

Privatized companies, golden shares and property ownership in the Euro crisis era: A discussion after *Commission v. Greece*.

Dr. Thomas Papadopoulos

Assistant Professor, Department of Law, European University Cyprus

Copyright © 2015

Hellenic Foundation for European and Foreign Policy (ELIAMEP)¹

49, Vas. Sofias Avenue, 106 76 Athens Greece

Tel.: +30 210 7257 110 | Fax: +30 210 7257 114 | www.eliamep.gr | eliamep@eliamep.gr

CRISIS OBSERVATORY | www.crisisobs.eu | info@crisisobs.gr

All Rights Reserved

Research Paper No 16/2015

Privatized companies, golden shares and property ownership in the Euro crisis era:

A discussion after *Commission v. Greece*.

Dr. Thomas Papadopoulos, DPhil (Oxford)

Dr. Thomas Papadopoulos is an Assistant Professor at the Department of Law of the European University Cyprus. Previously, he was a visiting researcher at Harvard Law School. He received his DPhil in Law from the Faculty of Law, University of Oxford. He received a degree of Magister Juris (MJur/LLM) and a degree of MPhil in Law from the Faculty of Law, University of Oxford. He also received his LLB with Distinction (ranked 1st) from the Department of Law, Aristotle University of Thessaloniki. He is a Visiting Professor at the International Hellenic University (Thessaloniki, Greece) and at the Open University of Cyprus (Nicosia, Cyprus). He was a part-time law lecturer at the Law School, University of Buckingham, a law tutor at the Oxford University Programme for Undergraduate Studies (OPUS), University of Oxford and an adjunct lecturer (P.D. 407/80) at the University of Central Greece. Moreover, he is an Editorial Secretary of the European Company Law (ECL) Journal published by Kluwer Publications. He was awarded the “Cyprus Research Award-Young Researcher (2014)” of the Research Promotion Foundation of the Republic of Cyprus (category of ‘Social Sciences & Humanities’). This award honoured him as the best young researcher of Cyprus, on the basis of his research on Takeovers and Mergers. He is the author of ‘EU Law and the Harmonization of Takeovers in the Internal Market’, European Monographs Series, 2010, (Kluwer). His articles were published in many top international law journals.

¹ ELIAMEP offers a forum for debate on international and European issues. Its non-partisan character supports the right to free and well-documented discourse. ELIAMEP publications aim to contribute to scholarly knowledge and to provide policy relevant analyses. As such, they solely represent the views of the author(s) and not necessarily those of the Foundation.

**Privatized companies, golden shares and property ownership in the Euro crisis era:
A discussion after *Commission v. Greece*.**

by
Dr. Thomas Papadopoulos²

May 2015

² LLB with Distinction(Thessaloniki), MJur, MPhil, DPhil (Oxford); Lecturer at the Department of Law, European University Cyprus; Visiting Professor at the International Hellenic University (Thessaloniki, Greece); Attorney at law (Greece); Editorial Secretary of the European Company Law (ECL) Journal (Kluwer). Email: T.Papadopoulos@euc.ac.cy or thomas.papadopoulos@yahoo.com

Privatized companies, golden shares and property ownership in the Euro crisis era:

A discussion after *Commission v. Greece*.

Forthcoming-European Company and Financial Law Review (ECFR)- De Gruyter

Abstract

In *Commission v. Greece*, the Court of Justice of the European Union examined Article 345 TFEU (ex Article 295 EC) on property ownership, in the context of golden shares of privatized companies. The neutrality of the EU towards privatizations is questioned. The scope and the outer limits of Article 345 TFEU are also scrutinized and a few distinctions are drawn. The decision whether to privatize and to introduce golden shares falls within the scope of Article 345 TFEU and outside the scope of fundamental freedoms, but the materialization of this decision and, as matter of fact, the privatization process fall within the scope of fundamental freedoms. Recent developments on privatization prohibitions will also be discussed. This analysis will take place in the context of privatizations occurring in over-indebted Member States affected by the Eurozone crisis and having concluded bailout agreements. Emphasis will be placed on the Greek and Cyprus bailout agreements, where privatizations constitute an important part of the Economic Adjustment Programmes of these two Member States. Analysis of Article 345 TFEU will also cover corporatizations as an essential prerequisite for privatizations. The delineation of the boundaries between Article 345 TFEU and the fundamental freedoms constitutes a challenge for the bailout agreements and the privatization laws of over-indebted Member States.

Keywords

Privatizations, golden shares, Greece

Table of Contents

Introduction.....	6
Factual and legal background.....	7
Judgment of the CJEU.....	8
Privatizations and Article 345 TFEU (ex Article 295 EC) on property ownership: preliminary observations, in the context of <i>Commission v. Greece</i>	10
Privatizations and the outer limits of Article 345 TFEU on property ownership (ex Article 295 EC).....	12
Privatization prohibition and Article 345 TFEU on property ownership (ex Article 295 EC): the impact of <i>Essent</i>	14
Is the EU really neutral towards privatizations? The case of bailout deals of over-indebted Member States in the Eurozone.....	16
Corporatizations and privatizations in over-indebted Member States affected by the Eurozone crisis.....	18
Conclusion	20

Introduction

One of the last golden shares cases decided by the Court of Justice of the European Union (CJEU) was Case C-244/11 *Commission v. Greece*. The Commission initiated infringement procedures against Greece, which had adopted, by special legislation, a scheme of prior authorization for the acquisition of voting rights in strategic public limited companies and of ex post control. The CJEU found that the Greek scheme conferred a wide discretion on Greek authorities which is difficult for the courts to control and which includes a risk of discrimination. This article aims to analyze the contribution of Case C-244/11 *Commission v. Greece* to the clarification of the scope of Article 345 TFEU on property ownership (ex Article 295 EC). This analysis will take place in the broader context of privatizations occurring in over-indebted Member States affected by the Eurozone crisis. Special weight will be placed upon the Greek debt crisis and EU/IMF loan package for Greece, because specific privatizations were required as part of the Greek bailout deal. Implications on the Cyprus bailout deal will also be discussed.

