Common Market Law Review **33:** 395–400, 1996.

EDITORIAL COMMENTS

Public service obligations: A blessing or a liability?

One of the issues that is presently being discussed in the context of the Inter Governmental Conference (IGC) is the subject of public services. Proposals have been forwarded to change Article 90 EC so as to make it more accommodating to the spirit and practicabilities of public services. The topic made headlines in the press during the strikes in France last autumn. French politicians made explicit references to the Community framework rules for public enterprises, suggesting that if it were not for this straightjacket the woes of the public services could be addressed in a much less painful manner. Consequently they suggested a change in the Treaty.[1]

Public enterprises are also addressed in the Europe Agreements which the Community has concluded with Poland, Hungary, the Czech and Slovak Republics, Romania, Bulgaria and three Baltic States. These agreements all contain a provision similar to that of Article 90 EC, requiring the principles of this Article to be applied from the third year of the entry into force of the agreement. A Commission White Paper lays down the guidelines for the application of the *acquis communautaire* in the countries of Central and Eastern Europe.[2] The relevant parts describing the key elements of Article 90 provide a summary of Community law, clearly implying that this is the standard which the Europa Agreement partners have to meet. A daunting task!

1. *Le Monde*, 7 Dec. 1995. Interestingly they suggested a change in the Treaty of Maastricht rather than the EC Treaty, undoubtedly because in the eyes of the public it is the former treaty that is closely associated with the contentious transfer of sovereignty.

2. White paper, Preparation of the Associated countries of central and Eastern Europe for integration into the internal market of the Union, COM (95) 163 final, Brussels, 10 May 1995.

The most outspoken call for an amendment to the Treaty to incorporate the concept of public services has come from the European Centre of Enterprises with Public Participation (CEEP). In mid-April this year it published a detailed opinion on the IGC in which it stated that during the revision of the Maastricht Treaty the EU must examine in depth and update the concept of competition in particular in relation to public enterprises.[3] CEEP proposes the introduction of a new Article 94A, which should define and regulate services of general economic interest. According to this proposal Member States may establish such services for the protection of the consumers, social cohesion and sustainable development. As a corollary CEEP proposes that the obligations contained in Article 90 be drastically curtailed.

It is public knowledge that CEEP's ideas are shared by a significant fraction of the European Parliament. The Belgian Socialist Claude Desama proposed in March last year that a chapter on universal service be introduced in the Treaty. It is also commonly known that CEEP does not operate in a political vacuum. Its ideas are shared by many politicians, especially in the Member States with a more "*dirigiste*" approach to the regulation of the economy.

However, it is also important to note that, even in these Member States, there are other forces at work. In this context attention should be drawn to the second report of the Advisory Group on Competitiveness chaired by Mr. Ciampi, former Italian Prime Minister and Governor of the Bank of Italy. This group is composed of industrialists from both northern and southern Member States and representatives of the Trade Unions.[4] Their report focuses, *inter alia*, on public services. It urges the Commission to enforce a common policy to introduce competitive pressures in public utility services, taking into account effects on minimal universal service, prices and employment. It also urges Member States to optimize their role as regulator and coordinator,

3. *Agence Europe* No. 6708, 15/16 April 1996. In 1995, CEEP published a study, *Europe Concurrence et Service Public*, which was initiated by former Commission President Delors as well as being financed by the Commission. In it, CEEP's proposal is elaborated in detail. The study also contains a proposal for a European charter for services of general economic interest.

4. *Agence Europe*, No. 1966/1967, 14 Dec. 1995.

in order to increase competition and the supply of cost-effective and high-quality public services.

The position of public service obligations or universal services, as they also called, under Community law is at present only partly addressed. They have found their clearest articulation in the transport sector, in particular in the air transport sector. Thus Article 4 of Regulation 2408/92 on access to intra-community air routes allows Member States to establish public service obligations relating to designated air routes.[5] In the inland transport sector, Article 77 of the Treaty specifically allows state aids connected to public service obligations, and further details are contained in secondary legislation. On the other hand it is interesting to note that the Commission has not taken the position that improper government involvement in the transport sector, notably air transport, can only be remedied if the relevant enterprises are privatized. In its communication of November 1994 setting out guidelines for the application of state aid provisions to aid granted in the civil aviation sector, it took the position that such a requirement would not be in conformity with the Treaty, in particular Article 222.[6] In the field of telecommunications the requirements related to public service obligations have been addressed in Commission directives and in the guidelines on the application of the competition rules in this sector.[7] The Commission has drafted similar guidelines for the postal sector. On the other hand, the Commission has so far not been able to express itself on the notion of public services in the energy sector, even though it has on several occasions announced its intention to do so.[8] It has thereby failed to contribute to reaching a consensus on this key issue. Consequently, the absence of clearly defined margins for

5. O.J. 1992, L 240/8.

6. O.J. 1994, C 350/5. The Commission took this position in answer to an explicit recommendation from the so-called "Comité des Sages", stating that future aid plans should only be exempted from the prohibition of Art. 92(1), if the restructuring plan submitted for the approval of the aid contains a commitment to privatize the company.

