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GREEK PRIVATISATIONS: A EURO “*PHOENIX*” TALE

George B. Bazinas and Yiannis Sakkas discuss emergency measures in place to resurrect from the ashes Greece’s EU profile

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reece’s place in Europe, and most importantly in the Euro-zone, has never been subjected to more scrutiny than it has in the last year or so. The country’s EU profile must be “resurrected” from its heavily indebted “ashes” (like a “*phoenix*”) as promptly and efficiently as possible. To a great extent, this depends upon the largest and most demanding privatisation plan that Greece has seen to date. In this direction the Greek Parliament has passed, on 1 July 2011, Law 3986/2011¹ to implement the divestment of State Owned Enterprises (SoEs) and public assets, as well as other emergency measures for the implementation of the newly adopted medium-term fiscal

strategy plan (Emergency Measures Law).

Among others, law 3986/2011 provides for the establishment of the “Fund for the Utilisation of the State’s Private Property” (the Fund)². The Fund is vested with ownership of specific SoEs, as well as other rights and interest, set for divestment. In particular, by virtue of article 2 (4) *ff*, the Fund acquires full ownership, without consideration, of various rights and interest falling within the broad categories of securities of legal entities, property rights, exploitation rights, economic interests as well as real assets, as these are listed in the Privatisation Programme of the Medium-Term Fiscal Strategy Plan (the Fiscal

Strategy Plan)³. The conveyance or transfer of the above mentioned assets and rights is effected, upon the fulfilment of all formalities for such conveyance or transfer depending on the nature of the asset or right in question, by a decision of the Inter-Ministerial Committee for Restructurings and Privatisations provided in article 3 of Law 3049/2002⁴.

The aforementioned committee is also empowered to transfer to the Fund other assets that fall within the above categories, further expanding the scope of the privatisation process, provided that such transfers serve the purposes of article 1 (1) of the emergency measures legislation⁵.

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The said article provides that the exclusive purpose of the Fund is the utilisation of assets owned directly or indirectly by the State in order to achieve the income goals that have been set, roughly in the range of €50 billion between 2011 and 2015.

For this purpose, the Fund has the power to dispose, assign, lease, liquidate and in general to take all adequate measures for the utilisation of the Fund’s assets including securitisation as well as the creation of rights *in rem*, which may also be in the form of a “surface right” over public land (resembling the lease hold under common law) that has been abolished from the Greek legal order since the 1946 and is re-introduced now with the emergency legislation⁶.

In simple terms, the task of divesting SoEs and public assets previously assigned to the Inter-Ministerial committee of Law 3049/2002 is now exclusive entrusted to the Fund. To some extent, this answers the calls of EU officials for the establishment of an independent organisation to implement and overlook the large-scale privatisation project at hand. In fact, the Fund is established in the form of a *societe anonyme*, operating in accordance with the principles of the private economy⁷. Furthermore, the law expressly states that the Fund does not fall within the category of organisations and enterprises of the broader public sector and, unless it is provided otherwise in the emergency legislation, it is governed by the provision of the legislation applicable to *societe anonymes* in Greece⁸.

However, the Fund is not entirely independent, both, from the State but also from the latter’s principal creditors. The State is the sole shareholder of the Fund⁹. Taking into account that the Fund is governed by the law applicable to companies limited by shares, the State has the rights afforded to the General Assembly of Shareholders under the said law. Therefore, for instance, the Chairman, CEO and the remaining three members comprising the Fund’s five (5) member board of directors are

appointed by a decision of the General Assembly, in other words by the sole shareholder. In this case, by virtue of article 3 (8) of the emergency legislation, the rights of the Fund’s shareholder are exercised by the Minister of Finance.

At the same time, the independency of the Fund is also compromised for the benefit of Greece’s EU creditors. The emergency legislation provides that two (2) representatives of the Eurozone Member States and the European Committee will be present on all meetings of the Fund’s board of directors, as observers without voting rights¹⁰. The Eurozone Member States and the European Committee also have an active role in the “Experts Council”, which is established within the Fund with the task of opining on specific matters falling within its competence and namely on technical, economic or law matters. The Experts Council is comprised by seven (7) members, three (3) of which are designated by the Eurozone Member States and the European Committee¹¹.

The significance of this should not be undermined, given that the Council’s opinion is a necessary prerequisite for some of the most important aspects of the privatisation process¹². For example, the assets of the Fund and of the companies the share capital of which belongs in full, either directly or indirectly, to the Fund are “utilised” in accordance with a plan approved by the Fund’s board of directors, upon the opinion of the Expert’s Council¹³. Furthermore and in cases where the transfer of the entire share capital of the abovementioned companies is not possible or is not deemed beneficial, the said companies may be restructured or liquidised with a decision of the Fund’s board of directors, after the Council has opined on the matter¹⁴.

In any case, the links between the State and the Fund are justified and necessary given the nature and scale of the privatisation project and in some cases the strategic importance of the assets, whereas the involvement of the sovereign’s

creditors in the process is a more complex and debatable matter. There have been views suggesting that “*European leaders have taken it upon themselves not only to decide that the Greek state will sell the family silver but, astonishingly, to effect the sale themselves*” (emphasis added), imposing on Greece the hardest form of taxation, i.e. privatisations¹⁵. Saying that, the inertia of Greek administrations of the last decades, and most importantly during the last 14 months, to reform the public sector and to privatize some of its operations¹⁶, undoubtedly creates scepticism in the Union on Greece’s ability and determination to proceed, manage and see through a systematic privatisation programme¹⁷.