The golden shares case law of the CJEU constitutes a series of cases which examines the compatibility of special prerogatives that Member States preserve in privatized companies with the fundamental freedoms. ‘Golden Shares’ are defined as special rights that States retain in certain privatized companies, which do not correspond often to the State’s shareholding in the company (i.e. no proportionality between capital and control). The establishment of these special rights is based usually on public interest considerations. These special rights frequently consist of veto rights over certain corporate decisions or powers to inhibit certain acquisitions of shares in the privatized company.³ The Commission considered the introduction of golden shares as restrictions on the freedom of establishment and the free movement of capital and initiated infringement procedures against the relevant Member States.⁴ The CJEU decided many cases in which the free movement of capital and the freedom of establishment were directly or indirectly restricted through the State holding such golden shares.⁵

³ J. Van Bakkum, J. Kloosterman and J. Winter ‘Golden Shares and European Company Law: the implications of *Volkswagen*’ [2008] ECL 6. Apart from these formal control mechanisms, informal control mechanisms are also available. A. Hamdani and E. Kamar ‘Hidden Government Influence Over Privatized Banks’ [2012] *Theoretical InqL* 567.

⁴ E. Szyszczak ‘Golden Shares and Market Governance’ [2002] *LIEI* 263.

⁵ Case C-58/99 *Commission v Italy* [2000] ECR I-3811, Case C-367/98 *Commission v Portugal* [2002] ECR I-4731, Case C-483/99 *Commission v France* [2002] ECR I-4781, Case C-503/99 *Commission v Belgium* [2002] ECR I-4809, Case C-463/00 *Commission v Spain* [2003] ECR I-4581, Case 98/01 *Commission v UK* [2003] ECR I-4641, Case C-174/04 *Commission v Italy* [2005] ECR I-4933, Joined Cases C-282 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141, Case C-112/05 *Commission v Germany* [2007] ECR I-8995.

These golden shares cases occupy the CJEU since 2000. This case law of the CJEU examined the various aspects of the corporate structure and the company law mechanisms that exist in the privatized companies at EU level. After examining various national legislations introducing golden shares in the light of the freedom of establishment and the free movement of capital, the CJEU adopted certain criteria for the identification of infringements of these two fundamental freedoms, as well as for their justification.⁶

Before proceeding to this examination of the compatibility of golden shares with the freedom of establishment and the free movement of capital, the CJEU analyzed the relationship between privatizations and the scope of Article 345 TFEU on property ownership (ex Article 295 EC). This relationship constitutes the main focus of this paper.

Factual and legal background

Greek legislation (Article 11 of Law 3631/2008) required prior authorization for the acquisition of voting rights representing 20% or more of the share capital in certain strategic public limited companies which operate national infrastructure networks within a monopoly context. More specifically, in respect of strategic public limited undertakings having, or having had, a monopoly, in particular with regard to companies owning, operating or managing national infrastructure networks, the acquisition by a shareholder other than the Greek State or by companies related to that shareholder or by shareholders acting jointly and in a concerted manner of voting rights representing more than 20% of the total share capital shall be subject to prior authorization by a special Inter-ministerial Privatization Committee. For indicative purposes, the Greek legislation mentioned certain evaluation criteria that the special Inter-ministerial Privatization Committee should take into account (e.g. the experience of third-party shareholders in the field of activity of the companies above, their solvency, information relating to their investment strategies, the transparency of their transactions etc.)

⁶ S. Grundmann and F. Moslein ‘Golden Shares-State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects’ [2004] EBFLJ (EUREDIA) 1, O’ Grady-Putek ‘Limited but not lost: A comment on the ECJ’s Golden Share Decisions’ [2004] FordhamLRev 2220, A. Artes ‘Advancing Harmonization: Should the ECJ apply Golden Shares’ Standards to National Company Law?’ [2009] EBLR 464, A. Looijestijn-Clearie ‘All That Glitters Is Not Gold: European Court of Justice Strikes Down Golden Shares in Two Dutch Companies’ [2007] EBOR 42, V. Kronenberger ‘The rise of the ‘golden’ age of free movement of capital: A comment on the golden shares judgments of the Court of Justice of the European Communities’ [2003] EBOR 115, U. Ehricke ‘Case Note, Case C-174/04 *Commission v Italy*’ [2006] CMLRev. 1457, J. Mukwiri ‘Free movement of capital and takeovers: a case-study of the tension between primary and secondary EU legislation’ [2013] ELRev. 829-847, J. Van Bekkum, J. Kloosterman and J. Winter ‘Golden Shares and European Company Law: the implications of *Volkswagen*’ [2008] ECL 6, S. Rammelloo ‘Past, present (and Future?) of the German *Volkswagensetz* under the EC Treaty’ [2007] ECL 118.

