

Golden Shares and the Greek Telecommunications Company

How the Greek legislation on golden shares led to the invasion of Deutsche Telekom in the Greek Telecommunications Company.

The issue of golden shares has repeatedly been the subject of discussion around Europe in the last decade. The reason is quite simple. European governments are more than ever selling previously state-owned companies responsible for the provision of services of general economic interest, and specifically utilities' companies. Although the governments are willing to substantially reduce their percentage in the share capital of these companies, at the same time they are not willing to allow the new owners to take over also the actual management of the company or the power to take all crucial decisions. In order to achieve this, the governments are using the mechanism of golden shares, i.e. shares which grant them more rights in the decision making policy of the company than the rights that correspond to the percentage of the shares they possess. A typical example is the right to veto decisions of the company regarding specific issues or the right to appoint a specific number of members in the Board of Directors of the company, sometimes even the majority!

The European Court of Justice has ruled on the issue of the compatibility of the golden shares provisions of many European countries with the EU Treaty provisions on the freedom of establishment and the freedom of capital on a number of occasions. In the majority of the cases, the ECJ has ruled that the specific golden shares provisions were a) in breach of the EU treaty provisions on the on the freedom of establishment and the freedom of capital b) could not be justified on the basis of the exceptions of public order, public health or public interest in general and c) were in breach of the proportionality principle. The only case in which the golden shares provisions of a Member State managed to survive the ECJ provision was the one of Belgium.

Although even in the past the Greek legislator had introduced some concepts similar to the one of Golden Shares, the case that made the Greek State respond in a more active manner was the Greek Telecommunications company (OTE), a listed company.

A Greek company financed by Arab funds originating from Dubai managed to buy through the Stock Exchange a significant percentage of the share capital of OTE amounting to approximately 19,9% of the company' s share capital. The Greek State which also owes a minority percentage in the company panicked since it felt that funds originating outside of the country and even outside the EU were about to take over one of the most important companies in Greece, crucial for the national economy and to some extent the public security of the country.

It thus decided to introduce a special provision according to which a) the acquisition of shares in a previously state-owed company which is crucial for the public interest exceeding 20% of its share capital must be previously approved by the Greek State while b) certain decisions of the company crucial to its development (for example its dissolution, conversion, merger, division) can only be made following the approval of the Greek State.

The above provision is a classic Golden Share provision. Although generally drafted it was obviously meant to stop the arabq fund from acquiring a bigger percentage in OTE. The compatibility of the above mentioned provision with EU law was immediately raised. Although this of course cannot be extensively dealt with in the present, it could be argued that the Greek provision is in breach of EU law for the following main reasons: a) the Greek provision does not provide for specific reasons of public interest which could justify the restrictions it contains b) the restrictions are not proportional since i) the second provision (veto power on certain decisions) is itself less restrictive than the first (acquisition of shares) and since they serve the same goal it renders the first provision disproportionate, ii) the same result could be achieved through other administrative means iii) the law does not provide for specific criteria which could allow an efficient judicial review of the Greek State' s decision in every specific case.

Therefore, there was no surprise when the EU Commission first asked the Greek Government to pause the implementation of the law until it ruled on its compatibility with the Greek law, and later initiated the procedure to challenge its validity before the European courts.

But the Greek Government succeeded in its goal. Following the introduction of the provision in question the arab fund stopped acquiring shares of the company. It never passed the 20% limit. Furthermore, it issued a public statement by which it declared that it had no intention to challenge the compatibility of the Greek provision with EU Law.

Following an apparent decision not to engage in OTE anymore, the arab fund decided to sell its shares. The potential Buyer was found in the German Telecommunications Company, Deutsche Telekom. With one important difference; the Greek State is very happy to have such a big telecommunications company as a strategic partner in OTE. Thus, not only it does not intend to block the acquisition of the shares by Deutsche Telekom, but has also decided to sell to it a further percentage of 3% still owed by the Greek State, following which the German telecommunications company will be the bigger shareholder in OTE.

Negotiations are under way for the conclusion of the whole deal which will also include an extensive shareholders' agreement. Regardless of those discussions an important conclusion can be reached. Sometimes private companies are not prepared to fight for their rights against the State. Financial success can occasionally be achieved through alternative routes!