the specification for these regimes of a different age limit for workers or groups, or groups or categories of employees and use in the context of these schemes of age criteria in the qualitative estimations under the condition that it does not result in discriminations on the basis of sex.

The person subjected to discrimination is entitled to compensation from the discriminator. If the discrimination is a criminal offense, there is the possibility to carry out criminal proceedings against the discriminator. Depending on the case, the law provides administrative sanctions to be imposed on the employer.

In order to facilitate the application of the equal treatment principle, and excluding the criminal procedure, special rules are implemented for the distribution of the burden of proof and the grade of formation of judicial decision.[10] The person subjected to

10. For the consumers' protection, see Act 2251/1994 n.8. The person providing the service is accountable for proving his innocence and lack of responsibility.

discrimination invokes and proves the critical incidents or elements from which the discrimination is derived on the basis of sex or marital status. Whoever proves that there was not a breach of the principle of equal treatment—namely that the discrimination was due to legal criterion and occurred by legal means (that it is objectively justified) or that harassment did not occur on the basis of sex or was not sexual harassment—and, of course, maintains the right to prove that the incidents alleged by the victim did not take place.

III. DISCRIMINATION BASED ON FAMILY LIFE

Regulations for the control against discriminations, the implementation of equal opportunities, and the harmonization of family and professional life are included in the national general collective agreements. As an example we are going to refer to article 7 of the national general collective agreement of 2006–2007, which provides:

> Aiming at the reinforcing of the women employment and the facilitation of the professional and family responsibilities of the workers, the parties have agreed to:
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> A) To promote a legislative regulation for the payment by the competent organization of the wages for unskilled worker to women and men workers who receive parental leave of child-rearing of the article 5 Act 1483/1984, and of their insurance contributions to the relative social insurances institutions.
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> B). To promote by means of vocational schemes practices in order to encourage filling the gap of the women with maternity leave with unemployed.
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> C) In case of adoption the parents are entitled to leaves regarding the child care and rearing as if they were the natural parents. During breastfeeding both the bearing mother and the mother who has adopted the child are entitled to the short-time employment provided by the article 9 of the 1993 National General Collective Agreement.

Moreover article 6 of the 2002–2003 National General Collective Agreement provides:

> 1. Mother workers are entitled for a thirty-month period from the expiration of the maternity leave, to come to work later or to leave work an hour earlier daily. Alternatively, with the employer's consent, the daily work time of mothers can be reduced by two hours daily for the first 12 months and by an hour for six (6) supplementary months.
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> 2. The father is entitled to the parental leave for reasons of child care as long as the mother does not use it, by submitting to the

employer a relative statement by the employer of the child's mother.

3. The right of coming late to work or leaving early of the mother and alternatively of the father for the care of the child, also are entitled to the foster parents of an up to six-year-old child, under the same aforementioned conditions of natural parents starting from the adoption.

4. The unmarried parents as well, are entitled to the parental leave for child care.

5. The leave for child care is regarded and is remunerated as work time and should not provoke negative conditions in the employment and labor relations

Article 7:

Regarding the workers (men and women) suffering the loss of husband or wife, as well as the unmarried parents, who have child's custody, are entitled to a paid leave of six (6) working days per year, apart from any other to which they are entitled according to other provisions. A parent having three (3) or more children, are entitled to an eight (8) working day leave.

This leave is given because of the increased care needs facing the parents with children who have completed up to twelve (12) years old of age, and it can be one-off leave or a partial one with the employer's consent, according to the needs of the parent and it must not coincide with the start or the end of the normal annual leave.

And in article 11:

The contracting parties have agreed to encourage with regard to the people of old age:

α)Their prioritized participation in all the work attachment programs.

β)The incentive reinforcement for their integration to new employment schemes (if they have been dismissed) and in programs combating the long term unemployment.

IV. CASE LAW AND EFFECTIVENESS OF THE LEGISLATION APPLICATION

According to the case law and theory, the manifestation of discrimination constitutes a breach of the equal treatment principle and the restoration of this principle comes with the extension of the favorable provision to those who have suffered the discrimination.[11] There is prolific case law allowing the inference of conclusions and the

11. AP 7/1993 (Greece); AP 1785/2001 (Greece).

possibility of evaluation in relation to the effective application of law, but only with regard to the discrimination on the basis of sex. The study of the relevant judicial decisions drives us to the conclusion that institutional equality is applied without divergences. Case law relative to discrimination based on the Acts 3304/2005 and 3488/2006 has not yet been created.

Based on the previous legislation and relatively to the harassment, the case law that has been formed accepts (and being in absolute accord with the theory) that it is abusive. For this reason the termination that lies on the fact that the woman worker has refused to give in to sexual harassment by the employer is invalid.[12] However, such a dismissal is already directly prohibited by law on the basis of the article 6 Act 3488/2006, which specifies that

> The termination or any other way of terminating the labor relationship and the working relationship, as well any other abusive treatment are prohibited, a) because of sex or marital status, b) when it is a retaliation behavior on the part of the employer, because the employer did not give in in sexual or any other harassment, according to the terms of article 3 of the present law, c) when it takes place as a reaction of the employer because of testimony or any other action of the employer before a court of law or other authority, which is relative to the application of the present or other law.