Moreover, there was a provision for ex post control with regard to the adoption of certain decisions. Certain decisions of these strategic undertakings shall be subject to authorization by the Minister for Finance for purposes of general interest. These decisions concerned dissolution and liquidation of these undertakings, restructuring (conversion, merger and break-up) and certain transactions on their assets (transfer, transformation or conversion, disposal, supply as a guarantee, as well as transformation or alteration of the allocation of strategic elements of the assets of these undertakings and of the basic networks and infrastructure necessary for the economic and social life of the country as well as its security).⁷

Judgment of the CJEU

The ruling was issued on 8 November 2012. First, the CJEU mentioned that, regarding the Greece's argument on Article 345 TFEU (ex Article 295 EC), which stated that '[the] Treaty shall in no way prejudice the rules in Member States governing the system of property ownership', it should be recalled that the CJEU already held that that article did not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty.⁸ In particular, the CJEU held that, although Article 345 TFEU (ex Article 295 EC) did not call into question the Member States' right to establish a system for the acquisition of immovable property, such a system remained subject to the fundamental rules of EU law, including those of non-discrimination, freedom of establishment and free movement of capital.⁹

It followed, as regards Article 11 of Law 3631/2008, which, as Greece stated, was part of the national legislation on the privatization of certain strategic public limited companies controlled by that Member State, that, although Article 345 TFEU (ex Article 295 EC) did not call into question the power of a Member State to establish such a privatization scheme, that scheme had to observe the fundamental rules of the Treaty, which included, in particular, the fundamental freedoms. Moreover, if a State decided to transform public undertakings into public limited companies whose shares were quoted on a stock exchange and could, in principle, be purchased freely on the market, allowing a non-State shareholder to establish itself in a significant way within those companies, as was the case of the strategic public limited companies at issue, it could not be accepted that Article 345 TFEU (ex Article 295 EC) might be invoked by a Member State in order to remove such acquisitions

⁷ Case C-244/11 *Commission v Greece* [2012] ECR, nry, para. 2.

⁸ Case C-503/04 *Commission v Germany* [2007] ECR I-6153, paragraph 37. Case C-244/11 *Commission v Greece* [2012] ECR, nry, para. 15.

⁹ Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 24. Case C-244/11 *Commission v Greece* [2012] ECR, nry, para. 16.

from the ambit of the fundamental freedoms guaranteed by the Treaty by making those acquisitions subject to a prior authorization scheme, as an unjustified lacuna in the system of protection of those fundamental freedoms would otherwise be created.¹⁰

The Greek scheme of prior authorization for the acquisition of voting rights in strategic public limited companies and of ex post control was found to be contrary to the freedom of establishment. The CJEU held that such a restriction existed if a prior authorization scheme had the effect of preventing or restricting the exercise of voting rights attached to shares held since these constituted one of the principal means for the shareholder to participate actively in the management of an undertaking or in its control. As regards the arrangements for ex post control, the CJEU held that such a scheme had to be assessed only under Article 49 TFEU since it related to decisions within the scope of the management of the company and therefore concerned only those shareholders capable of exerting a definite influence on it.

Next, the CJEU examined the justification for the restrictions on the freedom of establishment in the light of the objective invoked by Greece, namely of ensuring continuity of certain basic services and the operation of networks considered to be necessary for the economic and social life of a country; in particular the country's necessary energy and water supply, the provision of telecommunications services, and the management of the country's two largest ports.

The CJEU did not accept this as justification. It held that the prior authorization and the ex post control schemes were disproportionate. More specifically, the CJEU held that such a prior authorization scheme conferred a discretionary power on the administration which was difficult for the courts to control and which included a risk of discrimination. Regarding the ex post control scheme, the circumstances in which the right to object could be exercised were potentially numerous, undetermined and indeterminable and left the national authorities too much discretion. Consequently, it had to be stated that, the prior authorization and the ex post control schemes were infringing freedom of establishment and could not be justified.¹¹

¹⁰ Case C-503/04 *Commission v Germany* [2007] ECR I-6153, paragraph 37. Case C-244/11 *Commission v Greece* [2012] ECR, nry, para. 17-18.

¹¹ Case C-244/11 *Commission v Greece* [2012] ECR, nry, para. 64-87.

Privatizations and Article 345 TFEU (ex Article 295 EC) on property ownership: preliminary observations, in the context of *Commission v. Greece*.

Article 345 TFEU (ex Article 295 EC) declares the neutrality of the Treaties towards national provisions governing property ownership.¹² Article 345 TFEU (ex Article 295 EC) states that “(t)he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.”. The fact that certain activities or business operations take place in the private or public sector does not infringe the Treaties.¹³ According to this article, Member States are free to nationalize private property or to liberalize state property. Hence, the policy choices of Member States regarding privatizations fall outside the scope of the Treaties.¹⁴

The first cases on Article 345 TFEU (ex Article 295 EC) stressed the importance of neutrality of property rights, in the context of the proper functioning of the internal market.¹⁵ In subsequent cases, the CJEU did not only examine the exercise of special or exclusive property rights; it also examined the existence and the preconditions of these rights.¹⁶ This is a more decisive intervention of the CJEU in the core of property rights.

In *Commission v. Greece*, the CJEU proceeded to an examination of Article 345 TFEU (ex Article 295 EC) in the context of special privileges of the State in privatized companies. Greece invoked this article and argued that the Greek privatization scheme fell outside the scope of the fundamental freedoms. It contended that the measures taken by a Member State for the purposes of the privatization of those strategic undertakings controlled by the State fell outside the scope of the fundamental freedoms enshrined in the Treaty. This was subject to the condition that the privatization scheme was based on objective non-

¹² This neutrality must respect Article 120 TFEU, and more specifically: “...the principle of an open market economy with free competition, favouring an efficient allocation of resources...”. B. Akkermans and E. Ramaekers ‘Article 345 TFEU (ex. 295 EC), Its Meanings and Interpretations’ [2010] ELJ 292-314. F. Losada Fraga, and others ‘Property and European Integration: Dimensions of Article 345 TFEU’ [2012] Tidskrift utgiven av Juridiska Föreningen i Finland, Forthcoming; Helsinki Legal Studies Research Paper No. 17.

¹³ P. Craig and G. De Burca *EU Law-Text, Cases, and Materials* (OUP 5th edition, Oxford 2011) 1073.

¹⁴ W. Devroe ‘Privatizations and Community Law: Neutrality versus Policy’ [1997] CMLRev. 267. R. van der Hout “Article 345 on Property Ownership” in H. Smit, P. Herzog, C. Campbell, G. Zagel (eds) *Smit and Herzog on The Law of the European Union*, LexisNexis, 2.