7. O.J. 1991, C 233/2.

8. In its communication on security of supply, SEC (90) 1248, Brussels, 14 Sept. 1990 it announced that it would compile an inventory of national measures which have the security of supply as their objective. In its recent White Paper, "An Energy Policy for the European Union", COM (95) 682 final, Brussels, 13 Dec. 1995, para

public service obligations constituted a major factor influencing the poor progress of the Commission's proposals for the internal markets for electricity and natural gas.

The position of public service obligations under the Europe Agreements raises still more questions. There are two fundamental difficulties that arise from the absence of clearly defined public service obligations in the context of the obligation to enforce the principles of Article 90. First, unlike the Community itself the countries of Central and Eastern Europe will, at least for the foreseeable future, not have an independent body to enforce such rules. At best they will have a national competition authority entrusted with this task. This will mean that one branch of government will have to discipline other branches of government. This may well be too heroic a task in countries where the disentanglement of government and industry has only recently started.[9] The second problem results from the unsatisfactory situation in the Community. How can the Commission insist on the realignment of major monopolies and enterprises holding exclusive or special rights while the corresponding enterprises in the Member States of the Union are still far from such an alignment? It is not very realistic to outline the case law on Article 90, including such cases as *ERT* and the *port of Genoa*,[10] and to conclude from such an exercise that the relevant monopolies and exclusive rights have to be revised so as to conform to Community law. The least one can say is that this approach will face a major psychological barrier from the point of view of countries in Central and Eastern Europe.

What inspiration can be drawn from the state of affairs outlined above? First of all, it may be recalled that the question of the role of public enterprises and their essential functions in a market economy

59 states: "that it will need to be considered whether general criteria need to be established to judge those cases in which the application of the competition rules of the Treaty would obstruct the achievement of such public service obligations, in order to support the application of Treaty rules in a coherent and predictable manner."

9. We need only to refer to the proceedings in the *SEP* case, T 39/90, [1991] ECR II-1498 and case C-36/92P, [1994] ECR I-1932, to recall that "Chinese walls" between the different government departments are, also in regard to the EC Member States, an illusion.

10. Case C-260/89, [1991] ECR I-2925 and case C-171/90, [1991] ECR I-5889, respectively.

was already discussed at the Messina Conference.[11] Since then it has never been completely resolved, nor has it been absent from the Community agenda.[12] Nevertheless, it may be useful to reiterate the basic assumptions of the EC Treaty. The starting point will always have to be the principles of Articles 3 (g) and 3A. As the latter provision puts it, the policies of the Community shall be conducted in accordance with the principle of an open market economy with free competition. This means that the basic regime for all sectors of the economy is based on free movement and a regime of undistorted competition, except where the Treaty itself provides for amendments or additions. Such modifications are foreseen for the agricultural and the transport sector. Article 90 provides for such modifications as far as public enterprises and enterprises entrusted with the operation of services of general economic interest are concerned. As the judgments of the Court of Justice in the *Corbeau*, *Almelo* and to some extent also the *Reiff*, *Meng* and *Ohra* cases[13] have shown, Member States have retained powers to enact measures which lay down rules for public services. On the other hand it is a fundamental rule of Community law that such concepts have to be defined and interpreted at the Community level in order to prevent the circumvention of the fundamental rules of the Treaty. Such a definition can of course result from Court judgments, as *Corbeau* and *Almelo* have demonstrated. It should be remembered, however, that such a judicial role has its inherent limitations.[14] In the legal order of the Community, it falls to the Commission to initiate legislation, and in the specific field of Article 90 the Commission is also empowered to specify the obligations of Member States. The Commission is the only institution equipped for such a role, given the complexities of the

11. See "Rapport des chefs de Délégation aux Ministres des Affaires Etrangères, Comité intergouvernemental créé par la conférence de Messine", Brussels, 21 April 1956, p. 39 (Spaak Report). English text unavailable.

12. See e.g. Deringer, *Equal treatment of public and private enterprises, General Report*, VIII FIDE Conference, Copenhagen, 1978.

13. Case C-230/91, [1993] ECR I-2533, Case C-393/92,[1994] ECR I-1477, Case C-185/91, [1992] ECR I-5801, Case C-2/91 [1993] ECR I-5751, Case C-245/91 [1993] ECR I-5851.

14. Cf. Edward and Hoskins, "Article 90: Deregulation and EC law, Reflections arising from the XVI FIDE Conference", 32 CML Rev. 181 et seq.

industries concerned. Admittedly the definition of public service obligations or, in the words of Article 90(2), "the particular tasks assigned", is a delicate exercise. But it can be done, as the example of the air transport sector shows, and it should be done. Absence of such rules will undermine the credibility of the Community both in the streets of Paris, and in the offices of Central and Eastern European governments, where public servants ponder over the requirements that the implementation of the *aquis communautaire* imposes on them. Legislative action is also necessary to secure a level playing field among the vanguard and the rearguard of the liberalization process in the respective industries.

In the meantime efforts to embody public service obligations in the Treaty by way of amendments introduced for the IGC should be resisted. Cosmetic changes, or worse amendments compromising the equality between private and public enterprises, will only create disenchantment with the Community.

Public service obligations will constitute a blessing for the development of the internal market if and when a clear definition of them enables public enterprises to perform their dual role of provider of public services on the one hand, and enterprise subject to competition on the other hand. They will be a liability as long as they are not properly defined, and thus allow public enterprises to change hats at their convenience, thereby frustrating competition.