



Press and Information

Court of Justice of the European Union

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Judgment in Case C-244/11
Commission v Greece

The Greek scheme of prior authorisation for the acquisition of voting rights in strategic public limited companies and of *ex post* control is contrary to the freedom of establishment

That scheme confers a discretionary power on the administration which is not easily amenable to judicial review and involves a risk of discrimination

Greek legislation requires prior authorisation for the acquisition of voting rights representing 20% or more of the share capital in certain strategic public limited companies¹ which operate national infrastructure networks within a monopoly context. There is provision for *ex post* control in regard to the adoption of certain decisions.

According to the Commission, the Greek scheme applicable to certain strategic companies which are quoted on the stock exchange includes restrictions on the freedom of establishment as well as on the free movement of capital. In particular, the *ex post* control has the effect of restricting the effective participation of shareholders in the management of the undertakings. As it takes the view that the Greek legislation must be subject to the fundamental principles of the Treaties, the Commission therefore brought an action against Greece for failure to fulfil obligations.

Greece has defended its position by arguing, in particular, that the scheme does not apply to undertakings that have already been privatised and in which the State maintains special privileges ('golden shares'), but rather to strategic undertakings that have not yet been privatised, and which thus fall outside the scope of the fundamental freedoms.

In its judgment delivered today, the Court points out first of all that the **Treaty allows the Member States to establish a privatisation scheme in compliance with the fundamental freedoms guaranteed by the Treaty**. In other words, if a State decides to transform public undertakings into public limited companies whose shares are quoted on the stock exchange and may be purchased freely on the market, it cannot subsequently invoke the rule on the protection of private property to remove such acquisitions from the ambit of the fundamental freedoms by making them subject to an authorisation scheme.

Next, the Court examines the **justification for the restrictions** on the freedom of establishment **in the light of the objective**, invoked by Greece, of **ensuring the continuity of basic services and the operation of networks necessary to economic and social life** (that is to say, energy and water supply, telecommunications and the management of the country's two largest ports).

The Court points out that the security of energy supply can only be relied on as a justification if there is a genuine and sufficiently serious threat to a fundamental interest of society.

The Court then examines whether the Greek legislation is **appropriate** and proportionate for the purpose of attaining the objectives invoked.

¹ When that legislation was adopted, according to the Greek authorities, it concerned six undertakings: the undertaking holding the telecommunications monopoly (which has in the meantime been privatised), that holding the former monopoly in electricity supply, the undertakings providing drinking water in Athens and Thessaloniki, and the bodies responsible for the management of the ports of Piraeus and Thessaloniki.

The Court notes in that regard that the prior authorisation scheme produces its effects **without a risk, even a potential risk, of interference with the security of supply having been established**. Moreover, even at the time when the authorisation is granted, it is not certain that all real and sufficiently serious threats to the energy supply can be identified. The restriction on the exercise of voting rights applies, in addition, **not only to decisions capable of threatening the objective of the law in specific respects**, but to all those taken by shareholder vote.

Furthermore, as regards the examination of the **proportionality of the national legislation**, the Court notes that the criteria making it possible to issue the prior authorisation are listed solely 'for indicative purposes' and in general and imprecise terms. They do not make it possible to determine the specific circumstances in which a refusal may be expected. Finally, they do not cover real and sufficiently serious threats and are not of direct relevance to the intended objective. Furthermore, in the case of *ex post* control of fundamental decisions in the life of an undertaking, the investors are not in a position to know when the right to object may apply, as the circumstances are potentially numerous, undetermined and indeterminable.

In conclusion, the Court finds that both the prior authorisation and the *ex post* control leave **the national authorities with a measure of discretion which is too extensive and not easily amendable to judicial review**.

Consequently, the restrictions on the freedom of establishment inherent in the Greek scheme of prior authorisation and *ex post* control are contrary to the freedom of establishment and cannot be justified.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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