¹⁵ Case 155/73 *Sacchi* [1974] ECR 409, Case 182/83 *Fearon* [1984] ECR 367, Joined cases 56 and 58/64 *Consten* [1966] ECR 299 (English special edition), Case C-235/89 *Commission v Italy* [1992] ECR I-777. R.-E. Papadopoulou “Article 345” in V. Christianos (ed.) *Commentary on TEU and TFEU* (Nomiki Viliothiki publications, Athens 2012-in Greek) 1356-1357.

¹⁶ Case C-202/88 *France v Commission* [1991] ECR I-1223. C. Blumann and L. Dubouis *Droit matériel de l'Union européenne* (Daloz, Paris 2012) 615 R.-E. Papadopoulou (n. 13) 1356-1357.

discriminatory criteria which were known in advance to the undertakings concerned and that it provided for legal remedies.¹⁷

The CJEU rejected this argument and stated that, although Article 345 TFEU (ex Article 295 EC) did not call into question the Member States' right to establish a system for the acquisition of immovable property, such a system remained subject to the fundamental rules of EU law, including those of non-discrimination, freedom of establishment and free movement of capital.¹⁸ It could be argued that the arguments of the Greek government about objective non-discriminatory criteria and the available legal remedies are irrelevant to the substance of Article 345 TFEU (ex Article 295 EC). It is difficult to see how the conditions of the privatization scheme are really related to the scope of Article 345 TFEU (ex Article 295 EC).

The relationship between Article 345 TFEU (ex Article 295 EC) and the proposed justifications of infringements of fundamental freedoms is quite interesting. In previous golden shares cases, the CJEU examined the public interest or public security concerns invoked by Member States (like Greece) in order to justify the infringements of fundamental freedoms introduced by the golden shares in question. However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 345 TFEU (ex Article 295 EC), by way of justification for obstacles, resulting from privileges attaching to their position as shareholders in a privatized undertaking, to the exercise of the fundamental freedoms. This article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty.¹⁹ It is quite clear that Article 345 TFEU (ex Article 295 EC) cannot be invoked as a justification for the infringement of fundamental freedoms.

The justifications invoked by the Member States regarding golden shares do not play any role in the delimitation of Article 345 TFEU. The invoked justifications do not determine whether privatizations would fall within the scope of Article 345 TFEU (ex Article 295 EC) and, as a result, whether they would be exempted from the scope of fundamental freedoms. The CJEU implies that the invoked justifications are simply not related to the distinction

¹⁷ Case C-244/11 *Commission v Greece* [2012] ECR, nry, para. 14.

¹⁸ In *Ospelt*, the CJEU held that Article 345 TFEU does not call into question the Member States' right to establish a system for the acquisition of immovable property which lays down measures specific to transactions relating to agricultural and forestry plots, such a system remains subject to the fundamental rules of EU law, including those of non-discrimination, freedom of establishment and free movement of capital. In particular, the CJEU held that the scope of the national measures governing the acquisition of immovable property should be assessed in the light of those provisions of the Treaty which relate to the movement of capital. Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraphs 28 to 31, Case 182/83 *Fearon* [1984] ECR 3677, para. 7, Case C-367/98 *Commission v Portugal* [2002] ECR I-4731, para 47, Case C-483/99 *Commission v France* [2002] ECR I-4781, para 43, Case C-463/00, *Commission v Spain* [2003] ECR I-4581, para. 67, Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 24, Case C-244/11 *Commission v Greece* [2012] ECR, nry, para. 14.

¹⁹Case C-483/99 *Commission v France* [2002] ECR I-4781 para. 44, Case C-503/99 *Commission v Belgium* [2002] ECR I-4809 para. 44, Case C-463/00 *Commission v Spain* [2003] ECR I-4581 para. 67.

between Article 345 TFEU (ex Article 295 EC) and fundamental freedoms. Hence, Member States cannot invoke the public interest or public security concerns in order to have their national provisions on golden shares embraced by Article 345 TFEU (ex Article 295 EC) and to escape the application of fundamental freedoms.

Privatizations and the outer limits of Article 345 TFEU on property ownership (ex Article 295 EC).

The CJEU adopted a narrow interpretation of Article 345 TFEU (ex Article 295 EC); only specific operations fall within the scope of this article. The term “national system of property rights” includes privatizations, expropriations, law utilizations, basic properties and other national rules on property and does not determine only vaguely the public or private nature of the property. Hence, the scope of Article 345 TFEU (ex Article 295 EC) was interpreted unambiguously by the CJEU and was structured quite specifically. It is obvious that this approach of the CJEU towards the scope of Article 345 TFEU (ex Article 295 EC) is specific, as well as narrow, and does not leave any obscure points.

A national rule falling within the scope of Article 345 TFEU (ex Article 295 EC) is not caught by the fundamental freedoms. The free movement rules take a second place.²⁰ The CJEU is aware that the wider the scope of Article 345 TFEU (ex Article 295 EC), the narrower the scope of the application of the fundamental freedoms is. This narrow interpretation of Article 345 TFEU(ex Article 295 EC) contributes to a smooth functioning of the internal market because Member States cannot use Article 345 TFEU (ex Article 295 EC) as a vehicle of excluding certain national privatization practices from the scope of fundamental freedoms.

A distinction between a property right which is governed by national property laws and the exercise of such a right, which must comply with the fundamental freedoms, could be drawn in the context of golden shares.²¹ This distinction derives from industrial and commercial property case law on Article 345 TFEU (ex Article 295 EC)²², but it might also apply to

²⁰ G. Davies *European Union Internal Market Law* (Cavendish publishing 2nd edition, London 2003) 91.