From a purely technocratic point of view, the Fund’s task to raise €50 billion by year 2015 is feasible. The imposed involvement of the EU in the Fund purports to ensure that. Nevertheless, achieving to draw a set amount of funds from the divestment of state owned assets is not the only yardstick to determine the success of such project. Undoubtedly, if the sovereign manages to keep its promise to Brussels and disposes the assets marked for privatisation, it will improve its credibility in the eyes of its European counterparts and principal lenders.

Nevertheless, it is the long-term outcome of privatisations that will be the decisive point for Greece’s European course. This is because, at some point, Greece needs to be in a position to service its sovereign debt by its own means, if it is to remain in the Eurozone. Both the rescue funds and the outcome of the divestments will be exhausted sooner rather than later.

Therefore, the privatisation process is ought to be viewed as the most important investment affair in the history of the nation and should not be reduced to a mere fund raising exercise. As such, it is paramount to be coupled with profound legislative, regulatory and economic reforms to ensure that the entities that will succeed the State in providing public services or will acquire real



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assets will operate in a stable market environment that will further facilitate the insertion of new funds, allowing the economy to develop and grow competitive.

Admittedly, steps have been made in this direction, for example the introduction of the one-stop-shop reducing the formalities and expediting the formation of legal entities in Greece, the proposed amendments of the Greek procedural code to improve the operation and alleviate the work load of the courts, as well as the draft bill for yet another amendment of the Greek insolvency code with proceedings introducing some form of pre-pack arrangements. Nevertheless, the need to repay maturing debt inevitably resulted to measures that hinder investments.

Following the recent attempts to address the sustainability of Greece's sovereign debt, and in the hope that these will soon be succeeded by a more concrete

ECB solution, there is confidence that the State will be afforded the time for the rehabilitation of the national economy, also through the privatisation process, and to regain the confidence of its European counterparts and the markets. After all, Greece's past and future is inextricably linked to the EU. Greece has first named Europe, later acceded to it, now (allegedly) threatens the very existence of the Union and will ultimately be the impetus for the institutional changes that will efficiently address, at a central European level, future financial hardship of member states.

Footnotes

1. Law 3986/ 01 July 2011, "Emergency Measures Applying the Medium-Term Fiscal Strategy 2012-2015"(State Gazette Issue A 152/1.7.2011)
2. Article 1 (1), Law 3986/2011.
3. Law 3985/2011, Medium-Term Fiscal Strategy Plan 2012-2015 (State Gazette Issue A 151/1.7.2011). Some of the SoEs under divesture include the National Lottery; a stake in the Hellenic Postbank, the National Railways, a stake in the Hellenic Casino in Mont Parnes, a stake in the Athens Airport, three district Airports, a stake in Greek Petroleum company, a stake in the Postal Services, a stake in the Public Power Corporation, the Horse Racing Organisation, Northern Greece natural gas reserves, two ports, mining rights, etc.
4. A full English translation of Law 3049/2002 *Divesture of Public Undertakings* is available at www.bazinas.com
5. Article 2 (5), L. 3986/2011.
6. Article 18 (1), L. 3986, Chapter C: Surface Right over Public Fields. The surface right is initially created for a minimum time of five (5) years and a maximum period of 50 years, with the right to extend for up to maximum of 100 years.
7. Article 1 (3), L. 3986/2011.
8. Article 1 (3), L. 3986/2011. This may prove a provision of outmost significance. Article 2 (2) of the Greek insolvency code provides that legal persons governed by public law, municipal authorities and public organisations are not declared insolvent⁹. However, the Fund does not fall within the category of organisations and enterprises of the broader public sector. This means that in all likelihood the Fund has insolvency capacity under Greek law. For the English text of the Greek insolvency code visit www.bazinas.com
9. Article 2 (1), L. 3986/2011. Also, under paragraph 2 of the same article, the Fund's shares are not transferable.
10. Article 3 (11), L. 3986/2011.
11. Article 4 (1), L. 3986/2011.
12. Otherwise all decisions taken by the Fund's board of directors, for which the Council's opinion is required, are absolutely null, Article 4(3), L. 3986/2011.
13. Article 2 (10), L. 3986/2011
14. Article 5 (4), L. 3986/2011
15. Professor Y. Varoufakis, *Privatisation Without Representation* <http://yanisvaroufakis.eu/2011/05/24/privatisation-without-representation-european-democracys-last-gasp/> *European democracy's last grasp*, (published before the adoption of the Fiscal Strategy Plan and the Emergency Law) available at <http://>
16. Mostly attributed to the political cost associated with any attempt to alter the employment status in the core as well as the broader public sector
17. The recent sale of 10% of the National Telecommunications Organisation (OTE) to Deutsche Telecom (DT) falls short of a systematic privatisation effort given that it was effected with the exercise of a put option right of the Greek state that was concluded as part of the agreement to sell 30% of OTE to DT in 2008.

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