According to the case law of the Supreme Administrative Court (Council of State), provisions that implement divergences from the equality principle against women concerning the access to employment (namely divergences from the prohibition of discrimination, if they are provided especially by law and if, by law or its introductory essay) occurs—in combination with the common sense experience. That is, the divergences are justified by the nature or the conditions of employment.[13] Moreover, the divergences are justified if a specific purpose is pursued, irrespective of the discrimination on the basis of sex, with the specific provision, and if the divergence constituted the necessary means.[14] Contrary to the principle of sexual equality and the prohibition of discrimination was deemed the characterization of professions as feminine or masculine.[15]

12. AP 1655/1999 (Greece); Single Judge Athens First Instance Court 743/1999 DEE 2000.547; Single Judge Athens First Instance Court 3623/1997.

13. SE 281/07 (Greece) [the gender restrictions on the employment of border guards are unconstitutional]; SE 1986/2005 (Greece); DEN 1074 (2005); SE 1933/1998 (Greece); N.V., 1610 (1998); SE plenary 1917/1998 (Greece); HelDic 1998.1050.

14. SE 1986/2005 (Greece); DEN 1074 (2005).

15. SE 4113/1983 (Greece) [illegal employment of women in the abolished sector in secretarial positions with the proper justification is innate with their sex, SE 3217/1977 (Greece)

Contrary to the principle of equality of the sexes and the prohibition of discrimination, and completely invalid, without diminishing the prestige of the contest, was deemed the addition in contest for the employment of personnel, which defines different selection criteria on the basis of sex.[16] The invitation to tender separate employment of men and women for positions was considered invalid, as was the drafting of separate tables of success,[17] providing that the candidates of one sex are disqualified as having concentrated more points compared to those of the opposite sex who were granted employment. However this invalidity does not affect the prestige of the contest and the signing of a labor contract according to the other terms of the invitation to tender.[18] In one case, an employer refused to hire disqualified people by this manner and was found in arrears in the payment[19] had to pay the disqualified people the wages from the day they should have been employed.

The discrimination on the basis of sex during the termination of a labor contract is allowed only if they are related to the biological and psychical specialties of women justifying the protection of a mother worker during pregnancy, confinement, and breastfeeding.[20] For this reason, the removal of a woman worker by her employer because she is entitled to retirement due to reaching retirement age, an age lower than that for men (under the article 8b Act 3198/1955), has to be regarded as no longer an invalid employer right after the implementation of the article 15 of Act 1414/1984,[21] and has been abolished as unconstitutional.[22]

Relative to the possibility of dismissal of pregnant workers, the courts prohibit the termination of the labor relationship of the woman worker by the application of the provision of article 15 of Act 1483/1984. Both during pregnancy and also for the time period of one year after the confinement or during her absence for a longer time period, which is due to confinement, courts have judged that those protected by law are not only the women workers who are employed with valid labor contracts, but also those who are employed with

[illegal exclusion of women from airport police and air traffic control positions without the nature and the type of job justifying the denial].

16. AP 1095/1998 (Greece); AP 1661/1995 (Greece); EErgD 1997.295.
17. AP 1661/1995 (Greece); EErgD 1997.295.
18. AP 79/1993 (Greece); HelDic 1993.354, AP 1360/1992 (Greece); EErgD 1993.32.
19. Thessalonica Appeal Court 1037/1993; EErgD 1994.959.
20. AP 1785/2001 (Greece); EErgD 2002.721.
21. AP 1785/2001 (Greece); EErgD 2002.721.
22. AP 266/1999 (Greece); EErgD 2000.451; AP 85/1995 (Greece); AP 1935/1988 (Greece); Athens Appeal Court 2188/1986; EErgD 1986.393.

invalid labor contracts, as well as those are employed without concluding such contracts, namely with a simple labor relation.[23] The protection is provided even if the employer was ignorant of the pregnancy, and must justify the termination in writing and notify the competent services.[24] The provision is not applicable to fixed term contracts, which are terminated within the time period of the protection.[25]

During the application of the contract, the discrimination against women because of pregnancy or after coming back from the confinement were judged unconstitutional. The removal of a pregnant from a management position was also found to be illegal.[26]

Relative to remuneration issues, a very important issue has been arisen if the family benefit should be received in total by both working parents. After a debate, the case law reached the conclusion that this benefit is regarded part of the remuneration that the worker is entitled to and no discrimination on the basis of sex is forgiven, or else there is a breach of the provisions of the articles 4, paragraphs 2 and 22, paragraph 1b of the Constitution and of article 119 of the Rome Convention.[27]

V. CONCLUSION

Many cases of discrimination do not reach court even with the form of complaint to the competent public services. As a result, there are no statistical elements permitting to depict, even in fictive form, a general image of reality.

23. AP 892/2003 (Greece); EErgD 2003.1213; Athens Appeal Court 2729/2004 Δ/νη 2005.239; Nafplion Appeal Court 220/2004; EErgD 2004.1144 [the three month deadline of η τρίμηνη αποσβεστική προθεσμία προσβολής του κύρους της καταγγελίας διακόπτεται και λόγω συνδρομής λόγου ανωτέρας βίας, τον οποίο συνιστά και η σοβαρή νόσος της εγκύου η οποία απειλεί σοβαρώς την αποβολή του εμβρύου].

24. AP 892/2003 (Greece); EErgD 2003.1213; Nafplion Appeal Court 220/2004; EErgD 2004.1144.

25. AP 892/2003 (Greece); EErgD 2003.1213; Nafplion Appeal Court 220/2004; EErgD 2004.1144.

26. AP 37/2004 (Greece).

27. AED 3/2001; APol 15/1997; AP 315/2007 (Greece).