²¹ R. van der Hout (n. 12) 4. For a different approach, see the Joined opinion of Advocate General Ruiz-Jarabo Colomer Case C-463/00 *Commission v Spain* and Case C-98/01 *Commission v UK* [2003] ECR I-4581, paras 54-58.

²² Case 119/75 *Terrapin* [1976] ECR 1039, para. 5: “However, it is clear[...] that whilst the Treaty does not affect the existence of rights recognized by the legislation of a Member State in matters of industrial and commercial property, yet the exercise of those rights may nevertheless, depending on the circumstances, be restricted by the prohibitions in the Treaty.” Case C-10/89 *Hag GF* [1990] ECR I-3711, para. 12, Case C-61/97 *FDV* [1998] ECR I-5171, para. 13, Case C-115/02 *Rioglass SA* [2003] ECR I-12705, para.23, Case C-421/04 *Marazan Concord* [2006] ECR I-2303, para. 28. See, also: D. A. Wyatt and A. Dashwood and others, *European Union Law* (Oxford, Hart Publishing, 6th edn., 2011)

privatizations and golden shares. On the one hand, Article 345 TFEU (ex Article 295 EC) permits Member States to preserve special rights and to adopt golden shares in privatized companies. The decision of Member States to preserve these golden shares and, as a matter of fact, the existence of these special rights, which constitute property rights, fall within the scope of Article 345 TFEU (ex Article 295 EC) and outside the scope of fundamental freedoms. This is an economic policy²³ decision and its adoption is entrusted to national governments. On the other hand, the content as well as the exercise of these golden shares, which constitute property rights, must comply with the fundamental freedoms and these are not caught by Article 345 TFEU (ex Article 295 EC). It is easily understood that this distinction between the existence and the exercise of property rights (golden shares in privatized undertakings, in our case) could draw the border between Article 345 TFEU (ex Article 295 EC) and the fundamental freedoms.²⁴

The position of the privatization process and the adoption of golden shares, in the framework of the distinction between the existence and the exercise of property rights should be scrutinized further. The decision whether to privatize and to introduce golden shares falls within the scope of Article 345 TFEU (ex Article 295 EC) and outside the scope of fundamental freedoms, but the materialization of the decision to privatize (the content and exercise of special rights introduced by golden shares) falls within the scope of fundamental freedoms. Although the decision to privatize or not does not fall within the scope of fundamental freedoms, the privatization process (i.e. the realization and execution of the decision to privatize) must comply with internal market rules. More specifically, the part of the privatization process concerning golden shares should be compatible with fundamental freedoms. The substance of prerogatives, the structure and the conditions of exercise of golden shares by the Member States should be examined in the light of fundamental freedoms and should comply with them.

452, M. Ross “Article 16 EC and Services of General Interest; From Derogation to Obligation?” [2000] ELRev. 22, J. Steiner and L. Woods *EU Law* (OUP 10th edition, Oxford 2009) 713. In *Deutsche Grammophon*, the CJEU stated that “although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty”. Case 78/70, *Deutsche Grammophon* [1971] ECR 487, para 11. B. Akkermans and E. Ramaekers (n 10) 310-311, 314.

²³ Case 44/79 *Liselotte Hauer* [1979] ECR 3727.

²⁴ In *Commission v Portugal*, the CJEU stated that “[Article 345 TFEU] merely signifies that each Member State may organise as it thinks fit the system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty.” Case 367/98 *Commission v Portugal* [2002] ECR I-4731, para 28. Another interesting discussion on whether golden shares fall within the scope of fundamental freedoms examines the actor in question (private party or State) and the beneficiary of the measure at stake. W.G. Ringe ‘Domestic Company Law and Free Movement of Capital: Nothing Escapes the European Court?’ University of Oxford Legal Research Paper Series (2010) Paper No 42/2008 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295905 > accessed on 12-1-2014.

Privatization prohibition and Article 345 TFEU on property ownership (ex Article 295 EC): the impact of *Essent*.

In *Essent*, the CJEU differentiated from the previous distinction between the existence and the exercise of property rights and adopted a different view on the scope of Article 345 TFEU (ex Article 295 EC). Dutch legislation introduced a privatization prohibition. Under Dutch law, the transfer of shares held in an electricity or gas distribution system operator required the consent of the Minister for Economic Affairs; that consent had to be refused where the result of such a transfer was that the shares became the property of persons other than the public authorities. The prohibition of privatization, allowed, in essence, the transfer of shares held in a distribution system operator only to public authorities, since any transfer which had the result that the shares become the property of persons other than the public authorities was prohibited. It followed that the prohibition of privatization precluded ownership by any private individual of shares in an electricity or gas distribution system operator active in the Netherlands.²⁵

The dichotomy mentioned above between a property right which is governed by national property laws and the exercise of such a right does not apply to privatization prohibitions. It was argued that Article 345 TFEU (ex Article 295 EC) was embedded to the fundamental freedoms framework and that Article 345 TFEU (ex Article 295 EC) was used as a “sword” for the European Union to assess national property choices in the light of internal market rules. Member States can decide to transfer property titles from the private to the public sector or vice versa, but these policy decisions are no longer shielded and must comply with fundamental freedoms.²⁶

Member States are capable of structuring their public or private ownership systems, but Article 345 TFEU (ex Article 295 EC) no longer insulates these policy decisions. According to this interpretation of Article 345 TFEU (ex Article 295 EC), Member States are competent to decide upon the public or private nature of ownership entitlements and to adopt a specific ownership system, but that system must comply with internal market rules. As a matter of fact, public ownership claims, like the Dutch privatization prohibition, that contribute to fair competition are compatible with internal market.²⁷ Although EU law cannot dictate national choices of public or private nature of ownership entitlements, these national choices must

