

EDITORIAL COMMENTS

Meanwhile at the Kirchberg . . .

The two Intergovernmental Conferences on the Economic and Monetary Union and the Political Union necessarily claim the attention of all those interested in the future of Community law.

What has so far come out by way of texts, such as the reference document of the Luxemburg Presidency of June 18, 1991, makes fascinating reading. Very much the same feeling is created by the negotiations on the European Economic Area (EEA). Yet it is almost impossible to follow these developments in a systematic, let alone analytic, way as new proposals are being drafted, circulated or floated almost every day. Only *Agence Europe* seems to be in a position to inform its readers on the day-to-day developments in the two conferences and negotiations with the EFTA countries. With so much diplomacy going on and catering for headlines in the daily news it is almost forgotten that the development of Community law continues. As ever this development is significantly marked by the case law of the Court of Justice. Recent judgments dealing with the interpretation of Article 90 of the Treaty, i.e. the rules for public undertakings and undertakings to which Member States grant special or exclusive rights, merit more than the usual attention. The principles emanating from these judgments may be the foundations for a new Community policy concerning government controlled sectors of the economy. Interestingly, these developments occur at a time when the governments in Eastern Europe are all endeavouring to turn their planned economies into market economies. Rumour also has it that in trying to capture the various developments referred to so

far, the Government of the *Bundesrepublik Deutschland* has proposed a provision in the Draft Treaty on the Economic and Monetary Union requiring the privatization of State enterprises. Not altogether surprisingly the Luxembourg draft does not include such a proposal.

The basic issue which is at stake in the judgments *France v. Commission*¹, *Höfner*², *ERT v. DEP*³ and *Delattre*⁴, is the question whether and to what extent the rules of the Treaty allow Member States to create and maintain public enterprises or grant special or exclusive rights when shaping the national economies, social taxation and other policies.

The classic answer to this question has always been that the Treaty is neutral on the position of state ownership and state control. For that purpose reference is made to Article 222 of part six of the Treaty, entitled General and Final provisions, which reads:

This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

At the same time it was also clear that the Treaty embodies the concept of a market economy inspired by neo-liberal philosophy. Article 90(1) obliges Member States to respect the rules of the Treaty in case of public enterprises. In policy terms it is a case of “dirigisme” versus market economics. At times it was even possible to express the debate in terms of Member States and/or political leaders.

For a long time the Community has been able to live with this duality. While the Community was passing through its transitional period, other issues seemed to be in more urgent need of being resolved than the question of public ownership. In the period between the end of the transitional period and the beginning of the new drive towards the completion

1. Case C-202/88, *French Republic* supported by Italy, Belgium, Germany and Greece v. *Commission of the European Communities*, Judgment of the full Court of 19 March 1991, not yet reported.

2. Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, Judgment of the sixth Chamber of 23 April 1991, not yet reported.

3. Case C-260/89, *Elliniki Radiofonia Tileórasi (ERT) v. Dimotiki*, Judgment of the full Court of 18 June 1991, not yet reported.

4. Case C-369/88, criminal proceedings against J.-M. Delattre, reference for a preliminary ruling, judgment of 21 March 1991.

of the internal market and the adoption of the Single Act, political consensus was always badly needed to pass legislation for the construction of the common market because Articles 100 and 235 require unanimity for decisions to be taken.

In such a situation there was an understandable concern not to antagonize Member States by efforts to strip them of their highly valued instruments of national economic policy, which is what many politicians would consider public enterprises to be. An occasional action against a Member State for its national oil monopoly did not basically influence the continuation of the situation of duality. It should, of course, also be remembered that the prevailing political mood was more “dirigiste” and more prone to government intervention than it is today. Times have changed, as the composition of the Community has also.

The new era which was started with Lord Cockfield’s White Paper brought fresh attempts to bring sectors of the economy which were hitherto virtually excluded from the application of the basic provisions of the Treaty in line with the rest of the economy and the general market orientation. The procedure in Case C-202/88, *France v. Commission*, is the direct result of the Commission’s resolve to subject the “excluded” sectors to the Treaty regime. Other examples include the new initiatives in the field of public procurement.

As always, developments do not take place in isolation, and it is therefore no coincidence that the Court’s judgment in the Telecom Case⁵ was followed by others. These judgments involved actions between private parties and in all three cases private parties raised the question of the compatibility of State monopolies and exclusive rights with basic rules of the Treaty. In accordance with the “Zeitgeist” and as a result of the increasing general awareness of and familiarity with Community law private entrepreneurs were questioning the privileged position of public enterprises.

The successive judgments of the Court allow us to draw some provisional and very general conclusions about the position of public enterprises and exclusive or special rights.

While the Court seems to be careful to maintain the dual position out-

5. Case C-202/88, see note 1 *supra*.

lined above, it does accept the invitation to consider the actual effect of the creation, and presumably *a fortiori* the maintenance, of public enterprises with a dominant position on trade between the Member States. It thus embarks on what may be a gradual process of eroding national powers in this respect. It has at least implicitly refused to start its analysis on the presumption of an *a priori* position, i.e. that the existence of public enterprises and special or exclusive rights as such cannot be contrary to the Treaty. The Court has applied the actual analysis in all four judgments.

In addition the Court has, in the Telecom Case, confirmed the Commission's power to issue directives for the purpose of specifying the obligations of Member States *vis-à-vis* public enterprises and undertakings with special or exclusive rights. Taken together these two lines will tilt the balance between State ownership and control in the economy and respect of the basic rules of the Treaty, most notably the Articles 85 and 86, definitely towards the latter.

As in other areas of Community law where national interests have to be weighed against Community interests, such as in the case law on commercial and intellectual property rights, the European Court of Justice treads carefully. The Court does leave scope for justification for public enterprises and special or exclusive rights based on public policy arguments as contained in Article 36 and the mandatory requirements rule referred to in its case law. We also know from that case law that the balancing between the basic objectives of the Treaty and the justification is not a static exercise but one which takes shape and evolves in the course of the integration process.

As the development of Community law has shown, such justifications will increasingly be formulated on a Community level. With the application of the basic rules of the Treaty to the public sector of the economy the Community is coming of age and applying a widely and popularly held belief in creating similar conditions for public and private enterprises in the market place.