²⁵ Joined cases C-105/12 to C-107/12 *Staat der Nederlanden v Essent NV* (C-105/12), *Essent Nederland BV* (C-105/12), *Eneco Holding NV* (C-106/12) and *Delta NV* (C-107/12) [2013] ECR nry, paras 17, 32-33. C. Charalambous ‘Energy Distribution System Operators and National Laws Controlling Ownership within the Internal Market’ [2014] ENLRQ. 71-77

²⁶ P. Van Cleynenbreugel ‘No privatisation in the service of fair competition? Article 345 TFEU and the EU market-state balance after *Essent*’ [2014] ELRev 266. In his Opinion, Advocate General Jaaskinen adopted a different interpretation: Opinion of AG Jaaskinen Joined cases C-105/12 to C-107/12 *Staat der Nederlanden v Essent NV* (C-105/12), *Essent Nederland BV* (C-105/12), *Eneco Holding NV* (C-106/12) and *Delta NV* (C-107/12) [2013] ECR nry, paras 42 and 45.

²⁷ P. Van Cleynenbreugel (n. 24) 272-273.

respect internal market rules. Therefore, the neutrality of Article 345 TFEU (ex Article 295 EC) exists, if such neutrality contributes to the internal market.²⁸

Furthermore, *Essent* has an important impact on the justification of infringements of fundamental freedoms. In previous golden shares cases, public interest or public security concerns invoked by Member States (like Greece) cannot entitle Member States to plead their own systems of property ownership, referred to in Article 345 TFEU (ex Article 295 EC), by way of justification for obstacles, resulting from golden shares.²⁹ According to *Essent*, as regards the prohibition of privatization, the CJEU held that this provision could not justify a restriction on the rules relating to the free movement of capital. However, that does not mean that the interest underlying the choice of the legislature in relation to the rules on the public or private ownership of the electricity or gas distribution system operator may not be taken into consideration as an overriding reason in the public interest. This divergent approach is based on the difference between *Essent*, concerning a privatization prohibition, and the rest of the golden share cases, concerning special privileges of the State in privatized undertakings. Hence, according to *Essent*, the reasons underlying the choice of the rules of property ownership, in the context of Article 345 TFEU (ex Article 295 EC), constitute factors which may be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital.³⁰

It could be inferred that when a Member State imposes a privatization prohibition, it is allowed to invoke the objectives which underlie the choice of the legislature in relation to the adopted rules governing the system of property ownership as overriding public interest requirements to justify any infringements of fundamental freedoms.³¹ This approach to the justification of infringements of fundamental freedoms constitutes a further shift in the interpretation of Article 345 TFEU (ex Article 295 EC), in the framework of the internal market.

²⁸ P. Van Cleynenbreugel (n. 24) 274.

²⁹ Case C-483/99 *Commission v France* [2002] ECR I-4781 para. 44, Case C-503/99 *Commission v Belgium* [2002] ECR I-4809 para. 4, Case C-463/00 *Commission v Spain* [2003] ECR I-4581 para. 67.

³⁰ Joined cases C-105/12 to C-107/12 *Staat der Nederlanden v Essent NV* (C-105/12), *Essent Nederland BV* (C-105/12), *Eneco Holding NV* (C-106/12) and *Delta NV* (C-107/12) [2013] ECR nry, paras 53-55.

³¹ Joined cases C-105/12 to C-107/12 *Staat der Nederlanden v Essent NV* (C-105/12), *Essent Nederland BV* (C-105/12), *Eneco Holding NV* (C-106/12) and *Delta NV* (C-107/12) [2013] ECR nry, para 68

Is the EU really neutral towards privatizations? The case of bailout deals of over-indebted Member States in the Eurozone.

The Commission, contrary to Article 345 TFEU (ex Article 295 EC), seems to favor privatizations rather than to promote the exercise of public influence and state intervention in this field. Although Article 345 TFEU (ex Article 295 EC) declares the neutrality of EU law towards national provisions governing property ownership, many primary and secondary EU law provisions are encouraging Member States to proceed to privatizations. For example, provisions on economic policy (stringent budgetary discipline, the Council's "broad guidelines of the economic policies", and the promotion of private funding of transeuropean networks) and provisions on competition policy (the conditioning of state aid upon privatization, and the process of demonopolization) seem to incite Member States to privatize.³² The 1993 White Paper on Growth, Competitiveness, Employment and the 1993 Recommendation on the broad guidelines of the economic policies of the Member States and of the EEC were supporting this tendency towards privatizations; while privatizations were not directly required, public undertakings should adjust to market rules.³³

Apart from these primary and secondary EU law provisions, there are explicit requirements for privatizations in the Economic Adjustment Programmes that the heavily indebted Member States of the Eurozone agreed with the Troika (ECB, Commission and IMF). Greece, confronted with a heavy sovereign debt crisis, was the first Eurozone country that negotiated an Economic Adjustment Programme with the Troika.³⁴

The bailout deal between Greece and Troika is subject to the fulfillment of certain conditions and adoption of certain measures which were stipulated in a Memorandum of Understanding (MoU),³⁵ evaluated and amended periodically. The content of the MoU was subsequently incorporated in Council Decision 2010/320/EU (and the subsequent amendments and supplements) dictating to Greece detailed measures "for the deficit reduction judged necessary to remedy the situation of excessive deficit".³⁶ After the

³² W. Devroe (n. 12) 268.

³³ White Paper on Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century COM (93) 700 and Council recommendation of 22 December 1993 on the broad guidelines of the economic policies of the Member States and of the Community COM (94) 217.

³⁴ See the Statement by President Van Rompuy following the agreement of 2nd May 2010, available at < http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/114128.pdf > accessed on 26-12-2013.

³⁵ The Greek MoU consists of three parts: The Memorandum of Economic and Financial Policies (MEFP), the Memorandum of Understanding on Specific Economic Policy Conditionality (SEPC) and the Technical Memorandum of Understanding (TMU).

³⁶ OJ 2010, L 145/6. The Council Decision 2010/320/EU has been thereafter amended by: Council Decision 2010/486/EU of 7 September 2010 (OJ 2010, L 241/12), Council Decision 2011/57/EU of 20 December 2010 (OJ 2011, L 26/15), and Council Decision 2011/257/EU of 7 March 2011 (OJ 2011, L 110/26). Council Decision 2010/320/EU has been repealed and replaced on 12 July 2011 by Council Decision 2011/734/EU (OJ 2011, L 296/38.). The latter Council Decision was amended by: Council

adoption of this Decision and its amendments and supplements, the Council is considered to be responsible for the objectives of the Economic Adjustment Programme.

Privatizations are among the main objectives of the MoU.³⁷ According to the MoU, Greece must “fundamentally reduce the footprint of government in the economy through bold structural fiscal reforms and by privatizing public assets” in order to “rebalance the economy, support growth and employment, restore fiscal sustainability, and secure financial stability”.³⁸ Moreover, the MoU states that, under the Economic Adjustment Programme, Greece aims “to accomplish a fundamental shift of public assets to private sector control. Transferring assets in key sectors of the economy (such as ports, airports, motorways, energy, and real estate) to more productive uses through privatization and concessions should help encourage Foreign Direct Investment and other private investment, supporting the economic recovery and long-term growth.”³⁹ It will also help to reduce public debt, contributing to improved market sentiment over time and supporting Greece’s return to bond markets.”⁴⁰ Hence, these Council Decisions are supporting privatizations as a means of economic adjustment and are not endorsing the proclaimed neutrality of Article 345 TFEU (ex Article 295 EC) towards privatizations. However, this is not surprising, because, as mentioned above, many other EU law provisions are encouraging privatizations.

It could be deduced that Article 345 TFEU (ex Article 295 EC) has only limited applicability to heavily indebted Member States of the Eurozone, like Greece, which agreed to privatizations as part of their Economic Adjustment Programmes. By adopting the aforementioned Decisions, the Council favors privatizations, which are mandatory for these Member States, as part of their bailout agreements. Similar requirements for privatizations exist in other bailout agreements of heavily indebted Member States, like Cyprus.⁴¹ Hence, it could be argued that the Commission and the Council, as members of bailout agreements, do not retain a neutral position towards privatizations but they encourage them. In the framework of the bailout agreements, privatizations constitute one of the main tools for reducing

Decision 2011/791/EU of 8 November 2011 (OJ 2011, L 320/28), Council Decision 2012/211/EU of 13 March 2012 (which followed the adoption of the second MoU (OJ 2012, L 110/26)) and Council Decision 2013/6/EU of 4 December 2012 (OJ 2013, L 004/40).

³⁷ For a legal analysis of previous Greek laws on privatizations, see: P. Staikouras ‘Structural Reform Policy: Privatisation and Beyond-the Case of Greece’ [2004] EJLE 373-398.

³⁸ Greek Memorandum of Understanding on Specific Economic Policy Conditionality, para. 2. Many privatizations will take place through the Hellenic Republic Asset Development Fund (HRADF). The Greek government would transfer assets to HRADF which will be responsible for the privatizations.

³⁹ S. Gadinis ‘Can Company Disclosures Discipline State-Appointed Managers - Evidence from Greek Privatizations’ [2012] Theoretical InqL. 525.

⁴⁰ Greek Memorandum of Understanding on Specific Economic Policy Conditionality, 15. For an analysis of obstacles and opposition to privatization of Greek State undertakings, see: K. Featherstone ‘“Varieties of Capitalism’ and the Greek case: explaining the constraints on domestic reform?’ London School of Economics-GreeSE Paper No 11, Hellenic Observatory Papers on Greece and Southeast Europe, February 2008.

⁴¹ See the Cyprus Memorandum of Understanding on Specific Economic Policy Conditionality, 12, 14-15 < http://www.mof.gov.cy/mof/mof.nsf/index_en?OpenDocument > accessed on 18-1-2014

budget deficit and achieving fiscal balance; hence, it is an inherent element of the bailout agreements that the Commission and the Council should promote privatizations and could not be neutral towards them.

The abovementioned argument is also strengthened by the fact that the MoU supports privatizations by making Greek State-owned companies more attractive to potential investors. The MoU requires compatibility of existing golden shares with fundamental freedoms and declares that “no further special rights will be introduced in the course of future privatization projects”.⁴² The introduction of new special rights is not allowed. This is a general prohibition; it seems that not even lawful special rights, which would be compatible with fundamental freedoms, are permitted. Special rights, even the lawful ones, are considered to deter investors planning to acquire shares of these privatized companies. Hence, acquisition of corporate control by private parties is expedited. The prohibition of new golden shares would make Greek State-owned companies more appealing to bidders interested in acquiring control of these companies. This provision definitely facilitates the privatization process.

Corporatizations and privatizations in over-indebted Member States affected by the Eurozone crisis.

Corporatization in the context of the internal market is another interesting aspect of this case, which is relevant to the delineation between Article 345 (ex Article 295 EC) and fundamental freedoms. It is interesting to see if corporatization is caught by Article 345 TFEU (ex Article 295 EC) or if it falls within the scope of fundamental freedoms. This distinction has important implications on the process of privatizations in over-indebted Eurozone Member States.

Corporatization is defined as the transformation of a government-owned enterprise into a company which operates under company law. It is a common practice that corporatization is a precursor to privatization and as such, provides for the necessary changes which must occur in a State-owned enterprise prior to its passage from public to private sector ownership.⁴³

In *Commission v Greece*, the CJEU held that if a State decided to transform public undertakings into public limited companies whose shares were quoted on a stock exchange and could, in principle, be purchased freely on the market, allowing a non-State shareholder to establish itself in a significant way within those companies, as was the case of the Greek strategic public limited companies, it could not be accepted that Article 345 TFEU (ex Article

⁴² Greek Memorandum of Understanding on Specific Economic Policy Conditionality, 33-34.

⁴³ J. Sozzani, “Privatization in the United States and Australia: A Comparative Analysis of the Modern Privatisation Movement in Corrections” [2001] BondLR 136, 139.

295 EC) might be invoked by a Member State in order to remove such acquisitions from the ambit of the fundamental freedoms.⁴⁴ It could be deduced that this transformation of public undertakings into public limited companies falls outside the scope of Article 345 TFEU (ex Article 295 EC) but within the scope of fundamental freedoms. As a matter of fact, the process of corporatization must comply with fundamental freedoms. Member States having decided to proceed to privatizations must be aware that corporatization constituting a precursor to privatizations would be scrutinized in the light of fundamental freedoms.

The compatibility of corporatization with internal market rules is quite important for Member States planning to proceed to corporatizations, and subsequently, to privatizations and to adoption of golden shares. The case of Cyprus is quite interesting. Cyprus, as the last victim of the Eurozone crisis, had to sign a Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the Eurogroup, the Commission, the European Central Bank and the International Monetary Fund, as part of its bailout deal and its agreed Economic Adjustment Programme. According to this MoU, Cyprus must initiate a privatization plan which should consider the privatization prospects of State-owned enterprises and semi-governmental organizations.⁴⁵ The first step is the corporatization of State-owned enterprises and semi-governmental organizations.⁴⁶

However, there are no thorough requirements or detailed clauses, neither in the MoU, nor in the subsequent policy documents, for the compliance of this corporatization with the fundamental freedoms. There are only requirements for the privatization of natural monopolies; the provision of basic public goods and services by privatized industries will be fully safeguarded, in line with the national policy goals and in compliance with the EU Treaties and appropriate secondary legislation rules.⁴⁷ This omission is quite dangerous for the Cyprus Economic Adjustment Programme. If the corporatization process does not comply with the fundamental freedoms, this might lead to their infringement. It is easily understood that a potential infringement of fundamental freedoms by the corporatization process might obstruct subsequent privatizations, and as a matter of fact, the fulfillment of the conditions of the Economic Adjustment Programme.

⁴⁴ Case C-244/11 *Commission v Greece* [2012] ECR, nry, para. 23-25.

⁴⁵ Cyprus Memorandum of Understanding on Specific Economic Policy Conditionality, 15 < http://www.mof.gov.cy/mof/mof.nsf/index_en/index_en?OpenDocument > accessed on 18-1-2014

⁴⁶ Proposal to the ministerial council of the Republic of Cyprus, "Privatization policy" Y.O.: 13.24.010.02.03.

⁴⁷ Cyprus Memorandum of Understanding on Specific Economic Policy Conditionality, 15 < http://www.mof.gov.cy/mof/mof.nsf/index_en/index_en?OpenDocument > accessed on 18-1-2014

Conclusion

The meaning of Article 345 TFEU (ex Article 295 EC) is that Member States can preserve their own property laws, as long as they comply with fundamental freedoms. Compliance with free movement rules must exist, because laws on property ownership can be so complex and restrictive that if an integrated market is to be achieved they have to take second place to free movement.⁴⁸ *Commission v. Greece* and previous golden shares cases referred to the position of special rights and golden shares of privatized companies, in the context of Article 345 TFEU (ex Article 295 EC).

The decision of Member States whether to proceed to a privatization is caught by Article 345 TFEU (ex Article 295 EC) and falls outside the scope of fundamental freedoms. While Member States are free to decide whether a public undertaking would be privatized, the content of their decision to privatize falls within the scope of fundamental freedoms and, as a matter of fact, it must comply with them. The means through which the decision to privatize is executed and materialized are covered by the fundamental freedoms and must comply with them. Although the CJEU cannot scrutinize the decision of Member States to privatize or not a public undertaking, it could examine the content of their decision to privatize in the light of fundamental freedoms and, more specifically, the freedom of establishment and the free movement of capital. Hence, the privatization laws of Member States stipulating the details of the privatization process and the various stages and conditions (including golden shares) under which a privatization will take place must be compatible with fundamental freedoms.

The delineation of the boundaries between Article 345 TFEU (ex Article 295 EC) and the fundamental freedoms constitutes a challenge for the bailout agreements and the privatization laws of over-indebted Member States affected by the Eurozone crisis. The bailout agreements of these Member States require extensive privatizations which must comply with internal market rules; otherwise, possible infringements of fundamental freedoms might obstruct the privatization programmes of these Member States and, as a result, the realization of their Economic Adjustment Programmes. The jurisprudential directions that the golden shares case law provides are really important for these over-indebted Member States bound by bailout agreements.

⁴⁸ G. Davies (n. 18) 91. Article 345 TFEU (ex Article 295 EC) imposes limitations on the regulatory methods that a Member State could choose when it intervenes in the economy. E. Szyssczak *The Regulation of the State in Competitive Markets in the EU* (Hart, Oxford 2007) 1.



ΕΛΙΑΜΕΠ  **ΕΛΙΑΜΕΠ**

ΕΛΛΗΝΙΚΟ ΙΔΡΥΜΑ ΕΥΡΩΠΑΪΚΗΣ & ΕΞΩΤΕΡΙΚΗΣ ΠΟΛΙΤΙΚΗΣ
HELLENIC FOUNDATION FOR EUROPEAN & FOREIGN POLICY

49, Vas.Sofias Ave. 10676 Athens Greece | Tel. +30 210 7257 110 | Fax +30 210 7257 114 | E-mail info@crisisobs.gr